

HB

22

Revision Date: _____ Dept. Affected: Revenue
 Title: Civil Liability for Bootleggers BRU: Alcoholic Beverage Control Board
 Component: Alcoholic Beverage Control Board
 Sponsor: Representative Ivan
 Requestor: (H) JUD COMPONENT SERIAL NO. 100

Expenditures/Revenues: (Thousands of Dollars)

OPERATING EXPENDITURES	FY 98	FY 99	FY 00	FY 01	FY 02	FY 03
PERSONAL SERVICES						
TRAVEL						
CONTRACTUAL						
SUPPLIES						
EQUIPMENT						
LAND & STRUCTURES						
GRANTS, CLAIMS						
MISCELLANEOUS						
TOTAL OPERATING	0.0	0.0	0.0	0.0	0.0	0.0

CAPITAL EXPENDITURES						
----------------------	--	--	--	--	--	--

CHANGE IN REVENUES ()						
------------------------	--	--	--	--	--	--

FUND SOURCE (Thousands of Dollars)

1002 Federal Receipts						
1003 GF Match						
1004 GF						
1005 GF/Program Receipts						
1037 GF/Mental Health						
Other						
TOTAL	0.0	0.0	0.0	0.0	0.0	0.0

Estimate of any current year (FY97) cost \$ 0.0

POSITIONS:

FULL-TIME						
PART-TIME						
TEMPORARY						

ANALYSIS: (Attach a separate page if necessary)

This bill amends Alaska law to clearly assert that immunity for social hosts that serve alcoholic beverages does not extend to those persons engaged in the illegal sale of alcohol. Alaska's strong immunity provisions for social hosts was reaffirmed and relied upon in the 1996 Alaska Supreme Court decision, Chokwok v. Worley, that concluded that civil liability for social hosts applied even when serving minors. This bill is designed to remove the potential for this doctrine to be used as a defense by bootleggers facing prosecution.

No fiscal impact is anticipated.

Prepared by: Douglas B. Griffin Phone: (907) 277-8638
 Division: Alcoholic Beverage Control Board Date: January 22, 1997
 Approved by Commissioner: Wilson L. Condon Date: January 22, 1997
 Agency: Revenue

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FISCAL NOTE

STATE OF ALASKA
1997 LEGISLATIVE SESSION

BILL NO. HB 22

Revision Date: _____
Title: Civil liability for bootlegging

Dept. Affected: Alaska Court System
BRU: Trial Courts
Component: _____

Sponsor: Rep. Ivan
Requestor: House Judiciary

COMPONENT SERIAL NO. 768

Expenditures/Revenues (Thousands of Dollars)

OPERATING EXPENDITURES	FY 98	FY 99	FY 00	FY 01	FY 02	FY 03
PERSONAL SERVICES						
TRAVEL						
CONTRACTUAL						
SUPPLIES						
EQUIPMENT						
LAND & STRUCTURES						
GRANTS & CLAIMS						
MISCELLANEOUS						
TOTAL OPERATING	0.0	0.0	0.0	0.0	0.0	0.0

CAPITAL EXPENDITURES						
----------------------	--	--	--	--	--	--

CHANGE IN REVENUES (
----------------------	--	--	--	--	--	--

Fund Source (Thousands of Dollars)

1002 Federal Receipts						
1003 GF Match						
1004 GF	0.0	0.0	0.0	0.0	0.0	0.0
1005 GF/Program Receipts						
1037 GF/Mental Health						
Other						
TOTAL	0.0	0.0	0.0	0.0	0.0	0.0

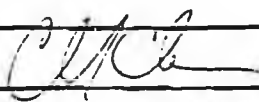
Estimate of any current year (FY 97) cost: None

Positions

Full-Time						
Part-Time						
Temporary						

ANALYSIS: (Attach a separate page if necessary)

No fiscal impact.

Prepared by: C. S. Christensen III, Staff Counsel 
Agency: Alaska Court System

Phone: 264-8228
Date: 01/23/97

Approved by: Arthur H. Snowden, II, Administrative Director 
Agency: Alaska Court System

Date: 01/23/97

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FISCAL NOTE

STATE OF ALASKA
1997 LEGISLATIVE SESSION

BILL NO. HB 22

Revision Date: _____ Dept. Affected: Department of Law
 Title: An Act relating to civil liability for illegal sales of BRU: Civil Division
alcoholic beverages Component: General Legal Services
 Sponsor: Representative Ivan
 Requester: (H) JUDICIARY COMPONENT SERIAL NO. 2087

Expenditures/Revenues (Thousands of Dollars)

OPERATING EXPENDITURES	FY 98	FY 99	FY 00	FY 01	FY 02	FY 03
PERSONAL SERVICES						
TRAVEL						
CONTRACTUAL						
SUPPLIES						
EQUIPMENT						
LAND & STRUCTURES						
GRANTS, CLAIMS						
MISCELLANEOUS						
TOTAL OPERATING	0.0	0.0	0.0	0.0	0.0	0.0

CAPITAL EXPENDITURES						
----------------------	--	--	--	--	--	--

CHANGE IN REVENUES ()						
------------------------	--	--	--	--	--	--

FUND SOURCE (Thousands of Dollars)

1002 Federal Receipts						
1003 GF Match						
1004 GF						
1005 GF/Program Receipts						
1006 GF/MHTIA						
Other						
TOTAL	0.0	0.0	0.0	0.0	0.0	0.0

Estimate of any current year (FY97) cost: \$ 0.0

POSITIONS

FULL-TIME	0.0	0.0	0.0	0.0	0.0	0.0
PART-TIME						
TEMPORARY						

ANALYSIS: (Attach a separate page if necessary)

This bill would make individuals who sell or barter an alcoholic beverage to another person in violation of AS 04.11.010 strictly liable for civil damages resulting from the intoxication of the person receiving the alcoholic beverage.

Passage of this legislation would have no fiscal impact on the Department of Law.

Prepared by: Joan Kasson
 Division: Administrative Services Division
 Approved by Commissioner: Bruce M. Botelho, Attorney General
 Agency: Department of Law

Phone: 455-5370
 Date: 1/14/97
 Date: 1/14/97

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HOUSE COMMITTEE REPORT

(7)

Date Referred to Committee: January 13, 1997

FURTHER REFERRALS:

Date of Committee Action: 2/14/97

The JUDICIARY Committee considered:

HB 22

HOUSE BILL NO. 22

CIVIL LIABILITY FOR BOOTLEGGERS

"An Act relating to civil liability for illegal sales of alcoholic beverages; and providing for an effective date."

recommends it be replaced with the following committee substitute CSHB 22 (JUD) the same title a new title

additional referral to _____ Committee
 attached amendment(s)

ADOPTS: _____ Letter of Intent

ATTACHES NEW FISCAL NOTE(S): (Dept)

APPROVES PREVIOUS: (Dept/Date)

fiscal note(s) _____

fiscal note(s) _____

zero fiscal note(s) CT. SYS., DEPT. of LAW, ABC BD.

zero fiscal note(s) _____

SIGNING WITH RECOMMENDATIONS	DP	DNP	NR	AM
<i>[Signature]</i> CROFT	✓			
<i>[Signature]</i> ROKEBERG	✓			
<i>[Signature]</i> PORTER	✓			
<i>[Signature]</i> GREEN	✓			
<i>[Signature]</i> RUNDE	✓			
<i>[Signature]</i> JAMES	✓			
<i>[Signature]</i> BERKOWITZ	✓			

CHAIR'S SIGNATURE *[Signature]*

CS FOR HOUSE BILL NO. 22(JUD)

IN THE LEGISLATURE OF THE STATE OF ALASKA

TWENTIETH LEGISLATURE - FIRST SESSION

BY THE HOUSE JUDICIARY COMMITTEE

Offered:
Referred:

Sponsor(s): REPRESENTATIVES IVAN, Porter

A BILL

FOR AN ACT ENTITLED

1 "An Act relating to civil liability for illegal sale or barter of an alcoholic
2 beverage or a controlled substance; and providing for an effective date."

3 BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF ALASKA:

4 * Section 1. AS 04.21.020 is amended by adding new subsections to read:

5 (b) Notwithstanding (a) of this section, a person who sells or barter an
6 alcoholic beverage to another person in violation of AS 04.11.010 is strictly liable
7 (1) to the recipient or another person for civil damages if, while under the influence
8 of the alcoholic beverage, the person receiving the alcoholic beverage engages in
9 conduct that results in civil damages and the recipient's being under the influence of
10 the alcoholic beverage substantially contributes to the civil damages; and (2) for the
11 cost to the state or a political subdivision of the state to criminally prosecute a person
12 who receives an alcoholic beverage from a person who violates AS 04.11.010 if the
13 prosecution results from the violation of AS 04.11.010 described in this subsection.
14 In this subsection, "civil damages" includes damages for personal injury, death, or

1 injury to property of a person, including the state or a political subdivision of the state.

2 (c) In an action under (b) of this section, it is not a defense that the person
3 receiving the alcoholic beverage voluntarily consumed the alcoholic beverage or that
4 the person receiving the alcoholic beverage was voluntarily under the influence of the
5 alcoholic beverage.

6 * Sec. 2. AS 09.65 is amended by adding a new section to read:

7 **Sec. 09.65.205. Civil liability for controlled substances offense.** (a) A
8 person who sells or barter a controlled substance in violation of AS 11.71 is strictly
9 liable

10 (1) to the recipient or another person for civil damages if, while under
11 the influence of the controlled substance, the person receiving the controlled substance
12 engages in conduct that results in civil damages and the recipient's being under the
13 influence of the controlled substance substantially contributes to the civil damages; and

14 (2) for the cost to the state or political subdivision to criminally
15 prosecute a person who receives a controlled substance from a person who violates
16 AS 11.71 if the prosecution results from the violation of AS 11.71 described in this
17 subsection.

18 (b) In an action under (a) of this section, it is not a defense that the person
19 receiving the controlled substance voluntarily consumed the controlled substance or
20 was voluntarily under the influence of the controlled substance.

21 (c) In this section,

22 (1) "civil damages" includes damages for personal injury, death, or
23 injury to property of a person, including the state or a political subdivision of the state;

24 (2) "controlled substance" has the meaning given in AS 11.71.900.

25 * Sec. 3. This Act takes effect July 1, 1997.

0-LS0148K
Ford
2/12/97

CS FOR HOUSE BILL NO. 22()
IN THE LEGISLATURE OF THE STATE OF ALASKA
TWENTIETH LEGISLATURE - FIRST SESSION

BY

Offered:
Referred:

Sponsor(s): REPRESENTATIVE IVAN

A BILL

FOR AN ACT ENTITLED

1 "An Act relating to civil liability for illegal sale or barter of an alcoholic
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5 (b) Notwithstanding (a) of this section, a person who sells or barter an
6 alcoholic beverage to another person in violation of AS 04.11.010 is strictly liable to
7 the recipient or another person for (1) civil damages if, while under the influence of
8 the alcoholic beverage, the person receiving the alcoholic beverage engages in conduct
9 that results in civil damages and the recipient's being under the influence of the
10 alcoholic beverage substantially contributes to the civil damages; and (2) ^{for} the cost to
11 the state or a political subdivision of the state to criminally prosecute a person who
12 receives an alcoholic beverage from a person who violates AS 04.11.010 if the
13 prosecution results from the violation of AS 04.11.010 described in this subsection.
14 In this subsection, "civil damages" includes damages for personal injury, death, or

1 injury to property of a person, including the state or a political subdivision of the state.

2 (c) In an action under (b) of this section, it is not a defense that the person
3 receiving the alcoholic beverage voluntarily consumed the alcoholic beverage or that
4 the person receiving the alcoholic beverage was voluntarily under the influence of the
5 alcoholic beverage.

6 * Sec. 2. AS 09.65 is amended by adding a new section to read:

7 Sec. 09.65.205. Civil liability for controlled substances offense. (a) A
8 person who sells or barter⁽¹⁾s a controlled substance in violation of AS 11.71 is strictly
9 liable to the recipient or another person for

10 ~~(1)~~ civil damages if, while under the influence of the controlled
11 substance, the person receiving the controlled substance engages in conduct that results
12 in civil damages and the recipient's being under the influence of the controlled
13 substance substantially contributes to the civil damages; and

14 ^{for} (2) the cost to the state or political subdivision to criminally prosecute
15 a person who receives a controlled substance from a person who violates AS 11.71 if
16 the prosecution results from the violation of AS 11.71 described in this subsection.

17 (b) In an action under (a) of this section, it is not a defense that the person
18 receiving the controlled substance voluntarily consumed the controlled substance or
19 was voluntarily under the influence of the controlled substance.

20 (c) In this section,

21 (1) "civil damages" includes damages for personal injury, death, or
22 injury to property of a person, including the state or a political subdivision of the state;

23 (2) "controlled substance" has the meaning given in AS 11.71.900.

24 * Sec. 3. This Act takes effect July 1, 1997.

WORK DRAFT

WORK DRAFT

WORK DRAFT

0-LS0148/E
Ford
1/28/97

CS FOR HOUSE BILL NO. 22()

IN THE LEGISLATURE OF THE STATE OF ALASKA

TWENTIETH LEGISLATURE - FIRST SESSION

BY

Offered:
Referred:

Sponsor(s): REPRESENTATIVE IVAN

A BILL

FOR AN ACT ENTITLED

1 "An Act relating to civil liability for illegal sales of alcoholic beverages and to
2 civil liability for controlled substances offenses; and providing for an effective
3 date."

4 BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF ALASKA:

5 * Section 1. AS 04.21.020 is amended by adding new subsections to read:

6 (b) Notwithstanding (a) of this section, a person who sells or barters an
7 alcoholic beverage to another person in violation of AS 04.11.010 is strictly liable for
8 civil damages if the person receiving the alcoholic beverage becomes intoxicated and
9 the intoxication substantially contributed to the civil damages. In this subsection,
10 "civil damages" includes personal injury, death, or property damage of an individual,
11 the state, or a political subdivision of the state and the cost to the state or a political
12 subdivision of the state to criminally prosecute a person who receives an alcoholic
13 beverage from a person who violates AS 04.11.010.

14 (c) Voluntary intoxication by an alcoholic beverage or a controlled substance

positive expression of no defense

*File 4
Title 28
35.029
.033*

*intox
def.
Crim
Statute*

Post-it® Fax Note	7671	Date	# of pages ▶ 2
To	SUSAN COX	From	LISA KIRSCH
Co./Dept.	SPECIAL LITIG.	Co.	HOUSE JUD.
Phone #	465 3600	Phone #	465 4990
Fax #	465 6735	Fax #	465 4316

Post-it® Fax Note	7671	Date	2/3/97 # of pages ▶ 2
To	Anne Carpenter	From	Lisa Kirsch
Co./Dept.	Law - Crim.	Co.	House Jud
Phone #		Phone #	465-4990
Fax #	465 4043	Fax #	" 4316

WORK DRAFT

WORK DRAFT

0-LS0148NF

1 is not a defense to a claim for civil damages under (b) of this section.

