S-17802 / 17821

IN THE SUPREME COURT FOR THE STATE OF ALASKA

ASSOCIATION OF VILLAGE COUNCIL PRESIDENTS REGIONAL HOUSING AUTHORITY, Appellant/Cross-Appellee, vs. DIETRICH MAEL, on his own behalf and on behalf of his minor children D.K. and E.M.; THOMAS MAEL; and ROSE MAEL, Appellees/Cross-Appellants, vs. STATE OF ALASKA, Appellee.	Case Nos. S-17802 / S-17821 Trial Court No. 4BE-17-00061 CI

Trial Court No. 4BE-17-00061 CI

APPEAL FROM THE SUPERIOR COURT,
FOURTH JUDICIAL DISTRICT AT BETHEL,
THE HONORABLE TERRENCE P. HAAS, PRESIDING

BRIEF OF APPELLANT/CROSS-APPELLEE ASSOCIATION OF VILLAGE COUNCIL PRESIDENTS REGIONAL HOUSING AUTHORITY

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AS 09.17.010. Noneconomic damages.

(a) In an action to recover damages for personal injury or wrongful death, all damage claims for noneconomic losses shall be limited to compensation for pain, suffering, inconvenience, physical impairment, disfigurement, loss of enjoyment of life, loss of consortium, and other nonpecuniary damage.

(b) Except as provided under (c) of this section, the damages awarded by a court or a jury under (a) of this section for all claims, including a loss of consortium claim, arising out of a single injury or death may not exceed $400,000 or the injured person's life expectancy in years multiplied by $8,000, whichever is greater.

(c) In an action for personal injury, the damages awarded by a court or jury that are described under (b) of this section may not exceed $1,000,000 or the person's life expectancy in years multiplied by $25,000, whichever is greater, when the damages are awarded for severe permanent physical impairment or severe disfigurement.

(d) Multiple injuries sustained by one person as a result of a single incident shall be treated as a single injury for purposes of this section.

JURISDICTIONAL STATEMENT

Superior Court Judge Terrence P. Haas, of the Fourth Judicial District at Bethel, presided over a trial by jury between September 16 and September 27, 2019. The Superior Court entered final judgments on May 13, 2020. [Exc. 0616-25]. This Court has jurisdiction pursuant to AS 22.05.010(a) and Alaska R. App. Pro. 202(a).

STATEMENT OF ISSUES PRESENTED FOR REVIEW

1. Whether the trial court erred as a matter of law in its interpretation and application of the Mutual Help and Occupancy Agreement that AVCP RHA had a continuing duty to inspect even after the home was eligible for conveyance. [POA 1, 2, 3, 4, 5, 8, 9, 10].

2. Whether the trial court erred as a matter of law when it determined that AVCP RHA owed a tort duty to inspect based solely on a contract promise to inspect and that the Mael family could pursue negligence damages based upon the contract duty to inspect. [POA 6, 11, 12, 14, 15, 17, 18 and 19].

3. Whether the trial court erred as a matter of law in its interpretation and application of AS 09.17.010. [POA 24].

4. Whether the trial court erred as a matter of law in upholding the jury findings and denying AVCP RHA's motion for judgment notwithstanding the verdict. [POA 20, 21, 22 and 37].

5. Whether the trial court erred as a matter of law by improperly instructing the jury. [POA 25, 26, and 27].

6. Whether the trial court erred in denying AVCP RHA's motion for new trial. [POA 23].

7. Whether the trial court erred by improperly admitting evidence without proper foundation. [POA 31].

STATEMENT OF THE CASE

This appeal addresses the important distinction between obligations undertaken by contract, obligations imposed by law, and whether breaching a contract obligation can by itself support a negligence claim for personal injury. In 2016, a boiler burst in a home purchased by Thomas and Rose Mael under a federal mutual help and occupancy program administered by the Association of Village Council Presidents Regional Housing Authority ("AVCP RHA"). At the time, the Maels had equitable ownership; AVCP RHA had record title.

The mutual help and occupancy agreement ("MHO agreement") between the Maels and AVCP RHA – required to participate in the program – directed AVCP RHA to conduct annual inspections of the home, including its boiler. AVCP RHA performed those inspections until March 2011. It stopped once the agreement had expired and the home became eligible for title conveyance to the Maels.

For the next several years, the Maels inspected their home and performed maintenance as needed, including work on their boiler (even though title had not actually been conveyed). In January 2016 – almost *five years* after AVCP RHA stopped performing inspections – the boiler ruptured, injuring the Maels' adult son, Dietrich Mael. The Mael family (Thomas, Rose, Dietrich, and Dietrich's two children, Dillon and Erica) (collectively "Plaintiffs") sued AVCP RHA for breach of contract and negligence. At trial, the Maels contended that the MHO agreement obligated AVCP

RHA to continue inspections indefinitely, and the failure to inspect, discover, and prevent the boiler from bursting made AVCP RHA liable in both contract and tort.

For strategic reasons, the Maels voluntarily dismissed their breach of contract claim after the close of evidence, opting instead to proceed solely on a negligence theory. They argued, and the trial judge agreed, that the purported contract promise to perform inspections beyond eligibility for conveyance could constitute a tort duty for negligence.

Contrary to this Court's precedent, the trial judge instructed the jury that negligence can be found by a person or entity failing to exercise reasonable care in performing a duty or promise set out in a contract. The Maels used this legal error to argue to the jury at closing that AVCP RHA was negligent (i.e., breached its duty of care) by failing to honor its contractual promise to perform inspections. AVCP RHA raised several objections to this errant concept of contract-promise-as-a-tort-duty ruling by the trial court – which were overruled. As such, the jury held AVCP RHA liable in tort for breaching its supposed contract duty to continue inspections indefinitely.

The Maels did not establish a duty of care that was separate from the contract. They simply converted what should have been a breach of contract claim into a negligence claim by using a contract promise to form the basis of the tort duty. That strategic trial decision proved successful when the jury awarded substantial damages to the Maels (not otherwise available under contract law) based entirely on the trial court's erroneous hybrid theory of liability that a contract promise could serve as a tort duty.

STATEMENT OF FACTS

AVCP RHA "is a public corporation that facilitates the construction of housing for Native Alaskans in rural areas of the state."[1] "AVCP RHA was chartered in order to provide low-cost housing in certain villages."[2] AVCP RHA serves 48 communities in the Bethel region. [Tr. 9/23/19 at 47:12].

In 1937, Congress enacted the U.S. Housing Act of 1937 ("1937 Act") to help Americans with housing issues.[3] Some programs under the 1937 Act helped Indian families afford low-income rental options, while other programs allowed Native families to purchase housing through lease-to-own or lease-purchase agreements.[4]

Pursuant to the goals set out in the 1937 Act, the U.S. Department of Housing and Urban Development ("HUD") developed the Mutual Help and Homeownership Program ("Homeownership Program") to assist low-income Native families in purchasing their own homes.[5] "Prior to 1988, the [Homeownership Program] was operated through administrative directives and regulations rather than through any specific statutory provisions."[6] In 1988, Congress passed the Indian Housing Act

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[1] *Neal & Co. v. AVCP Regional Housing Authority*, 895 P.2d 497, 499 (Alaska 1995).

[2] *Kopanuk v. AVCP Regional Housing Authority*, 902 P.2d 813, 815 (Alaska 1995).

[3] *See* 42 U.S.C. §§ 1437-1440.

[4] *Walker River Paiute Tribe v. United States HUD*, 68 F. Supp. 3d 1202, 1205 (D. Nev. 2014).

[5] *Marceau v. Blackfeet Housing Authority*, 455 F.3d 974, 976-77 (9th Cir. 2006).

[6] *Dewakuku v. Martinez*, 271 F.3d 1031, 1034 (Fed. Cir. 2001).

which provided statutory authority for the Homeownership Program to be carried out by HUD.[7]

Under the Homeownership Program, "HUD could enter into contracts with Indian housing authorities to provide financial assistance for the development and operation of single-family home projects."[8] In order to receive federal funds, "the Indian housing authority needed to require that each selected family enter into a mutual help and occupancy agreement."[9] There could be no mutual help and occupancy home without an MHO agreement in place.[10]

This MHO agreement "is a form contract provided by HUD" and "HUD requires the MHOA to be used in all cases where the agency is receiving Mutual Help and Occupancy (MHO) funds."[11] "In enacting the Indian Housing Act, Congress explicitly required that any housing authorities seeking financial assistance include a provision in the MHO agreement that places responsibility for the maintenance of the dwelling on the family."[12]

The contracting family would have to make an initial contribution and, after occupying the home, make monthly payments for up to 25 years in an amount

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[7] *Dewakuku v. Martinez*, 226 F. Supp. 2d 1199, 1201 (D. Ariz. 2002).

[8] *Interior Regional Housing Authority v. James*, 989 P.2d 145, 148 (Alaska 1999).

[9] *Id.*

[10] *See Hous. Auth. of Kaw Tribe of Indians v. Ponca City*, 952 F.2d 1183, 1191 n.8 (10th Cir. 1991) (housing authority must enter into an MHO agreement before it may participate in MHO program administered by HUD).

[11] *Kopanuk*, 902 P.2d at 815.

[12] *Interior Regional Housing Authority,* 989 P.2d at 150.

calibrated to their income.[13] "The family then enters into what is, in essence, a lease-purchase agreement, for a period of up to twenty-five years."[14] "The MHOA is self-described as a lease, although it contains provisions typical of both installment contracts and leases."[15] The purchase price would decline over those 25 years, eventually reaching zero at which point the agreement would expire and title to the home would be conveyed to the homebuyer.[16] Until record title passed, the homebuyer would be a "homeowner with equitable title."[17]

On December 13, 1984, Thomas and Rose Mael moved into a mutual help home in Chefornak, Alaska provided by AVCP RHA. [Tr. 9/23/19 at 53:20-22; 63:1-3]. But for some unknown reason, they did not sign the required MHO agreement until September 13, 1989. [Exc. 0634-73]; [Tr. 9/18/19 at 29:9-11]. Under the contract, the Maels had to make an initial contribution of land, cash, labor, or materials, and, after occupying the home, make monthly payments for up to 25 years in an amount calibrated to their income. [Exc. 0634-73]. The Maels also had to maintain the home. [Exc. 0671]; [Tr. 9/18/19 at 35:10-18]; [Tr. 9/19/19 at 134:21-25]. In exchange, AVCP RHA had to perform certain inspections. [Exc. 0645-46]; [Tr. 9/23/19 at 60:2-61:7].

