

DIGEST OF INSURANCE LAW

ALASKA

Courtesy of

[Hughes Gorski Seedorf Odsen & Tervooren, LLC](#)

Anchorage, Alaska

CIVIL JUDICIAL SYSTEM

Civil Judicial Power of Alaska is vested in District Courts, Superior Courts and Supreme Court.

Jurisdiction

District Court. No equity powers. Civil cases where amount in controversy does not exceed \$100,000. Small Claims Court where amount is less than \$10,000. Certain civil cases excepted from jurisdiction; limited criminal jurisdiction. *See generally*, A.S. 22.15.010 *et seq.*

Superior Court. All cases in law or equity. Overlaps District Court jurisdiction. Has appellate jurisdiction over cases originating in District Court. *See generally*, A.S. 22.10.010 *et seq.*

Intermediate Court of Appeals (Criminal only). *See generally*, A.S. 22.07.010 *et seq.*

Supreme Court. Appellate jurisdiction over all cases. Appeal of right generally limited to civil cases. *See generally*, A.S. 22.05.010 *et seq.*

LAW

Abbreviations

A.A.C. – Alaska Administrative Code.

A.S. – Alaska Statutes.

Alaska R. Civ. P. – Alaska Rules of Civil Procedure.

Alaska R. Prof. Cond. – Alaska Rules of Professional Conduct.

Evid. R. – Alaska Rules of Evidence.

P. – Pacific Reporter.

P.2d – Pacific Reporter, Second Series.

P.3d – Pacific Reporter, Third Series.

R. App. Proc. – Alaska Rules of Appellate Procedure.

Citations to cases are from the Alaska Supreme Court unless otherwise indicated.

ACCIDENT AND HEALTH INSURANCE

See “ACCIDENTAL MEANS,” CANCELLATION,” and “DAMAGES.”

ACCIDENTAL MEANS

Accidental death policy covers injury to patient who died during surgery as a result of cardiac arrest. Policy is broad enough to cover accidental death “caused by an accident,” regardless whether any specific, identifiable act during surgery caused death. *INA v. Brundin*, 533 P.2d 236 (1975).

“Accident” means “anything that begins to be, that happens, or that is a result which is not anticipated and is unforeseen and unexpected.” Failure of a curtain drain that results in the collapse and destruction of a septic system is an “accident” from the homeowner’s standpoint, even if the cause was the contractor’s failure to properly install drain. *Fejes v. Alaska Ins.*, 984 P.2d 519 (1999).

Injuries sustained by a visiting child who was physically and sexually assaulted by adult son of insureds is an “accident” within meaning of homeowner’s policy from the point of view of his parents, who were the defendants. *C.P. v. Allstate*, 996 P.2d 1216 (2000).

“An accident ordinarily does not include injuries that are intentionally inflicted by the insured. Indeed, Alaska recognizes “a general public policy against insuring a person against liability for his or her intentional acts.” “Injuries resulting from sexual contact are intentionally caused. Sexual contact is deliberate, not accidental. No coverage for perpetrator under policy because sexual contact was not an accident. Additionally, “in liability insurance cases involving sexual abuse of children, the intent to cause injury can be inferred as a matter of law.” No coverage exists for injuries that are “expected or intended” by the insured. *Kim v. National Indem. Co.*, 6 P.3d 264 (Alaska 2000).

Injuries to insured resulting from being shot by her ex-boyfriend were caused by an “accident” within the



meaning of automobile policy's uninsured/underinsured coverage. *Shaw v. State Farm*, 19 P.3d 588 (2001).

Exclusion for losses caused, directly or indirectly by intoxication, only required showing that intoxication was a contributing cause of loss, not that it was the only cause. *Morgan v. Fortis Benefits Ins.*, 107 P.3d 267 (Alaska 2005).

ADJUSTERS

Independent adjusters must be licensed under A.S. 21.27. A.S. 21.27.010. General qualifications: comply with A.S. 21; comply with regulations of Director of Insurance adopted under A.S. 21.06.090; be at least 19 years old; have high school diploma, or equivalent; be a resident (resident license); pass exam required under A.S. 21.27.060; "be a trustworthy person"; not use license principally to write controlled business as defined under A.S. 21.27.030; and not have committed act constituting cause for non-issuance/renewal or revocation in this or other jurisdiction. A.S. 21.27.020.

Additional qualification for independent adjuster: have either six months active working experience within prior two years in specified positions and exhibit professional competence, as determined by Director of Insurance; or have previously been licensed in Alaska within past four years and not have had license suspended or revoked. A.S. 21.27.830.

See A.S. 21.27.860 (governing work by unlicensed non-resident adjuster).

Claims adjusters and attorneys who rendered professional services to insolvent insurance companies did so as independent companies or contractors and not as employees. Therefore, they were not entitled to priority status for compensation actually owing to employees. *White v. State ex rel. Block*, 597 P.2d 172 (1979), *construing* A.S. 21.78.260 (a).

Insurance adjuster cannot be held liable to insured on contract theory, but may be liable for failure to exercise ordinary care. The extent of liability may be based on a settlement between third-party plaintiff and insured, which may exceed policy limits, so long as the underlying settlement is "reasonable." *Continental v. Bayless & Roberts, Inc.*, 608 P.2d 281 (1980). The scope of adjuster's duty of care includes adjustment, investigation and evaluation of a claim. *C.P. v. Allstate Ins. Co.*, 996 P.2d 1216 (Alaska 2000).

Insurance adjusters who, after superior court declared authorizing statute unlawful, continued to recommend that insurers continue paying reduced workers' compensation benefits to injured workers living out of state, were not liable to workers when supreme court

affirmed superior court decision. Adjusters were guilty of no tortious conduct and were acting as agents of disclosed principal. *Vienna v. Scott Wetzel Svcs.*, 740 P.2d 447 (1987).

Workers' suit, attempting to hold adjusters personally liable for advice to insurer, was "frivolous" and "unreasonable," even if not in "bad faith." Hence, workers must pay adjuster's attorney's fees. *Crawford v. Vienna*, 744 P.2d 1175 (1987), *citing* R. App. Proc. 503 (e) and Alaska R. Civ. P. 82.

AGE

The age of majority is defined by law. "A person is considered to have arrived at majority at the age of 18, and thereafter has control of the person's own actions and business and has all the rights and is subject to all the liabilities of citizens of full age, except as otherwise provided by statute." A.S. 25.20.010.

AGENTS AND BROKERS

Oral contract of present automobile insurance entered into by agent bound principal notwithstanding lack of express authority in agency agreement, at least where principal relied on agent's judgment and cancellation clause in policy, should risk be found unacceptable. *Mackwiz v. Resolute Ins. Co.*, 123 F. Supp. 142 (D. Alaska 1954).

If insurance company's agent was negligent or made misrepresentations while acting within scope of his apparent authority, insurance company might be liable to insured who suffered loss from earthquake not covered by policy. *Austin v. Fulton Ins. Co.*, 498 P.2d 702 (1972).

Plaintiff may recover against bank, as agent, based on bank's oral promise to procure insurance on land plaintiff contracted to sell to third party. To prevail, plaintiff must show existence of contract to procure insurance, including: subject matter of contract, risk insured against, amount of coverage, and premiums to be paid. *Howarth v. First Nat'l Bank of Anchorage*, 596 P.2d 1164 (1979).

Agent's oral, telephonic affirmation of increased inventory-value coverage requested by insured constitutes waiver of fire policy's written inventory-value monthly requirement. Insurer, agent, and agency are liable for amount of oral fire loss valuation reported to agent. *Mountain View Sports Ctr. v. Commercial Union*, 599 P.2d 1382 (1979).

Plaintiff may recover damages against agent for failure to procure workers' compensation insurance based on agent's breach of ordinary negligence standard



of care and/or agent's negligent misrepresentations that he obtained requested insurance coverage. Plaintiff may recover punitive damages if the agent acted with reckless indifference in failing to notify plaintiff of his failure to obtain insurance. *Clary Ins. Agency v. Doyle*, 620 P.2d 194 (1980).

Insurance agent owes insured a duty to exercise reasonable care, skill and diligence in procuring insurance; but agent has no absolute duty to obtain the lowest possible rates. *Eagle Air v. Corroon & Black*, 648 P.2d 1000 (1982).

Pipeline's promise to obtain insurance for contractor does not make the pipeline the contractor's insurer. Promise to procure insurance is not equivalent to promise to indemnify, nor does it create fiduciary duties; however, breach of the promise renders promisor liable for promisee's proximately caused damages. *Alyeska Pipeline v. H.C. Price Co.*, 694 P.2d 782 (1985).

Agent is liable to insured if agent wrongfully fails to procure insurance and insured suffers a loss. Agent satisfies his duty to insured by using reasonable diligence to procure insurance and by informing insured of cancellation, which gives insured the opportunity to make other arrangements. *Jefferson v. Alaska 100 Ins.*, 717 P.2d 360 (1986).

Insurance agents do not have a duty to advise a client to obtain different or additional coverage, unless a "special relationship" exists. *Peter v. Schumacher*, 22 P.3d 481 (Alaska 2001). A request for "full coverage" is not a request for a specific type of coverage. *Id.*

Insured may rely on agent's broker's professional skill and representations when interpreting the scope of coverage. Statute of limitations begins to run on insured's claim against broker when claimant discovered or reasonably should have discovered existence of all elements essential to cause of action. *Gudenau & Co. v. Sweeney Ins.*, 736 P.2d 763 (1987).

Pyrotechnician's breach of promise to name sponsor of fireworks display as additional insured under pyrotechnician's policy may render it liable to sponsor. Sponsor may recover its damages if the policy would have covered sponsor's liability, despite fact that sponsor had his own insurance, to extent allocated under policies' "other insurance" clauses. *Clark v. Greater Anchorage*, 780 P.2d 1031 (1989).

ARBITRATION

Alaska has adopted Uniform Arbitration Act that governs arbitration agreements made before January 1, 2005. *See* A.S. 09.43.010-09.43.180. For arbitration agreements made on or after January 1, 2005, Alaska has

adopted the Revised Uniform Arbitration Act. *See* A.S. 09.43.300-09.43.595. Arbitration agreements are valid, enforceable, and irrevocable in law and equity to the same extent as other contracts. *See* A.S. 09.43.010 and A.S. 09.43.330. Arbitration act generally does not apply to labor-management contracts. *Patterson v. State*, 880 P.2d 1038 (Alaska 1994), *cert. denied*, 513 U.S. 1127 (1995).

Public policy favors arbitration, as demonstrated by adoption of Arbitration Act. *Modern Constr. v. Barce*, 556 P.2d 528 (Alaska 1976). Absent statutory restrictions, parties free to contract for terms of arbitration desired. *Board of Ed. v. Ewig*, 609 P.2d 10 (Alaska 1980).

Arbitrator's decisions on fact and law given great deference on appeal. *Kinn v. Alaska Sales & Service*, 144 P.3d 474 (Alaska 2006). Questions of arbitrability are reviewed de novo. *OK Lumber Co. v. Alaska R.R. Corp.*, 123 P.3d 1076 (Alaska 2005).

Special provisions exist for voluntary arbitration agreements between patients and health care providers for any dispute arising out of care or treatment. Arbitration agreement consists of form approved by Attorney General. Agreement revocable by patient within 30 days of execution, but not by health care provider. Execution cannot be prerequisite to care. Execution by parent/guardian binding on minor. *See* A.S. 09.55.535.

ATTORNEYS

See generally, Alaska R. Civ. P. 82 and Evid. R. 503. Alaska R. Civ. P. 82 permits the prevailing party to recover, by motion, a percentage of its attorney's fees. Alaska R. Civ. P. 82 (a)-(c). The penalty for failing to accept an offer of judgment and obtaining a less favorable result at trial is an award of attorneys' fees up to 75% of "reasonable actual attorneys' fees" depending on when the offer of judgment was made. *See generally* Alaska R. Civ. P. 68.

Under Alaska R. Civ. P. 82 (b) (1), if the prevailing party recovers no money judgment, courts shall award 30% of fees necessarily incurred if the case goes to trial, and 20% of fees if the case does not go to trial. Alaska R. Civ. P. 82 (b) (2).

Trial court improperly allowed insurer to recover greater amount of attorney's fees than amount specifically authorized by Alaska R. Civ. P. 82 (b). *Alaska Pacific v. Collins*, 794 P.2d 936 (1990).