2 * Sec. 2. AS 09.65 is amended by adding a new section to read:

3 **Sec. 09.65.205. Civil liability for controlled substances offense.** A person
 4 who is ~~convicted~~ of an offense under AS 11.71 or 11.73 is ~~also~~ strictly liable for civil
 5 damages that result from the commission of the offense if the commission of the
 6 offense substantially contributed to the civil damages. Voluntarily being under the
 7 influence of a controlled substance is not a defense to a claim for civil damages under
 8 this section. In this section, "civil damages" includes personal injury, death, or
 9 property damage of an individual, the state, or a political subdivision of the state.

10 * Sec. 3. This Act takes effect July 1, 1997.

intox?

*too wide a net
sell provision
only?*

0-LS0148\H
Ford
2/10/97

CS FOR HOUSE BILL NO. 22()

IN THE LEGISLATURE OF THE STATE OF ALASKA

TWENTIETH LEGISLATURE - FIRST SESSION

BY

**Offered:
Referred:**

Sponsor(s): REPRESENTATIVE IVAN

A BILL

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5 (b) Notwithstanding (a) of this section, a person who sells or barter an
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7 (1) civil damages if, while under the influence of the alcoholic beverage, the person
8 receiving the alcoholic beverage engages in conduct that results in civil damages and
9 the recipient's being under the influence of the alcoholic beverage substantially
10 contributes to the civil damages; and (2) the cost to the state or a political subdivision
11 of the state to criminally prosecute a person who receives an alcoholic beverage from
12 a person who violates AS 04.11.010 if the prosecution results from the violation of
13 AS 04.11.010 described in this subsection. In this subsection, "civil damages" includes
14 damages for personal injury, death, or injury to property of a person, including the

1 state or a political subdivision of the state.

2 (c) In an action under (b) of this section, it is not a defense that the person
3 receiving the alcoholic beverage voluntarily consumed the alcoholic beverage or that
4 the person receiving the alcoholic beverage was voluntarily under the influence of the
5 alcoholic beverage.

6 * Sec. 2. AS 09.65 is amended by adding a new section to read:

7 **Sec. 09.65.205. Civil liability for controlled substances offense.** (a) A
8 person who sells or barter a controlled substance in violation of AS 11.71 is strictly
9 liable for

10 (1) civil damages if, while under the influence of the controlled
11 substance, the person receiving the controlled substance engages in conduct that results
12 in civil damages and the recipient's being under the influence of the controlled
13 substance substantially contributes to the civil damages; and

14 (2) the cost to the state or political subdivision to criminally prosecute
15 a person who receives a controlled substance from a person who violates AS 11.71 if
16 the prosecution results from the violation of AS 11.71 described in this subsection.

17 (b) In an action under (a) of this section, it is not a defense that the person
18 receiving the controlled substance voluntarily consumed the controlled substance or
19 was voluntarily under the influence of the controlled substance.

20 (c) In this section.

21 (1) "civil damages" includes damages for personal injury, death, or
22 injury to property of a person, including the state or a political subdivision of the state;

23 (2) "controlled substance" has the meaning given in AS 11.71.900.

24 * Sec. 3. This Act takes effect July 1, 1997.



FACSIMILE TRANSMISSION COVER SHEET

TORT Section
1031 W. 4TH AVE.
SUITE 200

ANCHORAGE, AK 99501

PHONE: (907) 269-5190 FAX: (907) 258-0760

DATE: 2/7/97

TO: LISA KIRSCH FAX: (907) 465-4316

COUNSEL FOR HOUSE JUDICIARY COMMITTEE

FROM: GAIL VOITLANDER

ASSISTANT ATTORNEY GENERAL

NUMBER OF PAGES INCLUDING THIS SHEET: 2

MESSAGE: _____

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(907) 269-5190 ASK FOR: SANDY

(b) Notwithstanding (a) of this section, a person who sells or barter an alcoholic beverage in violation of AS 04.11.010 is strictly liable for (1) civil damages if the recipient of the alcoholic beverage from that person engages in conduct, while under the influence of the alcoholic beverage, which results in civil damages and the intoxication of the recipient substantially contributes to the civil damages; and (2) the cost, to the state or a political subdivision of the state, of the criminal prosecution of the recipient for conduct engaged in while under the influence of the alcoholic beverage received in violation of AS 04.11.010.

*Lisa -
How about above with
parallel changes to drug
sale provisions?
Gail Viglander*

Alaska State Legislature



House of Representatives
House Judiciary Committee

State Capitol, Room 120
Juneau, Alaska 99801-1182
(907) 465-4990

MEMORANDUM

Date: February 7, 1997

To: Gail Voigtlander, AAG
Fax: 258-0760

From: Lisa Kirsch, Counsel for House Judiciary Committee
Fax: 465-4316

RE: HB 22 Bootlegger Liability

Here's my proposed amendment:

Page 1, line 7, after, "(1) civil damages if"

Insert: "while under the influence of the alcoholic beverage the person receiving the alcoholic beverage engages in conduct which results in civil damages and the intoxication of the person receiving the alcoholic beverage substantially contributes to the civil damages."

Delete: line 7 from "the person receiving the alcoholic beverage..." through line 8, "...under the influence of the alcoholic beverage;"

269 - 5190
HB 22 Gail V.

Post-It® Fax Note	7671	Date	2/6/97	# of pages	2
To	GAIL VOIGTLANDER		From	LISA KIRSCH	
Co./Dept.	Spec. Prosec.		Co.	HOUSE JUD.	
Phone #	269 5100		Phone #	465 4990	
Fax #	258 0760		Fax #	4316	

0-LS0148VF
Ford
2/5/97

ANY Q CALL ME PLEASE

CS FOR HOUSE BILL NO. 22()

IN THE LEGISLATURE OF THE STATE OF ALASKA

TWENTIETH LEGISLATURE - FIRST SESSION

BY

**Offered:
Referred:**

Sponsor(s): REPRESENTATIVE IVAN

A BILL

FOR AN ACT ENTITLED

1 "An Act relating to civil liability for illegal sale or barter of an alcoholic
2 beverage or a controlled substance; and providing for an effective date."

3 **BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF ALASKA:**

4 * **Section 1.** AS 04.21.020 is amended by adding new subsections to read:

5 (b) Notwithstanding (a) of this section, a person who sells or barter an
6 alcoholic beverage to another person in violation of AS 04.11.010 is strictly liable for
7 (1) civil damages if the person receiving the alcoholic beverage substantially
8 contributed to the civil damages while under the influence of the alcoholic beverage;
9 and (2) the cost to the state or a political subdivision of the state to criminally
10 prosecute a person who receives an alcoholic beverage from a person who violates
11 AS 04.11.010 if the prosecution results from the violation of AS 04.11.010 described
12 in this subsection. In this subsection, "civil damages" includes damages for personal
13 injury, death, or injury to property of a person, including the state or a political
14 subdivision of the state.

1 (c) In an action under (b) of this section, it is not a defense that the person
2 receiving the alcoholic beverage voluntarily consumed the alcoholic beverage or that
3 the person receiving the alcoholic beverage was voluntarily under the influence of the
4 alcoholic beverage.

5 * Sec. 2. AS 09.65 is amended by adding a new section to read:

6 **Sec. 09.65.205. Civil liability for controlled substances offense.** (a) A
7 person who sells or barter a controlled substance in violation of AS 11.71 is strictly
8 liable for

9 (1) civil damages if the person receiving the controlled substance
10 substantially contributed to the civil damages while under the influence of the
11 controlled substance; and

12 (2) the cost to the state or political subdivision to criminally prosecute
13 a person who receives a controlled substance from a person who violates AS 11.71 if
14 the prosecution results from the violation of AS 11.71 described in this subsection.

15 (b) In an action under (a) of this section, it is not a defense that the person
16 receiving the controlled substance voluntarily consumed the controlled substance or
17 was voluntarily under the influence of the controlled substance.

18 (c) In this section,

19 (1) "civil damages" includes damages for personal injury, death, or
20 injury to property of a person, including the state or a political subdivision of the state;

21 (2) "controlled substance" has the meaning given in AS 11.71.900.

22 * Sec. 3. This Act takes effect July 1, 1997.

WORK DRAFT

WORK DRAFT

WORK DRAFT

0-LS0148VE
Ford
1/28/97

CS FOR HOUSE BILL NO. 22()
IN THE LEGISLATURE OF THE STATE OF ALASKA
TWENTIETH LEGISLATURE - FIRST SESSION

BY

Offered:
Referred:

Sponsor(s): REPRESENTATIVE IVAN

A BILL

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4 BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF ALASKA:

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7 alcoholic beverage to another person in violation of AS 04.11.010 is strictly liable for
8 civil damages if the person receiving the alcoholic beverage becomes intoxicated and
9 the intoxication substantially contributed to the civil damages. In this subsection,
10 "civil damages" includes ^{damages for} personal injury, death, or ^{injury to} property ~~damage~~ of an individual,
11 the state, or a political subdivision of the state and the cost to the state or a political
12 subdivision of the state to criminally prosecute a person who receives an alcoholic
13 beverage from a person who violates AS 04.11.010.

14 (c) Voluntary intoxication by an alcoholic beverage or a controlled substance

WORK DRAFT

WORK DRAFT

0-LS01481E

1
2
3
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9
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is not a defense to a claim for civil damages under (b) of this section.

* Sec. 2. AS 09.65 is amended by adding a new section to read:

Sec. 09.65.205. Civil liability for controlled substances offense. A person who is convicted of an offense under AS 11.71 or 11.73 is also strictly liable for civil damages that result from the commission of the offense if the commission of the offense substantially contributed to the ~~civil damages~~ ^{personal injuries, death or injury to} property. Voluntarily being under the influence of a controlled substance is not a defense to a claim for civil damages under this section. In this section, "civil damages" includes ^{damages for} personal injury, death, or property ~~damage~~ of an individual, the state, or a political subdivision of the state. →

* Sec. 3. This Act takes effect July 1, 1997.

and to the state or political subdivision of the state for the cost to the state or a political subdivision of the state to criminally prosecute a person who receives the controlled substance from a person who is convicted of an offense under AS 11.71 or AS 11.73.

The only way you have to prove is that bootlegger sold

on sale
Gene Kubina

give money ahead up

added

- 1) Alc came from bootlegger to consumer under af.
- 2) into x
- 3) ~~caused~~ Subs Factor

- 2 bumps
- 1 Bootlegger drunk
- 2 Intox caused to party

test

Q For Mike
Do you have

conduct of guy intoxicated from

in Evidence - the person receiving the AB. Conduct of the person receiving the AB results in civil damages and loss of her intox

that intoxication subs contribs. damages those damages

~~the person is~~

resulting ~~test~~

HB22

[

 — Doug Griffin Div. ABC Bd

 — HB22

 he supports —

 — He in Anch — 277-8638

 — can get to 210 —

~~Am...~~ ~~4037~~

William Walters

 Tamara Chrest

 800 478 6822 ex 3273

HB22

Carpet

2/5/97

§ 2 ~~11.73~~

 " under the influence "

 crim def.

✓ [11.71 included poss.

 might want to name

Gail Voigtlander

substantially contributed

Sim v State excessive force
break in nexus

Tocoy's Elbow Room

legal vs prox cause

Supreme Ct

substantial factor

Title 4 - Drunken person

substantially impaired

§2 Self defense

M v O F 11.71.010-060

28.35.033 (c)

cannot limit competent ev.

PROTESTANDO

Protestando /prɒtɛstændɔw/. L. Lat. *Protesting*. The emphatic word formerly used in pleading by way of protestation. See *Protestation*.

Protestants. Those who adhered to the doctrine of Luther; so called because, in 1529, they protested against a decree of the emperor Charles V and of the diet of Spire, and declared that they appealed to a general council. The name is now applied indiscriminately to all the sects, of whatever denomination, who have seceded from the Church of Rome.

Protestation. In old pleading, the indirect affirmation or denial of the truth of some matter which cannot with propriety or safety be positively affirmed, denied, or entirely passed over. The exclusion of a conclusion.

Protest fee. Fee charged by banks or other financial agencies when items (such as checks) presented for collection cannot be collected.

Prothonotary /prɒtɒnɔwdəri/prɒwɒs/. The title given (in e.g. Pennsylvania) to an officer who officiates as principal clerk of some courts.

Protocol /prɒtɒkɔl/. A brief summary of the text of a document. Also, the minutes of a meeting which are generally initiated by the parties present to reflect their assent to the accuracy of the minutes.

A section of the Department of State charged with the preparation of agreements and treaties. Commonly, term refers to the etiquette of diplomacy and the ranking of officials.

Protutor /prɒtɔwtɔr/. Lat. In the civil law, he who, not being the tutor of a minor, has administered his property or affairs as if he had been, whether he thought himself legally invested with the authority of a tutor or not. He who marries a woman who is tutrix becomes, by the marriage, a protutor. The protutor is equally responsible with the tutor.

Prout patet per recordum /prɒwt pɛtət pɛr rɒkɔrdəm/. As appears by the record. In the Latin phraseology of pleading, this was the proper formula for making reference to a record.

Provable. Susceptible of being proved.

Prove. To establish or make certain; to establish a fact or hypothesis as true by satisfactory and sufficient evidence. *Lawson v. Superior Court In and For Los Angeles County*, 155 Cal.App.2d 755, 318 P.2d 812, 814. As used in legal matters and proceedings means to establish, to render or make certain. *Texas & N. O. R. Co. v. Flowers*, Tex.Civ.App., 336 S.W.2d 907, 914. See also *Proof*.

Prover. In old English law, a person who, on being indicted of treason or felony, and arraigned for the same, confessed the fact before plea pleaded, and appealed or accused others, his accomplices, in the same crime, in order to obtain his pardon.

Provide. To make, procure, or furnish for future use, prepare. To supply; to afford; to contribute.

Provided. The word used in introducing a proviso (*q.v.*). Ordinarily it signifies or expresses a condition; but this is not invariable, for, according to the context, it may import a covenant, or a limitation or qualification, or a restraint, modification, or exception to something which precedes.

Provided by law. This phrase when used in a constitution or statute generally means prescribed or provided by some statute.

Province. The district into which a country has been divided; as, the province of Quebec in Canada. More loosely, a sphere of activity or a profession such as medicine or law.