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[13] See 42 U.S.C. § 1437bb(e); 24 C.F.R. § 805.408, 805.416 (later repealed and replaced by the Native American Housing Assistance and Self-Determination Act ("NAHASDA")).

[14] *Dewakuku*, 271 F.3d at 1035.

[15] *Kopanuk*, 902 P.2d at 815.

[16] *See id.*

[17] *See Interior Regional Housing Authority,* 989 P.2d at 149.

While the contract itself contained no requirement for annual inspections, the federal regulations incorporated into the MHO agreement as contract terms at the time the contract was signed, provided:

> (c) Annual inspections. To ensure the timely periodic maintenance of the dwelling by the family, as required by section 905.418, the IHA shall conduct a complete interior and exterior examination of each home at least once a year, and shall furnish a copy of the inspection report to the homebuyer.[18]

The MHO agreement also provided at Section 5.2(b)(2) that if the condition of the property created a hazard to the life, health or safety of the occupants – presumably discovered through an annual inspection – AVCP RHA had to have the work done, and charge the cost thereof to the homebuyers. [Exc. 0647].

AVCP RHA performed annual inspections up until the home becoming eligible for conveyance to the Maels in 2009 (with a couple of mistaken inspections done in 2010 and 2011). [Exc. 0633]; [Tr. 9/23/19 at 63:14-64:5]; [Tr. 9/23/19 at 74:6-9]; [Tr. 9/24/19 at 14:3-11]. During the last inspection, in March of 2011, no problems or concerns were noted with respect to the boiler in the home. [Exc. 0633]; [Tr. 9/19/19 at 27:14-17]. Pursuant to its understanding of the contract and the law, AVCP RHA then stopped performing annual inspections after March 2011. [Tr. 9/19/19 at 128:24-

[18] *See* 24 C.F.R. § 905.417(c) (repealed upon adoption of NAHASDA). The trial court ruled that it was "interpreting the contract under the law that existed at the time it was signed" which was the Indian Housing Act of 1988 and its implementing regulations. [Tr. 9/25/19 at 22:3-12]. That law and those regulations were later repealed when NAHASDA was enacted. *See* 63 Fed. Reg. 4076, 4086 (Jan. 27, 1998) (Indian Housing Act regulations cancelled as of October 1, 1997).

129:8]. Because the Maels failed to return transfer documents needed to convey title, the home was not conveyed to the Maels. [Tr. 9/23/19 at 77:3-16].

On January 6, 2016 – almost *five years* after the last inspection by AVCP RHA – the boiler in the home ruptured. [Tr. 9/18/19 at 42:25-43:2]; [Tr. 9/19/19 at 129:6-8]. Rose Mael heard a whistling noise coming from the boiler (a noise she had never heard before) and asked her adult son, Dietrich Mael, to go check it out. [Tr. 9/18/19 at 158:1-159:5]. As he was checking it out, the boiler burst and badly injured Dietrich Mael. [Tr. 9/19/19 at 9:6-7]. He sued AVCP RHA for breach of contract and negligence damages. [Exc. 0001-5]. He claimed AVCP RHA had a duty to perform regular inspections and arrange for the necessary maintenance and repair of the house's boiler. [Exc. 0003-4].

His two children (Dillon Kusiak and Erica Mael), and his parents (Thomas and Rose Mael), also sued for breach of contract and negligent infliction of emotional distress damages. [Exc. 0001-5]. Plaintiffs persisted in their argument that, had AVCP RHA continued its annual inspections after that last inspection in March 2011, AVCP RHA would have discovered that a condition of the property – the boiler – created a hazard to the life, health, or safety of the occupants and AVCP RHA would have had the boiler repaired pursuant to Section 5.2(b)(2) of the MHO agreement before the explosion. [Exc. 0122-49].

STATEMENT OF PROCEEDINGS

AVCP RHA moved for summary judgment arguing, in part, that any liability for any failure to inspect sounded in contract rather than tort. [Exc. 0020-54]. That is, the negligence claim had to be dismissed, as a matter of law, because no tort duty existed – only a contract duty to inspect. [Exc. 0044-46]. In denying summary judgment, the trial court found a factual dispute existed and ruled that AVCP RHA could be liable in tort if it breached a separate legal duty separate from the contract, stating in pertinent part:

> AVCP RHA argues correctly that in many cases a litigant suing for breach of contract will be limited to a contract suit and cannot sue in tort. Specifically, the housing authority cites *Alaska Pac. Assur. Co. v. Collins*, for the proposition that "*[p]romises* set forth in a contract must be enforced by an action on that contract." 794 P.2d 936, 946-47 (Alaska 1990), *as amended on denial of reh'g* (Aug. 30, 1990) (italics added). However, the Supreme Court in *Alaska Pacific* went on to note that "[o]nly where the duty breached is one imposed by law, such as a traditional tort law duty furthering social policy, may an action between contracting parties sound in tort." *Id.*
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> Thus, failure to provide the contracted services of a home inspection is a breach of a specific promise which by itself sounds in contract, while the duty to conduct the required inspection with the appropriate care is a separate legal duty traditionally imposed by law and that may sound in tort. *See e.g., Kay v. Danbar, Inc.*, 132 P.3d 262, 270 (Alaska 2006) ("[W]hen the state undertakes a fire inspection, it has the further duty to exercise reasonable care in conducting the inspection."); *Van Biene v. ERA Helicopters, Inc.*, 779 P.2d 315, 321 (Alaska 1989) ("negligent performance of a safety inspection"); *Wallace v. State*, 557 P.2d 1120, 1121 (Alaska 1976) (negligent inspection of work site).

[Exc. 0401-10]. The case proceeded to trial.

At trial, the evidence established that AVCP RHA conducted annual inspections up to 2011. [Tr. 9/23/19 at 63:14-64:5]. The evidence confirmed that the boiler had no

problems as of the last inspection in March of 2011. [Exc. 0633]; [Tr. 9/19/19 at 127:14-17]. The evidence showed that AVCP RHA performed no inspections for almost five years between March 2011 and January 2016. [Tr. 9/19/19 at 129:6-8].

At the end of trial just before jury instructions, Plaintiffs voluntarily and strategically dismissed their breach of contract claim to simplify their case and maximize the potential to capture tort damages, not otherwise available in contract. [Tr. 9/26/19 at 8:14-23]. They also abandoned their voluntary assumption of duty to use reasonable care argument and proceeded forward only on a breach of the promise to continue to inspect in the MHO agreement as the basis for negligence. [Tr. 9/26/19 at 9:12-17; 47:12-16; 48:23-49:21].

Plaintiffs argued that a duty expressed in a contract could also serve as the basis for a duty under tort law. [Tr. 9/26/19 at 34:17-19]. According to them, the contract was the basis of the tort duty. [Tr. 9/26/19 at 53:9]. They emphasized they were abandoning the breach of contract claim arising from this contract duty to inspect, but not abandoning the tort claim arising from the *same* duty to inspect. [Tr. 9/26/19 at 35:5-7]. They also reiterated they were relying on the contract duty for negligence and not any negligence based on a voluntarily assumed duty. [Tr. 9/26/19 at 49:12-14; 54:10-21].

In light of these arguments, the trial court dismissed the contract claim, deleted the proposed jury instruction on a voluntarily assumed duty to use reasonable care, determined that a tort duty can arise from a contractual duty, and ruled that breach of a contract can also constitute a tort. [Tr. 9/26/19 at 9:25-10:7; 12:11-12; 35:13-14; 36:7-11; 37:16-38:1; 54:11-12]. AVCP RHA objected to this ruling and argued that this

conflation of tort duty and contract duty to create a new hybrid theory of liability was wrong as a matter of law. [Tr. 9/26/19 at 34:7-8; 35:8-12; 49:23-50:4; 54:8-9].

The trial court submitted the case to the jury solely on the tort theory of negligence (including negligent infliction of emotional distress) based on the contract promise to inspect. [Tr. 9/26/19 at 130:13-19]. The trial court instructed the jury that negligence can be found by a person or entity failing to exercise reasonable care in performing a duty or promise set out in a contract. [Tr. 9/26/19 at 132:1-3]. The trial court then instructed the jury that the contract at issue required AVCP RHA to inspect and that the contract was in effect at the time of the boiler explosion. [Tr. 9/26/19 at 132:3-8]. Not surprisingly, the jury returned a substantial verdict for Plaintiffs against AVCP RHA finding negligence and imposing tort damages based on the failure to inspect up to the time of the boiler explosion, as required by the contract. [Tr. 9/27/19 at 51:11-52:22].

AVCP RHA moved for judgment notwithstanding the verdict, remittitur, and new trial. [Exc. 0441-62; Exc. 0465-77]. The trial court denied the JNOV motion, denied the new trial motion, and partially denied the remittitur. [Exc. 0611-12; Exc. 0684-96] [Tr. 2/26/20 at 73:3-6; 78:15-86:11]. AVCP RHA now appeals and asks this Court to vacate the jury's verdict and resulting judgments, reverse the trial court's order denying JNOV, and remand for entry of judgment for AVCP RHA based on the Maels' binding election to drop their contract and voluntary assumption of duty claims.[19]

[19] See *Allstate Ins. Co. v. Kenick*, 435 P.3d 938, 947 (Alaska 2019) (vacating Bethel jury's multi-million-dollar verdict and resulting judgment, reversing superior court's order denying motion to dismiss, and remanding for dismissal of complaint).

ARGUMENT

I. Superior Court Erred as a Matter of Law When It Held that AVCP RHA Owed a Tort Duty to Inspect

Plaintiffs sued in negligence for breach of a duty to inspect imposed by a contract. In letting the negligence claim go forward, the trial court recognized the problem with this approach, but ruled that the contractual duty to inspect was similar enough to duties that the law might impose:

> So I am going to hold that the plaintiff may abandon its contract claim and pursue it only as a tort claim even though the duty that we're talking about appears to have arisen as a relationship between the parties that is contractual under the MHOA. And because that duty was a duty to inspect, and because either a failure to inspect with care or perhaps a failure to inspect all together is the kind of breach of a duty that is traditionally available under tort law, that in this instance the contract is relevant and that the breach of the contract, if found, can also constitute a tort, and that they can pursue the tort independently.

[Tr. 9/26/19 at 37:16-38:1].[20] This ruling was legal error because a tort duty cannot originate exclusively from a bare contract promise. As discussed below, the law is clear that there must be some independent basis for the tort duty separate and distinct from the contractual obligation. A plaintiff cannot simply relabel a contract promise as a tort duty in the hopes of capturing tort damages otherwise unavailable under

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[20] The trial court's ruling that a duty to inspect imposed by contract could also be the basis of a tort duty directly contradicted the trial court's prior reasoning and ruling on summary judgment where it held:

> Thus, failure to provide the contracted service of a home inspection is a breach of a specific promise which by itself sounds in contract, while the duty to conduct the required inspection with the appropriate care is a separate legal duty traditionally imposed by law and that may sound in tort.