Trial courts have broad discretion to designate prevailing parties under Alaska R. Civ. P. 82 (a), and attorney fee awards will not be reversed unless the trial courts abuse their discretion or rule manifestly unreasonably. No immutable rule that party which obtains an

affirmative recovery must be considered the prevailing party for purposes of Alaska R. Civ. P. 82 (a) (2). Although insureds did not prevail on their bad faith claim for compensatory and punitive damages, plaintiffs prevailed on their coverage claim and hence, were prevailing parties entitled to Rule 82 attorney's fees award. *Hillman v. Nationwide*, 855 P.2d 1321 (1993).

Fee Agreements. Ambiguities in fee agreements construed against attorneys. A modified contingent fee agreement that created a hybrid flat fee/contingency fee agreement premised on whether case involved "further substantial litigation" was valid. *Weiner v. Burr Pease & Kurtz*, 221 P.3d 1 (2009).

Evid. R. 503 states the attorney-client privilege and its exceptions.

Obligee under commercial construction performance bond was entitled to discover existence and amount of any loss reserves surety may have established to cover obligee's claims. This information is reasonably calculated to lead to discoverable evidence and is not protected by attorney-client privilege or work product doctrine. Evid. R. 503 (b). *Loyal Order of Moose v. International Fid.*, 797 P.2d 622 (1990).

Attorney-client privilege does not, generally, apply to statements made by insured to insurer; materials in insurer's files are conclusively presumed to have been compiled in ordinary course of business absent showing that they were prepared at the request or under supervision of insured's counsel. *Langdon v. Champion*, 752 P.2d 999 (1988).

Services client seeks in aid of crime or bad faith breach of duty are not protected by the attorney-client privilege. To obtain in camera review of attorney-client materials, claimant must show factual basis adequate to support a good-faith, reasonable belief that in camera review may reveal evidence that the exception applies; once this showing is made, the decision whether or not to conduct in camera review rests in discretion of trial court. Insured that sought discovery of insurer's claim file presented adequate factual basis, i.e., belated reservation of rights letter and actions after letter was sent that show bad faith breach of duty, to support good faith belief by reasonable person that in camera review of attorney-client materials may reveal evidence of crime or fraud. Evid. R. 503 (d) (1). *Central Const. v. Home Indem.*, 794 P.2d 595 (1990).

Settlement. Authority to settle is not implied when a client employs an attorney; authority to terminate litigation must be explicit or ratified by subsequent conduct of the client. *Saxton v. Spletstoezer*, 557 P.2d 1126 (1976).

Independent Counsel - Conflict of Interest, Insurer Reservation of Rights. An insured has the right to independent counsel where a conflict of interest exists between the insured and the insurer. *Continental v. Bayless & Roberts*, 608 P.2d 281 (1980); *CHI of Alaska v. Employers Reinsurance Corp.*, 844 P.2d 1113 (Alaska 1993); A.S. 21.96.100. Where insurer asserts policy defense and offers to defend insured under reservation rights, conflicts of interest exist between insured and insurer: 1) insurer may offer mere token defenses, 2) insurer may steer result to judgment under uninsured theory of recovery, and 3) insurer may gain access to confidential or privileged information which it may later use to its advantage. *Continental v. Bayless & Roberts*, 608 P.2d 281 (1980). By law, claims of punitive damages or damages in excess of policy limits do not constitute conflicts of interest. A.S. 21.96.100(b)(1), (2). By law, claims or facts for which the insurer denies coverage do not constitute conflicts of interest, unless the insurer reserves its rights on an issue for which coverage is denied, in which case the insurer must provide independent counsel. A.S. 21.96.100(b)(3), (c).

Independent Counsel - Obligations of Insured and Counsel. Independent counsel and the insured must continue to consult and cooperate with the insurer. A.S. 21.96.100(e), (g). Independent counsel must keep detailed billing records of costs covered by insurer. A.S. 21.96.100(d).

Independent Counsel - Contractual Provisions, Other Rights and Obligations of Insurer. An insurance contract may contain a provision governing appointment of independent counsel that complies with A.S. 21.96.100.

A.S. 21.96.100(a). Insurer may require independent counsel selected by insurer satisfy certain statutory professional qualifications. A.S. 21.96.100(d). An insurance contract may specify the fee an independent counsel may charge, otherwise the rate is that actually paid by the insurer in defense of similar civil actions in the community. A.S. 21.96.100(d). Insurer obligated to pay for defense of allegations for which insurer either reserves its rights or accepts coverage. A.S. 21.96.100(d). An insurance policy may contain an attorney fee dispute resolution clause, otherwise a dispute is subject to arbitration under A.S. 09.43. A.S. 21.96.100(d).

Independent Counsel - Waiver. An insured may waive its right to independent counsel by signing a statement conforming to statutory requirements. A.S. 21.96.100(a), (f).

Independent Counsel - Settlement. When insured has independent counsel, insurer may settle directly with the plaintiff if the settlement includes all claims for

which the insurer reserved its rights or accepted coverage, regardless of whether settlement extinguishes all claims against the insured. A.S. 21.96.100(h).

AUTOMOBILES

Age. A.S. 28.15.031 and A.S. 28.15.051 require an applicant be 16 to obtain an unrestricted driver's license, and 14 to obtain an instruction permit.

Comparative Fault. Alaska is a pure comparative fault state. *See* A.S. 09.17.080.

Last Clear Chance Doctrine. Since comparative negligence principles are to be used instead of a contributory negligence rule, there is no longer a need for the "last clear chance" doctrine. *Kaatz v. State*, 540 P.2d 1037 (1975); *see also* A.S. 09.17.080.

Seat Belts. A.S. 28.05.095 requires use of seat belts and child safety restraints. Although failure to wear seat belt is not negligence per se, it is relevant evidence for purpose of damage reduction in automobile collision case. *Hutchins v. Schwartz*, 724 P.2d 1194 (1986). Alaska's seat belt law, A.S. 28.05.095, was subsequently amended to make seat belt use compulsory. In the future, Supreme Court may find seat belt non-use negligence per se, or evidence of comparative fault, rather than mitigation of damage issue.

Negligent Entrustment. "As a general rule, the owner or other person in control of a vehicle and responsible for its use who is negligent in knowingly supplying, entrusting, permitting or lending it to an incompetent or habitually careless driver is liable for negligent entrustment." *Neary v. McDonald*, 956 P.2d 1205 (1998).

Negligence Per Se. Under Restatement approach to negligence per se, trial court must make initial legal determination whether conduct at issue falls within scope of statute or regulation alleged to be standard of care; however, trial court retains discretion to refuse to adopt law as standard of care if, for example, law is so obscure, unknown, outdated, or arbitrary as to make its adoption as the standard of care inequitable. Excuse is an affirmative defense. *Sweet v. Sisters of Providence*, 895 P.2d 484 (1995), citing Restatement (Second) of Torts §§286, 288A, 288B (1965).

The unexcused violation of a traffic statute, regulation, or legislative enactment adopted by court as the standard of reasonable behavior is negligence per se. *Ferrell v. Baxter*, 484 P.2d 250 (1971).

Regulation prohibiting driving at speed greater than is reasonable and prudent under circumstances does not set absolute standard such that violation of regulation constitutes negligence per se. *Nazareno v. Urie*, 638

P.2d 671, 677 n.7 (1981), *overruled on other grounds, Kavorkian v. Tommy's*, 711 P.2d 521 (1985).

Driver who strikes a car from rear is not negligent per se. *Grimes v. Haslett*, 641 P.2d 813 (1982).

Possibility that minor who purchases alcohol may drive automobile, and that alcohol-related accident may result, is well within scope of foreseeable risk, for purpose of determining liquor licensee's liability in negligence. *Loeb v. Rasmussen*, 822 P.2d 914 (1991).

Driving while intoxicated is per se culpable negligence. *Lupro v. State*, 603 P.2d 468 (1979).

Drivers who cause an injury while attempting to commit or committing a "serious criminal offense," i.e. driving while intoxicated, are liable for full reasonable attorneys fees. A.S. 09.60.070.

AVIATION

Statutes pertaining to aviation are generally found in Title 2 of the Alaska Statutes.

Inherently Dangerous Activity. Air travel no longer regarded as inherently dangerous, and flights aboard certified carriers do not involve unreasonable risks of harm. *Alaska Airlines v. Sweat*, 568 P.2d 916 (1977). *See* "NEGLIGENCE, Common Carriers."

BROKERS

See "AGENTS AND BROKERS."

BURGLARY INSURANCE

On claim under theft policy for vehicle that was "repossessed," "crucial question is whether the taker seized or repossessed the vehicle believing that he was entitled to do so, under a claim of legal ownership or a bona fide claim of right. In other words, did the taker have criminal intent in taking the vehicle? A claim of right is present where the taking is by a person acting under an honest belief that he is entitled to possession of the property." *Donnelly v. Rockwood Ins.*, 718 P.2d 147 (1986).

CANCELLATION

Automobile insurer satisfied statutory notice requirements by sending multiple notices to the address it had on file for the insured, even though insured had moved and address was no longer any good. Insured failed to provide new address to insurer. Returned mail receipt established insurer mailed notice. *Blood v. Kenneth A. Murray*, 151 P.3d 428 (Alaska 2006).

Evidence of insured's suicide attempt and alcoholism, which were not disclosed on application for life policy, was relevant and admissible to insurer's claim for rescission of policy in action by beneficiary for breach of contract, where application process was sufficient to elicit facts indicating insured's alcoholism and suicide attempt if insured had answered fully and truthfully, and there was evidence that insurer would not have issued policy on insured's life if it had been informed of alcoholism and suicide attempt. *Petersen v. Mutual Life*, 803 P.2d 406 (1990).

Cancellation of insurance policy for nonpayment of premiums has no effect on an accident occurring before the cancellation date. *Alyeska Pipeline Svc. v. H.C. Price*, 694 P.2d 782 (1985).

Liability policy cancellation clause which provided that both insured and insurer might cancel policy either by mailing notice of cancellation or by delivery of such notice and which specifically provided that mailing by insurer of at least ten-day notice of cancellation to insured at his address shown in policy should be sufficient proof of notice was clear and unambiguous and not to be construed against insurer. *Hartsfield v. Carolina*, 411 P.2d 396 (1966). *See also*, A.S. 21.36.210 *et seq.*

Material misrepresentations made on insurance application voided coverage *ab initio*. Insured claimed he used a cabin as a full-time residence and did not conduct business on property. When property destroyed by fire, misrepresentations permitted insurer to rescind the policy, thereby voiding the contract. *Bennett v. Hedglin*, 995 P.2d 668 (2000). *See also* A.S. 21.42.110.

Insurer's acceptance of past due premiums may be conditioned on an effective date for reinstated coverage that leaves a gap in coverage. *Amos v. Allstate Ins. Co.*, 184 P.3d 28 (Alaska 2008)

CONSTRUCTION OF POLICY

Insurance contracts are contracts of adhesion, and as such will be construed accordingly to principle of reasonable expectations. Construction of insurance policy under principle of reasonable expectations does not depend on prior determination of policy ambiguity. Grants of coverage should be construed broadly, while exclusions are interpreted narrowly against insurer. Where clause in policy is ambiguous in sense that it is reasonably susceptible to more than one interpretation, court accepts interpretation which most favors insured. *Bering Strait Sch. Dist. v. RLI*, 873 P.2d 1292 (1994); *Fejes v. Alaska Ins. Co.*, 984 P.2d 519 (Alaska 1999).

Objectively reasonable expectations of insured will be honored even though painstaking study of policy pro-

visions would have negated those expectations. *West v. Umialik Ins.*, 8 P.3d 1135 (2000).

Ambiguity does not exist simply because two parties have differing subjective interpretations. Ambiguity exists only when contract taken as a whole is reasonably subject to different interpretations. *Dugan v. Atlanta Cas. Cos.*, 113 P.3d 652 (Alaska 2005).

Court interprets insurance contracts by looking to language of disputed policy provisions, language of other provisions, relevant extrinsic evidence, and case law interpreting similar provisions. *Cox v. Progressive*, 869 P.2d 467 (1994).

Where there are no disputed facts, construction of insurance contract is matter for court. "Family" group accident policy could not reasonably be interpreted to provide coverage for death of insured's unmarried cohabitant; decedent was not insured's "spouse" within meaning of policy, as they were never legally married and never applied for or obtained marriage license. *Serradell v. Hartford*, 843 P.2d 639 (1992).

