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"An Act repealing the requirement that a cause of action against the state be tried by a judge without a jury: and providing for an effective date."

2/11/75

COMMITTEE REPORT

FINANCE

HOUSE

Mr. Speaker:

Date _____

The Committee on Judiciary has had SB 50

under consideration. A Majority of the members of the Committee

recommends it DO PASS

recommends it DO NOT PASS

recommends it DO PASS WITH ATTACHED AMENDMENT(S)

recommends it BE REPLACED WITH CS FOR _____ AND THAT

CS FOR _____ DO PASS

"and" recommends it BE REFERRED TO THE _____

COMMITTEE

reports it back WITHOUT RECOMMENDATION

"other"

Members signing the Majority report:

Members NOT concurring in the Majority report:

_____ recommends:

_____ recommends:

_____ recommends:

_____ recommends:

_____ recommends:

_____ Chairman

House Judiciary Committee
January 30, 1975

The meeting was called to order at 1:35 by Chairman Gardiner.
Members present: Gardiner, Bradley, Parr, Fink, Cotton, Brown.

HB 94 - Conflict of interest

Rep. Fink mentioned that SB 62, which is the Governor's bill on the same subject, stipulates that one must file if still in office at the filing deadline, instead of the December 11 date stipulated in HB 94. The committee agreed that the language in SB 62 was preferable.

Rep. Brown moved CS for HB 94 which included Section 10 from SB 62 and Sections II and III from HB 94. The CS was approved and reported out of committee with a do pass.

HCR 5 - Drivers License regulations

Three representatives of the Department of Public Safety, Charlie Smith, Director of Traffic Safety, Dan Kanouse and Dennis Robertson, fielded questions from the committee. They requested that the effective date of the regulations be postponed to allow time for reorganization of several department offices.

The committee requested that the Department resubmit the regulations with the effective date included so that the total package could receive legislative approval.

The committee also pointed out a typographical error in the regulations which should be corrected. Members also requested additional information concerning the weights of vehicles which are generally towed by passenger cars.

Mr. Smith indicated that the Department would gather the requested information and make the requested changes in the regulations. A meeting would be called for next week to reconsider HCR 5.

HB 55 by Cowper

SB 53

HB 91 - all concerning the requirement of posting bond before bringing suit against the State

John Spencer, City Attorney of Anchorage, testified concerning the problem of collecting attorneys fees in suits against political subdivisions other than the State. He emphasized that bonds should still be required in injunctions and temporary restraining orders cases and suggested that this be mentioned in the committee report to avoid possible misinterpretation of the law.

Rep. Cowper, sponsor of HB 55, indicated that his bill goes further than HB 91.

The committee requested that the bills be held and that a representative of the Attorney General's Office be invited to give testimony.

Adjourned 2:50 p.m.

Mr. Hickey continued that in a preliminary hearing, probable cause is the standard of proof. In a grand jury hearing, sufficiency of evidence is unexplained and uncontradicted.

Rep. Parr indicated that probable cause needn't be defined in the constitution but in the court rules or statutes. Rep. Fink indicated that he preferred that this guarantee be specified. Mr. Hickey stated that only suspicion is less grounds than probable cause.

Rep. Brown expressed his concern that the investigative functions of the grand jury would be virtually eliminated as would most grand juries.

Mr. Hickey expressed the opinion that although grand juries should improve the prosecutors' public images, in reality they do not.

HB 55 - Bond/Suit

Mr. Walker of Legislative Affairs explained a proposed amendment to lines 12 - 18. He also presented a proposed committee report to accompany the bill.

Rep. Fink moved and asked unanimous consent that the amendment suggested by Arthur Peterson of the AG's office be adopted. Mr. Brown objected. On a tied vote, the amendment failed.

Mr. Brown moved the amendment explained by Mr. Walker and asked unanimous consent. There being no objection, the amendment was accepted.

SB 53, on the same subject and currently in this committee will be acted on. A House CS for SB 53 will be drawn up which incorporates all of HB 55 as amended.

The meeting was adjourned at 3:20.