[Exc. 0409]. The former is a contract duty; the latter is a voluntarily assumed tort duty. The trial court never addressed the contradiction between its legal rulings.

contract law. The duty of care must be one that is imposed by law, not by agreement of the parties.

Because there was no independent legal basis for a duty to inspect, separate from the contract, there was no basis on which AVCP RHA could be found negligent for failing to inspect the boiler. AVCP RHA committed no tort. The trial court erred as a matter of law in finding a tort duty to inspect.

A. Standard of Review

The existence of a tort duty is a question of law that this Court reviews de novo.[21] When applying the de novo standard of review, this Court applies its independent judgment to questions of law, adopting the rule of law most persuasive in light of precedent, reason, and policy.[22] This Court gives no deference to the trial court's judgment.[23]

B. Controlling Case Law Confirms AVCP RHA Owed No Tort Duty to Inspect

"The tort of negligence consists of four separate and distinct elements: (1) duty, (2) breach of duty, (3) causation, and (4) harm."[24] "[T]he first step in determining whether a negligence action can be maintained is determining whether the defendant

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[21] *Sowinski v. Walker*, 198 P.3d 1134, 1145 (Alaska 2008).

[22] *Farthest North Girl Scout Council v. Girl Scouts of the United States*, 454 P.3d 974, 977 (Alaska 2019).

[23] *See Rusenstrom v. Rusenstrom*, 981 P.2d 558, 560 (Alaska 1999) ("in determining how legal doctrine applies to undisputed facts, we rule de novo, without deference to the trial court's judgment"); *see also State v. Roberts*, 999 P.2d 151, 153 (Alaska Ct. App. 2000) (de novo review is without deference to trial court).

[24] *Parks Hiway Enterprises v. Cem Leasing*, 995 P.2d 657, 667 (Alaska 2000).

owed the plaintiff a duty of care."[25] If a defendant has no duty, then that defendant "cannot have committed any breach which might give rise to liability."[26] As with any negligence case, the plaintiff must establish the duty of care.[27]

The existence and extent of a duty of care are questions of law.[28] Alaska courts use a three-step process to determine whether a duty of care exists.[29] Courts first look generally to statutes to determine whether an actionable duty exists.[30] If none exists, they "then determine if the current case falls in the class of cases controlled by existing precedent."[31] If no closely related case law exists, the courts then weigh public policy considerations.[32] But the courts never get to the public policy considerations "in deciding whether an actionable duty exists if the duty issue is governed by recognized principles of tort law."[33]

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[25] *McGrew v. State*, 106 P.3d 319, 325 (Alaska 2005).

[26] *Schumacher v. City & Borough of Yakutat*, 946 P.2d 1255, 1257 (Alaska 1997).

[27] *Silvers v. Silvers*, 999 P.2d 786, 793 (Alaska 2000).

[28] *Dep't of Health & Soc. Servs. v. Sandsness*, 72 P.3d 299, 301 (Alaska 2003).

[29] *Estate of Mickelsen v. N.-Wend Foods, Inc.*, 274 P.3d 1193, 1199 (Alaska 2012); *see also Fischer v. Home Depot U.S.A., Inc.*, No. 3:18-CV-00226-SLG, 2019 WL 4131699, at *3, 2019 U.S. Dist. LEXIS 148416, at *7 (D. Alaska Aug. 30, 2019). ("Alaska Supreme Court uses a three-step process to determine whether a duty of care exists").

[30] *Dore v. City of Fairbanks*, 31 P.3d 788, 792 (Alaska 2001).

[31] *Wongittilin v. State*, 36 P.3d 678, 681 (Alaska 2001).

[32] *Estate of Mickelsen*, 274 P.3d at 1199; *see also Hurn v. Greenway*, 293 P.3d 480, 486 n.27 (Alaska 2013) ("courts should look first to statute, then to precedent, and then to public policy to determine if a duty of care exists").

[33] *Martinez v. Government Employees Ins. Co.*, 473 P.3d 316, 323 n.17 (Alaska 2020).

Here, the current case is governed by recognized principles of tort law and falls in the class of cases controlled by this Court's existing precedent distinguishing tort duty and contract duty. For more than 30 years, this Court has repeatedly held that promises set forth in a contract – such as a promise to inspect – must be enforced by an action on that contract and not an action in tort.[34] "Only where the duty breached is one imposed by law, such as a traditional tort law duty furthering social policy, may an action between contracting parties sound in tort."[35] A violation of a duty arising from contract simply does not give rise to a tort claim.[36] Not every contract breach can be turned into a tort.[37]

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[34] *See Alaska Pac. Assurance Co.*, 794 P.2d at 946 (an action for negligence in breaching a specific contractual duty sounds in contract and not in tort); *see also GeoTek Alaska, Inc. v. Jacobs Eng'g Grp., Inc.*, 354 P.3d 368, 379 n.70 (Alaska 2015) ("promises set forth in a contract must be enforced by an action on that contract"); *Sowinski*, 198 P.3d at 1146 ("we have previously rejected the argument that a breach of contract alone – without an independent viable theory of tort recovery – could give rise to damages in tort"); *Jarvis v. Ensminger*, 134 P.3d 353, 363 (Alaska 2006) ("promises set forth in a contract must be enforced by an action on that contract"); *K & K Recycling, Inc. v. Alaska Gold Co.*, 80 P.3d 702, 717 (Alaska 2003) (claims that concern contractual breaches and disputes sound in contract, rather than tort); *Dep't of Nat. Res. v. Transamerica Premier Ins. Co.*, 856 P.2d 766, 772 (Alaska 1993) (tort action available only where the duty of care is one that the law imposes, not the contract).

[35] *Alaska Pac. Assurance Co.*, 794 P.2d at 946; *see also* 1 American Law of Torts § 1:20 ("In order to recover in tort arising from a contractual relationship, the duty tortiously or negligently breached must be a common law duty, not one existing between the parties solely by virtue of the contract.")

[36] *Jarvis*, 134 P.3d at 363; *see also Gudenau & Co. v. Sweeney Ins.*, 736 P.2d 763, 766 n.4 (Alaska 1987) (promise to do something sounds in contract rather than tort).

[37] *See NordAq Energy v. Devine*, No. 3:16-CV-0267 SLG, 2018 WL 1083922, at *5, 2018 U.S. Dist. LEXIS 31433, at *12-13 (D. Alaska Feb. 27, 2018) (dismissing tort claims under Alaska law for lack of independent tort duty separate from contract); *Walt v. State*, 751 P.2d 1345, 1351 (Alaska 1988) (rejecting attempt to change claim for breach of contract into a tort claim).

In the groundbreaking case of *Alaska Pac. Assurance Co. v. Collins*, a homebuilder sued his insurance company for breach of contract and negligent investigation. This Court agreed with the insurer that an action for negligence in breaching a specific contractual duty sounds in contract and not in tort.[38] The insurer could not be held liable in tort for negligence in performing its contractual duties: "Promises set forth in a contract must be enforced by an action on that contract."[39] Where the duty breached "is not imposed by law, but is a duty created by the contractual relationship, and would not exist 'but for' the contract, then breach of either express covenants or those necessarily implied from them sounds in contract."[40] This Court expressly declined "to hold that where a party breaches a contractual promise 'negligently,' such conduct may form the basis for a tort action."[41]

In so holding, this Court referenced with approval the Idaho Supreme Court case of *Steiner Corp. v. American District Telegraph*.[42] In that case, with facts very similar to the facts of this case, the plaintiff sued ADT in negligence for failure to inspect a fire alarm system pursuant to a maintenance contract. The Idaho Supreme Court found no tort duty to inspect. There was no statutory or common law duty to

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[38] *Alaska Pac. Assurance Co.*, 794 P.2d at 946.

[39] *Id.*

[40] *Barmat v. John and Jane Doe Partners A-D*, 747 P.2d 1218, 1222 (Ariz. 1987) (cited by this Court with approval in *Alaska Pac. Assurance Co.*).

[41] *Alaska Pac. Assurance Co.*, 794 P.2d at 946.

[42] 683 P.2d 435 (Idaho 1984).

inspect and maintain the fire alarm system; nothing that was separate from the contract. In explaining why no duty existed apart from the contract, the court stated:

> The actions alleged to have caused damage to Steiner were clearly acts of omission or nonfeasance, as opposed to active negligence or misfeasance. Steiner alleges that ADT failed to properly perform its duty to inspect and maintain the fire alarm system. Thus, a clear duty must be shown to exist by operation of law, separate and apart from the contractual duty to maintain the equipment. It is clear from the allegations in this complaint that such a separate duty cannot be shown. Apart from this contract, ADT could not be said to have a duty to maintain equipment in Steiner Corporation's building. Steiner has not pointed to any statutory duty of suppliers of fire alarm systems, nor pointed to any common law duty of a supplier to his customer. The only duty to which ADT could be held liable under the facts of this case is that which arose by virtue of the contract obligating it to maintain this fire alarm system.[43]

The same is true for AVCP RHA. Apart from the MHO agreement, AVCP RHA had no duty to inspect the boiler in the Mael home. People do not have a duty to go into other people's homes and inspect their boilers. Plaintiffs cannot point to any applicable statutory or common law duty that says otherwise. They acknowledged as much to the trial court when they said the tort duty to inspect was the *same* duty to inspect that arose under the contract. [Tr. 9/26/19 at 35:5-7].

Therefore, absent the contract, AVCP RHA would have had no obligation to inspect the boiler. The duty to inspect would not have existed "but for" the mutual help and occupancy agreement. As a result, any breach of that duty – whether based on a misreading of the contract terms or otherwise – sounded in contract rather than tort.

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[43] *Id.* at 438-39.

This conclusion is bolstered by the fact that Plaintiffs explicitly and repeatedly referenced and based their recovery on the contract provisions in Section 5.2(b)(2) of the MHO agreement:

> If the condition of the property creates a *hazard* to the life, health or safety of the occupants, the IHA shall have the work done, and charge the cost thereof to the Homebuyer's MEPA in accordance with Section 6.3(a). [Emphasis added].