Provincialis /prɒvɪnshijəylɪs/. Lat. In the civil law, one who has his domicile in a province.

Provision. Foresight of the chance of an event happening, sufficient to indicate that any present undertaking upon which its assumed realization might exert a natural and proper influence was entered upon in full contemplation of it as a future possibility.

In commercial law, funds remitted by the drawer of a bill of exchange to the drawee in order to meet the bill, or property remaining in the drawee's hands or due from him to the drawer, and appropriated to that purpose.

Provisional. Temporary; preliminary; tentative; taken or done by way of precaution or *ad interim*.

A term of the check collection process describing payment, credit or other settlement for a check or other item when the person giving the settlement reserves a right, by law or agreement, to recover the payment or credit if the item is not finally paid.

Provisional committee. A committee appointed for a temporary occasion.

Provisional court. A federal court with jurisdiction and powers governed by the order from which it derives its authority. A provisional court established in conquered or occupied territory by military authorities, or the provisional government, is a federal court deriving its existence and all its powers from the federal government.

Provisional government. One temporarily established in anticipation of and to exist and continue until another (more regular or more permanent) shall be organized and instituted in its stead.

Provisional injunction. Term sometimes used for interlocutory or temporary injunction.

Provisional remedy. A remedy provided for present need or for the immediate occasion; one adapted to meet a particular exigency. Particularly, a temporary process available to a plaintiff in a civil action, which secures him against loss, irreparable injury, dissipation of the property, etc., while the action is pending. Such include the remedies of injunction, appointment of a receiver, attachment, or arrest.

Provisional seizure. A remedy known under the law of Louisiana, and substantially the same in general nature as attachment of property in other states.

Proviso /prɒvɪzɔw/. A condition, stipulation, limitation, or provision which is inserted in a deed, lease, mortgage, or contract, and on the performance or non-performance of which the validity of the instrument frequently depends; it usually begins with the word "provided."

A limitation or exception to a grant made or authority conferred, the effect of which is to declare that the one shall not operate, or the other be exercised, unless in the case provided.

A clause or part of a clause in a statute, the office of which is either to except something from the enacting clause, or to qualify or restrain its generality, or to exclude some possible ground of misinterpretation of its extent.

A "proviso" is used to limit, modify or explain the main part of section of statute to which it is appended. *Saginaw County Tp. Officers Ass'n v. City of Saginaw*, 373 Mich. 477, 130 N.W.2d 30, 32. The office of a "proviso" in a statute is to restrict or make clear that which has gone before. *Allen v. Burkhardt*, Okl., 377 P.2d 821, 827. A clause engrafted on a preceding enactment for the purpose of restraining or modifying the enacting clause or of excepting something from its operation which would otherwise have been within it. *Stoller v. State*, 171 Neb. 93, 105 N.W.2d 852, 856. A proviso is sometimes misused to introduce independent pieces of legislation. *Cox v. Hart*, 260 U.S. 427, 43 S.Ct. 154, 157, 67 L.Ed. 332. Its proper use, however, is to qualify what is affirmed in the body of the act, section, or paragraph preceding it, or to except something from the act, but not to enlarge the enacting clause. And it cannot be held to enlarge the scope of the statute.

Exception and proviso distinguished. See Exception.

Proviso est providere presentia et futura, non præterita /prɒvɪzɔw ɛst prɒvɪdɪrɪ prɛzɛnshijə ɛt fytʃɪtʃərə, nɒn prætrɛrɪtɪ/. A proviso is to provide for the present or future, not the past.

Provisor /prɒvɪzɔr/. In old English law, a provider, or purveyor. Also a person nominated to be the next incumbent of a benefice (not yet vacant) by the pope. He that hath the care of providing things necessary; but more especially one who sued to the court of Rome for a provision.

Proviso, trial by. In old English practice, a trial brought on by the defendant, in cases where the plaintiff, after issue joined, neglects to proceed to trial; so called from a clause in the writ to the sheriff, which directs him, in case two writs come to his hands, to execute but one of them. The defendant may take out a *venire facias* to the sheriff, which hath in it these words, *Proviso quod*, etc., provided that if the plaintiff shall take out any writ to that purpose, the sheriff shall summon but one jury on them both.

Provocation. The act of inciting another to do a particular deed. That which arouses, moves, calls forth, causes, or occasions. Such conduct or actions on the part of one person towards another as tend to arouse rage, resentment, or fury in the latter against the former, and thereby cause him to do some illegal act against or in relation to the person offering the provocation. See also *Provoker*.

Provocation which will reduce killing to manslaughter must be of such character as will, in mind of average reasonable man, stir resentment likely to cause violence, obscure the reason, and lead to action from passion rather than judgment. There must be a state of passion without time to cool placing defendant beyond control of his reason. Provocation carries with it the idea of some physical aggression or some assault which suddenly arouses heat and passion in the person assaulted.

Provoke. To excite; to stimulate; to arouse. To irritate, or enrage.

Provost-Marshal. In military law, the officer acting as the head of the military police of any post, camp, city or other place in military occupation, or district under the reign of martial law. He or his assistants may, at any time, arrest and detain for trial, persons subject to military law committing offenses, and may carry into execution any punishments to be inflicted in pursuance of a court martial.

Proxenota /prɒksɔniətə/. Lat. In the civil law, a broker; one who negotiated or arranged the terms of a contract between two parties, as between buyer and seller; one who negotiated a marriage; a match-maker.

Proximate. Immediate; nearest; direct, next in order. In its legal sense, closest in causal connection. *Armijo v. World Ins. Co.*, 78 N.M. 204, 429 P.2d 904, 905. Next in relation to cause and effect.

Proximate cause. That which, in a natural and continuous sequence, unbroken by any efficient intervening cause, produces injury, and without which the result would not have occurred. *Wisniewski v. Great Atlantic & Pac. Tea Co.*, 226 Pa.Super. 574, 323 A.2d 744, 748. That which is nearest in the order of responsible causation. That which stands next in causation to the effect, not necessarily in time or space but in causal relation. The proximate cause of an injury is the primary or moving cause, or that which, in a natural and continuous sequence, unbroken by any efficient intervening cause, produces the injury and without which the accident could not have happened, if the injury be one which might be reasonably anticipated or foreseen as a natural consequence of the wrongful act. An injury or damage is proximately caused by an act, or a failure to act, whenever it appears from the evidence in the case, that the act or omission played a substantial part in bringing about or actually causing the injury or damage; and that the injury or damage was either a direct result or a reasonably probable consequence of the act or omission.

The last negligent act contributory to an injury, without which such injury would not have resulted. The

"But For"

dominant, moving or producing cause. The efficient cause; the one that necessarily sets the other causes in operation. The causes that are merely incidental or instruments of a superior or controlling agency are not the proximate causes and the responsible ones, though they may be nearer in time to the result. It is only when the causes are independent of each other that the nearest is, of course, to be charged with the disaster. Act or omission immediately causing or failing to prevent injury; act or omission occurring or concurring with another, which, had it not happened, injury would not have been inflicted. *Herron v. Smith Bros.*, 116 Cal.App. 518, 2 P.2d 1012, 1013.

See also Concurrent causes; Efficient cause; Immediate cause; Legal cause.

Proximate consequence or result. One which succeeds naturally in the ordinary course of things. A consequence which, in addition to being in the train of physical causation, is not entirely outside the range of expectation or probability, as viewed by ordinary men. *The Mars, D.C.N.Y.*, 9 F.2d 183, 184. One ordinarily following from the negligence complained of, unbroken by any independent cause, which might have been reasonably foreseen. One which a prudent and experienced man, fully acquainted with all the circumstances which in fact existed, would, at time of the negligent act, have thought reasonably possible to follow, if it had occurred to his mind. *Coast S. S. Co. v. Brady, C.C.A.Ala.*, 8 F.2d 16, 19. A mere possibility of the injury is not sufficient, where a reasonable man would not consider injury likely to result from the act as one of its ordinary and probable results.

Proximate damages. See Damages.

Proximately. Directly or immediately. Pertaining to that which in an ordinary natural sequence produces a specific result, no independent disturbing agency intervening. *Weaver v. Landis*, 66 Cal.App.2d 34, 151 P.2d 884, 886. See Proximate; Proximate cause.

Proximity. Kindred between two persons. Quality or state of being next in time, place, causation, influence, etc.; immediate nearness.

Proximus est cui nemo antecedit, supremus est quem nemo sequitur /próksímás ést k(yuw)ay níymow ántesýdét, sáprímás ést kwém níymow sékwotar/. He is next whom no one precedes; he is last whom no one follows.

Proxy. (Contracted from procuracy.) A person who is substituted or deputed by another to represent him and act for him, particularly in some meeting or public body. An agent representing and acting for principal. Also the instrument containing the appointment of such person. *Cliffs Corporation v. United States, C.C.A.Ohio*, 103 F.2d 77, 80.

Written authorization given by one person to another so that the second person can act for the first, such as that given by a shareholder to someone else to represent him and vote his shares at a shareholders' meeting. Depending on the context, proxy may also refer to the

grant of authority itself (the appointment), or the document granting the authority (the appointment form). See also Power of attorney; Proxy statement; Voting trust.

Proxy marriage. A marriage contracted or celebrated through agents acting on behalf of one or both parties. A proxy marriage differs from the more conventional ceremony only in that one or both of the contracting parties are represented by an agent; all the other requirements having been met. *State v. Anderson*, 239 Or. 200, 396 P.2d 558, 561.

Proxy statement. Information required by SEC to be given stockholders as a prerequisite to solicitation of proxies for a security subject to the requirements of Securities Exchange Act. The purpose of the proxy statement is to provide shareholders with the appropriate information to permit an intelligent decision on whether to permit their shares to be voted as solicited for particular matter at forthcoming stockholders meeting. See also Buried facts doctrine.

Prudence. Carefulness, precaution, attentiveness, and good judgment, as applied to action or conduct. That degree of care required by the exigencies or circumstances under which it is to be exercised. This term, in the language of the law, is commonly associated with Care and Diligence and contrasted with Negligence. See those titles.

Prudent. Sagacious in adapting means to end; circumspect in action, or in determining any line of conduct. Practically wise, judicious, careful, discreet, circumspect, sensible. *Tureen v. Peoples Motorbus Co. of St. Louis, Mo.App.*, 97 S.W.2d 847, 848. In defining negligence, practically synonymous with cautious.

Prudenter agit qui praecepto legis obtemperat /pruw-déntar éyjat kwáy práseptow líyjas obtemperat/. He acts prudently who obeys the command of the law.

Prudent Man Rule. An investment standard. In some states, the law requires that a fiduciary, such as a trustee for pension funds, may invest the trust's or fund's money only in a list of securities designated by the state—the so-called legal list. In other states, the trustee may invest in a security if it is one which a prudent man of discretion and intelligence, who is seeking a reasonable income and preservation of capital, would buy. For example, New York's "prudent man rule," trustee is bound to employ such diligence and such prudence in care and management of fund as, in general, prudent men of discretion and intelligence in such matters employ in their own like affairs. *Withers v. Teachers' Retirement System of City of New York, D.C.N.Y.*, 447 F.Supp. 1248, 1254. A federal "prudent man rule" which governs investment of pension funds is found in ERISA § 40(a)(1); 29 U.S.C.A. § 1104(a)(1).

Prurient interest. A shameful or morbid interest in nudity, sex, or excretion. *Brockett v. Spokane Arcades, Inc.*, 472 U.S. 491, 498, 105 S.Ct. 2794, 2799, 86 L.Ed.2d 394. Model Penal Code § 251.4(1). An obsessive interest in immoral and lascivious matters. An excessive or unnatural interest in sex. One of the criteria of obscene-

ty enunciated in *Miller v. California*, 413 U.S. 15, 93 S.Ct. 2607, 37 L.Ed.2d 419, is whether the material appeals to the "prurient interest" in sex. See also Obscene; Obscenity.

P.S. An abbreviation for "Public Statutes," also for "postscript."

Pseudo /s(y)úwdow/. False, counterfeit, pretended, spurious.

Pseudograph /s(y)úwdográf/. False writing.

P.S.I.A. An abbreviation for "pounds per square inch absolute."

Psychoneurosis /sáykown(y)árwósws/. See Insanity.

Psychosis /sáykówsás/. A severe mental disorder in which the patient departs from the normal pattern of thinking, feeling, and acting. There is generally a loss of contact with reality. Progressive deterioration may occur. See also Insanity.

Psychotherapy /sáykowáhrópiy/. A method or system of alleviating or curing certain forms of disease, particularly diseases of the nervous system or such as are traceable to nervous disorders, by suggestion, persuasion, encouragement, the inspiration of hope or confidence, the discouragement of morbid memories, associations, or beliefs, and other similar means addressed to the mental state of the patient, without (or sometimes in conjunction with) the administration of drugs or other physical remedies.

PTI. See Previously taxed income; Pre-trial intervention.

Puberty. The earliest age at which persons are capable of begetting or bearing children. In the civil and common law, the age at which one became capable of contracting marriage. It was in boys fourteen, and in girls twelve years.

Public, n. The whole body politic, or the aggregate of the citizens of a state, nation, or municipality. The inhabitants of a state, county, or community. In one sense, everybody, and accordingly the body of the people at large; the community at large, without reference to the geographical limits of any corporation like a city, town, or county; the people. In another sense the word does not mean all the people, nor most of the people, nor very many of the people of a place, but so many of them as contradistinguishes them from a few. Accordingly, it has been defined or employed as meaning the inhabitants of a particular place; all the inhabitants of a particular place; the people of the neighborhood. Also, a part of the inhabitants of a community.

Public, adj. Pertaining to a state, nation, or whole community; proceeding from, relating to, or affecting the whole body of people or an entire community. Open to all; notorious. Common to all or many; general; open to common use. Belonging to the people at large; relating to or affecting the whole people of a state, nation, or community; not limited or restricted to any particular class of the community. *Peacock v. Retail Credit Co., D.C.Ga.*, 312 F.Supp. 418, 423.

As to public Accounts; Acknowledgment; Act; Adjurer; Administrator; Agent; Attorney; Auction; Breach; Blockade; Boundary; Business; Capacity; Carnar; Charge; Charge; Charity; Company; Corporation; Debt; Domain; Easement; Enemy; Ferry; Fund; Grant; Health; Highway; Holiday; Hospital; House; Incident; Institution; Market; Minister; Money; Necessity; Notice; Nuisance; Office; Officer; Peace; Policy; Property; Prosecutor; Record; Revenue; River; Rose; Sale; School; Seal; Square; Stock; Store; Tax; Thing; Thoroughfare; Trial; Trust; Trustee; Verdict; Vessel; War; Works; Worship, and Wrong, see those titles.