Insurer is required to give insured such notice of its intent to deny liability and of its refusal to defend as will give insured reasonable time to protect himself: such notice must not only be prompt, but must provide reasonable explanation of basis in insurance policy in relation to facts or applicable law for denial of claim. Insurer's prompt notice of basis for denial of coverage or defense is necessary to avoid prejudice to insured which may result from delays in insured undertaking its own defense or from delay in gathering evidence essential to successfully challenge denial of coverage or defense. Mere tender of form nonwaiver agreement to insured is insufficient to meet insurer's obligation to insured when insurer decides to deny coverage or defense. *Sauer v. Home*, 841 P.2d 176 (1992).

Innocent coinsured is entitled to recover when insured intentionally sets fire to property covered by policy unless policy clearly precludes such recovery. *Atlas v. Mystic*, 822 P.2d 897 (1991). Wife, who was an innocent coinsured, had sufficient beneficial interest in husband's truck to give her insurable interest. *State Farm Mut. Auto. Ins. Co. v. Raymer*, 977 P.2d 706 (Alaska 1999).

Alaska recognizes a general public policy against insuring person against liability for his or her intentional act. *Dairy Queen of Fairbanks, Inc. v. Travelers Indem. Co. of Am.*, 748 P.2d 1169 (Alaska 1988). There is no liability insurance coverage for insured that commits intentional act. *Kim v. National Indem. Co.*, 6 P.3d 98 (Alaska 2000) (adopting inferred intent rule).

Alaska statutes do not require insurer to explicitly label a motor vehicle liability policy either an “owner’s” policy or a “personal policy.” Policy only needs to meet requirements for “owner’s” policy under A.S. 28.22.101(a). *Progressive v. Skin*, 211 P.3d 1093 (2009).

Indemnity provision of contract should be construed to effectuate the objectively reasonable expectations of the parties. Court will enforce indemnity clause as reasonably construed even if the provision does not specify that the indemnitee is entitled to recover for liability resulting from its own negligence; if reasonable construction dictates that clause provides coverage for indemnitee’s own negligence, it is irrelevant whether or not the indemnitor was also negligent. *Duty Free Shoppers v. State*, 777 P.2d 649 (1989). *But see Kissick v. Schmierer*, 816 P.2d 188 at n. 4 (1991), *cert. dismissed*, 502 U.S. 1084 (1992).

Regarding conflicts between “other insurance” clauses, Alaska follows the Lamb-Weston rule, which states that the best approach is to find the clauses repugnant and reject them in toto, prorating the loss between the insurers up to their respective policy limits. *Horace Mann v. Colonial Penn*, 777 P.2d 1162 (1989); *Columbia Mut. Ins. v. State Farm*, 905 P.2d 474 (1995).

Fiduciary relationship inherent in every insurance contract gives rise to implied covenant of good faith and fair dealing. *O.K. Lumber v. Providence Washington*, 759 P.2d 523 (1988).

Court cannot and should not do violence to plain terms of insurance contract by artificially creating ambiguity where none exists; in situations in which reasonable interpretation favors insurer and any other would be strained and tenuous, no compulsion exists to torture or twist language of the contract. *Jarvis v. Aetna*, 633 P.2d 1359 (1981) (applying California substantive law).

Omnibus clause of automobile insurance policy should be liberally construed so as to effectuate its basic intent, which is to protect public from damages caused by vehicles operated by persons other than named insureds. *Johnson v. U.S. Fidelity*, 601 P.2d 260 (1979).

DAMAGES

A.S. 09.17.080 governs apportionment of damages in tort actions. The court shall enter judgment against each party liable on the basis of several liability in accordance with that party’s percentage of fault. A.S. 09.17.080 (d). “Party,” as it is used in A.S. 09.17.080 (d), means parties to the action, including third-party defendants, settling parties, and released parties. *Benner v. Wichman*, 874 P.2d 949 (1994). State initiative which eliminated contribution between joint tortfeasors did not abolish all claims between defendants

and potential third-party defendants to apportion fault; absent contribution, equitable apportionment is available as means of bringing other tort-feasors into action. *Id.* Fault cannot be apportioned to anyone not fitting into the definition of “party.” *Id.* Effective for causes of action accruing on or after August 7, 1997, a party may allocate fault to a person who is not a party if the person has been identified as a potentially responsible person, but (a) the person is outside the jurisdiction, (b) the person is precluded from being joined by law or court rule, or (c) the person is not easily locatable. A.S. 09.17.080 (a). There is no statute of limitations defense applicable to allocation of fault to third parties under A.S. 09.17.080. Third party plaintiff may join third party defendant irrespective of applicable limitations period and plaintiff can recover damages from third party defendant who is added for purposes of allocation of fault. *Alaska Gen. Alarm, Inc. v. Grinnell*, 1 P.3d 98 (2000).

A.S. 09.17.080’s several liability regime applies to cases involving intentional conduct. *Pederson v. Barnes*, 139 P.3d 552 (2006).

Minor’s fault could not be allocated to liquor store under Alaska’s dram shop statute (A.S. 04.21.020). Liquor store is only liable for its own fault per A.S. 09.17.080, overruling earlier holding that A.S. 04.21.020 was an “exceptional statute” not subject to comparative negligence. *Sowinski v. Walker*, 198 P.3d 1134 (2008).

Dram Shop Causation. Liability in statutory dram shop cases hinge on whether actor’s intoxication was so important in bringing about the injury that a reasonable person would regard it as a cause. Plaintiff does not need to prove that intoxication resulted from the alcohol that was unlawfully provided in violation of dram shop statute. *L.D.G. v. Brown*, 211 P.3d 1110 (2009).

Evidence. While contested amount in negligence action need not be proven with mathematical accuracy, there must be some competent evidence on which to base award. *Conam v. Bell Lavalin*, 842 P.2d 148 (1992).

Amount of damages need not be proven in exact detail, but evidence must be sufficient to provide a reasonable basis for jury’s decision. However, a purely speculative award is impermissible. *Cameron v. Chang-Craft*, ___ P.3d ___, 2011 WL 1441856 (2011).

Mitigation. Wronged party must use reasonable efforts to avoid consequences of injury done by another. Question of mitigation of damages is entirely independent of extent of damages. *Johnson v. State*, 836 P.2d 896 (1991). Plaintiff’s duty to make reasonable efforts to mitigate damages does not extend to subjecting one’s self to undue risk and expense. *Gates v. City of Tenneco Springs*, 822 P.2d 455 (1991).

Punitive damages are recoverable in a wrongful death action even when the decedent is not survived by statutory beneficiaries. *Portwood v. Copper Valley*, 785 P.2d 541 (1990). There is no definite ratio between compensatory and punitive damages, although comparing punitive and actual damage awards is one factor to consider in determining whether punitive damages are excessive. *Cameron v. Beard*, 864 P.2d 538 (1993).

Government entities may be liable for punitive damages only pursuant to express and specific statutory authority. *Johnson v. State*, 836 P.2d 896 (1991).

Insurer's conduct in negotiating uninsured motorist settlement, while justifying finding that insurer acted in bad faith, did not involve conduct that could be characterized as outrageous so as to support additional punitive damages award; lower offers were made before electromyography revealed positive signs of root nerve damage, rather than merely cervical strain, and when insured's physicians evidently believed her injury would be self-resolving. *State Farm v. Weiford*, 831 P.2d 1264 (1992).

Punitive damages may not be awarded unless supported by clear and convincing evidence. A.S. 09.17.020. Generally, punitive damages may not exceed the greater of three times compensatory damages or \$500,000. *Id.* Half of any punitive damage award is paid to the state. *Id.* To recover punitive damages, plaintiff must prove that wrongdoer's conduct was outrageous, such as acts done with malice or bad motives, or reckless indifference to interests of another. *Barber v. Nat'l Bank of Alaska*, 815 P.2d 857 (1991). Actual malice need not be proved, but reckless indifference to the rights of others or conscious action in deliberate disregard of them may prove the necessary state of mind to justify punitive damages. *Id.* Purpose of punitive damages is to punish wrongdoer and to deter wrongdoer and others like him from repeating offensive act. *Id.* Punitive damages may not be recovered from the estate of a deceased tortfeasor. *Doe v. Colligan*, 753 P.2d 144 (1988). Punitive damages are not awarded for breach of contract unless breach is also a separate and independent tort. *Lee Houston & Assoc. v. Racine*, 806 P.2d 848 (1991). Moreover, award of punitive damages cannot stand alone. Viable underlying claim for compensatory damages is also required. *DeNardo v. GCI Comm. Corp.*, 983 P.2d 1288 (1999).

Punitive damages caps are constitutional. *Reust v. Alaska Petroleum Contrs.*, 127 P.3d 807 (2005).

In negligence cases involving drunk driving, a no contest plea to an assault charge (as opposed to DUI) establishes "recklessness" element for punitive damages as a matter of law. However, it is still for jury to decide

whether to award punitive damages. *Lamb v. Anderson*, 147 P.3d 736 (2006).

Taxes, present value, inflation, and interest. Income tax rates, provisions relating to deductions and exemptions, and other aspects of income tax laws and regulations are so subject to change in the future that courts cannot predict with sufficient certainty just what amounts of money a plaintiff would be obliged to pay in federal and state income taxes on income that he would have earned in the future had it not been for defendant's tortious conduct. Hence, damage award for impairment of earning capacity should not be reduced by the estimated amount representing income taxes that the injured party may be required to pay on future income. *Beaulieu v. Elliott*, 434 P.2d 665 (1967).

Future economic damages must be reduced to present value. A.S. 09.17.040 (b). Prejudgment interest should only be awarded as to past damages not future damages, including punitive damages. *McConkey v. Hart*, 930 P.2d 402 (1996).

For Causes of Action Accruing Before August 7, 1997. Noneconomic damages may not exceed \$500,000 "for each claim based on a separate incident or injury." A.S. 09.17.010 (b). This limitation does not apply to damages for "disfigurement or severe physical impairment." A.S. 09.17.010 (c).

For Cause of Action Accruing On or After August 7, 1997. Noneconomic damages may not exceed \$400,000 or the injured person's life expectancy in years multiplied by \$8,000, whichever is greater. A.S. 09.17.010 (b) (amended). When noneconomic damages are for "severe permanent physical impairment or severe disfigurement," damages may not exceed \$1,000,000 or the injured person's life expectancy in years multiplied by \$25,000, whichever is greater. A.S. 09.17.010 (c) (amended).

Caps on non-economic damages are constitutional. *C.J. v. State*, 151 P.3d 373 (2006).

If a claimant does not have motor vehicle liability insurance required under Alaska law in effect when they are involved in an accident caused by ordinary negligence, no recovery noneconomic damages against the tortfeasor is permitted. Exceptions exist for conduct that would support an award of punitive damages. A.S. 09.65.320.

Notwithstanding the United Supreme Court's decisions on "grossly excessive" punitive damage awards violating the Due Process Clause and holdings that a ratio of 4 to 1 punitive to compensatory damages is close to the line of constitutionality, court concluded that a ratio of 30 to 1 (\$150,000 to \$5,042) would be poten-

tially justified and not excessive because of the relatively low compensatory damages on a spoliation claim. *Carpenter v. Westwood One*, 171 P.3d 41 (2007).

In cases involving joint tortfeasors, a non-settling defendant is not entitled to full off-set against his liability to plaintiff for amount of settlement between plaintiff and settling defendant. Under pure several liability regime, non-settling defendant is liable damages awarded by jury based on the fault percentage determined by jury, regardless of whether that results in a windfall to plaintiff. *Petrolane v. Robles*, 154 P.3d 1014 (2007). See also *Diggins v. Jackson*, 164 P.3d 647 (2007).

If defendant intends to seek offset (i.e. subrogation payment), it is responsible for ensuring the jury's verdict is sufficiently specific for trial court to determine whether jury awarded same expenses for which offset is sought. *Turner v. Municipality of Anchorage*, 171 P.3d 180 (2007).

DEATH

Abatement and Survival. All cause of action, except defamation, survive death and do not abate upon death. See A.S. 09.55.570.

Action for Wrongful Death. Cause of action for wrongful death exists under A.S. 09.55.580. Action must be initiated within two years by decedent's personal representative. A.S. 09.55.580 (a). Discovery rule applies. *Hanebuth v. Bell Helicopter*, 694 P.2d 143 (1984). Damages must "fairly compensate" for injury caused; trier of fact must consider all "facts and circumstances," including statutory factors. A.S. 09.55.580 (c). Damages are for exclusive benefit of decedent's spouse, children, dependents; when none exist, damages limited to pecuniary loss. A.S. 09.55.580 (a).

Parents of minor decedent who was not survived by dependents could not claim loss of society under wrongful death statute, as statute limited recovery to pecuniary loss to estate. However, parents have an independent parental cause of action under A.S. 09.15.010, which includes the right to recover damages for loss of society. *Gillispie v. Beta Constr.*, 842 P.2d 1272 (1992).