[Exc. 0647]. Thomas Mael testified that a boiler that is not serviced and regularly maintained can become "hazardous" and that is what happened in this case. [Tr. 9/18/19 at 54:19-23]. Plaintiffs then argued to the court that "the duty to inspect flows from the contract, and it flows most directly from the contract provision that says if the housing – if the house has a *hazardous* condition, the Housing Authority shall do the repair." (Emphasis added). [Tr. 9/25/19 at 50:14-17]. At Plaintiffs' request, the trial court read Section 5.2(b)(2) to the jury. [Tr. 9/26/19 at 131:5-9]. Plaintiffs then argued to the jury that had AVCP RHA inspected between 2011 and 2016, AVCP RHA would have discovered that the boiler created a *hazard* to the life, health, and safety of the occupants and fixed the problem before the boiler exploded. [Tr. 9/26/19 at 138:17-22; 139:18-22; 140:14-15; 142:1-7]; [Tr. 9/27/19 at 16:9-14; 32:20-23; 33:8-13; 33:16-24; 34:12-18]. The duty to inspect and exercise reasonable care to discover and remedy any hazardous problems with the boiler would not have existed but for the language in the MHO agreement.

The promise to inspect set forth in the MHO agreement must be enforced by an action on that contract and not an action in tort.[44] The trial court erred as a matter of law when it found a tort duty to inspect based on the contract promise to inspect. No independent tort duty existed when this case went to the jury. Absent a tort duty, there was no tort remedy upon which the jury could award tort damages.

II. Superior Court Erred as a Matter of Law When It Misinterpreted the MHO Agreement to Find a Promise to Inspect Beyond 2009

Assuming *arguendo* that a tort duty could be based on a contract promise, the MHO agreement never contained a contract promise to inspect indefinitely, or until title conveyance. The conduct of the parties demonstrated that any duty to inspect under the contract ended upon expiration of the contract and eligibility for title conveyance to the Maels – well before the boiler burst.

The trial court ruled as a matter of law that AVCP RHA had a continuing duty to inspect up to the date of the explosion in 2016, stating in pertinent part:

> My ruling was that so long as the relationship of owner and equitable title holder was in place that period[ic] inspections were required under the terms of the contract signed in 1989. And so, that does in fact include – as I understand the facts here, that does in fact include the time period in which the boiler malfunctioned.

[Tr. 9/25/19 at 195:2-7]. In other words, because the house had not been formally conveyed to the Maels by 2016 – even though the Maels were the undisputed equitable title holders – the trial court ruled that the obligation to inspect was in place

[44] *See GeoTek Alaska, Inc.*, 354 P.3d at 369 ("general contractor had no extra-contractual duty in tort to guarantee its subcontractor's payment obligations").

at the time of the explosion. [Tr. 9/25/19 at 60:2-3]. Interpreting the contract promise to inspect to continue beyond 2009 was legal error.[45]

A. Standard of Review

"Interpretation of a contract against a given factual background is a question of law which we examine *de novo*, without deference to the trial court."[46] When applying the de novo standard of review, this Court applies its independent judgment to questions of law, adopting the rule of law most persuasive in light of precedent, reason, and policy.[47]

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[45] The trial court ignored the fact that and the contract-based reasons why AVCP RHA stopped inspections almost five years before the boiler accident, and without objection from the Maels. *Cf.* Restatement (Second) of Contracts § 202(5) ("Wherever reasonable, the manifestations of intention of the parties to a promise or agreement are interpreted as consistent . . . with any relevant course of performance, course of dealing, or usage of trade.") AVCP RHA's actions were based in part on its understanding of a 2008 HUD Notice that permitted Indian housing authorities to stop inspections when a mutual help home became eligible for conveyance (and the HUD subsidy stopped). *See* HUD Notice PIH-2008-32 [Exc. 0679-82]. The Maels introduced a 2012 HUD Notice to suggest that an Indian housing authority could stop inspections only when the mutual help home was formally conveyed. *See* HUD Notice PIH-2012-45 [Exc. 0675-78]. While finding that AVCP RHA acted in good faith in reliance on the 2008 HUD Notice, the trial court nonetheless ruled that regulations, while relevant, "could not ultimately, by way of guidance or regulation or anything else, relieve [AVCP RHA] of their obligations under the contract to conduct regular inspections in accordance with a regular inspection program they created annually." [Tr. 9/26/19 at 56:11-20; 59:19-23]. But there are practical reasons not to inspect a home after expiration of the contract. For one, HUD stopped funding the inspections. Also, AVCP RHA could no longer force the Maels to comply with their maintenance obligations under the contract on pain of breach of contract because the contract no longer existed. The trial court's ruling requires parties to continue actions that no longer make contractual sense once ownership has shifted to the homebuyer after 25 years.

[46] *Donnybrook Bldg. Supply v. Interior City Branch, First Nat'l Bank*, 798 P.2d 1263, 1267 (Alaska 1990).

[47] *Hahn v. Geico Choice Ins. Co.*, 420 P.3d 1160, 1166 (Alaska 2018).

B. The Housing Authority Owed No Contractual Duty to Inspect in 2016

"The goal in interpreting any contract is to give effect to the reasonable expectations of the parties."[48] In determining the reasonable expectations of the parties, courts look to the written contract as well as extrinsic evidence regarding the parties' intent at the time the contract was made.[49]

Courts will examine the language used in the contract, case law interpreting similar language, and relevant extrinsic evidence, including the subsequent conduct of the parties.[50] "It is therefore not necessary to find that an agreement is ambiguous before looking to extrinsic evidence as an aid in determining what it means."[51] "The conduct of the parties after the contract was entered into is generally considered to be admissible as a probative extrinsic aid to determining the intent of the parties when they made the contract."[52]

Here, it is undisputed that the MHO agreement contained no express provision for annual inspections. Instead, AVCP RHA conducted annual inspections per a HUD regulation incorporated into the contract at the time the contract was signed.[53] There was no evidence at trial that the Maels knew anything about this HUD regulation or

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[48] *Neal & Co.*, 895 P.2d at 502 (internal quotes omitted).

[49] *Lingley v. Alaska Airlines, Inc.*, 373 P.3d 506, 512 (Alaska 2016).

[50] *Black v. Whitestone Estates Condo. Homeowners' Ass'n*, 446 P.3d 786, 791 (Alaska 2019).

[51] *Miller v. Fowler*, 424 P.3d 306, 313 (Alaska 2018) (internal quotes omitted).

[52] *Peterson v. Wirum*, 625 P.2d 866, 870 n.7 (Alaska 1981).

[53] *See* 24 C.F.R. § 905.417(c) (repealed upon adoption of NAHASDA).

expected annual visits to their home as a result of this HUD regulation. The Maels testified at trial that they did not read the full MHO agreement or just read the first few pages. [Tr. 9/17/19 at 89:13-15]; [Tr. 9/18/19 at 26:4-14; 154:14-17; 170:5-12]. The Maels never testified they had an expectation when they moved into the home or when they signed the contract that AVCP RHA would perform annual inspections for 30 years or more until record title was finally conveyed to them. Furthermore, even if this was their expectation, they never testified that they expressed this understanding to AVCP RHA at the time of contracting.[54]

Instead, the evidence showed that the Maels continued to perform inspections and maintenance of the boiler themselves after the last AVCP RHA inspection in 2011. [Tr. 9/17/19 at 91:20-92:13]; [Tr. 9/18/19 at 55:9-56:1] [Tr. 9/19/19 at 140:20-141:11]. For example, Thomas Mael testified he replaced the fuel pump on the boiler. [Tr. 9/17/19 at 92:1-5]. He also put a hose clamp on the boiler so the circulating pump would turn off and on. [Tr. 9/17/19 at 92:10-13]. Significantly, Rose Mael testified she had planned to get the boiler serviced the summer before the explosion but never followed up on it. [Tr. 9/19/19 at 133:12-24]. This conduct strongly suggests the Maels understood their responsibility to inspect and perform maintenance of the boiler and that AVCP RHA would be making no more annual inspections.[55]

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[54] *See Norville v. Carr-Gottstein Foods Co.*, 84 P.3d 996, 1003 (Alaska 2004) ("Testimony of a party as to his subjective intentions concerning the meaning of a particular clause in a contract is not probative unless the party in some way expressed or manifested his understanding at the time of contract formation.")

[55] *See Black*, 446 P.3d 786, 792 n.9 (Alaska 2019) ("The intent of the parties is the primary issue, and their intent can be drawn from extrinsic evidence, especially their

AVCP RHA also understood that inspections ended once the contract expired upon eligibility for conveyance.[56] [Tr. 9/23/19 at 61:4-7]. While AVCP RHA did conduct annual inspections pursuant to the now-repealed HUD regulation incorporated into the contract during the 25-year term of the MHO agreement, AVCP RHA stopped those inspections (absent two mistaken inspections in 2010 and 2011) once the contract had expired and the home became eligible for conveyance.

With respect to expiration, the trial court further erred in finding that the MHO agreement did not expire after 25 years, stating in pertinent part:

> But the fact remains that they entered into a contract with these individuals that I don't think has a provision or anything in it that would cause it to automatically expire after 25 years . . . And so I don't think that the contract automatically expires upon 25 years . . . .

[Tr. 9/26 at 55:4-12]. However, Section 3.2 of the MHO agreement did cause the contract to expire after 25 years:

> The term of the Homebuyer's lease under this Agreement shall commence on the first day of the calendar month following the Date of Occupancy and *shall expire when the Initial Purchase Price has been fully amortized* in accordance with the Homebuyer's Purchase Price Schedule (see Section 7.2(b) and 7.3(b)) unless this Agreement is previously terminated or the Homebuyer previously acquires ownership of the Home. [Emphasis added].

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express attempts to comply with the contract as they understood it"); *Sowinski*, 198 P.3d at 1145 (some maintenance suggests no contractual obligation by other party).

[56] The uncontroverted testimony of the Indian housing expert, Bill Nibbelink, was that after the home "was eligible for conveyance in 2009, the Housing Authority, AVCP, no longer had an obligation to inspect the unit." [Tr. 9/24/19 at 137:4-6].

[Exc. 0642].[57] Section 7.2(b) provided that the purchase price would be amortized over a 25-year period. [Exc. 0652]. Section 7.3(b) also referred to the initial 25-year period in the context of a subsequent homebuyer takeover (not applicable here). [Exc. 0652]. These provisions as a whole show that the agreement expired after 25 years.[58]

Moreover, the Indian housing expert, Bill Nibbelink, confirmed that the MHO agreement expired after 25 years:

> Eligible for conveyance means that in accordance with the Mutual Help and Occupancy Agreement, once the unit was occupied in 1984, the Mutual Help and Occupancy Agreement stated that the MHOA was good for -- the cost of the home in the MHOA -- MHOA agreement was for 25 years. Therefore, the MHOA agreement expired -- or the amortization period of 25 years expired in 2009. Therefore, the house is eligible for conveyance at that time. After the 25 year -- the lease on the house was good for 25 years, and that expired in 2009. Therefore, the house was eligible for conveyance and should have been conveyed at that time.