Public accommodation. Within the meaning of the Civil Rights Act of 1964, which prohibits racial discrimination in such places, it is generally a business establishment, affecting interstate commerce or supported in its activities by State action, which provides lodging, food, entertainment or other services and is open to the public. 42 U.S.C.A. § 2000a(b).

Public advocate. One who may or may not be an attorney who purports to represent the public at large in matters of public concern such as utility rates, environmental quality, and other consumer matters. See also Ombudsman.

Public agency. A department or agency of government which has official or quasi official status. An administrative body.

Publican /públakn/. In the civil law, a farmer of the public revenue; one who held a lease of some property from the public treasury; a collector of taxes and tolls.

In English law, a person authorized by license to keep a public house, and retail therein, for consumption on the premises where sold, all intoxicating liquors; also termed "licensed victualler." A victualler; one who serves food or drink prepared for consumption on the premises.

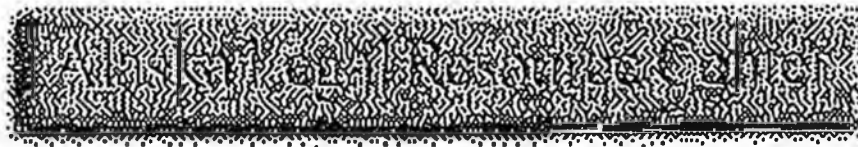
Publicanus /públakéyns/. Lat. In Roman law, a farmer of the customs; a publican.

Public appointments. Public offices or positions which are to be filled by the appointment of individuals, under authority of law, instead of by election.

Publication. To make public; to make known to people in general; to bring before public; to exhibit, display, disclose or reveal. *Tiffany Productions v. Dewing, D.C.Md.*, 50 F.2d 911, 914. The act of publishing anything, offering it to public notice, or rendering it accessible to public scrutiny. An advising of the public; a making known of something to them for a purpose. It implies the means of conveying knowledge or notice. See also Notice; Proclamation; Publish.

Term "publication" is both a business term meaning printing and distribution of written materials and a legal term meaning communication of libelous matter to a third person. *Applewhite v. Memphis State University, Tenn.*, 495 S.W.2d 190, 192. See also Law of libel; below; and Libel; Utter.

As descriptive of the publishing of laws and ordinances, it means printing or otherwise reproducing copy-



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Results of search: "substantially contributed"

The following items were returned as matches for "substantially contributed" by the keyword search. They are ordered with the best matches first.

- AS 10.50.275. Consideration For Company Interests.
(Score=1000, Size=377)
- AS 44.47.290. Contributions By Parent or Guardian.
(Score=786, Size=408)
- ● AS 09.65.210. Damages Resulting From Commission of a Felony.
(Score=659, Size=600)
- AS 21.69.500. Dividends to Mutual Policyholders.
(Score=584, Size=610)
- AS 14.30.650. Funding.
(Score=551, Size=647)
- AS 24.45.116. Disclosure of Contributions.
(Score=546, Size=696)
- AS 21.48.220. Employee Life Insurance.
(Score=483, Size=744)
- AS 21.69.490. Dividends to Stockholders.
(Score=479, Size=746)
- AS 37.06.080. Adoption of Regulations.
(Score=446, Size=864)
- AS 39.35.158. Administrative Director of Courts.
(Score=446, Size=872)
- ● AS 04.11.020. Exceptions: License or Permit Not Required.
(Score=424, Size=874)
- ● AS 23.25.030. Contract, Insurance, or Indemnity is Not a Defense.
(Score=404, Size=887)
- AS 24.20.156. Purposes.
(Score=401, Size=1053)
- ● AS 45.03.406. Negligence Contributing to Forged Signature or Alteration of Instrument.
(Score=364, Size=1154)
- ● AS 32.05.340. Rights Where Partnership Contract Rescinded For Fraud or Misrepresentation.
(Score=337, Size=1064)
- AS 36.10.160. Preference For Residents of Economically Distressed Zones.

(Score=329, Size=1268)

- AS 36.10.175. Preference For Economically Disadvantaged Female Residents.
(Score=328, Size=1327)
- AS 42.05.471. Depreciation Rates, Initial Losses and Accounts.
(Score=313, Size=1237)
- ● AS 23.30.017. Immunity For Third-Party Design Professional.
(Score=307, Size=1383)
- AS 21.69.630. Mutual Member's Share of Assets On Liquidation.
(Score=304, Size=1256)
- AS 14.43.325. Funding.
(Score=278, Size=1350)
- AS 36.10.150. Determination of Zone of Underemployment.
(Score=267, Size=1665)
- AS 10.50.860. Maintenance of Records.
(Score=246, Size=1621)
- AS 36.10.170. Preference For Economically Disadvantaged Minority Residents.
(Score=239, Size=1884)
- AS 22.25.012. Retirement Benefits of Administrative Director.
(Score=237, Size=1744)
- AS 09.17.070. Collateral Benefits.
(Score=236, Size=1655)
- AS 39.20.245. Donation of Leave.
(Score=235, Size=1546)
- AS 32.11.840. Records to Be Kept.
(Score=215, Size=1828)
- AS 29.60.600. Human Services Community Matching Grants.
(Score=206, Size=1997)
- AS 21.87.080. Application For Certificate of Authority.
(Score=194, Size=2074)
- AS 14.11.008. School District Participation in Grant Program.
(Score=191, Size=2174)
- ● AS 45.03.404. Impostors; Fictitious Payees.
(Score=191, Size=2159)
- AS 10.13.440. Purchase.
(Score=190, Size=237)
- AS 21.48.070. Credit Union Group.
(Score=188, Size=2042)
- AS 38.05.874. Public Access Fund Created.
(Score=185, Size=2073)
- ● AS 32.05.130. Rules Determining Rights and Duties of Partners.
(Score=184, Size=2104)
- AS 21.75.270. Financial Impairment; Determination of Insolvency.
(Score=177, Size=2149)
- AS 21.76.080. Joint Insurance Fund.
(Score=176, Size=2403)
- AS 18.67.080. Awarding Compensation.
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3.11 INJURY OR DEATH SUFFERED IN THE COMMISSION OF A FELONY

The plaintiff cannot recover for the claimed loss(es) if the (injury) (death) (injury and death) of the (plaintiff) (deceased) occurred while the (plaintiff) (deceased) was engaged in the commission of a felony for which the (plaintiff) (deceased) was convicted and the felony substantially contributed to the (injury) (death) (injury and death). You are instructed that in this case the (plaintiff) (deceased) has been convicted of a felony of _____ which occurred (insert date and location where felony occurred).

Therefore, you may not award damages to the plaintiff if you decide that it is more likely true than not true that:

(1) the (injury) (death) (injury and death) occurred while the (plaintiff) (deceased) was engaged in the commission of a felony; and

(2) the (injury) (death) (injury and death) would not have happened "but for" the commission of the felony; and

(3) the commission of the felony was so important in bringing about the (injury) (death) (injury and death) that reasonable people would regard it as a cause and attach responsibility to it.

If you decide that each of the above elements is more likely true than not true, you must return a verdict for the defendant(s) in this case. Otherwise, you cannot deny plaintiff recovery on the basis of this law and this instruction.

Use Note: This instruction should be used only when the party suffering the death or injury has been convicted of a felony. Thus, usually the conviction will not be a disputed issue of fact.

Comment

Effective May 1986, the legislature amended Title Nine (09) to prohibit recovery of damages by a convicted felon if the felony substantially contributed to the injury or death which is the subject matter of the litigation. AS 09.17.030. The proximate or legal cause test for substantiality has been incorporated into this instruction because policy underlying this statute and proximate cause are the same: liability for acts or omissions which injure others does not extend beyond the point at which reasonable people would attach responsibility to such acts. The additional factor here, of course, is that the policy has been made applicable to a certain class of people injured under circumstances that constitute a convictable felony.

vesting of title in Kopanuk. We granted Kopanuk's petition for hearing.

III. DISCUSSION

A. Standard of Review

[1] The standard of review is *de novo*. In *Kennecorp Mortgage & Equities, Inc. v. First National Bank of Fairbanks*, 685 P.2d 1232 (Alaska 1984), appellants challenged the trial court's denial of a Rule 60(b)(4) motion to set aside the default judgment. We noted that, "In reviewing the denial of a Rule 60(b)(4) motion, this court does not defer to the discretion of the trial court." *Id.* at 1236. We give no deference to the superior court because "the validity of a judgment is strictly a question of law." *Id.* (quoting *Aguchak v. Montgomery Ward Co.*, 520 P.2d 1352, 1354 (Alaska 1974)). According to *Perry v. Newkirk*, 371 P.2d 1150, 1153 n. 5 (Alaska 1994), "[v]oidness under 60(b)(4) also encompasses the concept of lack of subject matter jurisdiction."

[2,3] Interpretation of a contractual agreement presents a question of law. *Aviation Assocs., Ltd. v. TEMSCO Helicopters, Inc.*, 881 P.2d 1127, 1130 (Alaska 1994). When reviewing questions of law, this court applies its independent judgment. *Summers v. Hagen*, 852 P.2d 1165, 1168-69 (Alaska 1993).

B. The District Court Lacked Jurisdiction to Adjudicate the Dispute

[4] District courts are courts of limited jurisdiction. AS 22.15.050. District courts do not have jurisdiction over "an action in which the title to real property is in question" or "actions of an equitable nature, except as otherwise provided by law." AS 22.15.050(1), (2).¹ Kopanuk invokes both of these prohibitions in his brief. He claims

that title is in dispute because he has "equitable ownership interests" in the house. We address only whether this action involves equitable ownership interests.

[5,6] The district court's jurisdiction depends upon whether equitable interests exist. Typically a lease will not give rise to equitable interests in the lessee; however, an installment contract often will give rise to equitable interests in the purchaser. See 3 Richard R. Powell, *Powell on Real Property* 37-155 (1994). We noted the differences between installment and option contracts in *Dillingham Commercial Co., Inc. v. Spears*, 641 P.2d 1 (Alaska 1992):

The purchaser under an installment land contract is treated as the equitable owner and the vendor as holding the bare legal title merely as security for the purchase price. In contrast, an optionee under a purchase option holds only a contractual right to the land.

Id. at 7 n. 7 (citations omitted).

Kopanuk argues that the contract at issue is more like an installment contract than a lease/option contract, and urges that the substance of the contract be examined. Conversely, AVCP RHA argues that the contract is a lease-option.

[7] Kopanuk emphasizes several contract provisions as evidence that the contract is an installment contract. First is use of the word "homebuyer" throughout the agreement.² Second is the non-refundable contribution of land. Third is the existence of "equity accounts" for holding payments in excess of a certain amount. Fourth is the lack of a payment required to exercise the purchase option, if exercised after twenty-five years. Fifth is the ability to purchase the home before the price drops to zero by paying the declining balance. Sixth is lan-

complex inquiries, such as when equitable ownership interests are at stake. Therefore, although AS 22.15.030(a)(6) specifically grants the district court power to hear FED actions, this is not a grant of jurisdiction over all equitable actions.

2. "Homebuyer" is defined as "The person(s) who has executed this MHO agreement . . . and who has not yet achieved homeownership."

1. As a preliminary matter, the nature of FED jurisdiction must be clarified. In *Vinson v. Hanthorn*, 854 P.2d 733, 737 (Alaska 1993), this court held that "in an FED hearing, an award of possession constitutes equitable relief." AVCP argues that this holding means that "[t]he statutory power to hear FED proceedings simultaneously grants power to hear an equitable action." Although an FED action may result in equitable relief, it is a swift and summary proceeding. FED actions are unsuited for resolution of more

*No recovery for negligent
criminal injured party*

HB22

Ricky J. BURCINA, Appellant,

v.

CITY OF KETCHIKAN, Gateway Center
for Human Resources and Russell A.
Huffman, Jr., Appellees.

No. S-5893.

Supreme Court of Alaska.

Sept. 22, 1995.

Following his conviction for arson, mental patient brought action against mental health facility and his psychiatrist, claiming that negligent treatment aggravated his mental illness and caused him to set fire. The Superior Court, First Judicial District, Ketchikan, Larry C. Zervos, J., granted summary judgment for defendants, and patient appealed. The Supreme Court, Rabinowitz, J., held that: (1) public policy principle that precludes person who has been convicted of crime from imposing liability on others for consequences of crime applied in instant case; (2) patient's plea of nolo contendere in criminal case had collateral estoppel effect as to issue of his mental capacity; and (3) patient waived for appellate review issue related to his entitlement to recover for injuries unrelated to arson conviction.

Affirmed.

1. Judgment \ominus 181(2), 185(2)

Party is entitled to summary judgment if there is no genuine issue of material fact and moving party is entitled to judgment as a matter of law; all reasonable inferences of fact must be drawn against moving party and in favor of nonmoving party.

guage in the contract stating that a "homebuyer" "must purchase" the home if certain conditions are met, such as ability to meet the routine costs of ownership.

AVCP RHA emphasizes other provisions in support of its position. First is a list of homebuyer obligations similar to those in the Uniform Residential Landlord and Tenant Act, citing AS 34.03.120 and MHOA § 5.4.³ Second is variable monthly payments changeable at AVCP RHA's discretion. Third is a counseling and inspection requirement. Fourth is the income reporting requirement and the restrictions on who may reside in the home. Fifth is the fact that no subletting or assignment is allowed. Sixth is the housing authority's control of insurance. Seventh is detailed termination information.

[8] The MHOA is a hybrid contract, containing provisions typical of both lease/option contracts and installment contracts. Indeed, a contract more difficult to categorize is hard to imagine. However, we need not determine the exact label to be applied to the contract, as we conclude that the contract creates equitable interests, or potential equitable interests, in the homebuyer, which preclude the district court from hearing the case. One of the justifications for FED actions is the lack of equity held by the tenant-in-possession. This is not the case here. Equity may exist in fact since the "homebuyer" has put up land for a "down payment." Furthermore, a person who maintains property over a period of years may have equity in the appreciated value of that property. Since the district court lacks jurisdiction over equitable actions, AS 22.15.050(2), the judgment of the superior court is REVERSED.⁴



3. Specifically, keeping the house clean and safe, disposing of waste properly, using appliances reasonably, refraining from damaging the property, avoiding disturbing neighbors, and refraining from illegal activity. AS 34.03.120(a)(1)-(6); MHOA 5.4(c)-(j).

4. The United States, as amicus curiae, argues that HUD has consistently interpreted the MHOA

program to be a lease program. The HUD regulations are irrelevant, as we hold under state law that equitable interests may exist and the district court therefore lacks jurisdiction. HUD has no power to interpret state law, and the cited regulations do not interpret any provisions of federal law purporting to override the state law at issue here.