Mother in capacity as representative of deceased son's estate could recover damages for son's pre-death pain and suffering under survival statute. Mother was a statutory beneficiary because she was an "other dependent" within the meaning of statute. As a statutory beneficiary, she could recover damages for loss of son's future earnings and did not need to establish dependence on son's lost future earnings. *North Slope Borough v. Brower*, 215 P.3d 308 (2009).

Where decedents had no dependents, estate's recovery was limited to pecuniary harm, which did not include intangible loss of enjoyment of life. *Sowinski v. Walker*, 198 P.3d 1134 (2008). Non-dependent siblings cannot assert claim for nonpecuniary harm (i.e. emotional harm). *Id.* Parents of deceased minor cannot recover loss of consortium damages for period after minor would have reached age of majority. *Id.*

Future earnings in wrongful death case are calculated by determining decedent's future gross earnings and subtracting decedent's personal consumption. Future tax liability is not considered in calculating either future gross earnings or future personal consumption. Designated beneficiary can recover for "prospective inheritance," which is the inheritance she would have received if grantor had not died prematurely. Measure of damages is amount of money which would have been saved absent premature death. *Kulawik v. ERA Jet*, 820 P.2d 627 (1991).

Damages for wrongful death are not precluded because deceased leaves no dependents; in such a case, damages must be measured by pecuniary loss to deceased's estate. *Osborne v. Russell*, 669 P.2d 550 (1983); A.S. 09.55.580.

Wrongful death statute allows damages for benefit of decedent's "other dependents" as well as for spouse and children and applies to those who occupy position similar to spouse and children and who are actually dependent on decedent for support at time of death; claimants must show actual dependency on significant contributions of support over sufficient period of time to establish that such contributions would have continued. *Greer v. Boettger*, 609 P.2d 548 (1980).

FINANCIAL RESPONSIBILITY LAW

See Law Digest Tables.

FIRE INSURANCE

Spouse had "insurable interest" in vehicle destroyed by fire even if not on title of vehicle, if vehicle was marital property, or if spouse had a contingent or beneficial interest in vehicle. Therefore, spouse who was "innocent co-insured" could recover for her interest in the vehicle. *State Farm v. Raymer*, 977 P.2d 706 (1999).

Landlord is a co-insured under a tenant's fire insurance policy only if the policy expressly so provides. Therefore, "implied insured" doctrine did not apply and tenant's insurer could pursue a subrogation claim against landlord for landlord's alleged negligence in causing a fire. *Great Amer. Ins. v. Bar Club, Inc.*, 921 P.2d 626 (1996).



Under all risk insurance policy, replacement cost coverage covered costs required to rebuild high school in conformity with current building code requirements, even though different from requirements existing when school was originally built. *Bering Strait School Dist. v. RLI Ins.*, 873 P.2d 1292 (1994).

Insurer prohibited from receiving more insurance proceeds than required to satisfy its outstanding debt. *Fireman's Fund Mortg. v. Allstate*, 838 P.2d 790 (1992).

“Public policy dictates that an insured who intentionally sets fire to property covered by the insurance contract may not recover thereon.” “Where policy language clearly precludes recovery if any of the co-insureds wrongfully cause the loss, the courts will deny recovery to an innocent co-insured.” Where policy was ambiguous, innocent co-insured (wife) was entitled to recover one-half of the damages or one-half of the contract limits, whichever is less, in accordance with the terms of insurance contract. *Atlas Assur. Co. v. Mistic*, 822 P.2d 897 (1991).

“If the landlord in a commercial lease covenants to maintain fire insurance on the leased premises, and the lease does not otherwise clearly establish the tenant's liability for fire loss caused by its own negligence, by reserving to the landlord's insurer the right to subrogate against the tenant, the tenant is, for the limited purpose of defeating the insurer's subrogation claim, an implied co-insured of its landlord.” *Alaska Ins. v. RCA Alaska Comm.*, 623 P.2d 1216 (1981).

“The mortgagee may satisfy his secured debt from the proceeds, but if the indebtedness does not exhaust the proceeds, the balance shall be paid to the mortgagor. Were the rule otherwise, the mortgagee would be unjustly enriched at the expense of the mortgagor, who bears the ultimate burden of paying for the insurance. The purpose of requiring insurance coverage in such instances is to protect the integrity of the asset which is hypothecated to the mortgagee to secure repayment of the underlying debt. Beyond that the mortgagee cannot fairly ask for more.” *Moran v. Kenai Towing & Salvage*, 523 P.2d 1237 (1974).

HOSPITALS

Alaska's lien law allows hospitals to record a lien for medical expenses. See A.S. 34.35.450-480.

Statutory lien procedure in A.S. 34.35.475 is hospital's exclusive remedy against tortfeasor and hospital may not directly sue tortfeasor to recover medical expenses even with an assignment from its patient. Personal injury claims are not assignable. *Mat-Su Regional Med. Center v. Burkhead*, 225 P.3d 1097 (2010).

Tribal organizations can enforce liens for medical treatment provided to qualified members for free and recover cost from third party, but would have to pay pro rata share of fees and costs to recover sum. *Alaska Native Tribal Health Consortium v. Settlement Funds*, 84 P.3d 418 (2004).

25 U.S.C. § 1621e does not apply to an action between the Alaska Native Tribal Health Consortium (Alaska Native Medical Center) and the individual to whom it provides services to recover sums for medical treatment from a settlement obtained from a third-party tortfeasor. Consortium can pursue a direct action against the third-party or can rely on Alaska law lien provisions. *Blatchford v. Alaska Native Tribal Health Consortium*, ___ F.3d ___, No. 10-35785 (9th Cir. 5/19/11).

“Alaska is the only state that imposes on hospitals a non-delegable duty to provide quality emergency medical care. Unless the patient selects the physician herself, a general acute care hospital will be liable for the physician's negligence in the emergency room.” *Ward v. Lutheran Hospitals*, 963 P.2d 1031 (1998); and *Jackson v. Power*, 743 P.2d 1376 (1987). Court declined to extend *Jackson* to adopt vicarious hospital liability for independent contractor physicians utilizing hospital operating rooms. However, patient can assert separate independent claim against hospital for negligence in credentialing of physician. *Fletcher v. South Peninsula Hosp.*, 71 P.3d 833 (2003).

A.S. 09.65.096 provides standard for determining when hospital is not liable for damages resulting from an act or omission of an independent contractor emergency room doctor. Hospital must show it (1) exercised “reasonable care” in granting privileges, (2) reviewed privileges regularly, and (3) took “appropriate steps to revoke or restrict privileges in appropriate circumstances.” Hospital must provide statutorily defined notice to use this defense.

Claim for intentional spoliation does not exist where no evidence existed that hospital “lost or destroyed” medical records “with the intent to disrupt” a “prospective civil action” for malpractice. Remedy for negligent spoliation consisted of “burden shifting” where a rebuttable presumption was adopted to the effect that the hospital was medically negligent in treating its patient and that this negligence legally caused the patient's injuries, absent a jury finding that the hospital's failure to maintain the records was excused. *Sweet v. Sisters of Providence*, 895 P.2d 484 (1995).

HUSBAND AND WIFE

Interspousal Immunity. Alaska has rejected the doctrine of interspousal immunity in the context of negli-



gence-based claims. *Cramer v. Cramer*, 379 P.2d 95 (1963).

Loss of Consortium. A spouse “has a right to sue for loss of consortium by negligently inflicted injury to his or her spouse.” *Schreiner v. Fruit*, 519 P.2d 462 (1974).

INFANTS

“Minor children have an independent cause of action for loss of parental consortium resulting from injuries tortiously inflicted on their parent by a third person.” Such claims “must be joined with the injured parent’s claim whenever feasible.” *Hibpshman v. Prudhoe Bay Supply*, 734 P.2d 991 (1987).

General rule is that “children should be held to the standard of care of a reasonable person of the same ‘age, intelligence, and experience under like circumstances.’” Exception exists where “child engages in an activity which is normally undertaken only by adults, and for which adult qualifications are required.” Child who takes possession of, operates and permits another child to operate a vehicle falls within the exception to general rule. *Ardinger v. Hummell*, 982 P.2d 727 (1999).

LIABILITY INSURANCE

Liability insurers have separate duties to defend and to indemnify their insureds. *CHI of Alaska v. Employers Reins.*, 844 P.2d 1113 (1993). Liability insurer is only required to pay reasonable cost of insured’s defense; this provides a measure of protection for insurers against over-billing and over-litigating by independent counsel. *Id.*

Duty to defend arises whenever complaint states cause of action within, or potentially within, policy coverage. *Sauer v. Home*, 841 P.2d 176 (1992). Insurer is required to give insured such notice of its intention to deny liability and of its refusal to defend as will give insured reasonable time to protect himself; such notice must not only be prompt, but must provide reasonable explanation of basis in insurance policy in relation to facts or applicable law for denial of claim. *Id.* Where insurer that is in doubt as to either its duty to defend or as to scope of coverage provides defense unconditionally, doctrines of waiver and estoppel ordinarily preclude insurer from later contesting coverage. *Id.* Comprehensive general liability insurer, having breached its duty to defend insured and failed to timely notify insured that it was denying defense and coverage, was liable for entire amount of judgment entered against insured, as well as costs and attorney fees, even if facts ultimately demonstrate that no indemnity is due. *Id.*

If adverse verdict in excess of policy limits is likely, insurer has duty to determine the amount of money judgment which might be rendered against its insured and to render in settlement that portion of projected money judgment which it contractually agreed to pay. *Bohna v. Hughes, Thorsness*, 828 P.2d 745 (1992). Insurer breached its obligation of good faith and fair dealing where insurer never offered accident victims specific dollar amount close to level at which insured would have been obligated in event of finding of liability. *Id.*

If contractor’s comprehensive liability insurer was found to have acted in violation of implied covenant of good faith and fair dealing in denying contractor coverage and defense to litigation, contractor could recover damages for mental and emotional anxiety, impairment of credit rating, impairment of reputation, impairment of ability to obtain insurance and bonding, and loss of earnings. *Alaska Pacific v. Collins*, 794 P.2d 936 (1990).

Tort of Bad Faith. In first-party insurance cases, tort of bad faith may or may not require conduct which is fraudulent or deceptive, but it necessarily requires that insurance company’s refusal to honor a claim be made without a reasonable basis. *Hillman v. Nationwide*, 855 P.2d 1321 (1993). Where insurer establishes that no reasonable jury could regard its conduct as unreasonable, the question of bad faith need not and should not be submitted to the jury. *Id.*

Insured persons may bring bad faith claims against their insurers in tort as well as contract. *State Farm v. Weiford*, 831 P.2d 1264 (1992). Insured’s conduct in negotiating uninsured motorist settlement, while justifying finding that insurer acted in bad faith, did not involve conduct that could be characterized as outrageous so as to support additional punitive damages award. *Id.*

Insurer which proceeded with coverage investigation by interviewing employees of insured regarding location of boat at time of loss, without advising insured of coverage issue, was estopped to deny coverage. If insurer has “reason to believe” a coverage dispute “may exist,” then insurer must advise insured of issue before continuing investigation under a reservation of rights. *Lloyd’s v. Fulton*, 2 P.3d 1199 (2000).

Prejudgment Interest. Automobile insurer was liable for prejudgment interest which exceeded policy limit; public policy of requiring drivers and insurers to provide minimum coverage required by legislature and ensuring that innocent victims received full prejudgment benefits of statutes pertaining to minimum coverage mandated overriding insurance contract. *Hughes v. Harrelson*, 844 P.2d 1106 (1993).

Insurer's agreement to settle claim for "policy limits" obligated insurer to pay its maximum potential liability under the policy, including prejudgment interest. *Tucker v. USAA*, 827 P.2d 440 (1992).

LIMITATIONS TIME FOR COMMENCEMENT OF ACTION

Contractual Limitations. Insurance clauses requiring suit to be filed within twelve months of "the inception of the loss" mean suit must be filed within a year after notification of the decision to deny coverage. *Fireman's Fund v. Sand Lake*, 514 P.2d 223 (1973). Contractual time limitations to bring suit will not be enforced without some showing of prejudice. *Alaska Energy v. Fairmont*, 845 P.2d 420 (1993).