[Tr. 9/24/19 at 137:9-20]. Also, Mark Charlie, the CEO of AVCP RHA, testified that the agreement was for 25 years. [Tr. 9/23/19 at 51:2-4; 52:1-14]. The Maels never testified to the contrary.

Once the price dropped to zero, the MHO agreement expired, and the home was eligible for conveyance, there was no contract obligation to continue inspections. So, premising a tort duty on a no longer operative contract provision was legal error

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[57] *See also Interior Regional Housing Authority*, 989 P.2d at 147 (discussing Section 3.2).

[58] *See Graham v. Municipality of Anchorage*, 446 P.3d 349, 352 (Alaska 2019) ("interpretation of a contract term does not take place in a vacuum, but rather requires consideration of the provision and agreement as a whole.")

(assuming the contract promise existed in the first place).[59] After expiration, the Maels lived in their home and acted as responsible homeowners would. There was no evidence that during the almost five-year period between the last inspection and the boiler explosion that the Maels objected or complained to the Housing Authority about any boiler problem, the lack of inspections, or that AVCP RHA was somehow in breach of the MHO agreement for not inspecting. [Tr. 9/23/19 at 58:16-59:20]. The Maels did nothing to suggest that the contract required continued inspections.[60] The fact that AVCP RHA never inspected the home after 2011 "provides the strongest evidence that it was not contractually obligated to do so."[61]

The conduct of the parties once the contract expired and the home became eligible for conveyance demonstrates that both sides understood that no more inspections would occur. Because the MHO agreement never contained a promise to inspect after 25 years, the trial court erred as a matter of law in basing its tort duty on

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[59] *See Folsom v. Burger King*, 958 P.2d 301, 311 (Wash. 1998) (security company whose contract had expired not subject to voluntarily assumed tort duty arising from contractual relationship because any tort duty ended upon expiration of said contract).

[60] *See Wirtz v. Wirtz*, No. S-12980, 2010 WL 1135765, at *15-16, 2010 Alaska LEXIS 32, at *49 (Alaska Mar. 24, 2010) (unreported) (failure to object to deficiencies in other party's performance indicates no obligation to perform); *Sowinski*, 198 P.3d at 1145 (failure to complain that other party is in breach suggests no contractual obligation); *see also* Restatement (Second) of Contracts § 202(4) ("Where an agreement involves repeated occasions for performance by either party with knowledge of the nature of the performance and opportunity for objection to it by the other, any course of performance accepted or acquiesced in without objection is given great weight in the interpretation of the agreement").

[61] *See Sowinski*, 198 P.3d at 1145 (subsequent conduct showed no contractual obligation to maintain); *see also Estate of Polushkin v. Maw*, 170 P.3d 162, 171 (Alaska 2007) ("[t]he parties to an agreement know best what they meant, and their action under it is often the strongest evidence of their meaning.")

this non-existent contract promise. The trial court's misinterpretation of the contract was legal error requiring reversal.[62]

III. Superior Court Erred as a Matter of Law When It Denied AVCP RHA's Motion for Judgment Notwithstanding the Verdict

The trial judge denied the JNOV motion on the legal question of duty because the jury could have "inferred" a tort duty existed. The trial court then denied the JNOV motion on the factual question of liability because the jury could have "inferred" liability based on the inferred duty. This was legal error.

A. Standard of Review

"[M]otions for judgment notwithstanding the verdict present questions of law that are reviewed on appeal de novo rather than deferentially."[63] "Where such a

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[62] Even assuming the contract did contain a promise to continue inspections, that contract duty ran to Thomas and Rose Mael, not Dietrich Mael and his children. The trial court erroneously ruled on summary judgment that Dietrich and his children were intended third-party beneficiaries of the MHO agreement. [Exc. 0407-8]. But Thomas and Rose Mael offered no evidence of their objective intent to directly benefit Dietrich and his children. *See Antenor v. State*, 462 P.3d 1, 8 n.30 (Alaska 2020) (intended third party beneficiary if circumstances indicate that promisee intended to give beneficiary benefit of the promise); *Ennen v. Integon Indem. Corp.*, 268 P.3d 277, 284 (Alaska 2012) (no third-party beneficiary when third party only benefits from existence of contract indirectly). Instead, the trial court relied solely on language in Section 5.2(b)(2) of the MHO agreement that said if there was a hazard to the "occupants" as opposed to the "homebuyers," then AVCP RHA had to fix the problem. [Exc. 0647]. This language established a condition precedent for action by AVCP RHA; not a clear intent by AVCP RHA and the Maels at the time they entered the MHO agreement to allow the "occupants" to sue on the contract. Section 5.2(b)(2) says nothing about who may sue to enforce this clause let alone who may sue to enforce the contract. The fact that Dietrich and his children may have incidentally benefited from this section of the MHO agreement as occupants did not make them intended third-party beneficiaries.

[63] *Government Employees Ins. Co. v. Gonzalez*, 403 P.3d 1153, 1160 (Alaska 2017); *see also Wiersum v. Harder*, 316 P.3d 557, 562 (Alaska 2013) (denial of JNOV motion reviewed de novo).

motion is evidence based, a trial court can only grant the motion where the evidence is such that, when viewed in the light most favorable to the nonmoving party, reasonable people could not differ in their judgment; an appellate court must use the same test."[64]

In other words, this Court reviews de novo the grant or denial of an evidence based "judgment notwithstanding the verdict to determine whether the evidence, viewed in the light most favorable to the non-moving party, is such that reasonable persons could not differ in their judgment."[65] "[T]o the extent that a ruling on a motion for JNOV involves questions of law, those questions will be reviewed de novo."[66]

B. The Superior Court Should Have Granted JNOV on the Legal Question of Duty

In its JNOV motion, AVCP RHA reminded the trial court that Plaintiffs had abandoned their failure to inspect with reasonable care theory just before jury instructions. AVCP RHA also pointed out that Plaintiffs told the trial court that Plaintiffs were proceeding to verdict solely on their negligence claim based on the contract promise to inspect. AVCP RHA also reiterated, with substantial discussion of case law, that a claim based on a contract promise must sound in contract and not tort. The trial court denied the motion.

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[64] *Borgen v. A&M Motors, Inc.*, 273 P.3d 575, 584 (Alaska 2012).

[65] *L.D.G., Inc. v. Brown*, 211 P.3d 1110, 1117-18 (Alaska 2009).

[66] *See Alaska Interstate Constr., LLC v. Pac. Diversified Invs.*, 279 P.3d 1156, 1162 (Alaska 2012) (reversing, in part, denial of JNOV motion).

In denying JNOV, the trial court stated its decision rested primarily on the record at trial concerning the legal question of duty. [Tr. 2/26/20 at 81:22-82:1]. But the trial court then went on to say:

> That being said, as to the – as to the question of whether or not a general duty exists, I don't think I have to answer that. I think I have to answer the question, whether under these circumstances, not as an assumed duty, but just based on the performance of the parties leading up to the trial, whether or not this jury could have *inferred* that a duty, either to conduct the inspection with care or to continue to conduct the inspections – which is different than a general duty to inspect – whether or not this jury, based on those facts and circumstances, could find a violation of a lawful duty on the part of the – of the defendant resulting in injury to the plaintiff in this instance. [Emphasis added].

[Exc. 0692]; [Tr. 2/26/20 at 82:5-18]. By allowing the jury to "infer" a duty, the trial court improperly delegated to the jury the legal question of tort duty. This was legal error.

First, recognizing that Plaintiffs had abandoned their assumed duty to use reasonable care argument, the trial court viewed the duty question "not as an assumed duty" to inspect with care but whether the jury could *infer* a duty to inspect with care. But a duty to inspect with care *is* an assumed duty.[67] Because Plaintiffs abandoned this basis for duty, the only tort duty the jury could have been able to "infer" was the duty to continue to conduct inspections after 2011. As discussed above, that

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[67] *See Anderson v. PPCT Mgmt. Sys.*, 145 P.3d 503, 511 (Alaska 2006) ("multiple provisions of the Restatement reflect the overarching view that undertakings can create a duty of care and that one who voluntarily assumes a duty must then perform that duty with reasonable care"); *Bryson v. Banner Health Sys.*, 89 P.3d 800, 805 n.12 (Alaska 2004) ("The general rule that undertakings can create a duty of care is often expressed by saying one who voluntarily assumes a duty must then perform that duty with reasonable care").

duty could never serve as an independent duty of care in tort, as it was at most a contract duty.

Second, juries are not permitted to infer actionable duties. "The existence and extent of a duty of care are questions of law for the court to determine."[68] "As a question of law, it is a question for the court and not the jury to answer."[69] A jury cannot infer the existence of a duty.[70] A judge must decide the threshold issue that a duty exists *before* a jury can find a violation of that duty.[71]

Third, even assuming a jury could "infer" a tort duty, there was no basis independent of the MHO agreement on which to make such an inference. The "performance of the parties leading up to the trial" as suggested by the trial judge was simply an aid in interpreting the MHO agreement, not the basis on which to find a tort duty.[72] The jury would have had to consider the so-called *D.S.W.* factors to "infer" a

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[68] *Beck v. Dep't of Transp. & Pub. Facilities*, 837 P.2d 105, 109 (Alaska 1992).

[69] *Smith v. State*, 921 P.2d 632, 634 (Alaska 1996).

[70] *See Robles v. Shoreside Petroleum*, 29 P.3d 838, 844 n.19 (Alaska 2001) ("the jury does not decide when a duty should exist but decides only if the facts that give rise to a duty exist").

[71] *See Dore*, 31 P.3d at 791 ("Determining whether a duty exists in the type of case presented is the first analytical step in deciding whether a negligence action can be maintained); *Kooly v. State*, 958 P.2d 1106, 1107 (Alaska 1998) (whether a defendant owes a duty of care is a threshold issue).

[72] *Peterson*, 625 P.2d at 870 n.7 (conduct of parties after contract entered aid to determining intent when contract made).

tort duty in this case.[73] Those factors were not raised or discussed (and, therefore, waived).[74] The trial court should have granted JNOV for lack of a tort duty.

C. The Superior Court Should Have Granted JNOV on the Factual Question of Liability

The trial court also denied the JNOV motion on the factual question of liability. According to the trial court,

> It is – whether it's because they should have flipped the valve the five years beforehand, and whether that would have revealed a problem with the valve, which I think a reasonable juror might well be able to infer – obviously it takes time for a valve to fail, but there was little evidence to suggest that five years is an unreasonable amount of time during which a valve might fail, or that at a five-year period they couldn't have been discovered, but also whether or not having undertaken that obligation and then similarly discontinued it, whether that proximately caused the injury, I think – I think that a reasonable jury could come to the conclusion that this jury apparently did.