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March 25, 1975

Mr. Terry Gardner
House Judiciary Committee
House of Representatives
Pouch V
Juneau, Alaska 99801

Re: Senate Bill 53

Dear Representative Gardner:

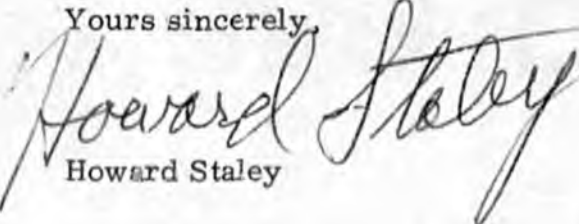
I am again writing to you in behalf of the bill, the number of which I don't have. which would repeal AS 09.50.290 requiring that any tort action against the State be tried by a judge, so that neither the State nor the parties suing the State have a right to a jury trial. The present law requiring a trial to a judge is usually explained as giving the State the "protection" from the possible passion and prejudice of a jury. From the standpoint of an attorney who has frequently represented the State and its insurance carriers, I know that this does not stand up in practice. The State is often treated far more harshly by a judge than it would be by a jury. I am enclosing an example of this in the form of an Alaska Supreme Court Opinion in State v. I'Anson issued by the Alaska Supreme Court on November 29, 1974. In that case, a civilian jeep was in the process of making a left turn across a state highway into a campground and collided with a vehicle which was passing it. The driver of the jeep sued the State for not having posted signs which would have in effect prohibited the driver of the overtaking vehicle from passing. The case was tried to a judge and an advisory jury, since the statute has been interpreted as allowing the judge to empanel an advisory jury. It should be noted that when an advisory jury is empaneled, the expense to the State is just the same as if the trial was to a judge and an advisory jury was not used. The advisory jury found in the State's favor, but the judge decided, as he is entitled to do under the law, to disregard the verdict of the advisory jury and entered a verdict against the State.

I don't believe that there is any valid reason to believe that jurors would favor the State because of having an interest as taxpayers in the outcome of litigation against the State. There are jury trials in actions brought against Alaska cities where the taxpayer's interest is far more direct than in an action against the State and there has certainly been no indication that jurors tend to be lenient with Alaskan cities because the jurors are taxpayers.

Page Two

If the amendment allowing the State and litigants against it the right to a jury trial is passed, there will undoubtedly be individual cases in which the State is either hurt or helped by having the claims against it tried to a jury, but that is not the issue. I believe the issue is whether or not the State as well as litigants against the State have a right to a jury trial in litigation of this sort. I don't think there is any valid reason for giving the State any more or any less privilege than any other litigant in this regard.

Yours sincerely,


Howard Staley

HS/mh
Enc.

THE SUPREME COURT OF THE STATE OF ALASKA

STATE OF ALASKA,)
)
 Petitioner,)
)
 v.)
)
 THOMAS I'ANSON and MAUREEN)
 I'ANSON,)
)
 Respondents.)
)
)

RECEIVED

DEC 13 1974

File No. 2032 MERDES, SCHAIKLE, STALEY & DeLISIO

O P I N I O N

[No. 1102 - November 29, 1974]

Petition for Review from the Superior Court of the State of Alaska, Third Judicial District, Anchorage, Eben H. Lewis, Judge.

Appearances: Charles P. Flynn and Theodore M. Pease, Burr, Pease and Kurtz, Inc., Anchorage, for Petitioner. Harland W. Davis, Anchorage, Joel E. Bradshaw and Russell Newman, Newman & Bradshaw, Inc. P.S., Seattle, Washington, for Respondents.

Before: Rabinowitz, Chief Justice, Connor, Erwin, and Fitzgerald, Justices. [Boochever, Justice, not participating]

RABINOWITZ, Chief Justice.

This petition for review arises out of a bifurcated superior court trial in which the issue of petitioner State of Alaska's liability was tried to the superior court with the assistance of an advisory jury. The central contention in this petition focuses on construction of the discretionary function or

Duty exception to Alaska's Tort Claims Act.

The automobile collision which led to the liability trial occurred in May 1970 at approximately Mile 63 of the Seward Highway near the entrance to the Granite Creek Campground. Between 7:30 and 8 p.m. on the day of the accident, John Ward was driving his car in a southerly direction on the Seward Highway. In the vicinity of the Granite Creek Campground he observed ahead an old Jeep pickup traveling from 15 to 20 miles per hour in a southerly direction.² According to Ward's testimony, he then blinked his lights and pulled out to pass the Jeep pickup; just as he was about to pass, the driver of the Jeep pickup pulled across the road in front of Ward whose vehicle then collided with the left rear portion of the Jeep.