Discovery Rule. Statute of limitations in attorney malpractice case is not tolled pending final resolution of litigation underlying malpractice claim. *Beesley v. Van Doren*, 873 P.2d 1280 (1994). Ordinarily, personal injury action accrues when plaintiff is injured; however, statute of limitations does not begin to run until claimant discovers, or reasonably should have discovered, existence of elements essential to cause of action. *Cameron v. State*, 822 P.2d 1362 (1991); *Pedersen v. Zielski*, 822 P.2d 903 (1991). Discovery rule applies in cases where plaintiff's injury is undiscovered and reasonably undiscoverable within two years after it was caused, as well as in cases where injury is known but its cause is unknown and reasonable diligence would not lead to its discovery. *Palmer v. Borg-Warner*, 818 P.2d 632 (1990).

Statute of limitations on product defect and negligence claims did not begin to run until boat sank, which was date plaintiff incurred an injury. Discovery rule does not shorten statute of limitations. *Jarvill v. Porky's Equipment, Inc.*, 189 P.3d 335 (2008).

Tolling. Statute of limitation for most causes of action, including ones for personal injury, are tolled for minors until age of majority. See A.S. 09.10.140. Provision providing that statute of limitations for child under 8 years of age runs on child's 10th birthday held unconstitutional on due process grounds. *Sands v. Green*, 156 P.3d 1130 (2007).

Individual's mental capacity to understand his rights, not whether he actually understood or knew of those rights, is gravamen of mental incompetency under statute tolling statute of limitations for persons incompetent by reason of mental illness of mental disability. *Hernandez v. State*, 849 P.2d 783 (1993).

Sexual Abuse Claims. A.S. 09.10.065 eliminates statute of limitations for claims where conduct constituted felony sexual abuse of a minor, felony sexual assault or unlawful exploitation of a minor at the time of

the conduct. Other conduct triggers a 3 year statute of limitations. A.S. 09.10.065 applies only to claims accruing after October 1, 2001.

A.S. 09.10.065 does not revive claims that were already time-barred, but discovery rule may apply to toll applicable statute. *Catholic Bishop of Northern Alaska v. Does 1-6*, 141 P.3d 719 (2006).

Notice. State was not equitably estopped from claiming expiration of two-year statute of limitations for contractor's tort claims against state for personal damages allegedly resulting when contractor's business failed due to cost overruns on contract with state, where contractor was on notice of state's rejection of his extra costs claims almost three years before he filed his action and there was no evidence that state lulled contractor into not filing his tort claims. *State v. Transamerica*, 856 P.2d 766 (1993).

Complaint, which incorrectly named father as defendant rather than son, was filed during limitation period. Amendment to substitute son as defendant related back because notice requirement was satisfied despite son's stated lack of awareness of lawsuit within limitations period. Insurer of both father and son was on notice of lawsuit and therefore, notice could be presumed to be imputed to son. *Phillips v. Gieringer*, 108 P.3d 889 (2005).

Estoppel. To estop assertion of statute of limitations defense, plaintiff must satisfy three conditions: pursuit of initial remedy must give defendant notice of claims; defendant must not be prejudiced by inability to gather evidence; and plaintiff must have acted in good faith. *Smith v. Stratton*, 835 P.2d 1162 (1992). Defendant was estopped from raising statute of limitations defense upon refiled action dismissed for want of prosecution, where plaintiff had granted defendant's insurance company unlimited time to answer complaint while settlement negotiations were underway. *Id.*

Relation Back. When applicable statute of limitations has run, for amendment to be allowable under rule providing for relation back of amendments, proposed amended pleading must relate back to date of timely original pleading. *Siemion v. Rumpfelt*, 825 P.2d 896 (1992). Under strict interpretation of the rule, a party seeking to amend his pleading under rule allowing relation back of amendments, so as to add additional defendants, must have made true mistake concerning identity or name of proper party. *Id.* However, for purposes of allocation of fault under A.S. 09.17.080, the statute of limitations and requirements for relation back under Alaska R. Civ. P. 14 do not apply. *Alaska Gen. Alarm, Inc. v. Grinnell*, 1 P.3d 98 (2000).

Workers' Compensation. Two-year statute of limitations period applicable to Workers' Compensation actions did not begin to run until logger learned that he could not treat his allergy to forest lichen with medicine and could not continue to work in forest as logger, even though he had previously been aware of his allergy. *Leslie Cutting v. Bateman*, 833 P.2d 691 (1992).

MALPRACTICE

Medical. Tort of "spoliation" is intentional destruction of records or evidence. *Sweet v. Sisters of Providence*, 895 P.2d 484 (1995). Health care provider's spoliation of patient's nursing records relevant to malpractice claim shifted burden of proof on issue of legal causation, as well as on issue of negligence; loss of records impaired patient's ability to prove causation in same manner as it impaired patient's ability to prove negligence. *Id.*

Patients must support medical malpractice claim with expert testimony unless causation of claimed injury is of a non-technical nature, which would be evident to a lay person. *Parker v. Tomera*, 89 P.3d 761 (2004).

A physician must disclose risks and benefits of proposed procedure which a reasonable patient would need to know in order to make informed and intelligent decision. *Korman v. Mallin*, 858 P.2d 1145 (1993). Under reasonable patient rule, a physician must disclose those risks which are "material" to reasonable patient's decision concerning treatment. *Id.* In certain circumstances, physician's failure to disclose risk may be privileged. *Id.*

A claim based on lack of informed consent is a negligence claim, not a strict liability claim. Physician can be liable for failure to disclose information he knew or should have known might have been considered important by the patient. "Material information" is information that would be regarded as significant by a reasonable person in a patient's position in deciding what medical treatment to pursue. *Marsingill v. O'Malley*, 128 P.3d 151 (2006).

Jury's finding that doctor failed to obtain informed consent from patient rendered any failure of evidence on actual negligence moot. *Roderer v. Dash*, 233 P.3d 1101 (2010).

IME doctor did not have a physician-patient relationship with claimant or any corresponding duty of care to claimant and was not liable for medical malpractice. *Smith v. Radecki*, 238 P.3d 111 (2010).

Legal. Legal malpractice claims are generally governed by contract statute of limitations, which for claim accruing since August 7, 1997 is three years. *Lee Houston v. Racine*, 806 P.2d 848 (1991); *Beesley v. Van*

Doren, 873 P.2d 1280 (1994). Legal malpractice claim against criminal defense counsel did not accrue until plaintiff obtained post-conviction relief. *Shaw v. State*, 861 P.2d 566 (1993). If the plaintiff in a legal malpractice action against his former defense attorney in fact engaged in criminal conduct he was accused of, public policy prevents recovery on his part. *Id.* In order to prove causation against criminal defense attorney, plaintiff must establish by preponderance of evidence that, "but for" the attorney's negligent misrepresentation, criminal jury would have returned a more favorable verdict; thus, plaintiff has to prove jury would not have found him guilty of charged conduct beyond reasonable doubt. *Id.*

"Actual guilt" as an affirmative defense to a legal malpractice claim requires proof of actual guilt by only a preponderance of the evidence. *Haynes v. McComb*, 147 P.3d 700 (2006).

Professional malpractice consists of four elements: 1) duty of the professional to use such skill, prudence, and diligence as other members of the profession commonly possess and exercise; 2) breach of that duty; 3) proximate causal connection the between negligent conduct and the resulting injury; and 4) actual loss or damage resulting from the professional's negligence. *Belland v. O.K. Lumber*, 797 P.2d 638 (1990).

Accountants. The appropriate measure of damages for malpractice by a tax accountant is the difference between what the client would have owed in any event if his tax returns were properly prepared and what he did owe because of the accountant's negligence, plus incidental damages. *Thomas v. Cleary*, 768 P.2d 1090 (1989).

NEGLIGENCE

Elements. Party seeking to prevail on negligence action must prove duty, breach of that duty, and injury which was proximately caused by the breach. *Richey v. Oen*, 824 P.2d 1371 (1992).

Causation. Concept of legal cause in negligence encompasses the two distinct prongs of actual causation and a more intangible legal policy element. *Vincent v. Fairbanks Mem. Hosp.*, 862 P.2d 847 (1993). Depending on issues and evidence presented at trial, jury instruction on negligence applying "substantial factor test" of causation may incorporate a "but for" test of actual causation. *Id.* The "but for" test of actual causation is inappropriate for cases involving independent concurrent causes. *Id.*

Superseding Cause. Where negligent conduct of actor creates or increases foreseeable risk of harm through intervention of another force, and is a substantial factor

in causing harm, such intervention is not a superseding cause. *Osborne v. Russell*, 669 P.2d 550 (1983).

Res Ipsa Loquitur. Doctrine of *res ipsa loquitur* permits, but does not compel, an inference of negligence from circumstances of an injury. *State Farm v. Anchorage*, 788 P.2d 726 (1990). Doctrine should be applied when 1) accident is one which ordinarily does not occur in absence of someone's negligence; 2) agency or instrumentality is within exclusive control of defendant; and 3) injurious condition or occurrence was not due to any voluntary action or contribution by plaintiff. *Id.*

Existence of Duty. Factors considered in determining whether duty of care is owed to plaintiffs are: 1) foreseeability of harm to plaintiff; 2) degree of certainty that plaintiff suffered injury; 3) closeness of connection between defendant's conduct and injury suffered; 4) moral blame attached to defendant's conduct; 5) policy of preventing future harm; 6) extent of burden to defendant and consequences to community of imposing a duty to exercise care with resulting liability for breach; and 7) availability, cost and prevalence of insurance for risk involved. *R.E. v. State*, 878 P.2d 1341 (1994). Traditional common law rule is that there is no general duty to safeguard others from foreseeable harm when that would require controlling conduct of another person or warning of such conduct. *Id.* An exception to common law rule exists when there is a special relationship between actor and either dangerous person or potential victim. *Id.*

A separate duty of due care arises when the combined actions of two separate actors creates a hazardous condition within the meaning of §321 of Rst. of Torts (2d). §321 allows each actor to be treated as having "created" the hazard so long as each actor's conduct substantially contributed to the resulting hazard and each actor realizes the resulting danger of serious harm to others. *Parnell v. Peak Oilfield Serv. Co.*, 174 P.3d 757 (2007).

Vicarious Liability. Under theory of respondeat superior, employer is liable for negligence of an employee as long as that employee is acting within scope of his or her employment. *State v. Will*, 807 P.2d 467 (1991). Where tortious conduct arises out of and is reasonably incidental to employee's legitimate work activities, "motivation to serve" test of respondeat superior liability will have been satisfied. *Doe v. Samaritan Counseling Ctr.*, 791 P.2d 344 (1990). Employer is generally not liable for negligence of its independent contractors. *Matomoco v. Arctic Mechanical*, 796 P.2d 1336 (1990). Employer of an independent contractor can be vicariously liable to a person injured on employer's business premises by an unsafe condition created by independent contractor's negligence, *Patton v. Spa Lady*, 772 P.2d 1082 (1989),

noting common law, "independent contractor rule" is subject to a host of exceptions.

Landowners. In determining whether a tract of land is "improved land" entitled to immunity under recreational use/landowner immunity statute on summary judgment motion, trial judge should consider: proximity of improvements to accident site; extent of property maintenance undertaken by landowners; and whether character of property as a whole justifies conclusion that landowner is responsible for reasonable risk management of area. *University of Alaska v. Shanti*, 835 P.2d 1225 (1992).

Ordinary principles of negligence govern landowners and property owners, who must act as a reasonable person in maintaining property in a reasonably safe condition in view of the circumstances, including the likelihood of injury to others, the seriousness of the injury, and the burden on the respective parties of avoiding the risk. *Burnett v. Covell*, 191 P.3d 985 (2008).

Actual or constructive notice of a hazardous condition is not an element of slip-and-fall prima facie case. Notice can be considered in evaluating reasonableness. Court declined to adopt "mode of operation" rule. *Edenshaw v. Safeway, Inc.*, 186 P.3d 568 (2008).

Evidence of other slip and fall accidents is only admissible if the plaintiff establishes that the falls occurred under substantially similar circumstances. The fact that the falls occurred on the same day, but in a different location on the property is not sufficient proof of similarity to warrant admission. *Mueller v. Buscemi*, 230 P.3d 1153 (2010).

Common Carriers. Airline passengers are entitled to assume that highest degree of care is being taken by common carrier for their safety. *Widmyer v. Southeast Skyways*, 584 P.2d 1 (1978), accord, *Barrett v. ERA Aviation, Inc.*, 996 P.2d 101 (2000). Responsibility of a common air carrier for safety of its passengers is so important that carrier should not be permitted to transfer it to another. *Alaska Airlines v. Sweat*, 568 P.2d 916 (1977).

Defenses. For allocation of fault, generally, see "DAMAGES."