[Exc. 0693]; [Tr. 2/26/20 at 83:3-16]. This too was legal error because the evidence was such that, when viewed in the light most favorable to Plaintiffs, reasonable people could not differ in their judgment. AVCP RHA visually inspected the boiler instead of physically touched the boiler. There was no evidence suggesting that the boiler would not have ruptured had AVCP RHA "flipped the valve" on the boiler in 2011 instead of just visually inspect the pressure relief valve. The boiler would have burst either way, so no reasonable jury could say that AVCP RHA is liable for visually inspecting instead of physically inspecting.

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[73] *See GeoTek Alaska, Inc.*, 354 P.3d at 376.

[74] *See Martinez*, 473 P.3d at 323 n.17 (failure to argue *D.S.W.* factors in superior court waives argument on appeal).

First, as mentioned above, the Maels abandoned their argument that AVCP RHA was negligent for "undertaking" a duty to inspect with reasonable care when it last inspected in 2011. Instead, Plaintiffs repeatedly argued to the jury that the problem with the boiler "would have been caught if there had been an inspection after 2011 before the explosion" as required by the contract. [Tr. 9/27/19 at 33:18-20]. The issue at trial, and the basis for the jury's verdict, was AVCP RHA's failure to inspect altogether after 2011, not a failure to inspect with reasonable care in 2011. Because this latter basis for liability was never sent to the jury after the Maels abandoned the argument, reasonable persons could not differ in their judgment that AVCP RHA was not liable based on an allegedly negligent inspection in 2011.[75]

Second, the evidence at trial, even when viewed in the light most favorable to Plaintiffs, did not support a finding of liability based on the 2011 inspection. Whether or not AVCP RHA "flipped the valve" made no difference. Thomas Mael testified that AVCP RHA would do inspections and if they found a deficiency, they noted the deficiency on an inspection form. [Tr. 9/18/19 at 32:7-10]. There were no deficiencies about the boiler noted on the 2011 inspection form. [Exc. 0633]

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[75] If this Court finds that Plaintiffs did not abandon their argument that AVCP RHA voluntarily assumed a duty to inspect with reasonable care in 2011, then this Court should consider remanding for a new trial on that issue rather than affirming the judgments. The fact that the trial court confused, conflated, and combined the two duty concepts – especially in light of Jury Instruction No. 55 – makes it impossible to then say that the jury based its decision solely on the failure to inspect with care in 2011 (tort) versus the failure to inspect at all after 2011 (contract). A new trial would be warranted. *See GMC v. Farnsworth*, 965 P.2d 1209, 1220 n.14 (Alaska 1998) ("a new trial must be held where proper and improper theories were submitted to the jury and it was asked to render a general verdict unless it appears that the prevailing party was entitled to the verdict on other grounds as a matter of law").

Bosco Hooper, a maintenance counselor for AVCP RHA who had extensive experience performing such inspections, testified that inspectors visually inspected boilers by "looking for corrosion, rust, leaks, anything like that, anything out of or – the ordinary." [Tr. 9/24/19 at 8:17-22]. Inspectors did not physically touch the pressure relief valves on the boilers. [Tr. 9/24/19 at 8:13-19]. But in this case, it made no difference whether AVCP RHA visually inspected or physically inspected the boiler in the Mael home in 2011 because the inspection form indicated no rust, corrosion, or anything of that nature. [Tr. 9/24/19 at 8:23-25]. The 2011 inspection form indicated no problems with the boiler. [Exc. 0633]; [Tr. 9/24/19 at 8:3-12].

But, had an inspection been done in 2016 just before the incident, Hooper likely would have discovered the problem because the "pressure relief valve was rusty and corroded at the time of the explosion" and an "inspection would have revealed that even if [he] didn't operate the valve." [Tr. 9/24/19 at 37:6-18]. The first sign that anybody knew that the Mael boiler was in a hazardous condition was the tea kettle whistling noise heard just before the explosion in 2016. [Tr. 9/24/19 at 24:2-6]. Flipping the valve in 2011 would have indicated nothing about any potential problem with the boiler almost five years later.

Moreover, Rose Mael confirmed that there were no problems with the boiler in 2011:

> Q. On the – the question I had on the first one we were talking about, this is the one that was from 2011, and just the question I had was if – was your understanding when they did these inspections that they would check a box or something if there was a problem as they went through?
>
> A. Yes. And they – I think so, yes.

Q. Was – did they – was there a problem with the boiler when they did this 2011 inspection?

A. There was no problem with the boiler. It was running normal, so there was nothing on – on it.

[Tr. 9/19/19 at 127:7-17]. She testified she had never heard that "whistling sound" from the boiler indicating a problem until just before it exploded. [Tr. 9/18/19 at 158:5-11]. She said that "it seemed like it was working okay, the boiler, up until that funny noise" in January 2016. [Tr. 9/19/19 at 134:1-2].

John Andrew, the former maintenance manager for AVCP RHA called by Plaintiffs, testified that the failure to maintain the pressure relief valve caused the explosion. [Tr. 9/20/19 at 99:6-10]. And when asked why it was obvious to him that the pressure relief valve had not been maintained and that caused the explosion, he answered because "there is corrosion and rust sediments that were on – a sign of leakage." [Tr. 9/20/19 at 99:11-24]. According to John Andrew, the problem with the pressure relief valve occurred *after* the last inspection in 2011. [Tr. 9/20/19 at 105:3-19]. The reason the boiler ruptured was "because the pressure relief valve became corroded and rusted and it didn't work right." [Tr. 9/20/19 at 132:25-133:3].

As Bosco Hooper testified, these were the same indicators used when visually inspecting the pressure relief valve. John Andrew confirmed that the problem with the boiler occurred after the 2011 inspection and "it's a problem that would have been caught if there had been an inspection after 2011 and before the explosion." [Tr. 9/20/19 at 105:15-19]. No reasonable juror could believe that if AVCP RHA had "flipped the valve the five years beforehand" as suggested by the trial judge rather than visually inspected the valve those five years earlier that the explosion in 2016

would not have occurred. It made no difference and Plaintiffs offered no evidence to the contrary.

Third, the trial court's statement that "there was little evidence to suggest that five years is an unreasonable amount of time during which a valve might fail" was also in error and unsupported by the evidence. Steve Virostek, a mechanical engineer called by AVCP RHA, testified that the pressure relief valve could degrade and fail within six months. [Tr. 9/24/19 at 61:21-62:10]. Despite having the burden of proof on this issue, Plaintiffs introduced no evidence on the amount of time it would take for a pressure relief valve to fail. Absent pure speculation, there was no way for the judge or jury to reasonably say five years was a reasonable amount of time between inspection and explosion.

Moreover, such a leap would be contradicted by other evidence in the case. As mentioned, AVCP RHA conducted all its inspections visually. The inspection in 2006 was done visually. That inspection form indicated nothing wrong with the boiler. [R. 003902]. If the failure to touch the boiler could cause an explosion, the failure to touch the boiler in 2006 should have led to an explosion five years later in 2011. But the boiler did not burst in 2011. It ruptured 10 years after that 2006 visual inspection. Is 10 years an unreasonable amount of time in which a pressure relief valve might fail? AVCP RHA also conducted a visual inspection in 2001 and found nothing amiss with the boiler. Is 15 years an unreasonable amount of time in which a pressure relief valve might fail? The fact that AVCP RHA had performed visual inspections for years without the Mael boiler bursting contradicts the trial court's speculation that five years

is not "an unreasonable amount of time during which a valve might fail." [Tr. 2/26/20 at 83:9-10].

No reasonable jury could find that the failure to physically touch as opposed to visually inspect the pressure relief valve in 2011 caused the boiler explosion five years later in 2016. The trial court erred as a matter of law when it ruled that reasonable persons could differ as to liability. The trial court should have granted JNOV.

IV. Superior Court Erred as a Matter of Law When It Instructed the Jury About Negligence Based on Contract

Over objection, the trial court instructed the jury in Jury Instruction No. 55 as follows:

> Negligence can be found by a person or entity failing to exercise reasonable care in performing a duty or promise set out in a contract. The Court has found as a matter of law that the MHOA contract required the defendant to perform periodic inspections of the boiler and to exercise reasonable care to discover and remedy any hazardous problems with it. The Court has also found as a matter of law that the contract was in effect at the time of the boiler explosion in this case. You must decide whether the defendant breached that duty.

[Exc. 0431]; [Tr. 9/26/19 at 132:1-9]. The first sentence was taken verbatim from Plaintiffs' Proposed Jury Instruction No. 5. [R. 00997]. Jury Instruction No. 55 was wrong and prejudicial as a matter of law.[76]

[76] The reference to "hazardous problems" in the instruction came from Section 5.2(b)(2) of the MHO agreement: "If the condition of the property creates a hazard to the life, health or safety of the occupants, the IHA shall have the work done, and charge the cost thereof to the Homebuyer's . . . ." [Tr. 9/26/19 at 131:4-9].

A. Standard of Review

This Court reviews jury instructions *de novo*.[77] "A jury instruction containing an erroneous statement of law constitutes reversible error if it prejudiced one of the parties; prejudice exists if it can be said that the verdict may have been different had the erroneous instruction not been given."[78]

B. Jury Instruction No. 55 Misstated the Law and Prejudiced AVCP RHA

After Plaintiffs dropped their contract claim and their claim alleging a voluntarily assumed duty to inspect with reasonable care, the parties and the trial court had a lengthy discussion about the wording of the tort-duty-based-on-the-contract-duty instruction. The trial court recognized that instruction "number 55 is about the contract duty" and "based on a contract duty". [Tr. 9/26/19 at 49:15; 51:1-2]. The trial court even considered including a quote from the contract in the instruction but opted not to because the jury would have the contract in its possession during deliberations anyway. [Tr. 9/26/19 at 51:5-52:18]. But the trial court did add that it had "found as a matter of law that the contract was in effect at the time of the boiler explosion in this case." [Tr. 9/26/19 at 54:1-3]. AVCP RHA objected. [Tr. 9/26/19 at 54:8-10].

The instruction misstates the law. As discussed above, negligence cannot be found by an entity failing to exercise reasonable care in performing a promise set out in a contract.[79] In essence, the trial court instructed the jury that if AVCP RHA

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[77] *L.D.G., Inc.*, 211 P.3d at 1118.

[78] *Barrett v. Era Aviation, Inc.*, 996 P.2d 101, 103 (Alaska 2000).