2. Appeal and Error \S 842(1)

Where appeal raises questions of law and public policy, state Supreme Court applies its independent judgment and adopts rule of law that is most persuasive in light of precedent, reason, and policy.

3. Action \S 12Negligence \S 105

Alaska Supreme Court has recognized public policy principle that precludes person who has been convicted of crime from imposing liability on others for consequences of that antisocial conduct.

4. Mental Health \S 51.20

Public policy principle precluding person who has been convicted of crime from imposing liability on others for consequences of such antisocial conduct applied in action brought against mental health facility and psychiatrist by patient who was convicted of arson, notwithstanding patient's contention that there should be exception to such principle due to fact that he was insane at time he committed arson.

5. Judgment \S 648

Mental patient's plea of *nolo contendere* to charge of arson had collateral estoppel effect in patient's subsequent suit against mental health facility and psychiatrist in which patient claimed that negligent treatment caused him to set fire, and patient could thus not relitigate issue of whether he was insane at time of arson; necessary element of conviction was that patient have requisite intent.

6. Judgment \S 648

Based on public policy grounds, civil plaintiff is collaterally estopped from relitigating any element of criminal charge to which he has pled *nolo contendere*.

7. Appeal and Error \S 179(1), 758.1

Mental patient waived for appellate review in his action against mental health facility and psychiatrist issue of whether public

1. Burcina injured several people in a psychotic episode and was subsequently charged with six counts of assault, convicted and incarcerated. Burcina was then committed to the Alaska Psychiatric Institute where he was diag-

policy did not bar his claims for injuries unrelated to his criminal conviction; patient did not include claim in any of his pleadings or in his statement of points on appeal, and his only reference to injuries unrelated to conviction was contained in footnote in memorandum in opposition to defense motion for judgment on the pleadings.

Caroline B. Crenna and Thomas W. Findley, Dillon & Findley, P.C., Juneau, for Appellant.

A. Fred Miller and Kevin G. Miller, A. Fred Miller, Attorneys at Law, Ketchikan, for Appellees City of Ketchikan and Gateway Center for Human Resources.

Geoffrey G. Currall, Keene & Currall, P.C., Ketchikan, for Appellee Russell A. Huffman, Jr.

Before MOORE, C.J., RABINOWITZ, MATTHEWS, COMPTON and EASTAUGH, JJ.

OPINION

RABINOWITZ, Justice.

I. INTRODUCTION

Ricky Burcina, who has a long history of mental illness and substance abuse, set fire to the Gateway Mental Health Drop-In Center and was subsequently convicted of arson. Thereafter, Burcina filed suit against the Gateway Center for Human Resources and his psychiatrist, Dr. Russell Huffman, claiming that he had received negligent treatment which aggravated his mental illness and caused him to set the fire. Burcina appeals from the superior court's grant of summary judgment in favor of both defendants. We affirm.

II. FACTS AND PROCEEDINGS

Following his release from prison in early 1986,¹ Ricky Burcina began outpatient mental health care with Gateway Center for Human Resources (Gateway), a department of the City of Ketchikan. Burcina began seeing

Dr. Wandall Winn, a psychiatrist and a mixed substance abuser, "with primary drug abuse being LSD, but to include cocaine and marijuana."

Dr. Wandall Winn, a psychiatric consultant to Gateway, who prescribed Navane (an anti-psychotic medication) as part of Burcina's treatment program. In February of 1987, Burcina requested that his medication be reduced. Dr. Winn believed that it was appropriate to begin to taper Burcina off his antipsychotic medication because Burcina's mental condition had stabilized and he was receiving vocational training that required fine motor coordination.

Burcina began seeing Dr. Russell Huffman in June of 1987.² Dr. Huffman provided "talk therapy" to Burcina, and may have had a role in monitoring Burcina's medication. However, Burcina continued to consult with and have his medication prescribed and monitored by Dr. Winn and Gateway.

In July 1987, Dr. Winn informed Burcina that he could gradually reduce his medication with the goal of completely discontinuing it in about sixty days. However, by November, Dr. Winn became concerned about Burcina's conduct and suggested that he restart the medication. Burcina refused. Nancy Hunter, a social worker at Gateway, also suggested that Burcina restart his medication, but he again refused. Over the next several months, Dr. Huffman, Dr. Winn, and Hunter continued to inform Burcina that he should be taking his medication. However, Burcina refused and thus became progressively more delusional.

On February 5, 1988, Burcina set fire to the Gateway Mental Health Drop-In Center (Drop-In Center). Burcina explained that he "thought that alien forces were trying to capture and kill [him]," and that he "set fire to the Drop-In Center in order to get the FBI's attention so that the FBI could protect [him] and debrief [him]." Burcina was charged with arson in the first degree.³

Thereafter, the superior court ordered a psychological evaluation. Burcina revealed to the psychologist that he had been abusing various substances including street drugs

2. During the period from 1986 through 1988, Dr. Huffman was employed in the private practice of psychiatry in Ketchikan. In addition, he had a contract with the City for "referred emergency mental health patients ... needing urgent care."

prior to February 5. The psychologist concluded that Burcina's psychotic episodes were induced by substance abuse and indicated that he would not be willing to make a diagnosis of schizophrenia "unless it can be clearly proven that [Burcina] demonstrates symptoms of schizophrenia on an outpatient basis when not using euphorogenic or mind-altering street drugs." The psychologist concluded that Burcina was competent to stand trial. Burcina subsequently entered a plea of *nolo contendere* to arson and was sentenced to eight years of incarceration with five and one half years suspended.

On February 2, 1990, Burcina filed suit against Gateway and Dr. Huffman claiming that he had received negligent treatment which aggravated his mental illness and, during a psychotic episode, caused him to set fire to the Drop-In Center. Burcina alleged that as a result of his conviction for arson and subsequent imprisonment, he had suffered and continues to suffer mental anguish, loss of income, loss of enjoyment of life, and emotional distress.

Before trial, Gateway and Dr. Huffman moved for summary judgment. The superior court granted Gateway's and Dr. Huffman's motions holding that Burcina's claims are prohibited by public policy. Specifically, the superior court relied upon the general rule that

[a] person cannot maintain an action if, in order to establish his cause of action, he must rely, in whole or in part, on an illegal or immoral act or transaction to which he is a party. Also, he cannot maintain a claim for damages based on his own wrong or caused by his own neglect, ... or where he must base his cause of action, in whole or in part, on a violation by himself of the criminal or penal laws.

1A C.J.S. Actions \S 29, at 386-87 (1985). Burcina now appeals.

3. Under AS 11.46.400, "[a] person commits the crime of arson in the first degree if the person intentionally damages any property by starting a fire or causing an explosion and by that act recklessly places another person in danger of serious physical injury."

drugs

III. DISCUSSION

A. *Burcina's Claims are Prohibited by Public Policy*⁴

[1-3] This court has recognized the public policy principle which precludes a person who has been convicted of a crime from imposing liability on others for the consequences of that antisocial conduct.⁵ Under this court's previous decisions, recovery is precluded at the "very threshold of the plaintiff's application for judicial relief." *Lord v. Fogcutter Bar*, 813 P.2d 660, 663 (Alaska 1991) (quoting *Barker v. Kallash*, 63 N.Y.2d 19, 479 N.Y.S.2d 201, 203-05, 468 N.E.2d 39, 41-42 (1984)).

[4] The superior court granted summary judgment in favor of Gateway and Dr. Huffman on the ground that *Burcina's* suit is prohibited by public policy. On appeal, *Burcina* argues that his suit is not barred because he was insane at the time he committed the crime of arson. In effect, *Burcina* requests that an exception be created to *Adkinson*, *Lord*, *Shaw*, and *Beilgard* in the circumstance where the person is insane at the time he or she commits the criminal act.

This court first held that, as a matter of public policy, a person who has been convicted of a crime is precluded from imposing civil liability on others for the consequences of his or her own criminal conduct in *Adkinson v. Rossi Arms Co.*, 659 P.2d 1236 (Alaska 1983). We held that *Adkinson*, who was convicted of manslaughter for shooting and killing a person with a shotgun, had no claim for relief in tort against either the manufacturer or the seller of the shotgun. *Id.* at 1240. In holding that *Adkinson's* claims were barred by public policy, we stated that "allowing a criminal defendant, who has been convicted of an intentional killing, to impose liability on oth-

ers for the consequences of his own antisocial conduct runs counter to basic values underlying our criminal justice system." *Id.* Thus, we concluded that because *Adkinson* was convicted based on his intentional conduct, he alone was responsible for any resultant personal losses.

In *Lord v. Fogcutter Bar*, 813 P.2d 660, 663 (Alaska 1991), we held that *Lord*, who was convicted of kidnapping, rape and assault which took place after he was served more than fourteen drinks at the *Fogcutter Bar*, was precluded from recovering in tort against the *Fogcutter Bar*. *Lord* alleged that the *Fogcutter* was liable for the damages he suffered as a result of his imprisonment because the *Fogcutter* and its employee violated Alaska's dram shop statute by selling *Lord* alcohol while he was a "drunken person." *Id.* at 662. We noted that "[c]ourts have consistently refused to aid those whose claims are based on their own illegal acts," and held that *Lord's* claim was barred for the same reason that summary judgment was affirmed in *Adkinson*. *Id.* at 663.

In *Shaw v. State, Department of Administration*, 861 P.2d 566, 571 (Alaska 1993) (*Shaw II*), this court held that the public policy principle enunciated in *Adkinson* and *Lord* prevented recovery on the part of a plaintiff in a professional malpractice action against his former defense attorney where the plaintiff in fact engaged in the criminal conduct with which he was charged. We noted our previous holdings "that civil recovery should not be a tool for shifting an individual's responsibility for the individual's criminal acts." *Id.* As in *Adkinson* and *Lord*, we held "that if plaintiffs engaged in the criminal conduct they are accused of, then they alone should bear full responsibility for the consequences of their acts, including imprisonment." *Id.* at 572.

rule of law which is most persuasive in light of precedent, reason and policy." *Shanks*, 835 P.2d at 1193.

5. *Beilgard v. State*, 896 P.2d 230, 233-34 (Alaska 1995); *Shaw v. State, Dep't of Admin.*, 861 P.2d 566 (Alaska 1993) (*Shaw II*); *Lord v. Fogcutter Bar*, 813 P.2d 660, 663-64 (Alaska 1991); *Adkinson v. Rossi Arms Co.*, 659 P.2d 1236, 1240 (Alaska 1983).

In *Beilgard v. State*, 896 P.2d 230 (Alaska 1995), we held that *Beilgard*, who was convicted of violating Alaska's game laws after requesting information and assistance from State employees as to what permits were required for his business, possessed no viable claim for relief in tort against the State. Our holding in *Beilgard* was grounded on the public policy principle enunciated in *Adkinson*, *Lord*, and *Shaw II*. *Id.* at 233-34.

In recognizing and applying this public policy principle, we have favorably cited two cases which are factually similar to the present case.⁶ In *Cole v. Taylor*, 301 N.W.2d 766 (Iowa 1981), the Iowa Supreme Court held that *Cole* was prohibited from recovering in tort from her psychiatrist, *Taylor*, on her claim that *Taylor* negligently failed to prevent her from committing murder. *Cole* shot and killed her former husband, and was subsequently charged, tried and convicted of first-degree murder. *Id.* at 766. *Cole* alleged that during her course of treatment, *Taylor* became aware that she had violent inclinations and was thinking about killing her former husband. *Id.* at 767. *Cole* claimed that *Taylor* failed in his treatment of her, that he failed to restrain her by hospitalization, and that he failed to warn her former husband of any impending danger. *Id.* After recognizing the general policy rule that a person should not be able to rely on an illegal act to maintain a cause of action, the lower court dismissed *Cole's* suit. The Supreme Court of Iowa held that *Cole's* responsibility for her criminal conduct was established by her murder conviction, and "that it would be, plainly and simply, wrong as a matter of public policy to allow recovery." *Id.* at 768.

Likewise, in *Glazier v. Lee*, 171 Mich.App. 216, 429 N.W.2d 857, 860 (1988), the Michigan Court of Appeals followed *Cole* and held that *Glazier* was precluded from recovering in tort from his psychologist, *Lee*, on his

claim that *Lee* negligently failed to prevent him from committing murder. *Glazier* shot and killed his girlfriend and was subsequently convicted of voluntary manslaughter. *Id.* 429 N.W.2d at 858. *Glazier* claimed that *Lee* negligently failed to medicate or hospitalize him, suggested violence to him when he was in a volatile, dependent state of mind, and failed to warn *Glazier's* girlfriend of his potential for violence. *Id.* The court held that *Glazier's* claim was barred based on the rule articulated in *Cole*. *Id.* 429 N.W.2d at 859. The controlling factor was *Glazier's* own criminal responsibility as evidenced by his voluntary manslaughter conviction. *Id.*

Based on the foregoing, we conclude that the public policy principle which precludes a person who has been convicted of a crime from imposing liability on others for the consequences of his or her own antisocial conduct applies here. Thus, we hold that *Burcina's* claims against *Gateway* and *Dr. Huffman* are barred.⁷

B. *Burcina's Plea of Nolo Contendere Has Collateral Estoppel Effect*

[5] *Burcina* also asserts that summary judgment was inappropriate because there was a genuine issue of material fact as to whether he was legally insane when he set the fire. He argues that because he was insane, the policies discussed in the previous section should not preclude his claim. See *Boruschewitz v. Kirts*, 197 Ill.App.3d 619, 144 Ill.Dec. 73, 554 N.E.2d 1112 (1990). However, because a necessary element of *Burcina's* criminal conviction for arson was that he have the requisite intent,⁸ we conclude that he is collaterally estopped from relitigating the issue of his mental capacity.⁹

[6] In *Sun v. State*, 830 P.2d 772, 777 & n. 9 (Alaska 1992), we held that AS 09.17.030¹⁰ collaterally estops a civil plaintiff

4. A party is entitled to summary judgment if there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. *Shanks v. Uppohi Co.*, 835 P.2d 1189, 1193 (Alaska 1992). In determining whether a party is entitled to judgment as a matter of law, all reasonable inferences of fact must be drawn against the moving party and in favor of the non-moving party. *Wright v. State*, 824 P.2d 718, 720 (Alaska 1992). And where, as here, an appeal raises questions of law and public policy, we apply our independent judgment and adopt "the

6. *Lord*, 813 P.2d at 663; *Adkinson*, 659 P.2d at 1240.

7. Our holding that public policy bars *Burcina's* claims against *Gateway* and *Dr. Huffman* makes it unnecessary for us to consider whether *Burcina's* claims are also prohibited by AS 09.17.030.