In a tort action brought by minor or her estate for injuries caused by minor's use of liquor purchased unlawfully from holder of a liquor license, the holder is not entitled to defend, in part, on basis of minor's comparative negligence in making an illegal purchase. *Loeb v. Rasmussen*, 822 P.2d 914 (1991).

As a general rule, contractual limitations on liability for negligence must be clearly set forth. *Bank of Calif. v. First American Title*, 826 P.2d 1126 (1992).

Title company is engaged in a business affected with the public interest and cannot, by an adhesion contract, exculpate itself from liability for negligence. *Id.*

Immunity. City's discretionary decision to have fence which encroached on city right-of-way removed was immunized, but decision as to how the fence was to be removed was an operational decision which was not protected by municipal immunity and city would not have been immunized for damages caused by negligence in removal of fence. *Gates v. City of Tenakee Springs*, 822 P.2d 455 (1991). Purpose of a Good Samaritan Statute is to induce voluntary rescue by removing fear of potential liability which acts as an impediment to such rescue; it is directed at persons who are not under preexisting duty to rescue. *Lee v. State*, 490 P.2d 1206 (1971), *overruled on other grounds*, *Munroe v. City*, 545 P.2d 165 (1976). Good Samaritan Statute does not extend to physicians who have preexisting duty to render emergency care. *Deal v. Kearney*, 851 P.2d 1353 (1993).

Indemnity. Obligation of indemnity is obligation resting on one party to make good a loss or damage another has incurred. *Fairbanks v. Kandik*, 823 P.2d 632 (1991). Indemnitee jointly liable in tort with indemnitor may recover implied non-contractual as well as implied contractual indemnity only if indemnitee is not in any degree also jointly at fault. *Id.*

Negligent Misrepresentation. To establish liability for negligent misrepresentation under theory that such a cause of action is complete when injured party has suffered a pecuniary loss as a result of the misrepresentation, it is not enough to demonstrate that subsequent occurrences made an originally accurate representation ultimately false; for a representation to be actionable, the representation must be false when made. *Bubbel v. Wein Air*, 682 P.2d 374 (1984). Liability for negligent misrepresentation requires existence of a duty, if one speaks at all, to give correct information. *Bank of America v. First American*, 826 P.2d 1126 (1992). Factors relevant to whether a duty exists include: whether defendant has knowledge, or its equivalent, that the information was desired for serious purpose and plaintiff intended to rely on it; the foreseeability of harm; the degree of certainty that plaintiff would suffer harm; the directness of causation; and the policy of preventing future harm. *Id.*

Negligent Infliction of Emotional Distress. Plaintiff can assert a claim for damages for negligent infliction of emotional distress if defendant should reasonably foresee injury to plaintiff and hence owe plaintiff a duty of care. *Beck v. State*, 837 P.2d 105 (1992). Existence and extent of duty of care are questions of law for court. *Id.* One who is either voluntarily or involuntarily thrust into dramatic events and who makes sudden sensory observation of traumatic injuries of a close relative in immediate

aftermath of event is no less entitled to assert claim than one who actually witnessed event. *Id.* One who learns of injury or death of a loved one or who observes pain and suffering or injuries only after considerable period of time has elapsed since accident suffers harm which, while foreseeable, policy and reason dictate it is not compensable. *Id.*; *Mattingly v. Sheldon Jackson College*, 743 P.2d 356 (1987). Under traditional rule, no recovery of damages for emotional distress stemming from negligent conduct was possible without physical injury. However, where defendant stands in a contractual or fiduciary relationship with plaintiff and nature of relationship imposes a duty on the defendant to refrain from conduct that would foreseeably result in emotional harm to plaintiff, plaintiff need not establish physical injury to recover. *Chizmar v. Mackie*, 896 P.2d 196 (1995).

If no preexisting legal duty exists, only a bystander who directly witnesses physical injury can assert NIED claim. *Hagen Ins. v. Roller*, 139 P.3d 1216 (2006).

Policy providing coverage to persons injured "in the same accident" did not cover parents claiming NIED for viewing daughter's body in hospital after auto accident because injuries occurred away from accident scene. *State Farm v. Dowdy*, 192 P.3d 994 (2008).

Negligence Per Se. In determining whether to give negligence per se instruction, trial court must first determine whether conduct at issue lies within ambit of statute or regulation in question. *Shanks v. Upjohn*, 835 P.2d 1189 (1992). If trial court concludes that statute is applicable, court has limited discretion to refuse to give negligence per se instruction only if 1) it determines that the rule of law is so obscure, unknown, outdated, or arbitrary as to make inequitable its adoption as standard of reasonable care; 2) statute is too vague or arcane to be used as reasonable standard of reasonable care; or 3) statute amounts to little more than duplication of common-law duty to act reasonably under circumstances. *Id.* See also "AUTOMOBILES."

PRIVILEGED COMMUNICATIONS

Only privileges provided by constitutions of the United States or State, by Alaska statutory law, or by rules adopted by Alaska Supreme Court are recognized. See Evid. R. 501.

Attorney-Client. Attorney-client privilege codified by Evid. R. 503. Privilege strictly construed. *USAA v. Werley*, 526 P.2d 28, 31 (1974). Several exceptions recognized: crime/fraud, claimants through same decedent, breach of duty by attorney, document attested to by attorney, joint clients. See Evid. R. 503 (d).

Insurer-Insured. Communications between insured and insurer not within attorney-client privilege unless

insurer acting upon express direction of counsel for insured. *See Langdon v. Champion*, 752 P.2d 999 (1988).

Clergy-Penitent. Clergy-Penitent privilege codified by Evid. R. 506.

Physician/Psychotherapist-Patient. Physician/ Psycho-therapist-Patient privilege codified by Evid. R. 504. "Filing of a personal injury action waives the physician-patient privilege as to all information concerning health and medical history relevant to the matters which the plaintiff has put in issue." *Trans-World Investments v. Drobney*, 554 P.2d 1148 (1976); *Langdon v. Champion*, 745 P.2d 1371 (1987).

Spousal. The Spousal privileges of immunity from giving testimony and confidentiality of marital communications are codified by Evid. R. 505.

Waiver. Any privilege waived when holder "voluntarily discloses or consents to disclosure of any significant part of the matter or communication." Evid. R. 510. Alaska R. Prof. Cond. 1.6 requires attorney to invoke attorney-client privilege on behalf of client, but attorney must obey order of court of competent jurisdiction requiring lawyer to give information regarding client. *Downie v. Superior Ct.*, 888 P.2d 1306, 1309 (Alaska Ct. App. 1995).

PRODUCT LIABILITY

When defective product creates situation potentially dangerous to persons or other property, and loss occurs as a result of that danger, strict liability in tort is appropriate theory of recovery, even though damage is confined to product itself. *Northern Power & Eng'r v. Caterpillar*, 623 P.2d 324 (1981). In products liability cases where only harm alleged is damage to product itself, plaintiff must show that loss was proximate result of dangerous defect and that loss occurred under kind of circumstances that made product basis for strict liability. *Id.* Product may be defective because of manufacturing defect, defective design, or failure to contain adequate warnings. *Shanks v. Upjohn*, 835 P.2d 1189 (1992).

Stream of Commerce. Purchaser and owner of office furniture, who makes furniture available for use by visitors, does not place furniture into stream of commerce and is not subject to strict product liability. *Burnett v. Covell*, 191 P.3d 985 (2008).

Failure to Warn. Product is "defective" under strict liability failure to warn theory if plaintiff proves that product as marketed posed a risk of injury to one who used product in a reasonably foreseeable manner and is marketed without adequate warnings of risk. *Prince v. Parachutes*, 685 P.2d 83 (1984). A manufacturer has no duty to warn about dangers that are open and obvious to

the ordinary consumer. *Id.* A manufacturer may introduce as a defense that the risk was scientifically unknowable at time product was distributed to plaintiff. *Shanks v. Upjohn*, 835 P.2d 1189 (1992). For a warning to be adequate, it should clearly indicate scope of risk or danger posed by product, reasonably communicate extent or seriousness of harm that could result from risk or danger, and be conveyed in such a manner as to alert reasonably prudent person. *Id.*

Design or Manufacturing Defect. Plaintiff who successfully establishes that product is defective should not be subjected to additional burden of proving whether precise cause of defect was in product's design or its manufacture. *Colt Indus. v. Frank W. Murphy Mfr.*, 822 P.2d 925 (1991).

A product is defective in design if plaintiff proves either that 1) the product failed to perform as safely as an ordinary consumer would expect when used in an intended or reasonably foreseeable manner, or 2) that the product's design proximately caused injury and the defendant fails to prove, in light of the relevant factors, that on balance the benefits of the challenged design outweigh risk of danger inherent in such design. *Caterpillar v. Beck*, 593 P.2d 871 (1979). The consumer expectation test was held to apply to products of complex design, such as seat belts, in face of argument that product is too complex to form basis for reasonable consumer expectation. *General Motors Corp. v. Farnsworth*, 965 P.2d 1209 (1998).

Plaintiff in strict products liability suit must establish product was defective at time it left possession of manufacturer. *Hiller v. Kawasaki*, 671 P.2d 369 (1983). To the extent that plaintiff's injury was caused by alterations to a substantially altered product, not product "defect" existing at time of manufacture, manufacturer is not liable for injuries. *Id.*

Evidence of prior or subsequent accidents may be introduced to demonstrate existence of a product defect, provided incidents occurred under substantially similar circumstances. *Caterpillar v. Beck*, 593 P.2d 871 (1979).

Used Products. An overhauler/repairer of an engine is strictly liable for selling and installing a used defective component part during overhaul where part is billed for separately and where overhauler extensively repaired, inspected and tested the part. Case involved a hybrid sales-service transaction. *Bell v. Precision Airmotive Corp.*, 42 P.3d 1071 (2002).

Defense. Conformity to state of the art is not a defense in products liability action. *Keogh v. W.R. Grasle*, 816 P.2d 1343 (1991). Compliance with industry-wide standards is not a defense and is considered to have little probative value, but may be considered by jury to deter-

mine existence of defect. *Sturm, Ruger v. Day*, 594 P.2d 38 (1979), *modified on other grounds*, 615 P.2d 621 (1980). Defense of superseding cause may apply in a strict products liability case. *Dura v. Harned*, 703 P.2d 396 (1985). A superseding cause occurs when, after the event and looking back from harm to actor's negligent conduct, it appears to court highly extraordinary that it should have brought about harm. *Id.* An intervening cause that lies within scope of foreseeable risk, or has a reasonable connection to it, is not a superseding cause. *Id.*

Comparative Fault. Pure comparative negligence applies in strict products liability action. *Butaud v. Suburban*, 555 P.2d 42 (1976). Failure to instruct on comparative fault in appropriate case is reversible error. *General Motors Corp. v. Farnsworth*, 965 P.2d 1209 (1998). Comparative fault in products liability cases extends to those cases where plaintiff misuses product and that misuse is proximate cause of injuries. *Id.* Evidence of product misuse by plaintiff was admissible as relevant to defense of comparative negligence in strict products liability action, even though defendant failed to plead affirmative defense of misuse in its answer. *Keogh v. Grastle*, 816 P.2d 1343 (1991). Evidence of a plaintiff's ordinary negligence can also constitute comparative negligence in products cases. *Smith v. Ingersoll-Rand*, 14 P.3d 990 (2000).

Subsequent Remedial Measures. Evidence of subsequent remedial measures is admissible to prove feasibility of alternative designs as well as to prove defective design. *Dura v. Harned*, 703 P.2d 396 (1985).

Successor Liability. "Mere Continuation" and "Continuity of Enterprise" theories of successor liability are recognized in Alaska. *Savage Arms v. Western Auto*, 18 P.3d 49 (2001).

RELEASE

Interpretation. Release is interpreted in same manner as any other contract. *Cameron v. Beard*, 864 P.2d 538 (1993).

Bar. A valid release will bar any subsequent claims covered by release. *Petroleum Sales v. Mapco*, 687 P.2d 923 (1984).

Policy. There is a policy favoring termination of litigation and encouraging settlement agreements, and law presumes release to be satisfaction unless plaintiff can prove otherwise. *Mitchell v. Mitchell*, 655 P.2d 748 (1982).

Scope. Mutual release purporting to cover all "financial and contractual obligations to each other," entered into between contractor and subcontractor at time

their relationship terminated, applied to prevent recovery by subcontractor from contractor of amount paid supplier of switching gear, even though subcontractor claimed that contractor's refusal to pay occurred after settlement; contractor's refusal was last step in dispute which existed prior to settlement. *Martech v. Ogden*, 852 P.2d 1146 (1993).