[79] *See Alaska Pac. Assurance Co.*, 794 P.2d at 946 ("We decline to hold that where

breached the MHO agreement by stopping inspections – which nobody disputed – AVCP RHA was negligent and liable for tort damages. In effect, the trial court made AVCP RHA strictly liable for any injury occurring after the last inspection in 2011.

This incorrect legal directive by the trial court using a hybrid theory of liability caused substantial prejudice to AVCP RHA because AVCP RHA never disputed that it had stopped inspections almost five years before the boiler explosion. Instead, AVCP RHA disputed whether it had a contract duty to continue inspections after the home became eligible for conveyance.[80]

By instructing the jury that AVCP RHA had such a duty up to the time of the boiler explosion and that AVCP RHA could be liable in negligence for breaching that duty, the trial court effectively instructed the jury that AVCP RHA was liable in negligence as a foregone conclusion. The resulting verdict was preordained once this instruction was given and would undoubtedly have been different had the erroneous instruction not been given. Jury Instruction No. 55 improperly prejudiced the jury and essentially mandated a substantial verdict for Plaintiffs.

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a party breaches a contractual promise 'negligently,' such conduct may form the basis for a tort action").

[80] The trial court also committed prejudicial error in Jury Instruction No. 52 when it instructed the jury that AVCP RHA "promised to conduct routine annual inspections of the boiler in Thomas and Rose Mael's home until full ownership of the home was conveyed to Thomas and Rose Mael." [Exc. 0429]; [Tr. 9/26/19 at 130:16-19]. As discussed above, AVCP RHA never made such a promise. Had the judge not given this instruction, the jury could not have found AVCP RHA liable for failing to inspect after 2011.

V. Superior Court Erred When It Denied AVCP RHA's Motion for a New Trial

AVCP RHA moved for a new trial on the basis that the jury's finding of no boiler defect and breach of a tort duty to inspect were against the clear weight of the evidence. The trial court denied the motion. This was an abuse of discretion.

A. Standard of Review

Generally, "the decision to grant or deny a new trial is within the trial court's discretion."[81] "In reviewing the substance of a trial court's order denying a new trial, we view the evidence in the light most favorable to the non-moving party, and will only reverse a decision to deny a new trial if the evidence supporting the verdict was so completely lacking or slight and unconvincing as to make the verdict plainly unreasonable and unjust."[82]

B. There Was No Evidence to Support the Finding of No Design Defect

It is well established that a "manufacturer is strictly liable in tort when an article he places on the market, knowing that it is to be used without inspection for defects, proves to have a defect that causes injury to a human being."[83] A product may be defective because of a manufacturing defect, a defective design, or a failure to contain adequate warnings.[84]

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[81] *Pugliese v. Perdue*, 988 P.2d 577, 581 (Alaska 1999).

[82] *Hunter v. Philip Morris USA Inc.*, 364 P.3d 439, 447 (Alaska 2015) (internal quotes omitted).

[83] *Clary v. Fifth Ave. Chrysler Center*, 454 P.2d 244, 247 (Alaska 1969).

[84] *Caterpillar Tractor Co. v. Beck*, 593 P.2d 871, 878 n.15 (Alaska 1979).

"[A] product is defective in design if either (1) the plaintiff proves that the product failed to perform as safely as an ordinary consumer would expect when used in an intended or reasonably foreseeable manner, or (2) the plaintiff proves 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 the risk of danger inherent in such design."[85] A manufacturer may be liable for design defect under either of these two alternative tests.[86]

Under the first test, "the plaintiff need only show, for strict liability to apply, that he used the product in an intended or reasonably foreseeable fashion and the product failed to perform in that capacity as safely as expected."[87] Under the second test, "the plaintiff must establish a prima facie case by introducing sufficient evidence to permit a jury to find that the product's design features were a proximate cause of plaintiff's injury."[88] Once plaintiff has made this showing, the burden of proof shifts to defendant to prove that the product was not defective by introducing evidence showing the various trade-offs in the design process.[89]

To determine whether the benefits of the design outweigh the risk, the fact finder must consider competing factors such as the gravity of the danger posed by the challenged design, the likelihood that such danger would occur, the mechanical

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[85] *Lamer v. McKee Indus.*, 721 P.2d 611, 613 (Alaska 1986) (internal quotes omitted).

[86] *Barker v. Lull Eng'g Co.*, 573 P.2d 443, 455 (Cal. 1978).

[87] *Caterpillar Tractor Co.*, 593 P.2d at 885.

[88] *Dura Corp. v. Harned*, 703 P.2d 396, 406 (Alaska 1985).

[89] *Heritage v. Pioneer Brokerage & Sales*, 604 P.2d 1059, 1063 (Alaska 1979).

feasibility of a safer alternative design, the financial cost of an improved design, and the adverse consequences to the product and to the consumer that would result from an alternative design.[90]

As to the first test, the uncontradicted evidence at trial proved that the boiler failed to perform as safely as an ordinary consumer would expect when used in an intended or reasonably foreseeable manner. At trial, AVCP RHA called Steve Virostek, an engineer and accident reconstruction expert, to testify. Based on his examination and testing he concluded that the boiler exploded because the boiler's pressure relief valve failed to open allowing the pressure in the boiler to rise to a point where it was beyond the strength of the tank to contain. [Tr. 9/24/19 at 60:8-20]. Virostek testified that the pressure relief valve was the most important safety device on the boiler because it represented the last line of defense against the boiler tank becoming over pressurized. [Tr. 9/24/19 at 59:19-60:2]. He further testified that he reviewed the Plaintiffs' deposition testimony and determined from their depositions that at the time of the explosion they were using the boiler to heat their home and that this was a reasonably foreseeable use of the boiler. [Tr. 9/24/19 at 55:8-56:5]. As such, Virostek opined that the boiler failed to perform as safely as a reasonable consumer would have expected it to perform. [Tr. 9/24/19 at 55:24-56:2].

Because Plaintiffs settled with the boiler manufacturer before trial as a tactical choice to focus the jury's blame on AVCP RHA at trial, Plaintiffs stepped into the shoes of the boiler manufacturer in defending against the product liability claim. However,

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[90] *Shanks v. Upjohn Co.*, 835 P.2d 1189, 1196 (Alaska 1992).

Plaintiffs offered no evidence to the contrary. They offered nothing to suggest that an ordinary consumer would expect his or her boiler to explode when used in its intended or reasonably foreseeable manner to heat a home. The trial court should have granted a new trial under the first test.

As to the second test, even assuming the boiler performed as safely as an ordinary consumer would expect, Plaintiffs failed to show that on balance the benefits of the challenged design outweighed the risk of danger inherent in such design. Virostek testified that the lack of a more reliable pressure relief valve on the boiler proximately caused the explosion and made its design defective. [Tr. 9/24/19 at 64:2-65:2]. The burden then shifted to Plaintiffs to prove the benefits of the design with the less reliable pressure relief valve outweighed the risks.

They offered the testimony of John Andrew, the former AVCP RHA maintenance manager. He testified that he had no reason to believe that the boiler was defectively designed. [Tr. 9/20/19 at 100:16-18]. However, at no point during the trial did Plaintiffs lay the foundation to establish that Andrew had the requisite degree of training, experience, or education to opine on whether the benefits of the Burnham boiler's design outweighed the risks of the design. In fact, on cross-examination, Andrew confirmed his misunderstanding of the term design defect: "Design defect is something that a product is not operable in a way that it should be operating." [Tr. 9/20/19 at 109:8-19].

Andrew confirmed that he had no background in boiler design, that he would not know how to go about designing a boiler, that he did not know what the benefits were of the boiler's design, and his understanding of the risks were that it could

explode. [Tr. 9/20/19 at 110:11-111:6]. More importantly, Andrew testified that when he said he had no reason to believe that the boiler was defective, he made his statement without weighing the risks of the boiler's design against its benefits. [Tr. 9/20/19 at 111:7-12].

Plaintiffs offered no evidence showing the various trade-offs in the design process. They offered no evidence as to the gravity of the danger posed by the challenged design, the likelihood that such danger would occur, the mechanical feasibility of a safer alternative design, the financial cost of an improved design, or the adverse consequences to the product and to the consumer that would result from an alternative design. Plaintiffs failed to prove that on balance the benefits of the challenged design outweighed the risk of danger inherent in such design. The trial court should have granted a new trial under the second test as well.[91]

[91] In addition, assuming a tort duty, AVCP RHA also moved for JNOV and new trial on the ground that no reasonable jury could find that AVCP RHA breached a tort duty to inspect. The only evidence introduced at trial on this issue was testimony by the Indian housing expert, Bill Nibbelink, to the effect that all Indian housing authorities stopped inspections of mutual help homes that became eligible for conveyance in 2009. [Tr. 9/25/19 at 74:7-16; 75:5-8]. A reasonably careful Indian housing authority would have done exactly as AVCP RHA did in this case. Plaintiffs introduced no evidence to the contrary. In fact, Plaintiffs introduced no evidence at all on what an Indian housing authority would or would not do under similar circumstances. Given the total lack of contrary evidence on this point, no reasonable jury could find negligence. The evidence supporting the verdict was so completely lacking and unconvincing as to make the verdict plainly unreasonable and unjust. The trial court should have granted JNOV or new trial.

VI. Superior Court Erred as a Matter of Law When It Failed to Correctly Apply AS 09.17.010 to Cap the Aggregate Non-Economic Damages Award to All Plaintiffs

The jury awarded Dietrich Mael $1,580,000 in non-economic damages and the other four Plaintiffs $175,000 in non-economic emotional distress damages. [Exc. 0432-36]. AVCP RHA moved for remittitur to cap all non-economic damages at $1 million pursuant to AS 09.17.010, including damages awarded to the four Plaintiffs based on claims of bystander negligent infliction of emotional distress ("NIED").[92] [Exc. 0441-62]. Despite recognizing that NIED claims "occur at the same time, and as a result of another person's injury," the trial court refused to include them within the cap. [Tr. 2/26/2020 at 75:3-7]. This refusal was legal error.

A. Standard of Review

In reviewing a trial court's interpretation of a statute, this Court applies its independent judgment "looking to the meaning of the language, the legislative history, and the purpose of the statute, and adopting the rule of law that is most persuasive in light of precedent, reason, and policy."[93] "The objective of statutory construction is to give effect to the intent of the legislature, with due regard for the meaning that the statutory language conveys to others."[94]

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[92] AS 09.17.010 caps non-economic damages "for all claims, including a loss of consortium claim, arising out of a single injury or death" in personal injury and wrongful death actions.