8. See *supra* note 3 for the text of AS 11.46.400 defining the crime of arson in the first degree.

Alaska Rep. 2d (902-905)-5

9. Because we conclude that *Burcina* is collaterally estopped from relitigating the issue of his insanity, we need not decide whether to adopt the exception announced in *Boruschewitz*.

10. Former AS 09.17.030, subsequently renumbered as AS 09.65.210, provides:

A person who suffers personal injury or death may not recover damages for the person-

from denying a criminal act to which he plead *nolo contendere*. Although our holding was based on the express language of AS 09.17.030, we have noted that AS 09.17.030 embodies the public policy principle enunciated in Alaska case law. *Lord*, 815 P.2d at 663. We now combine and clarify these rules. We hold, based on public policy grounds, that a civil plaintiff is collaterally estopped from relitigating any element of a criminal charge to which he has pled *nolo contendere*.

Such a conclusion is supported by Alaska rules and decisional law on the subject of *nolo contendere* pleas. *Pletnikoff v. John-*

al injury or death if the injuries or death occurred while the person was engaged in the commission of a felony, the person has been convicted of a felony, including conviction based on a guilty plea or a plea of *nolo contendere*, and the felony substantially contributed to the injury or death. This section does not affect a right of action under 42 U.S.C. 1983.

11. In *Pletnikoff*, this court expressly refrained from considering whether a conviction based on a plea of *nolo contendere* has collateral estoppel effect because the issue was not adequately briefed by the parties. *Id.* at 976 n. 2. In a dissent, Chief Justice Matthews reasoned that collateral estoppel should apply to the conviction at issue even though the subject was not adequately briefed. *Id.* at 979. Chief Justice Matthews noted that under federal law the rule of collateral estoppel does not apply to convictions based on pleas of *nolo contendere*. *Id.* He then discussed the differences between Alaska law and federal law, and why these differences justify applying the rule of collateral estoppel to convictions based on pleas of *nolo contendere* in Alaska:

The Alaska Rules are significantly different from the Federal Rules on the question of the effect of a plea of *nolo contendere*. Rule 410 of the Federal Rules of Evidence explicitly states that *nolo contendere* pleas are inadmissible while Alaska Rule of Evidence 410 does not. Further, Federal Criminal Rule 11(b) provides that a defendant may plead *nolo contendere* only with the consent of the court and only then after the court has given "due consideration of the views of the parties and the interest of the public in the effective administration of justice." Alaska has no counterpart to this provision. Moreover, Federal Criminal Rule 11(e)(6)(B) explicitly makes inadmissible a plea of *nolo contendere*. Alaska Criminal Rule 11(e)(6) contains no such provision. Finally, Federal Evidence Rule 803(22) provides that "[e]vidence of a final judgment, entered after a trial or upon a plea of guilty (but not upon a plea of *nolo contendere*), adjudging a person guilty of a crime punishable by death or imprisonment in excess of one year" is not hearsay. This suggests by implication that a con-

son, 765 P.2d 973, 979-82 (Alaska 1988) (Matthews, C.J., dissenting).¹¹ We note that had Burcina wished to avoid these collateral consequences of his *nolo contendere* plea, he could have asserted the defenses of either insanity¹² or mental disease or defect,¹³ or he could have entered a plea of guilty but mentally ill.¹⁴

Based on the foregoing, we hold that Burcina's plea of *nolo contendere* has collateral estoppel effect in this subsequent civil litigation because his claim is prohibited by public policy.

viction based upon a plea of *nolo contendere* is hearsay. By contrast the Alaska Evidence Rules contain no exception to the hearsay rule for judgments of previous conviction. The commentary explains that this omission was made advisedly, since the effect of a judgment of conviction is properly a subject governed by the rules of collateral estoppel, rather than the rules of evidence. See Alaska Evidence Rule 803 and commentary at 390 (1988).

As a matter of decisional law, Alaska law also differs from federal law concerning *nolo* pleas. In the federal system the trial judge has the discretion to reject a *nolo* plea. In Alaska a defendant may plead *nolo* rather than guilty as a matter of right. *Miller v. State*, 617 P.2d 516, 518 (Alaska 1980); *Lowell v. State*, 574 P.2d 1281, 1285 (Alaska 1978).

Pletnikoff, 765 P.2d at 979-80 (Matthews, C.J., dissenting).

12. Alaska Statute 12.47.010(a) states as follows:

In a prosecution for a crime, it is an affirmative defense that when the defendant engaged in the criminal conduct, the defendant was unable, as a result of a mental disease or defect, to appreciate the nature and quality of that conduct.

13. Alaska Statute 12.47.020(a) provides as follows:

Evidence that the defendant suffered from a mental disease or defect is admissible whenever it is relevant to prove that the defendant did or did not have a culpable mental state which is an element of the crime.

14. Alaska Statute 12.47.030(a) provides as follows:

A defendant is guilty but mentally ill if, when the defendant engaged in the criminal conduct, the defendant lacked, as a result of a mental disease or defect, the substantial capacity either to appreciate the wrongfulness of that conduct or to conform that conduct to the requirements of the law. A defendant found guilty but mentally ill is not relieved of criminal responsibility for criminal conduct and is subject to the provisions of AS 12.47.050.

C. *Burcina Waived Any Claims for Injuries Unrelated to the Arson Conviction*

[7] Burcina argues that the superior court erred in dismissing his entire suit because public policy does not bar his claims for injuries unrelated to the arson conviction. Burcina contends that his injuries include mental anguish, loss of enjoyment of life and emotional distress which he suffered before he set fire to the Drop-In Center.

We conclude that Burcina has waived this argument on appeal. As noted by Gateway and Dr. Huffman, Burcina failed to assert such a claim in his complaint,¹⁵ he failed to include it in his responses to interrogatories,¹⁶ he failed to include it in his statement of points on appeal, and he failed to oppose a motion for entry of final judgment dismissing his suit. In fact, Burcina suggested that his claims include injuries unrelated to the arson on only one occasion before the superior court. This appears in his memorandum in opposition to Dr. Huffman's motion for judgment on the pleadings. Burcina stated in a footnote as follows:

Additionally, plaintiff suffered mental anguish prior to the February 5, 1988, arson, as he gradually became delusional during the period following Huffman's December, 1987, instruction to discontinue his anti-psychotic medication. As with the injury suffered by plaintiff after the arson,

15. In Count I of his complaint, Burcina alleges in part as follows:

As a result of Defendant Gateway's failure to provide Plaintiff with medication, Plaintiff became psychotic. While in a psychotic state, Plaintiff set fire to the Mental Health Drop-in Center in Ketchikan, and as a consequence of this, he has suffered and will continue to suffer imprisonment, mental anguish, loss of income, loss of enjoyment of life and emotional distress.

The allegations contained in Counts II, III and IV are essentially the same as Count I. Count I clearly states that Burcina's mental anguish, loss of enjoyment of life, and emotional distress are a consequence of Burcina setting fire to the Drop-In Center. Thus, Burcina's complaint does not advance any claims for injuries unrelated to the arson.

16. During discovery Gateway served interrogatories on Burcina. Interrogatory No. 7 asked:

this mental anguish did not occur while plaintiff was engaged in the commission of a felony, and AS 09.17.030 cannot bar plaintiff's claim for these pre-arson damages.

In *Jeffries v. Glacier State Telephone Co.*, 604 P.2d 4 (Alaska 1979), we held that an issue was not properly before our court where the issue was not properly raised or briefed at the superior court level and was not included in the statement of points on appeal. *Id.* at 11. As in the present case, the only reference to the issue appeared in a memorandum in opposition to a motion for judgment on the pleadings. *Id.* at 11 n. 26. Thus, based on our holding in *Jeffries*, we hold that any claims for injuries unrelated to the arson conviction are not properly before this court. See also *In re L.A.M.*, 727 P.2d 1057, 1059 (Alaska 1986); *Wickwire v. McFadden*, 633 P.2d 278, 281 n. 6 (Alaska 1981).

IV. CONCLUSION

For these reasons, we AFFIRM the superior court's grants of summary judgment dismissing Burcina's claims against Gateway and Dr. Huffman.



Please describe the loss of enjoyment of life that you allege you have sustained in paragraphs 8 and 12 of your Complaint.

Burcina responded as follows:

I became severely mentally impaired by psychosis and delusions of paranoid schizophrenia. I was in fear of my life and personal safety because of my paranoid delusions. I almost committed suicide on several occasions because I believed I was going to get a 22-year jail sentence. I was severely depressed during my jail time. I am still depressed because I lost my girlfriend because of the complaint and I almost committed suicide over that. I have bad memories of the delusional psychosis that makes me have nightmares. I have nightmares about prison life. In prison other prisoners taunted me because I was an arsonist and called me crazy. In Ketchikan, I have a reputation as the insane arsonist and am unable to get dates with women in my age group. Thus, Burcina's response does not include claims for injuries unrelated to the arson conviction.

Alaska State Legislature



House of Representatives
House Judiciary Committee

State Capitol, Room 120
Juneau, Alaska 99801-1182
(907) 465-4990

MEMORANDUM

Date: January 27, 1997
To: Susan Cox, Special Litigation Section
Fax no: 465-6735
From: Lisa Kirsch, House Judiciary Committee
Re: HB 22, Civil Liability for Bootleggers

Enclosed please find memo dated January 24, 1997 with proposed section (b) amendment and second page with drafts of new sections (c) regarding liability to government entities and section (d) preventing a controlled substance defense.

Any input you may have would be appreciated, particularly as to the interaction with AS 09.55.570 or AS 09.55.580.

Mike Ford is the Legislative Counsel involved on this bill.

Thanks for your assistance.

TO: BRIAN

FM: JIM



Re: HB 22 Bootlegger Bill

Date: January 24, 1997

1. I recommend that you consider changing the bill to read as follows:

*Section 1. AS 04.21.020 is amended by adding a new subsection to read:

(b) Notwithstanding (a) of this section, a person who sells or barter an alcoholic beverage to another person in violation of AS 04.11.010 is strictly liable for civil damages FOR PERSONAL INJURIES, DEATH, AND PROPERTY DAMAGES, resulting from the intoxication of the person receiving the alcoholic beverage IF THE INTOXICATION SUBSTANTIALLY CONTRIBUTED TO THE PERSONAL INJURIES, DEATH AND PROPERTY DAMAGES.

(c) A person who violates subsection (b) shall also be civilly liable to the State of Alaska and to the municipality, if any, in which the sale or barter occurred, for the costs of criminally prosecuting the intoxicated person who received the alcoholic beverage, and shall also be civilly liable for property damage inflicted on state or municipal property by such intoxicated person.

(d) It shall be no defense to the person who sells or barter in violation of subsection (b), or to the intoxicated person who received the alcoholic beverage, that the intoxicant was also acting under the influence of an illegal controlled substance.

01/24/97

LEGISLATIVE TELECONFERENCE NETWORK SYSTEM

LTN1150

13:01:25

PARTICIPANT LIST (ALL PARTICIPANTS)

BY:ANC

TCN:70128

SCHEDULED FOR:01/24/97 13:00 TO 15:00

FOR:ANC

PUBLIC HEARING

HOUSE JUDICIARY

LOCATION: ANCHORAGE

HB 22	LINDA	O'BANNON	AAG	TESTIFY
HB 9	SARAH	MUSGRAVE		TESTIFY
HB 9	MARTI	GREESON	MADD	TESTIFY
HB 9	JANICE	LIENHART		TESTIFY
HB 9	JANELLE	DIXSON		TESTIFY

01/24/97

LEGISLATIVE TELECONFERENCE NETWORK SYSTEM

LTN1150

13:05:40

PARTICIPANT LIST (ALL PARTICIPANTS)

BY:ANC

TCN:70128

SCHEDULED FOR:01/24/97 13:00 TO 15:00

FOR:ANC

PUBLIC HEARING

HOUSE JUDICIARY

LOCATION: ANCHORAGE

HB 22	LINDA	O'BANNON		TESTIFY
HB 9	SARAH	MUSGRAVE		TESTIFY
HB 9	MARTI	GREESON	MADD	TESTIFY
HB 9	JANICE	LIENHART		TESTIFY
HB 9	JANELLE	DIXSON		TESTIFY
HB 9	RALPH	SAMMELS		TESTIFY
HB 9	DAWN	SCHERBERT		TESTIFY
HB 9	KAREN	CAMPBELL		TESTIFY
HB 9	CHARLOTTE	PHELPS		TESTIFY
HB 9	BARBARA	BRINK	AK PUBLIC DEFEND	TESTIFY

Additions

Has "Time restraint" to disregard testifying. Will get details

HOUSE BILL NO. 22

IN THE LEGISLATURE OF THE STATE OF ALASKA

TWENTIETH LEGISLATURE - FIRST SESSION

BY REPRESENTATIVE IVAN

Introduced:

Referred:

A BILL

FOR AN ACT ENTITLED

1 "An Act relating to civil liability for illegal sales of alcoholic beverages; and
2 providing for an effective date."

3 BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF ALASKA:

4 * Section 1. AS 04.21.020 is amended by adding a new subsection to read:

5 (b) Notwithstanding (a) of this section, a person who sells or barter an
6 alcoholic beverage to another person in violation of AS 04.11.010 is strictly liable for
7 civil damages resulting from the intoxication of the person receiving the alcoholic
8 beverage.

9 * Sec. 2. This Act takes effect July 1, 1997.

LAW OFFICES

HEDLAND, FLEISCHFR, FRIEDMAN, BRENNAN & COOKE

A PROFESSIONAL CORPORATION

BETHEL:

CHRISTOPHER R COOKE
CECILIA M. LACARA

ANCHORAGE:

JOHN S. HEDLAND
HUGH W. FLEISCHER
SAUL R. FRIEDMAN
JAMES T. BRENNAN
SARA E. HEIDEMAN
ERIC J. BROWN
AMY L. VAUDREUIL
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25. SEVENTH AVENUE

P. O. BOX 355

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ANCHORAGE OFFICE:

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ANCHORAGE, ALASKA 99501

907 279-5528

April 16, 1996

Mr. Ivan M. Ivan
Representative, House District 39
Alaska State House of Representatives
Alaska State Capitol
Juneau, Alaska 99801-1182

Dear Representative Ivan:

The Department of Law sent me a copy of their letter to you of April 12, 1996 dealing with civil liability for bootleggers. As you know, the current law seems to exempt those who sell liquor without a license from any civil liability for the damages that may be caused their illegal acts.

I think that the second proposal made by the Department of Law for strict liability of those who illegally sell or traffic in liquor is appropriate. I hope you will be able to introduce and persuade the legislature to pass such a bill.