Respondent Maurcen I'Anson was a passenger in the Jeep pickup which was being driven by Andy DeBeau. DeBeau testified that just prior to the collision he was attempting a left turn into the entrance roadway of the Granite Creek Campground. DeBeau further testified that the Jeep did not have operative electric turn signals

1. AS 09.50.250 where applicable provides:

A person . . . having a . . . tort claim against the state may bring an action against the state in the superior court. . . . However, no action may be brought under this section if the claim

(1) . . . is an action for tort, and based upon the exercise or performance or the failure to exercise or perform a discretionary function or duty on the part of a state agency or an employee of the state, whether or not the discretion involved is abused

2. Ward testified that at this time he was travelling at 50 to 55 miles per hour.

and that he did not give a left turn hand signal, but he had "effectively" given a turn signal by pumping his brakes which in turn illuminated the Jeep's sole brake light which was located on the vehicle's left side. DeBeau admitted he observed Ward's vehicle approaching from the rear before he commenced the left turn. ←

As to the State of Alaska's liability for the collision and ensuing personal injuries sustained by respondent Maureen I'Anson, it was asserted that the state was negligent in failing to post a warning sign in advance of the entrance road to the Granite Creek Campground, and that the state should have placed no-passing striping between the crest of a slight rise north of the campground and the campground entrance roadway. The parties called expert witnesses who differed sharply over whether warning signs and no-passing zone striping should have been placed in the area immediately to the north of the entrance road to the Granite Creek Campground.

After hearing extensive testimony regarding the issue of liability, the advisory jury found in favor of petitioner State of Alaska. The trial judge in turn rejected the verdict of the advisory jury and entered findings of fact and conclusions of law resolving the issue of liability in respondents' favor. This petition followed.

Before treating the central question of whether highway signing and striping comes within the discretionary function or duty exception of AS 09.50.250, Alaska's Tort Claims Act, two minor issues will be dealt with.

Civil Rule 39(c) provides that:

In all actions not triable of right by a jury the court upon motion or of its own initiative may try an issue with an advisory jury or, with the consent of both parties, may order a trial with a jury whose verdict has the same effect as if trial by jury had been a matter of right. 5 /

It is established that the trial court has discretion whether or not to use an advisory jury. In the event one is used, it is entirely within the trial court's discretion to accept or reject, in whole or in part, the verdict of the advisory jury. On appeal from a trial conducted with an advisory jury, review is limited to the findings of fact and conclusions of law of the trial court as if there had been no verdict from the advisory jury. There can be no review of asserted errors relating to rulings before and instructions to an advisory jury. In light of these established principles, we do not reach petitioner's contention that the superior court erred in refusing to instruct the advisory

5. AS 09.50.290 provides that actions against the state under AS 09.50.250 "shall be tried by the court without a jury". *Lee v. State*, 490 P.2d 1206, 1208 (Alaska 1971).

Fed. R. Civ. P. 39(c), which parallels Alaska's Civ. R. 39(c), codifies the equity practice which permitted the court to summon an advisory jury to assist it in deciding a case. 9 Wright & Miller, Federal Practice and Procedure § 2335, at 124 (1971); *Kohn v. McNulta*, 147 U.S. 238, 37 L. Ed. 150 (1893).

6. *Chicago & N.W. Ry. Co. v. Minnesota Transfer Ry. Co.*, 371 F.2d 129 (8th Cir. 1967); *In re Pan-American Life Ins. Co.*, 188 F.2d 833 (5th Cir. 1951); *Cudmore v. Smith*, 260 F. Supp. 760 (D.C. Conn. 1966).

7. *Cox v. Babcock and Wilcox & Co.*, 471 F.2d 13 (4th Cir. 1972); *Mallory v. Citizens Util. Co.*, 342 F.2d 796 (2d Cir. 1965).

8. *Chicago & N.W. Ry. Co. v. Minnesota Transfer Ry. Co.*, 371 F.2d 129 (8th Cir. 1967); *Frostie Co. v. Dr. Pepper Co.*, 361 F.2d 124, 125 (5th Cir. 1966).

jury in accordance with its requested instruction regarding the "dangerous condition doctrine."