Workers' Compensation. Upon required approval by Workers' Compensation Board, settlement agreements pertaining to workers' compensation benefits have same legal effect as benefit awards from Board, except settlements are more difficult to set aside. *Olsen v. Lawson*, 856 P.2d 1155 (1993).

Test for enforceability of release is whether at time of signing, releasor intended to discharge disability which was subsequently discovered. *Witt v. Watkins*, 579 P.2d 1065 (1978).

Burden to Set Aside. Former employee had burden of showing by clear and convincing evidence that release should be set aside, where she did not deny that she gave release to former employer and understood its nature. *Zeilinger v. SOHIO*, 823 P.2d 653 (1992). Economic necessity is not enough, by itself, to avoid otherwise valid release. *Id.*

REPRESENTATIONS AND WARRANTIES

Representations. That insurance agent did not clearly explain coverage exclusions to insured did not constitute fraudulent misrepresentation. *Alaska Pacific v. Collins*, 794 P.2d 936 (1990). Insured is entitled to rely on his broker's professional skill and representations when interpreting scope of insured's insurance coverage. *Gudenau v. Sweeney*, 736 P.2d 763 (1987). Whether insured actually believed that coverage in its insurance policy conformed to all-inclusive coverage that insurance broker promised to obtain was for trier of fact. *Id.*

Finding of coverage beyond clear terms of policy will not be made on policyholder's bare allegations that it expected such coverage; insured must demonstrate that its expectation of coverage was based on specific facts which make its expectation reasonable. *O'Neill v. Illinois Empl.*, 636 P.2d 1170 (1981).

All representations by an insurer to prospective purchaser of insurance policy must be taken into account in interpreting policy, and insurer will be bound by its representations to the extent that they form, with policy itself, expectations of a reasonable policyholder. *INA v. Brundin*, 533 P.2d 236 (1975).

Warranties. Actions for breach of implied warranty are governed by a four year statute of limitations which runs from date of purchase. *Armour v. Alaska Power*



Auth., 765 P.2d 1372 (1988). Insured's termination of aircraft lease and not reporting aircraft as covered plane on its aircraft insurance thereafter did not impair right of lessor's lienholder to recover from insurer for loss of aircraft in a crash, since breach of warranty clause in insurance protected lienholder against insured's acts, including unilateral cancellation, absent effective notice. *Underwriters at Lloyd's v. United Bank AK*, 636 P.2d 615 (1981).

SERVICE OF PROCESS

Long-Arm Statute. Alaska's long-arm statute, A.S. 09.05.015, sets forth a list of specific bases for asserting personal jurisdiction and also includes a catch-all subsection, subsection (c), which extends personal jurisdiction co-extensively with the Fourteenth Amendment. *Alaska Telecom v. Schafer*, 888 P.2d 1296 (1995). The list of specific bases avoids converting every jurisdictional issue into a constitutional question. *Id.* When constitutional questions arise, due process permits assertion of personal jurisdiction by any state over a defendant who has such minimum contacts with forum that maintenance of the suit does not offend traditional notions of fair play and substantial justice. *Id.*

Minimum contacts. Personal jurisdiction may be asserted consistently with due process when it is found that defendant's contacts with forum are sufficiently substantial so that defendant can reasonably anticipate being haled into court. *Glover v. Western Air*, 745 P.2d 1365 (1987). Defendant's contacts with forum should be found sufficiently substantial for due process purposes whenever defendant has maintained continuous and systematic general business contacts with forum state. *Id.* Physical absence from forum does not by itself show that exercise of personal jurisdiction would be unfair or unduly burdensome in violation of due process. *Id.* Non-resident franchiser's business activities within Alaska were substantial within meaning of long-arm statute; Mexican franchisee's rental of a single car to Alaskan residents in Mexico was not sufficient contact permitting exercise of personal jurisdiction. *Id.* In order to meet due process standards, personal jurisdiction over nonresident defendant requires certain minimum contacts with state so that maintenance of suit does not offend traditional notions of fair play and substantial justice. *Volkswagenwerk v. Klippan*, 611 P.2d 498 (1980). When a manufacturer voluntarily places its product in general stream of commerce without restriction, the "minimum contact" requirement of due process is satisfied in all forums where it is foreseeable to manufacturer that its product may be marketed. *Id.* A party's status as a component manufacturer does not preclude exercise of personal jurisdiction; such an exercise of jurisdiction does not of-

fer due process if minimum contacts are established. *Id.*

Void Judgment. Prior judgment could not be collaterally attacked absent showing that it was void due to 1) court's lack of subject matter or personal jurisdiction, 2) lack of proper notice by defendant, or 3) failure to comply with requirements necessary for valid exercise of power of court. *DeNardo v. Anchorage*, 775 P.2d 515, *cert. denied*, 493 U.S. 922 (1989).

Service of process is preliminary requirement to court obtaining personal jurisdiction over party and satisfies notice requirement essential to due process of law. *Beam v. Adams*, 749 P.2d 366 (1988). Judgment will be declared void where service is improper. *Id.* Service at mortgagor's former wife's residence was improper; residence was not mortgagor's dwelling house or usual place of abode, there was no indication that mortgagor frequented residence after he moved out six months prior to service of process, and there was no indication that mortgagor had expressly or impliedly made his former wife his agent for service of process. *Id.*

Foreign Courts. Foreign court's dismissal of plaintiff's action to recover upon deficiency judgment against defendant, on ground that original Alaska judgment was void for improper service of process, precluded plaintiff, under doctrine of collateral estoppel, from relying on original Alaska judgment as basis for a second deficiency action filed in Alaska; second action involved same parties as previous suit, issue whether Alaska judgment against defendant was void based on improper service of process was the same, and resolution of issue by foreign court was by final, appealable judgment, resulting in dismissal of action. *Campion v. State*, 876 P.2d 1096 (1994).

Appearance. Even if service of process on municipality was defective, personal jurisdiction attached when municipality appeared in suit without challenging validity of service, and thus default judgment subsequently entered against municipality was not void for lack of personal jurisdiction. *Kenai v. English Bay*, 781 P.2d 6 (1989), *limited on other grounds*, *Sandoval v. Sandoval*, 915 P.2d 1222 (1996).

Child Custody, Visitation & Support. Under Texas and Alaska law, Alaska would have jurisdiction to modify custody and visitation provisions of Texas amended decree after Alaska became "home state" of children and custodial parent, even though non-custodial parent remained resident of Texas. *Puhlman v. Turner*, 874 P.2d 291 (1994). Where nonresident parent seeks to enforce visitation provisions of out-of-state divorce decree, Alaska court may not exercise personal jurisdiction over



nonresident parent to modify support provisions of decree. *Id.*

SUBROGATION

An insurer is subrogated to rights of insured either by terms of policy or on grounds of general equitable principles. *Insurance Co. of No. Am. v. State Farm*, 663 P.2d 953 (1983).

Insurer may instruct insured not to pursue its medical payments subrogation claim as part of insured's lawsuit against tortfeasor. If the insurer does so, the subrogated claim is no longer part of insured's claim. *Ruggles v. Grow*, 984 P.2d 509 (1999).

Plaintiff's attorney cannot recover attorney's fees from plaintiff's insurer under "common fund" doctrine when plaintiff's insurer actively requested that plaintiff not pursue the insurer's subrogation interests. Lien would not be collected from plaintiff's recovery fund, but rather would be collected directly by the plaintiff's insurer from defendant's insurer and plaintiff was made whole for medical expenses before his insurer collected the subrogation lien. *O'Donnell v. Johnson*, 209 P.3d 128 (2009).

Although owner of defective airplane could have sued to recover full amount of damage and held appropriate portion of such recovery in trust for his insurer, whose subrogation rights arose upon payment under policy, insurer's decision to settle its claim with manufacturer foreclosed this option, notwithstanding owner's allegation that settlement agreement reached between manufacturer and owner's insurer was collusive. *Brinkerhoff v. Swearingen Aviation*, 663 P.2d 937 (1983). Insurance company is free to settle its subrogation claims for any amount. *Id.*

Waiver. Insurer may waive subrogation rights against coinsured by express contract language. *Atlas Assur. of Am. v. Mystic*, 822 P.2d 897 (1991).

Airline's liability insurer's waiver of rights of subrogation against State did not extend further than specific risks and losses for which coverage was provided to State within certificate of insurance that limited coverage to scope of airport terminal lease between State and airline; insurer did not waive subrogation for risks and losses associated with activities conducted by airline on runways and taxiways. *State v. Oriental Fire & Marine*, 776 P.2d 776 (1989).

Alaska recognizes contractual claim for reimbursement of medical expenses and distinguishes contractual right from equitable right of subrogation. Purpose of right to reimbursement is to prevent double re-

covery. *Maynard v. State Farm Mut. Ins. Co.*, 902 P.2d 1328 (1995).

Equitable Subrogation. Courts generally do not allow equitable subrogation until insured has been fully compensated for its loss. *McCarter v. Alaska Nat'l*, 883 P.2d 986 (1994).

Judgment creditor's cursory remarks in its motion documents that it had stepped into insolvent corporation's "shoes" for purposes of asset entitlement did not demonstrate that judgment creditor offered equitable subrogation theory to trial court. Therefore, creditor could not raise that argument on appeal, even though concept of equitable subrogation has been described by "shoes" metaphor. *Willner's Fuel Distributors v. Noreen*, 882 P.2d 399 (1994).

Mortgagee. Insurer was not entitled to subrogate against innocent coinsurer for payments made to mortgagee for loss where it did not deny innocent coinsured's claim. *Atlas Assur. of Am. v. Mystic*, 822 P.2d 897 (1991). Insurer cannot recover by means of subrogation against its own insured. *Id.*

Insurer may not enforce a putative subrogation if mortgagor procured insurance policy for his own benefit and at his own expense; however, if insurance was purchased for mortgagee's benefit alone, insurer may become a subrogee of the mortgagee's rights against the mortgagor. *Industrial Indem. v. Great American*, 686 P.2d 1216 (1984). Destruction of the mortgage by the mortgagee defeats the mortgagee's right to recover for a fire loss from insurer. *Id.* Insured's violation of insurer's subrogation rights serves as a defense which insurer can use to avoid payment of benefits to insured. *Id.*

Landlord. Absent express provision in lease establishing tenant's liability for loss from negligently started fires, insurance obtained by landlord is for mutual benefit of both parties, and tenant is coinsured of landlord, barring subrogation claim by insurer against tenant. *Alaska Ins. v. RCA*, 623 P.2d 1216 (1981).

WAIVER AND ESTOPPEL

Waiver of Insurer's Defenses. Where attorney retained by insurer to defend insured in wrongful death action had been aware more than one month before trial of a possibility that insurer had a policy defense based on alleged breach of cooperation clause, but did not inform insured of his intention to deny liability until after trial had begun, insurer waived right to assert the breach of co-operation clause defense. *Continental v. Bayless & Roberts*, 608 P.2d 281 (1980). Court took law of estoppel in insurance context even further in *Lloyd's & Inst. of London Underwriting Cos. v. Fulton*, 2 P.3d 1199 (2000) where court held that insurer must promptly in-

form its insured as soon as it has good reason to believe that it has potential reasons to deny coverage. If insurer breaches this duty by withholding notice to insured while it investigates its coverage defenses, it estops itself from denying coverage.

Insurer's alleged misconduct in investigating excluded driver issue did not prejudice insured because ATV did not qualify as "vehicle" under policy, and that was basis for coverage limitation. "Vehicle" coverage limitation did not have anything to do with "named driver exclusion," so there was no bases for coverage by estoppel. *Progressive v. Skin*, 211 P.3d 1093 (2009).

Preservation of Insurer's Rights. See "ATTORNEYS, Independent Counsel."

Clause in insurance contract, entitled "non-waiver agreement," which allowed insurer to investigate any claim without prejudice to its rights, was evidence that insurer did not intend to waive defenses that it did not specifically set forth in correspondence to insured. *Hillman v. Nationwide*, 758 P.2d 1248 (1993).