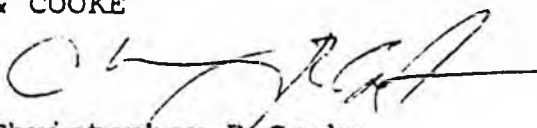
Certainly the proof requirements against a bootlegger should be less stringent than the proof required to show that a licensed dealer in alcohol engaged in conduct which should make him civilly liable for injuries resulting from intoxication. Also, the connection between the proposed strict liability statute and the unlicensed sale or trafficking in alcohol should separate those situation from the circumstances of social hosts. As shown by the Chokwak v. Worley decision, the legislature and the courts have been reluctant to impose civil liability on social hosts. As mentioned in my previous correspondence, however, the circumstances of someone who is profiting from illegal sale of alcohol are quite different from the circumstances of a private person who may provide liquor to guests at a social function.

If there is not time in the current legislative session to propose and consider a provision for civil liability of bootleggers, I ask

Mr. Ivan M. Ivan
Representative, House District 39
April 16, 1996
Page 2

that your staff might at least draft the proposed amendment so it could be available for filing as soon as the next legislative session begins. Thank you for your help on this matter.

Very truly yours,
HEDLAND, BRENNAN, HEIDEMAN,
& COOKE



Christopher R. Cooke

CRC:cls

STATE OF ALASKA

DEPARTMENT OF LAW

OFFICE OF THE ATTORNEY GENERAL

April 12, 1996

The Honorable Ivan M. Ivan
Representative, House District 39
Alaska State House of Representatives
Alaska State Capitol
Juneau, Alaska 99801-1182

Dear Representative Ivan:

This is in response to your recent letter to the Attorney General in which you forwarded a copy of Mr. Christopher Cooke's letter about a recent decision of the Alaska Supreme Court concerning civil immunity of social hosts serving minors. The decision was Chokwak v. Worley, Op. No. 4323 (Alaska, March 8, 1996). In Chokwak the Alaska Supreme Court held that the grant of civil immunity in AS 04.21.020 to social hosts applies even if the social hosts provide alcohol to minors. Although the Supreme Court did not address the question in the Chokwak decision, Mr. Cooke believes that "the interpretation of the statute rendered in this opinion seems to extend civil immunity to any person who is not a licensee, even if that person is an unlicensed seller of liquor or is otherwise unlawfully trafficking in alcohol." Since the Supreme Court did not specifically address the issue of whether the civil immunity of AS 04.21.020 extends to unlawful sellers of alcoholic beverages, this office cannot determine for certain that Mr. Cooke's interpretation of the Supreme Court's ruling is correct with regard to bootleggers.

Mr. Cooke's comments are well taken, however. Certainly the legislature could address this subject if they so wish. If the legislature wishes that civil immunity not be extended to "bootleggers" then we agree with Mr. Cooke that the statute should be amended for clarification. You may wish to have the legislature's staff draft various proposed amendments. One simple approach would be to make the existing statute paragraph (a) and add a paragraph (b) to AS 04.21.020 to provide:

(b) Notwithstanding (a) of this section a person who provides alcoholic beverages to another person in violation of AS 04.11.010 may be held civilly liable for injuries resulting from the intoxication of that person.

TONY KNOWLES, GOVERNOR

PLEASE REPLY TO:

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The Honorable Ivan M. Ivan
Representative, House District 39
Alaska State House of Representatives

April 12, 1996
Page 2

Mr. Cooke's letter also addresses whether there should be strict civil liability for unlicensed sellers of alcoholic beverages. This is a policy decision for the legislature. If the legislature wishes to institute such a policy the legislature could add a subsection (b) to AS 04.21.20 to provide:

(b) Notwithstanding (a) of this section a person who provides alcoholic beverages to another person in violation of AS 04.11.010 may be held strictly liable for injuries resulting from the intoxication of that person.

The Alaska Supreme Court remarked in Chokwak:

As difficult as it is to defend a policy specifically immunizing those who unlawfully furnish liquor to minors from civil liability, we agree . . . that a policy immunizing social hosts in general from liability for injuries caused by intoxicated persons to whom they have served liquor is not indefensible.

Id. at 13.

Whether the legislature wants to continue to provide civil immunity to those social hosts who provide minors with alcoholic beverages is also a policy issue for the legislature.

I hope this answers your questions. If you need other information or assistance concerning this issue don't hesitate to contact us. The Attorney General appreciated receiving this information and thanks you for keeping him informed of your concerns.

Very truly yours,

BRUCE M. BOTELHO
ATTORNEY GENERAL

By:

Linda M. O'Bannon
Linda M. O'Bannon
Assistant Attorney General

LMO/cw

cc: Christopher R. Cooke, Esq.
Bruce Botelho, Attorney General

TONY KNOWLES, GOVERNOR

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DEPARTMENT OF LAW

OFFICE OF THE ATTORNEY GENERAL

April 12, 1996

Christopher R. Cooke, Esq.
Hedland, Fleischer, Brennan & Cooke
P.O. Box 555
Bethel, Alaska 99559

Re: Civil Immunity/Liability for Unlicensed Providers of
Liquor

Dear Mr Cooke:

Thank you for your recent letter to the Attorney General expressing your concerns about the possibility that the Alaska Supreme Court's decision in Chokwak v. Worley, Opinion No. 4323 (Alaska, March 8, 1996) could be interpreted to exempt "bootleggers" from civil liability for serving alcoholic beverages to minors. The Attorney General asked me to respond to your letter since I am the Assistant Attorney General who represents the Alcoholic Beverage Control Board. He very much appreciated your taking the time to express your views on this important subject.

Your letter was also forwarded to the Attorney General by Representative Ivan. I have enclosed a copy of my response to Rep. Ivan which I believe addresses the issues you raised in your letter.

Your concerns raise important policy considerations for the legislature. We will be happy to provide any interested legislator with assistance as requested.

Don't hesitate to write again if there are issues that you believe need to be brought to our attention.

Very truly yours,

BRUCE M. BOTELHO
ATTORNEY GENERAL

By:

Linda M. O'Bannon
Linda M. O'Bannon
Assistant Attorney General

LMO/cw

cc: Representative Ivan M. Ivan
Bruce Botelho, Attorney General

LAW OFFICES

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ERIC J. BROWN

AMY L. VAUDREUIL

ERIC C. CROFT

March 18, 1996

Mr. Bruce M. Botelho, Attorney General
Attorney General's Office
P.O. Box 110300
Juneau, Alaska 99811-0300

Re: Civil Immunity/Liability for Unlicensed
Providers of Liquor

Dear Attorney General Botelho:

I recently read the Alaska Supreme Court's opinion in Phillip Chokwak v. Les Worley & Ron Worley, Opinion No. 4323, issued March 8, 1996, which interprets A.S. 04.21.020 dealing with civil liability of persons providing alcoholic beverages. The opinion holds that A.S. 04.21.020 grants civil immunity to social hosts who unlawfully provide liquor to minors and that this grant of immunity is not unconstitutional.

Although the focus of the opinion is on "social hosts" the interpretation of the statute rendered in this opinion seems to extend civil immunity to any person who is not a licensee, even if that person is an unlicensed seller of liquor or is otherwise unlawfully trafficking in alcohol.

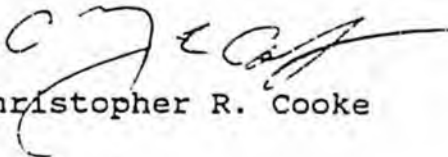
For example, if only licensees who violate subsections (1) and (2) of A.S. 04.21.020 may be held civilly liable for injuries resulting from intoxication and all others are immune, then a person who illegally sells alcohol to a minor or to an adult or in violation of a local option statute apparently has immunity from civil liability. If this statute means that "bootleggers" cannot be sued for any injuries resulting from the alcohol they illegally sell, that is an outcome with which I and, I believe, many in rural Alaska would disagree with. I also think that additional legislation is needed to impose civil liability on bootleggers for the consequences of their actions.

Mr. Bruce M. Botelho, Attorney General
Attorney General's Office
March 18, 1996
Page 2

Therefore, I am interested in your opinion as to whether the immunity arising from A.S. 04.21.020 includes bootleggers in rural Alaska and elsewhere. I am also interested in what sort of legislative remedy you would recommend to impose civil liability on such persons and what specific statutory language might accomplish this purpose. Personally, I believe strict liability - rather than just negligence - should apply to such conduct.

Because passing such legislation would obviously involve those in the political arena, I am sending copies of this letter to my legislative representatives and others who may have an interest in addressing this issue. Thank you for your consideration.

Very truly yours,
HEDLAND, FLEISCHER, BRENNAN &
COOKE



Christopher R. Cooke

cc: Senator Lyman Hoffman
Representative Ivan M. Ivan
Senator Georgianna Lincoln
Senator Al Adams
Representative Richard Foster
Representative Don Long
Representative Irene Nicholai
Mr. James Metcalfe, Bethel District Attorney

CRC:cls

Alaska State House of Representatives
House District 39



Session
Alaska State Capital
Juneau, Alaska 99801-1182
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Akiak, Alaska 99552
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Representative Ivan M. Ivan

SPONSOR STATEMENT - HOUSE BILL 22

Current law seemingly exempts those who sell liquor without a license (bootleggers) from any civil liability for the damages that may be caused by their illegal acts. The basis of House Bill 22 is to remove that exemption and make bootleggers strictly liable for their actions.

When in negative form? croft
Sec. 04.21.020. Civil liability of persons providing alcoholic beverages.

A person who provides alcoholic beverages to another person may not be held civilly liable for injuries resulting from the intoxication of that person unless the person who provides the alcoholic beverages holds a license authorized under AS 04.11.080 - 04.11.220, or is an agent or employee of such a licensee and

(1) the alcoholic beverages are provided to a person under the age of 21 years in violation of AS 04.16.051, unless the licensee, agent, or employee secures in good faith from the person a signed statement, liquor identification card, or driver's license meeting the requirements of AS 04.21.050(a) and (b), that indicates that the person is 21 years of age or older; or

(2) the alcoholic beverages are provided to a drunken person in violation of AS 04.16.030.

History -

(sec. 5 ch 131 SLA 1980; am sec. 14 ch 109 SLA 1983)

Revisors Notes -

In 1980, this section was rearranged for clarity.

Cross References -

For responsibility of licensee for violations, see AS 04.16.150; for responsibility of licensees, agents and employees, see AS 04.21.030.

Decisions -

Editor's notes. - Many of the cases cited in the notes below were decided under former AS 04.10.180 and 04.15.020.

Constitutionality. - This section is not so completely lacking in rationality or legitimacy of purpose as to be unconstitutional. Immunizing social hosts from liability caused by their guests' conduct can rationally be based on a view that it is an undesirable interference with normal hospitality to require a social host to monitor guests' alcohol consumption. Further, the primary actor responsible for harm caused by a drunken person is the drunken person. *Chokwak v. Worley*, 912 P.2d 1248 (Alaska 1996).

Legislative intent. - The intent of the legislature in enacting this section was to limit vendor liability in cases where the vendor has provided alcohol in a statutorily permissible manner. *Williford v. L.J. Carr Invs., Inc.*, 783 P.2d 235 (Alaska 1989).

"Provide" alcohol. - A vendor may "provide" alcohol even unwittingly to third parties. *Williford v. L.J. Carr Invs., Inc.*, 783 P.2d 235 (Alaska 1989).

This section does not immunize vendors who violate AS 04.16.030, - which prohibits certain conduct relating to drunken persons. *Williford v. L.J. Carr Invs., Inc.*, 783 P.2d 235 (Alaska 1989).

Proximate cause. - AS 04.16.030 and this section require for purposes of liability only that the defendant's intoxication, and not the particular sale of intoxicants to a drunken person, be a proximate cause of the accident. *Kavorkian v. Tommy's Elbow Room, Inc.*, 711 P.2d 521 (Alaska 1985).

Even though the plaintiffs may frame the "but for" causation question in terms of the providee's intoxication, they are not required to do so, and may instead take the more traditional approach toward proximate cause, that is, in terms of the negligent provision of the liquor. *Gonzales v. Krueger*, 799 P.2d 1318 (Alaska 1990).

Recognition of bystander's right to recover damages for negligent infliction of emotional distress caused by injury to another. - See *Tommy's Elbow Room, Inc. v. Kavorkian*, 727 P.2d

1038 (Alaska 1986).

Civil liability under former law. - The common-law rule as to the nonliability of the vendor of intoxicating liquor for torts committed by the drinker of liquor while the latter was intoxicated, without more, generally prevailed. *Cherbonnier v. Rafalovich*, 12 Alaska 634, 88 F. Supp. 900 (D. Alaska 1950) See *Vance v. United States*, 355 F. Supp. 756 (D. Alaska 1973).

Although it was true that policy embodied in former AS 04.10.180 could also be enforced by criminal and administrative sanctions, there was no reason for giving that statute a narrow interpretation that would preclude a private right of action for unlawful conduct. *Alesna v. LeGrue*, 614 P.2d 1387 (Alaska 1980).

It is not unfair to hold a licensee responsible for the establishment's operation even though the licensee does not have actual control of the day-to-day functions. *Alesna v. LeGrue*, 614 P.2d 1387 (Alaska 1980).

For construction of former AS 04.15.020(a) as setting a minimum standard of care for the purposes of the common-law cause of action based upon ordinary negligence, see *Vance v. United States*, 355 F. Supp. 756 (D. Alaska 1973).

Liability of social host. - Employer, as a social host, owed no legal duty to plaintiffs. Since employer did not hold a liquor license, it was not liable as a social host for injuries resulting from a guest's intoxication, nor was it liable (under a "control" theory) as the employer of an intoxicated person who caused injuries. *Mulvihill v. Union Oil Co.*, 859 P.2d 1310 (Alaska 1993).

Nonlicensees illegally furnishing liquor to minors. - Given the plain language of this section and the absence of convincing contrary legislative history, the court cannot by statutory interpretation construe this section to be inapplicable to nonlicensees who illegally furnish liquor to minors. *Chokwak v. Worley*, 912 P.2d 1248 (Alaska 1996).

Liability of alcohol seller. - Even though this section does not define the elements of all viable causes of action against liquor licensees, it does present a bar to all such causes of action based on providing alcoholic beverages if the conditions giving rise to immunity are met. A jury's conclusion that defendant did not with criminal negligence sell to a drunken person means that defendant was immune under the statute for all unlawful providing claims. The focus of the jury's attention should be whether the seller responded as a reasonable person would to the appearance and outward behavior manifestations of the person to whom the alcoholic beverage was sold, not on any specialized training the seller should have had as an aid to recognizing when a person is intoxicated. *Gonzales v. Safeway Stores, Inc.*, 882 P.2d 389 (Alaska 1994).