The second minor issue presented by this review proceeding involves two closely related assertions of error. In its original petition for preview, the State of Alaska claimed that the superior court not only improperly viewed the scene of the accident but erroneously conducted experiments at the accident site. In his memorandum decision, the trial judge wrote in part:

Certain facts evolved clearly from the testimony and were confirmed by a court view of the accident site and the approach to it from the north -- the direction from which the vehicles involved in the accident were traveling. . . .

. . . .

One observation by Thomas I'Anson in his testimony was confirmed by the court in taking a view of the scene. His statement was, substantially: 'You come over the hill and you are on it'. In approaching the scene at 50 miles per hour in a fairly heavy car equipped with good brakes, but without any special attempt to avoid an emergency situation, the court found that slowing from 50 miles an hour to a dead stop would be very difficult before reaching the campground entrance, in order to turn into it.

The subject of views by juries is governed by Civil Rule 48(c) which provides:

When the court deems proper, it may order a proper officer to conduct the jury in a body to view the property which is the subject of the litigation or the

9. Pursuant to Civ. R. 52(a), the superior court's memorandum decision was filed with the intent of satisfying the rule's requirement of formal findings of facts and conclusions of law.

conduct an impermissible experiment, this aspect of the case must necessarily be remanded in order to afford the parties an opportunity to develop the facts regarding both the alleged experiment by the court, and whether counsel were informed of and present during the court's carrying out of such experiment. On remand, the trial court should not only insure that the record reflects the relevant facts pertaining to the alleged experiment but should also indicate what weight, if any, was accorded the experiment in deciding the liability issue.

We now turn to the central issue in this review proceeding, namely, whether the placement of traffic signs and highway striping comes within the ambit of the discretionary function or duty exception of the Alaska Tort Claims Act. Counsel for petitioner

12. Professor McCormick writes:

On the other hand, where the trial judge is present to rule on admissibility, and provision for proper preparation of a proper record is made, there would appear no inherent vice in receiving testimony or allowing demonstrations or experiments during a view. These practices, however, have often been looked upon with disfavor by appellate courts, and some jurisdictions appear to hold reception of testimony or experiments during a view improper under any circumstances.

McCormick on Evidence § 216, at 538-39 (Cleary ed. 1972).

13. Our formulation of the question parallels that of respondents. Petitioner, on the other hand, views the issue as whether the State of Alaska can be held liable for negligent design of its highways contending that design is exempted under the planning discretionary exclusion of the Alaska Tort Claims Act.

In this court's order granting review in the instant case, we requested the parties to brief the questions of whether the placement of traffic signs could be characterized as a planning discretionary function, or as an operational function, and if operational, what standard of care was required of the State of Alaska and its agents or employees in the circumstances of this case.

view the question as one which was left unanswered by our opinion in State v. Abbott, 498 P.2d 712 (Alaska 1972). Respondents' counsel, on the other hand, view Abbott as controlling. To a large extent we are in agreement with respondents' position and begin with a review of the relevant portions of Abbott.¹⁴ In Abbott, we noted that the critical language in Alaska's Tort Claims Act, which establishes the discretionary function or duty exception of the State of Alaska's waiver of immunity, is identical to that contained in the Federal Tort Claims Act.¹⁵ Abbott then proceeded to review relevant federal case law on the subject of the discretionary function exception. Our discussion commenced with an analysis of Dalehite v. United States, 346 U.S. 15, 97 L. Ed. 1427 (1953). There the Supreme Court of the United States held that the federal government's decision to carry out a fertilizer export program without testing the explosiveness of the ammonium nitrate contained in the fertilizer was within the federal act's discretionary function exception. In so holding, Justice Reed, writing for the Court, first articulated the planning-operational test for resolution of scope of discretionary function

14. We recommend that the reader read in full Justice Erwin's incisive treatment of the subject of governmental immunity and the discretionary function or duty exception of both the Federal Tort Claims Act and Alaska's parallel legislation.