[93] *L.D.G., Inc.*, 211 P.3d at 1133.

[94] *Heller v. State, Dep't of Revenue*, 314 P.3d 69, 74 (Alaska 2013).

B. Bystander NIED Damages Fall Within the Statutory Single Cap

This Court's precedent, and the statute's plain language, legislative history, and overall purpose, support the application of a single damages cap to all claims that arise from a single occurrence. In fact, this Court has already held as much in *L.D.G., Inc.* when it applied the damages cap on a "per occurrence" basis.[95]

In *L.D.G., Inc.*, a case involving multiple wrongful death and related consortium claims arising out of a single death, this Court reasoned that a single cap applies to "all claims arising from each occurrence" based on the "clear language" of the statute which provides that "a single cap applies to all claims arising out of a single [injury]."[96] Noting the lack of "modifier of the phrase all claims," this Court concluded that such language "strongly suggests that the legislature was aware that multiple individuals could have claims arising from a single death or injury" yet "nevertheless intended to apply a single cap . . . to all claims arising from each occurrence."[97] This Court explicitly rejected the argument that each wrongful death claimant was entitled to a separate damages cap because each suffered an injury distinct from the underlying death and could therefore maintain an "individual cause of action."[98]

In so holding, this Court did not define "occurrence" under AS 09.17.010(b). But an examination of this Court's interpretation of "occurrence" and a "single incident" in

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[95] *See L.D.G., Inc.*, 211 P.3d at 1135, n.114 & n.117.

[96] *Id.*

[97] *Id.* at 1135 (internal quotes omitted).

[98] *Id.*

the context of AS 09.17.010(d) is instructive in examining this issue.[99] In *C.J. v. State*, this Court interpreted the "single incident" limitation as "intended to limit recovery for a single tortious act that causes multiple injuries."[100] Stating the limitation did not "absolve a tortfeasor of liability for committing multiple, separate tortious acts" because "[e]liminating liability for distinct tortious acts. . . would run counter to the stated purpose of the statute," this Court cited with approval an Indiana Court of Appeals opinion that "interpreted 'occurrence' to mean each negligent act and its resulting injury," and held that where a tortfeasor "committed two separate acts of negligence, it results in two separate injuries."[101]

Because the tortfeasor in *C.J.* "committed three distinct acts . . . each causing a separate injury," this Court concluded that a separate cap applied to each act. In this case however, it is undisputed that there was only a single negligent act – or "occurrence" – which was the breach of the duty to inspect which led to the harm. Following this Court's prior reasoning and precedent, a single cap should apply to all claims resulting from this single occurrence.

Given the legislature's incorporation of the insurance industry's "per occurrence" concept into AS 09.17.010, and the underlying goal of enacting a damages cap in the first place, it is instructive to note that an "occurrence" is generally

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[99] AS 09.17.010(d) provides that "[m]ultiple injuries sustained by one person as a result of a single incident shall be treated as a single injury for purposes of this section."

[100] *C.J. v. State, Dep't of Corr.*, 151 P.3d 373, 383 (Alaska 2006).

[101] *Id.* (citing *Medical Assur. of Indiana v. McCarty*, 808 N.E.2d 737, 743 (Ind. App. 2004)).

defined as "an accident, including a continuous or repeated exposure to conditions, which results in bodily injury or property damage."[102] "[T]he act which causes the damage constitutes the 'occurrence.'"[103] In determining the number of occurrences, "a substantial majority of the courts" that have addressed the "per occurrence issue" apply a "cause test."[104] "Under the 'cause test,' courts determine the number of accidents or occurrences by asking how many 'causes,' 'liability-triggering events,' or 'unfortunate events' produced the injury or damage."[105]

In this case, there was only one "occurrence" for the trier of fact to evaluate. Under the "cause test," each damage award stems directly from one proximate cause – namely, the alleged breach of duty to inspect. From this singular occurrence or act of negligence, a single injury to Dietrich Mael was caused which gave rise to all other claims by the Plaintiffs. The inclusion of NIED claims into a single occurrence analysis is not novel; sister jurisdictions addressing this issue have concluded that similar NIED claims are subject to a per occurrence insurance coverage limit.[106]

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[102] 9 Couch on Insurance § 126:29.

[103] *Id.*

[104] Restatement of the Law of Liability Insurance § 38 cmt c. (2019); *see also United Servs. Auto. Ass'n v. Neary*, 307 P.3d 907, 915 and n.37 (Alaska 2013) ("Courts sometimes use the effects test simply to determine when and where an accident occurred, using other tests—e.g., the 'cause' test—to calculate the number of occurrences.")

[105] Restatement of the Law of Liability Insurance § 38 cmt c. (2019).

[106] *See, e.g., Auto Club Ins. Ass'n v. Hardiman*, 579 N.W.2d 115, 118 (Mich. 1998) (applying per occurrence limitation as bystander NIED claim "constitutes a separate, not a derivative, cause of action" outside policy's per person definition); *Pekin Ins. Co. v. Hugh*, 501 N.W.2d 508 (Iowa 1993) (subjecting bystander NIED claim to per occurrence limitation as claim was a "bodily injury" under policy terms); *Crabtree v.*

The legislative history is replete with evidence that the legislature intended a single cap to apply on a "per occurrence" basis. Specifically, two April 1987 sectional summaries unequivocally state that the non-economic damages cap limits all damages arising out of one tortious act, even where there are multiple injured plaintiffs: "These caps are per occurrence, and not per claimant."[107] This principal was so important that it appeared verbatim twice in each sectional summary.[108] Committee minutes similarly describe the caps as operating on a "per occurrence" basis.[109] As further evidence of the legislature's intent to capture all claims within the statute, the legislature specifically considered and rejected a proposed amendment that would have provided that the cap applied to "all claims of a person . . . arising out of a single injury or death" (the interpretation advocated here by Plaintiffs).[110]

Following a full consideration of the various implications that a per occurrence cap would have on future litigants, the legislature approved a cap that limits damages "per occurrence, and not per claimant."[111] The unequivocal legislative history of AS 09.17.010 makes clear that a single cap was not only contemplated, but intended

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State Farm Ins. Co., 632 So.2d 736 (La. 1994) (holding spouse's "mental anguish" claim constituted a separate "bodily injury" not subject to the per person limit under policy); *Wolfe v. State Farm Ins. Co.*, 540 A.2d 871 (N.J. Super 1988) (subjecting bystander NIED claim to per accident limitation as claim was a separate, non-derivative, "bodily injury" under policy terms).

[107] *See State of Alaska's Brief, L.D.G., Inc., v. Brown*, 2007 WL 2776546 at 8-9.

[108] *See id.*

[109] Minutes, Senate Rules Comm. Hearing on H.B. 58 (April 15, 1997).

[110] *See State of Alaska's Brief, L.D.G., Inc., v. Brown*, 2007 WL 2776546 at 9.

[111] *See id.*

to address and limit all claims, even when there are multiple claimants. NIED claims are included within that cap.

VII. Superior Court Erred When It Admitted into Evidence Medical Records that Lacked Proper Foundation and Contained Hearsay

Over objection, the trial court admitted into evidence voluminous medical records that lacked a proper foundation. [Tr. 9/23/19 at 5:19-21; 9:1]. While conceding that the foundation was "somewhat thin," the trial court admitted the records under Evidence Rule 803(6) as a business record simply because "medical records are such a common and well-understood exception" under the hearsay rule. [Tr. 9/23/19 at 9:1-11]. That was error.

A. Standard of Review

This Court reviews "the admission or exclusion of evidence for abuse of discretion."[112] This Court will find an abuse of discretion when it is left with a definite and firm conviction after reviewing the whole record that the ruling was erroneous.[113]

B. The Trial Court Abused Its Discretion

"Under Alaska Rules of Evidence 801 and 802, a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted, is hearsay and is inadmissible."[114] While normally hearsay, business records may still be admissible under the business records exception if certain requirements are met "as shown by the testimony of the

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[112] *State v. Sharpe*, 435 P.3d 887, 892 (Alaska 2019).

[113] *Noffke v. Perez*, 178 P.3d 1141, 1144 (Alaska 2008).

[114] *Liimatta v. Vest*, 45 P.3d 310, 318 (Alaska 2002).

custodian or other qualified witness" of the records.[115] These requirements are as follows:

> [F]irst, the record must be of a regularly conducted business activity; second, the record must be regularly kept; third, the source of information must be a person who has personal knowledge; fourth, the information must have been recorded contemporaneously with the event or occurrence; and fifth, foundation testimony by the custodian of the record must be provided.[116]

Generally, medical records fall within the business records exception to the hearsay rule and are often admitted under that exception.[117] However, the proffering party must still provide "foundation testimony by the custodian of the record" for this exception to apply.[118]

Here, Plaintiffs provided no testimony by the custodian of record for the medical records admitted into evidence. There was no testimony by a person with personal knowledge that the records were a regularly conducted business activity, that the records were regularly kept, that the source of the information came from a person with personal knowledge, or that the information was recorded contemporaneously.

Instead, the court simply admitted the medical records because "medical records are such a common and well-understood exception" to the hearsay rule. [Tr. 9/23/19 at 9:3-4]. Whether or not true, a party must still satisfy the five foundation

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[115] *See* Alaska R. Evid. 803(6).

[116] *Wassillie v. State*, 411 P.3d 595, 600 (Alaska 2018).

[117] *See Dobos v. Ingersoll*, 9 P.3d 1020, 1027 (Alaska 2000).

[118] *Noffke v. Perez*, 178 P.3d 1141, 1147 (Alaska 2008).

requirements set forth above. If Evidence Rule 803(6) creates an automatic exemption for the admission of medical records, the Rule should say so expressly.

The trial court erred in its ruling admitting the medical records. That error prejudiced AVCP RHA by allowing the jury to review written records about Dietrich Mael's medical issues, diagnosis, and prognosis that were hearsay. Plaintiffs used the volume of the records (hundreds and hundreds of pages) to reinforce the seriousness of the injuries. The records should not have been given to the jury. This Court should reverse.

CONCLUSION

Based on the forgoing, this Court should vacate the jury's verdict and resulting judgments, reverse the trial court's order denying JNOV, and remand for entry of judgment for AVCP RHA consistent with this opinion.[119]

[119] *See Allstate Ins. Co.*, 435 P.3d at 947 (vacating Bethel multi-million-dollar jury verdict and resulting judgment, reversing superior court's order denying motion to dismiss, and remanding for dismissal of complaint).

CERTIFICATE OF TYPEFACE

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The undersigned hereby certifies that on the 13th day of November, 2020, a true and correct copy of the foregoing was served via electronic delivery on the following:

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