Insurer under "family" group accident plan was not estopped to assert unmarried cohabitant's ineligibility for family coverage by virtue of its failure to notice differences in last names of individuals whom insured listed as beneficiaries on enrollment form. *Serradell v. Hartford*, 843 P.2d 639 (1992). Different last name could have indicated a wife who retained her maiden name or even an adopted child, and completed enrollment form did not describe decedent as a cohabitant, or common-law spouse, or state that insured was seeking insurance for her as a spouse. *Id.*

Where insurer that is in doubt as to either its duty to defend or as to scope of coverage provides defense unconditionally, doctrines of waiver and estoppel ordinarily preclude insurer from later contesting coverage. *Sauer v. Home Indem.*, 841 P.2d 176 (1992). If insurer conducts defense conditionally, with consent of insured under a nonwaiver agreement, insurer can preserve its option to later disclaim coverage after conducting defense. *Id.* If insured does not consent to nonwaiver agreement and insured exercises its right to reject insurer's defense and obtains independent counsel at insurer's expense, the insurer retains its right to later contest coverage. *Id.* If, in a "policy defense" case, insured does not consent to nonwaiver agreement and insurer either refuses to defend or withdraws from defense, and insurer communicates this decision and the basis of the decision to insured, insurer may later contest coverage. *Id.* However, if insurer denies coverage without clearly communicating this decision or the basis of its decision to insured, the insurer is precluded from later arguing that coverage does not exist. *Id.*

WORKERS' COMPENSATION

Alaska Statutes Title 23, Chapter 30 contains the Alaska Workers' Compensation Act.

Purpose. Purpose of Alaska's workers' compensation law is to provide injured workers with simple and speedy remedy to compensate them for work-related injuries. *Sokolowski v. Best Western*, 813 P.2d 286 (1991).

The 2004 amendments to A.S. 23.30.045(a) and 23.30.055 that extended exclusive liability provisions to project owners and provided immunity for tort liability to both general contractors and project owners did not violate due process or equal protection rights of employees. *Schiel v. Union Oil Co.*, 291 P.3d 1025 (2009).

The term "project owner" as defined in A.S. 23.30.045 is not limited to the construction context. *Anderson v. Alyeska Pipeline Serv. Co.*, 234 P.3d 1282 (2010).

Medical Stability. The Act defines "medical stability" as the date after which further objectively measurable improvement from effects of compensable injury is not reasonably expected to result from additional medical care or treatment. *Anchorage v. Leigh*, 823 P.2d 1241 (1992). Neither this definition, nor the presumption of medical stability which arises when there is no objectively measurable improvement for a period of 45 days, violate substantive due process rights of injured workers. *Id.*

Construction Favoring Beneficiary. Alaska Supreme Court does not construe ambiguities in workers' compensation laws in favor of either party. *Rydwell v. Anchorage Sch. Dist.*, 864 P.2d 526 (1993). But act should be liberally construed in favor of claimant, in accordance with its humanitarian purposes. *Forest v. Safeway Stores*, 830 P.2d 778 (1992).

Presumption of compensability does not apply when employer is using exclusivity of remedy defense in a negligence lawsuit. *Estate of Milos v. Quality Asphalt Paving*, 145 P.3d 533 (2006).

Surviving unmarried co-habitant not entitled to death benefits for partner's death. *Ranney v. Whitewater Engineering*, 122 P.3d 214 (2005).

Retroactivity. Provision of workers' compensation law establishing social security benefits offset did not apply to claimant who sustained compensable injuries prior to provision's effective date. *Caspersen v. Alaska Workers' Comp. Bd.*, 786 P.2d 914 (1990).

For purposes of statute providing for suspension of compensation if employee unreasonably refuses medical treatment, factors to be used in determining reasonable-



ness of treatment refusal include the risk and seriousness of side effects, chance of cure or improvement, and any first-hand negative experience or observations of the employee, regarding either the procedure in question or medical care in general. *Metcalf v. FELEC*, 784 P.2d 1386 (1990).

Statute requiring claimants to request hearing within two years of controversion of claim by employer did not alter legal consequences of events giving rise to cause of action, and thus applied retroactively to suits arising prior to enactment. *Pan Alaska Trucking v. Crouch*, 773 P.2d 947 (1989).

Latent Defects. Statutory provision limiting the maximum time for filing claim to four years from date of injury was changed to permit claims arising from latent defects pertinent to and causing compensable disability, time limitations notwithstanding. *Fox v. Alascom*, 783 P.2d 1154 (1989).

“Last Injurious Exposure Rule.” When employee suffers successive injuries while working for different employers, both of which contribute to employee’s disability, “last injurious exposure rule” imposes full liability on later employer. *Olsen Logging v. Lawson*, 856 P.2d 1155 (1993); *Peek v. SKW/Clinton*, 855 P.2d 415 (1993); *State v. Cacioppo*, 813 P.2d 679 (1991). Rule applies when subsequent employment exacerbates, aggravates, accelerates or combines with preexisting condition to cause liability. *Wein Air v. Kramer*, 807 P.2d 471 (1991).

Employment Contract. Under “relative nature of the work test” for determining whether claimant is an employee, court considers character of claimant’s work or business and its relationship to purported employer’s work or business. *Benner v. Wichman*, 874 P.2d 949 (1994). Court considers degree of skill involved in claimant’s work, degree to which it is a separate calling or business, and extent to which claimant can be expected to carry his own accident burden. *Id.* If worker is an employee, he may be restricted by exclusive remedy provision of the Act. A.S. 23.30.055. *Id.*

Before an employee-employer relationship exists under the Act, an express or implied employment contract must exist. *Childs v. Kalgin Island Lodge*, 779 P.2d 310 (1989). When an employer exposes potential employees to risks inherent in trial period, and the applicant is under employer’s direction or control, any resulting injury is compensable as a matter of law. *Id.*

Compensable Injuries. An accident which produces injury by precipitating development of a latent condition or by aggravating a pre-existing condition is a cause of that injury. *Hester v. State*, 817 P.2d 472 (1991). In case of pre-existing condition associated with disability,

workers’ compensation claim is compensable upon showing that employment aggravated, accelerated, or combined with preexisting condition so as to be substantial factor in bringing about the disability. *Ensley v. Anglo Alaska*, 773 P.2d 955 (1989). Plaintiff with pre-existing condition bears the burden of apportioning damages when part of his injury is attributable to a pre-existing innocent cause. *LaMoureaux v. Totem*, 632 P.2d 539 (1981).

Employee who was injured while playing softball on employer-sanctioned team at field rented by league to which employer paid money for ball field rental was entitled to workers’ compensation benefits. *LeSuer-Johnson v. Rollins-Burdick*, 808 P.2d 266 (1991). Portion of Act which defines employer-sanctioned activities “arising out of and in the course of employment” does not, as written, limit employer-provided facilities to remote job site. *Id.*

Under “going and coming rule,” travel between home and work is considered a personal activity, and injuries occurring off the work premises during travel are generally not compensable. *Sokolowski v. Best Western*, 813 P.2d 286 (1991). Nothing in the special risk exception to the going and coming rule limits it to transportation by automobile. *Id.* Injury to an employee caused by a special hazard located on the employee’s normal or usual route to work is compensable if the injury is distinctive in nature or quantitatively greater than the risks to the public. *Id. Accord, Seville v. Holland America Line Westours, Inc.*, 977 P.2d 103 (1999).

Stress. To make a claim for “work stress,” employee must establish the work stress was extraordinary and unusual in comparison to pressures and tensions experienced by individuals in a comparable work environment and the work stress was the predominant cause of the mental injury. The amount of work stress must be measured by actual events. A.S. 23.30.010(b).

Claimant Misconduct. “Larson test” for analyzing employee responses to employer questionnaire provides that employee’s knowing and willful false representation of his physical condition may bar his recovery of workers’ compensation. *Robinett v. Enserch*, 804 P.2d 725 (1990).

In determining whether reinjured claimant had willfully intended to injure himself, an act was “willful” if it was done intentionally and purposefully, rather than accidentally or inadvertently. *Walt’s Sheet Metal v. Debler*, 826 P.2d 333 (1992).

Compensation. Remunerative employability is not a fact which may be considered in determining whether injured worker is eligible for reemployment benefits. *Moesh v. Anchorage Sand & Gravel*, 877 P.2d 763

(1994). An employee is not entitled to recover lost wages in a breach of contract action for any period that employee was disabled and received compensation benefits for the disability. *Cameron v. Beard*, 864 P.2d 538 (1993).

Employee with rating of zero permanent impairment under standard used for determining permanent impairment compensation was ineligible for reemployment benefits, even though she was unable to return to her preinjury job. *Rydwell v. Anchorage Sch. Dist.*, 864 P.2d 526 (1993).

Medical evidence of eligibility for reemployment benefits must satisfy three requirements: 1) evidence must take form of a prediction; 2) person making prediction must be a physician; and 3) prediction must compare physical demands of employee's job with employee's physical capabilities. *Yahara v. Construction & Rigging*, 851 P.2d 69 (1993).

In calculating compensation for permanent partial disability, Workers' Compensation Board may fix reasonable wage if employee has no actual postinjury wages, or employee's actual postinjury wages are below employee's earning capacity; in making that determination, Board focuses on employee's actual postinjury wages, if any. *Gilstrap v. International Contractors*, 857 P.2d 1182 (1993).

The inquiry into "disability" under the Act focuses on employee's loss of earning capacity, not on his actual medical impairment. *Leslie Cutting v. Bateman*, 833 P.2d 691 (1992).

Claimant is not entitled to either temporary or permanent total disability benefits if there is regularly and continuously available work in area suited to claimant's capabilities. *Summerville v. Denali Ctr.*, 811 P.2d 1047 (1991). Total disability does not necessarily mean state of abject helplessness. *Id.* "Odd-lot" doctrine entitles injured employee to total disability benefits if employee is unable to perform services other than those which are so limited in quality, dependability, or quantity that a reasonably stable market for them does not exist. *Id.*

With respect to a subsequent independent condition, claimant must show the work-related injury is a substantial factor in overall disability. Claimant also had to prove pre-existing condition combined with work injury to produce a disability. *Thurston v. Guys with Tools*, 217 P.3d 824 (2009).

Worker is not entitled to vocational rehabilitation plan if he returns to gainful employment and wants to remain in that position. *Olson v. AIC/Martin*, 818 P.2d 669 (1991). Medical benefits are part of award and presumption of compensability applies to continuing medi-

cal care. *Id.* Ability to perform any kind of work does not determine whether temporary total disability has ended; earning potential and availability of employment must be considered. *Id.*

Board retains discretion not to award continued care or treatment, to authorize care or treatment or to authorize care or treatment different from that specifically requested, based on requirements demonstrated either by employee's raised and un rebutted presumption of compensability, or by preponderance of evidence, as further informed in each case by board's experience, judgment, observations, unique or particular facts of case, and inferences drawn from those factors. *Anchorage v. Carter*, 818 P.2d 661 (1991). Injured employee can raise presumption of compensability to shift the burden of production to employer in proceeding to determine compensability of continuing care; in absence of substantial evidence to contrary, presumption will satisfy employee's burden of proof. *Id.* Presumption drops out if employer produces evidence sufficient to persuade reasonable minds that continued care is either not required or is not required as contended by claimant. *Id.*

While actual postinjury earnings raise presumption of actual earning capacity, they may be an unreliable indicator thereof, especially where they are of temporary or unpredictable character. *Pioneer v. Conlon*, 780 P.2d 995 (1989). Board should have treated claim by injured worker as one for temporary partial disability, not temporary total disability, where worker was unable to operate heavy equipment after injury but retained capacity to supervise employees and function as manager. *Id.*

Term "permanent," as used in workers' compensation statutes, refers to condition that, according to available medical opinion, will not improve during claimant's lifetime. If condition's duration is merely uncertain, then it cannot be found to be permanent. *Alaska Int'l v. Kinter*, 755 P.2d 1103 (1988).

Employer's notice of controversion must be filed in good faith; if it is not, employer will be penalized for failure to pay benefits due an employee. *Harp v. ARCO*, 831 P.2d 352 (1992). To be in good faith, employer must possess sufficient evidence that, if claimant introduces no evidence opposing controversion, Board will find that claimant is not entitled to benefits. *Id.*

Employer's duty to intervene in claimant's action against third party tortfeasor arises when employer receives notice court was going to adjudicate the extent of the employer's fault. Before such notice, interests of employer and claimant are aligned. *Scammon Bay Ass'n v. Ulak*, 126 P.3d 138 (2005).

IME doctor's testimony provided sufficient support for Board's decision that claimant failed to establish a

compensable claim. *Apone v. Fred Meyer*, 226 P.3d 1021 (2010).

Fraud. Employee's failure to inform his former employer he was working part-time while receiving benefits did not constitute fraud. Fraud statute (AS 23.30.250) requires causal link between a false statement and the benefits obtained and cause was lacking because

benefits were obtained before false statements were made. Claimant can be ordered to reimburse benefits after the date of the false statement, but not before the false statement was made where there is no such causal connection. *Shehata v. Salvation Army*, 225 P.3d 1106 (2010).