15. 28 USCA § 2680(a).

exception questions. In light of the "almost unanimous" adverse reaction of legal commentators to Dalehite and the limitations placed on the decision by subsequent federal decisions, we concluded that Dalehite was "now of questionable authority."¹⁷ Our evaluation of Dalehite was based in part upon analysis of Indian Towing Co. v. United States, 350 U.S. 61, 100 L. Ed. 48 (1955); Rayonier Inc. v. United States, 352 U.S. 315, 1 L. Ed. 2d 354 (1957);¹⁸ and Eastern Air Lines, Inc. v. Union Trust Co., 95 U.S. App. D. C. 189, 221 F.2d 62, aff'd per curiam, 350 U.S. 907, 100 L. Ed. 796 (1955). We also noted that due to the widespread belief that the Dalehite majority carried the discretionary function exception too far, Justice Jackson's dissenting opinion in Dalehite is quoted as often as is the majority opinion.¹⁹ Of particular significance is the fact that while we recognized that Justice Jackson "conceded there were many policy decisions of a

16. By way of dictum, Justice Reed wrote:

In short, the alleged negligence does not subject the government to liability. The decisions held culpable were all responsibly made at a planning rather than operational level. . . .

Dalehite v. United States, 346 U.S. 15, 42, 95 L. Ed. 1427, 1444 (1953).

17. State v. Abbott, 498 P.2d 712, 718 (1972).

18. In Rayonier the Supreme Court said in part that the Federal Tort Claims Act "was founded on the premise that it is preferable to spread the cost of governmental 'negligence' among all those who contribute financially to the government rather than allow the entire risk to fall on the injured party". Rayonier Inc. v. United States, 352 U.S. 315, 319-20, 1 L. Ed. 2d 358 (1957).

19. Reynolds, The Discretionary Function Exception of the Federal Tort Claims Act, 57 Geo. L.J. 81, at 95 (1968).

regulatory or governmental nature which should properly be 'controlled solely by the statutory or administrative mandate and not by the added threat of private damage suits'" he would not extend the discretionary function exception to "housekeeping" activities of the federal government. In this regard, Justice Jackson stated:

[T]here is no good reason to stretch the legislative text to immunize the Government or its officers from responsibility for their acts, if done without appropriate care for the safety of others. Many official decisions even in this area may involve a nice balancing of various considerations, but this is the same kind of balancing which citizens do at their peril and we think it is not within the exception of the statute. 21/

In Abbott, in addition to our discussion of federal case law, we emphasized several decisions of the Supreme Court of California in reaching the conclusion that "discretionary" acts should include only those made at the planning level, while decisions made at the operational or ministerial level should be actionable. In particular, we relied upon Johnson v. State, 73 Cal. Rptr. 240, 447 P.2d 352 (1968). There the court noted that almost any act involves some discretion, and therefore focused its inquiry on the policy behind the discretionary immunity doctrine. In so doing, the Johnson court recognized that

the very process of ascertaining whether

20. State v. Abbott, 498 P.2d 712, 718 (1972).

21. Dalehite v. United States, 346 U.S. 15, 60, 97 L. Ed. 1427, 1453 (1953).

an official determination rises to the level of insulation from judicial review requires sensitivity to the considerations that enter into it and an appreciation of the limitations on the court's ability to reexamine it. . . .

. . . Courts and commentators have therefore centered their attention on an assurance of judicial abstention in areas in which the responsibility for basic policy decisions has been committed to coordinate branches of government. Any wider judicial review, we believe, would place the court in the unseemly position of determining the propriety of decisions expressly entrusted to a coordinate branch of government. Moreover, the potentiality of such review might even in the first instance affect the coordinate body's decision-making process (emphasis in original) 24/

We take this occasion to reaffirm our adoption in Abbott of the planning-operational test, within an analytical framework which is sensitive to the policies underlying the discretionary function or duty exception of Alaska's Tort Claims Act. Act. In applying these analytical tools to the circumstances of the case at bar, we hold that the superior court did not err in refusing to extend the discretionary function exception to

22. Johnson v. State, 73 Cal. Rptr. 240, 248, 447 P.2d 352, 360 (1968).

In Abbott, we also noted that Professor Reynolds holds the view that the planning-operational distinction adequately serves what he regards as the main purpose of the discretionary function exception, namely: (1) The need to preserve separation of powers by limiting judicial re-examination of decisions made by the other branches of government; (2) the fact that courts are not equipped to investigate and balance all the factors that go into an executive or legislative decision; (3) the public interest in preventing the enormous and unpredictable liability that could result from judicial re-examination of the decisions of the other branches of government. Reynolds, note 19 supra at 121-23, 128-31.

petitioner. In the trial court, the questions in dispute turned on whether the state properly marked and striped a portion of the Seward Highway north of the Granite Creek Campground access road. In our view, functions of this nature do not involve broad basic policy decisions which come within the "planning" category of decisions which are expressly entrusted to a coordinate branch of government. We are further persuaded that resolution of questions such as whether or not the state properly striped or marked a portion of highway as it relates to the state's duty of care to users of the highway presents facts that courts are equipped to evaluate within traditional judicial fact-finding and decision-making processes.

24

Our decision is in accord with the holding and reasoning of the Supreme Court of Hawaii in Rogers v. State, 51 Hawaii 293, 459 P.2d 378 (1969). In Rogers, the state contended that its negligence in locating the road signs and restriping the center lines was not actionable under the discretionary function

23. In his memorandum decision, the trial judge wrote in part: "The defendant State has pled a defense that no cause of action was stated by the plaintiff in the claim under the Alaska Claims Act. While not specified by the State, I assume this is the discretionary function defense asserted in an earlier tort action against the State (AS 09.50.250). Inapplicability of this defense to tort claims involving operational level decisions was settled in State v. Abbott, 498 P.2d 712, 717-21 (Alaska 1972). No further discussion is required of this defense".

24. Inherent in our holding is the conclusion that no eroding of the separation of powers doctrine will result from a ruling that the functions in question are not within the ambit of the discretionary function exception of Alaska's Tort Claims Act.

exception of Hawaii's tort liability act. More particularly, the state contended that

discretion on the part of a State employee is involved in the placement of road signs and restriping of pavement in that road signs are placed after the district maintenance engineer has made a visual observation and has determined where and how they are to be placed, and center lines are restriped after the engineer has taken into consideration such factors as the geographical area involved, the amount of rain, and the volume of traffic in the area. 25 /

Justice Marumoto, writing for the Supreme Court of Hawaii, rejected the state's contention. After discussing the history of the Federal Tort Claims Act and federal decisional authority, Justice Marumoto wrote:

None of the cases mentioned above gave a precise definition as to what is meant by operational level acts. However, we may draft from the decisions in those cases, and others involving the discretionary function exception, a conclusion that operational level acts are those which concern routine, everyday matters, not requiring evaluation of broad policy factors. 26 /

Employing this definitional framework, the Supreme Court of Hawaii concluded that:

Here, such matters as the kinds of road signs to place and where to place them, and which center line stripings to repaint and when to repaint them, did not require evaluation of policies but involved implementation of decisions

25. Rogers v. State, 459 P.2d 378, 380 (Hawaii 1969).

26. Id.

made in everyday operation of governmental affairs. 27/

Admittedly, application of the Abbott "planning - operational" distinction regarding levels of decision-making involves delicate degrees of judgmental values. ²⁸ Although we recognize that it is not possible to articulate a rule which would provide more certainty, we remain convinced that the analytical approach adopted in Abbott is viable and will yield just results.

A second issue the parties were requested to brief related to the standard of care required of the State of Alaska. More particularly, this court asked what is the appropriate standard of care required of petitioner's agents in the event the placement of traffic signs and striping are held to be operational

27. Id. Compare Carroll v. State, Road Comm'n, 27 Utah 2d 384, 496 P.2d 888 (1972); Cameron v. State, 102 Cal. Rptr. 305, 497 P.2d 777 (1972).

In Carroll, the court concluded that

the decision of the road supervisor to use berms as the sole means of protection for the unwary traveler was not a basic policy decision essential to the realization or accomplishment of some basic governmental policy, program, or objective. His decision did not require the exercise of basic policy evaluation, judgment, and expertise on the part of the Road Commission. His determination may properly be characterized as one at the operational level of decision making
(footnotes omitted)

Carroll v. State, Road Comm'n, 27 Utah 2d 384, 496 P.2d 888, 891-92 (1972).

28. It appears that the Court of Appeals of Oregon would reach a different holding than we do in the instant case. Weaver v. Lane County, 499 P.2d 1351 (Ore. App. 1972).

functions rather than planning functions for purposes of the discretionary function exception to Alaska's Tort Claims Act. In response, petitioner State of Alaska has argued that "The State is to be judged by a standard of professional care in the same manner as a private engineer. To establish negligence on the part of the State or its agents, it is necessary to demonstrate professional malpractice". Respondents counter with the argument that the state's duty of care in the circumstances was established in State v. Abbott, 498 P.2d 712 (Alaska 1972). Again we find we are in agreement with respondents' position and think Abbott controlling.

In Abbott, we held that the state's duty of care to users of its highways "should be defined by ordinary negligence principles".²⁹ There we stated that the state "is not an insurer of the safety of motorists" and recognized that it is "the duty of highway authorities to exercise reasonable care to keep the highway in safe condition".³⁰ In deciding that this was the appropriate standard to employ, we were influenced by the fact that AS 09.50.250 "contains no indication that the legislature intended the state should be held to a lesser standard of care than private individuals";³¹ that AS 09.50.250 embodies a legislative decision in favor of risk-spreading; and that "While the negligence

29. State v. Abbott, 498 P.2d 712, 724 (Alaska 1972).

30. Id., 498 P.2d at 726, note 41, where case authorities from other jurisdictions adopting the same standard of care are collected.

31. Id., 498 P.2d at 724.

standard satisfies the strong public policy favoring compensation of individuls injured by the tortious conduct of the state, it is an extremely flexible standard, and consequently will not inhibit the vigorous and effective performance by the state of its duties in the way that a more rigid standard might".³²

We are unpersuaded that our adoption in Abbott of ordinary negligence principles as the appropriate standard of care owed by the State of Alaska to users of its highways should be either abandoned or modified. Therefore, we hold that the superior court did not err in following ordinary negligence principles in deciding the liability issues in the case at bar. Thus, the appropriate standard of care required of petitioner and its agents was to use reasonable care to keep the highway in a safe condition for the reasonably prudent traveler.³³

At trial the disputed issues concerning the state's

32. Id., 498 P.2d at 725. In this regard, Justice Erwin, writing for this court in Abbott, further elaborated:

Moreover, when the negligence standard is applied in conjunction with the policy-oriented interpretation of the discretionary function exception outlined in the previous section, the danger of excessive judicial interference with important decisions committed to the coordinate branches of government is avoided.

State v. Abbott, 498 P.2d 712, 725 (Alaska 1972).

33. Donnelly v. Ives, 159 Conn. 163, 268 A.2d 406, 408 (Conn. 1970); Martin v. State, Dep't of Highways, 175 So. 2d 441, 443 (La. 1965), where the court stated, "Generally it is the duty of the highway department to construct and maintain the highways . . . reasonably safe for a traveler himself exercising ordinary care; a highway will be deemed safe within these requirements if it may be negotiated successfully by all but the very reckless and careless drivers, there being no obligation to construct and maintain highways so as to insure the safety of such drivers".

alleged liability centered on whether or not the state should have placed a no-passing barrier stripe on the Seward Highway in the area leading up to the Granite Creek Campground entrance, and whether or not the state should have placed highway warning signs in advance of the campground roadway intersection with the Seward Highway.³⁴ Concerning the state's duty of care, AS 19.05.010 provides that the Department of Highways "is responsible for the planning, construction, maintenance, protection, and control of the state highway system". AS 19.05.130 defines the term "maintenance" in part to encompass the preservation and operation of "highway facilities and services to provide satisfactory and safe highways". AS 19.10.040 requires that "[t]he department shall classify, designate and mark highways under its jurisdiction and shall provide a uniform system of marking and posting these highways. The system of marking and posting shall correlate with and shall, as far as possible, conform to the recommendations of the Manual on Traffic Control Devices as adopted by the American Association of State Highway Officials".³⁵ At the time of the

34. More specifically, it was asserted that the State of Alaska was negligent in failing to place a yellow "no pass" barrier stripe, preventing southbound vehicles from legally passing, at the entrance of the Granite Creek Campground, and for an appropriate distance north.

35. AS 19.10.050 provides that:

The department shall prescribe types of traffic control signals to regulate traffic on highways. These signals shall correlate with and, as far as possible, conform to the recommendations of the Manual on Uniform Traffic Control Devices as adopted by the American Association of State Highway Officials. The department shall prescribe uniform rules for the placing and installation of traffic control signals.

accident in question, the 1961 Uniform Manual of Traffic Control Devices provides in Section 2B-7 that:

No-passing zones shall be established at vertical and horizontal curves and elsewhere on two and three lane highways where passing must be prohibited because of dangerously-restricted sight distances or other hazardous conditions.

During the trial the bulk of the professional engineering testimony received went to the issue of whether or not the entrance roadway to the Granite Creek Campground was an "other hazardous condition" within the ambit of Section 2B-7, although other theories of liability were advanced and evidence produced relating thereto by respondents. ³⁶ All of which bring us to another aspect of the proceedings below which is raised by our review of the superior court's decision.

In his memorandum decision, the trial court concluded in part "that the State was negligent in failing, as a safety minimum, to provide a yellow no-pass barrier stripe on the Seward Highway, from the present southerly terminus of the existing barrier stripe about 663 feet to the north, and continuing south past the entrance

36. The trial court found it "immaterial that a no-passing banner stripe appears once to have been in existence along the stretch of road where the accident occurred. It is also of little materiality to determine that, at the time of the accident, the junction of the campground with the Seward Highway be determined an 'intersection'".

to the Granite Creek Campground. This negligence was a legal cause
of plaintiffs' damages." ³⁷

Study of the court's memorandum decision indicates that the trial judge found the following "facts" furnished the basis for his conclusions: John Ward could have stopped his vehicle before striking DeBeau's jeep, if he had known DeBeau was going to turn left; that Ward would not have pulled out if there had been a no-pass barrier stripe or a "do not pass" sign; ³⁸ and that "the narrow road and lack of shoulder gave him no safe electives in evading the collision when he was committed to his pass, and it was too late to stop. He should not have been permitted to

37. In an order entered subsequent to its memorandum decision, the superior court implemented and amended its findings of fact and conclusions of law in part by stating that

the Court's decision was not based on dangerously restricted sight distance within the meaning of Sections 2b-7 and 2b-10 of the Manual of Uniform Traffic Control Devices [and] that the stopping sight distance of the junction of the Granite Creek Campground roadway and the Seward Highway was not a basis for the court's decision.

38. The trial judge also found that "If there had been a 'T' intersection sign, he would have passed, but would have travelled more slowly".

attempt a 'flying pass' at this location".

Civil Rule 52(a) requires that in a nonjury trial or in an action tried with an advisory jury, the "Court shall find the facts specially and state separately its conclusions of law thereon and direct the entry of the appropriate judgment". In applying this rule, we have consistently said that it is the trial court's duty under this rule to make findings sufficient to give a clear understanding of the basis of its decisions in order to enable intelligent review on appeal. ⁴⁰ Although the trial court's findings of fact and conclusions of law embodied in its memorandum decision probably satisfy the requirements of Civil Rule 52(a) and the judicial construction this rule has received, we deem it

39. In reaching this conclusion, the trial court gave particular emphasis to the testimony of two of respondents' expert witnesses. In his memorandum decision, the trial judge wrote in part:

It was the testimony of the expert witness Cysewski, who testified . . . that the circumstances at the accident scene, including the configuration of the road and the traffic control markings, encouraged an overtaking driver to make in effect an illegal pass in too short a space of time and space. In other words, Mr. Cysewski testified, the driver was entrapped by the circumstances.

. . . Mr. Bishop, a traffic engineer . . ., testified that the existence of the free passing zone beginning at the crest of the hill, 633 feet to the intersection, placed the driver of the passing vehicle within a dangerous condition, as he would have to complete his pass over a distance of 516 feet, otherwise he will be in the intersection during his pass.

40. Morrison v. State, 516 P.2d 402, 407 (Alaska 1973); Abbott v. State, 498 P.2d 712, 730 (Alaska 1972); Beaulieu v. Elliott, 434 P.2d 665, 670 (Alaska 1967); Patrick v. Sedwick, 413 P.2d 169, 174-75 (Alaska 1969); Hamilton v. Lotto, 391 P.2d 948, 949 (Alaska 1964).

appropriate on remand to afford the trial court the opportunity of making more detailed findings of fact pertaining to the negligence of the state, causation, and whether either or both of the parties to the collision failed to act in a reasonably prudent manner, and if they did, whether such conduct affects in any manner the state's liability in the circumstances of the case. 41

Affirmed in part and remanded for further proceedings in accordance with this opinion.

41. Earlier we held that a remand is necessary in order to permit the parties and the trial court to develop the record pertaining to the court's view of the accident scene and carrying out an experiment. In this regard, we deem it advisable for the trial court to indicate not only what weight it accorded the results of any experiment conducted but also to review its memorandum decision in order to make any modifications necessitated by its supplemental findings regarding the view and experiment.