Sale to group. - A licensed provider of alcoholic beverages is entitled to immunity from civil liability only if he does not sell to a drunken person, and since vendor sold liquor to a group, one of whom was clearly a drunken person, he could not avoid liability. *Gonzales v. Krueger*, 799 P.2d 1318 (Alaska 1990).

Quoted in *Gordon v. Alaska Pac. Bancorporation*, 753 P.2d 721 (Alaska 1988); *Lord v. Fogcutter Bar & Stacy Cap.* 813 P.2d 660 (Alaska 1991).

Collateral Refs -

45 Am. Jur. 2d, Intoxicating Liquors, sec. 553-614.

48A C.J.S., Intoxicating Liquors, sec. 428-463.

Liability of innkeeper, restaurateur, or tavernkeeper for injury occurring on or about premises to guest or patron by person other than proprietor or his servant. 70 ALR2d 628; 28 ALR4th 80; 43 ALR4th 281.

Who is, as "owner" of premises on which intoxicating liquor is sold, liable under civil

damage or dram shop act. 18 ALR3d 1323.

Third person's participating in or encouraging drinking as barring him from recovering under civil damage or similar acts. 26 ALR3d 1112.

Right of one liable under Civil Damage Act to contribution or indemnity from intoxicated person, or vice versa. 31 ALR3d 438.

Proof of causation of intoxication as a prerequisite to recovery under civil damage act. 64 ALR3d 882.

Liability of state or municipality in tort action for damages arising out of sale of intoxicating liquor by state or municipally operated liquor store or establishment. 95 ALR3d 1243.

Common-law right of action for damage sustained by plaintiff in consequence of sale or gift of intoxicating liquor or habit-forming drug to another. 97 ALR3d 528; 62 ALR4th 16.

Liability of persons furnishing intoxicating liquor for injury to or death of consumer, outside coverage of civil damages act. 98 ALR3d 1230.

Choice of law as to liability of liquor seller for injuries caused by intoxicated person. 2 ALR4th 952.

Employer's liability for furnishing or permitting liquor on social occasion. 51 ALR4th 1048.

Social host's liability for injuries incurred by third parties as a result of intoxicated guest's negligence. 62 ALR4th 16.

Sec. 04.11.010. License or permit required.

(a) Except as provided in AS 04.11.020, a person may not manufacture, sell, offer for sale, possess for sale or barter, traffic in, or barter an alcoholic beverage unless under license or permit issued under this title.

(b) Except as provided in this subsection, a person may not solicit or receive orders for the delivery of an alcoholic beverage in an area that has adopted a local option under AS 04.11.491. If the area has adopted a local option under AS 04.11.491(a)(1), (2), or (3), or (b)(1) or (2), a package store licensee outside of that local option area may receive orders as provided under AS 04.11.150 but may not solicit in that area or receive orders through an agent or employee in that area. This subsection does not apply to a package store licensee who operates a package store in an area that has adopted a local option under AS 04.11.491(a)(2)(C) or (3)(C) or (b)(2)(C). A person who violates this subsection is punishable upon conviction as provided under AS 04.16.200(a) or (b).

(c) In a criminal prosecution for possession of alcoholic beverages for sale in violation of (a) of this section, the fact that a person possessed more than 12 liters of distilled spirits, 24 liters or more of wine, or 12 gallons or more of malt beverages in an area where the sale of alcoholic beverages is restricted or prohibited under AS 04.11.491 creates a presumption that the person possessed the alcoholic beverages for sale

History -

(sec. 2 ch 131 SLA 1980; am sec. 1 ch 156 SLA 1988; am sec. 2, 3 ch 101 SLA 1995)

Amendment Notes -

The 1995 amendment, effective July 1, 1995, rewrote subsection (b) and, in subsection (c), substituted "12 gallons" for "45 liters," inserted "restricted or," and inserted a section reference.

History Reports -

For Senate letter of intent relating to the enactment of (c) of this section by sec. 1, ch. 156, SLA 1988 (HCS CSSB 371 (Jud) am H), see 1988 Senate Journal 2939.

AG Opinions -

A "cooperative" that purchases alcoholic beverages for its members and charges them the actual cost of the purchase plus a percentage "to cover administrative and shipping costs" is required to obtain a license under this section. July 2, 1987, Op. Att'y Gen.

Decisions -

Editor's notes. - Many of the cases cited in the notes below were decided under former AS 04.10.010 and earlier statutes.

This chapter sets forth the only conditions under which a liquor license may be issued - for the sale of liquor within Alaska. In re Kaye, 11 Alaska 556 (1948).

Possession must be with intent to sell. - AS 04.11.010 - 04.11.700 does not make it illegal to possess intoxicating liquors unless the possession is with the intention to sell the same in Alaska. Territory of Alaska v. 188 Cases of Mixed Intoxicating Liquors, 10 Alaska 414 (1944).

The right to sell liquor may be prohibited altogether - in Alaska. In re Kaye, 11 Alaska 556 (1948).

For legislative history of liquor license legislation, - see K & L Distributions, Inc. v. Alaska, 184 F. Supp. 496 (D. Alaska 1960), vacated, 318 F.2d 498 (9th Cir. 1963).

Interpretation of liquor license statutes. - Resort may be had to the legislative history of the liquor license statutes, evidenced by subsequent enactments and amendments, as an aid to their interpretation and application. K & L Distributions, Inc. v. Alaska, 184 F. Supp. 496 (D.

Alaska 1960), vacated, 318 F.2d 498 (9th Cir. 1963).

Constitutionality of AS 04.16.200. - When read in conjunction with this section, AS 04.16.200(b), governing the sale of alcoholic beverages by unlicensed persons, defines an offense, affords adequate notice of the proscribed conduct and the prescribed penalty, and satisfies due process requirements. *Burnor v. State*, 829 P.2d 837 (Alaska Ct. App. 1992).

AS 04.16.200(b) as it existed prior to 1988 construed. - See *Morgan v. State*, 661 P.2d 1102 (Alaska Ct. App. 1983).

Liability of licensee. - In the absence of a statute expressly imposing liability, a person was not liable to a wholesale liquor dealer for the purchase money for liquor merely because he owned the liquor license for the establishment where the dealer had sold the liquor. The protection of creditors of retail dealers in liquor did not come within the spirit or purpose of purely regulatory or revenue producing liquor license statutes. *Sabre Jet Room, Inc. v. K & L Distribs., Inc.*, 384 P.2d 952 (Alaska 1963). For present provisions concerning the licensee's liability, see AS 04.16.150 and 04.21.030.

Availability of defense to accomplice. - If the perpetrator receives a profit, an accomplice may not avail himself of the defense to a charge of illegal sale of alcohol for one who does not profit. *Kinegak v. State*, 747 P.2d 541 (Alaska Ct. App. 1987).

Purchasing agent defense. - A defendant cannot defend against a charge of selling alcohol without a license by alleging that he in effect acted as a purchasing agency by serving as a go-between between the consumer of the alcohol and a third-party seller, and is not entitled to a jury instruction defining sale as requiring a transfer of title from the defendant to the consumer. *Herrera v. State*, 753 P.2d 150 (Alaska Ct. App. 1988).

Evidence sufficient to convict of sale of alcohol and possession of alcohol for sale. - See *Hernandez v. State*, 691 P.2d 287 (Alaska Ct. App. 1984).

Conviction and sentence upheld. - See *Azzarella v. State*, 703 P.2d 1182 (Alaska Ct. App. 1985); *Tuckfield v. State*, 805 P.2d 982 (Alaska Ct. App. 1991).

Sentence upheld. - Concurrent sentences of 240 days with 120 days suspended and concurrent fines of \$3,000 with \$2,000 suspended for sale of alcohol and possession of alcohol for sale were not clearly mistaken. *Hernandez v. State*, 691 P.2d 287 (Alaska Ct. App. 1984).

Sentence of six months' incarceration as a condition of receiving a suspended imposition of sentence, upon conviction of one count of selling intoxicating beverages without a license in a local option area, was not clearly mistaken, where defendant had set up a commercial enterprise, although of short duration, and sold a pint of whiskey to a man who murdered a woman shortly after buying the whiskey. *Wassillie v. State*, 790 P.2d 1385 (Alaska Ct. App. 1990).

Sentence modification. - A trial judge who sentenced a worst offender to two maximum consecutive terms of one year for conviction of one count of selling alcoholic beverages without a license and one count of possession of alcoholic beverages for sale in a local option area, with 275 days of the first sentence suspended, was clearly mistaken in imposing consecutively the unsuspended portion of the offender's jail term for selling alcoholic beverages without a license, where the judge specifically commented at sentencing that the chances for the offender's rehabilitation seemed good and that there was no reason to believe the offender would be inclined to resume a criminal lifestyle. In order to impose consecutive sentences that exceed the maximum sentence for the single most serious count, the sentencing court must expressly find that the full term of imprisonment is necessary for the protection of the public. *Peruski v. State*, 711 P.2d 573 (Alaska Ct. App. 1985).

Cited in *Cleland v. State*, 759 P.2d 553 (Alaska Ct. App. 1988); *Noah v. State*, 887 P.2d

981 (Alaska Ct. App. 1995).

Collateral Refs -

45 Am. Jur. 2d, Intoxicating Liquors, sec. 114-227.

48 C.J.S., Intoxicating Liquors, sec. 90-116.

What constitutes "sale" of liquor in violation of statute or ordinance. 89 ALR3d 551.

Article Notes -

Editors Notes. Section 5, ch. 136, SLA 1996 provides that "the Alcoholic Beverage Control Board shall hold a public hearing on or before January 1, 1997, for the purpose of discussing the alcoholic beverage licenses currently being issued by the board and the interrelationship between those licenses."

LEGAL SERVICES

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STATE OF ALASKA

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130 Seward Street, Suite 409
Juneau, Alaska 99801-2105

MEMORANDUM

January 17, 1997

SUBJECT: Civil liability for illegal alcohol sales - (HB 22)

TO: Representative Ivan Ivan
Attn: Tom

FROM: Michael F. Ford *M.F.F.*
Legislative Counsel

You have asked for a brief explanation of the effects of the above- referenced bill. The bill would impose strict liability on bootleggers, or people who sell alcohol without a license. The imposition of strict civil liability means that a person convicted of bootlegging would be liable for any civil damages regardless of the degree of care exercised by the bootlegger. This is in contrast to a situation where a person is liable only if negligence is proven. To prove negligence you must show a failure to meet a standard of care, whereas in strict liability the only issues are commission of the act and damages.

Also, civil damages would include personal injuries as well as damages for a person's death. Assuming the intoxicated person does die as a result of a bootlegger providing alcohol, the deceased person's estate would still be able to recover damages from the bootlegger. See AS 09.55.570 and 09.55.580.

The imposition of strict liability is not common in our statutes and is often not favored by the courts. However, given the public health concerns addressed by the draft I do not think that there are any legal impediments to imposing strict liability in this situation.

Please contact me if you have further questions.

MFF:pl
97-013.plm

file in Ivan's
HB 22 folder

Position Paper
Tanana Chiefs Conference, Inc.

Subject: Civil liability for illegal sale of alcohol
Date: January 22, 1996
Bill Number: House Bill 22
Sponsor: Representative Ivan
Status: (H) Jud (single committee referral)

Issue: According the sponsor's statement, current law seemingly exempts those who sell liquor without a license (bootleggers) from any civil liability for the damages that may be caused by their illegal acts. The basis of House Bill 22 is to remove that exemption and make bootleggers strictly liable for their actions.

TCC Position: In the spirit of the War on Alcohol led by the Elders and multiple convention resolutions calling for the crackdown on bootlegging, Tanana Chiefs Conference supports HB 22.

**TANANA CHIEFS CONFERENCE
BOARD OF DIRECTORS
Resolution No. 96-13**

BOOT THE BOOTLEGGERS AND DRUG DEALERS

WHEREAS, alcohol and drug abuse among the youth is the main contribution to all the tragedies affecting the youth in our villages; and

WHEREAS, bootleggers and drug dealers in our villages are providing a deadly poison to our youth; and

WHEREAS, a high number of suicides, teen pregnancies, murders and alcohol related accidents are directly related to alcohol and drug abuse; and

WHEREAS, alcohol and drug abuse is destroying our culture and tradition;

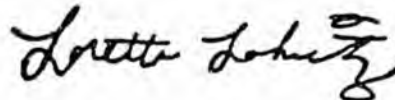
NOW THEREFORE BE IT RESOLVED that the Tanana Chiefs Conference Board of Directors direct staff to work with village councils to develop strategies to combat the alcohol and drug abuse problems; and

BE IT FURTHER RESOLVED that the VPSO's, State Troopers and other law enforcement agencies be requested to step up their efforts of booting the bootleggers and drug dealers out of our villages; and

BE IT FURTHER RESOLVED that this resolution is effective 3/14/96.

CERTIFICATION

I hereby certify that this resolution was duly passed by the Tanana Chiefs Conference, Inc. Board of Directors on March 14, 1996 at Fairbanks, Alaska and a quorum was duly established.



Loretta Lolnitz
Secretary/Treasurer

Submitted by: Youth Delegates



TANANA CHIEFS CONFERENCE, INC.
BOARD OF DIRECTORS
Resolution No. 95-40

ADVOCATING THE PREVENTION OF BOOTLEGGING AND SALE OF ILLEGAL DRUGS

- WHEREAS, the consumption of alcohol and use of illegal drugs is a major cause of damage to the lifestyle of Native communities in Alaska; and
- WHEREAS, illegal sale of drugs and sale of alcohol by "bootlegging" is widely known as having an extreme negative impact on the cultural, social, and economic well being of the Native communities in Alaska; and
- WHEREAS, tribal councils need technical assistance in developing tribal courts and ordinances as enforcement against illegal sale of drugs and sale of alcohol by "bootlegging"; and
- WHEREAS, laws should be written to make bootleggers and drug dealers accessories to crimes committed by the people to whom they have sold liquor or illegal drugs to; and
- WHEREAS, such laws should include the taking of any property of drug dealer or bootlegger bought by the profits of the illegal sale of drugs and sale of alcohol by "bootlegging" by the law enforcement; and
- WHEREAS, that use of alcohol and drugs offers nothing to our Native villages, but broken spirits, homes and families; pain suffering and death;

NOW THEREFORE BE IT RESOLVED the Tanana Chiefs Conference, Inc. Board of Directors direct their staff to assist the FCC villages in developing and implementing ordinances against the illegal sale of drugs and alcohol; and

BE IT FURTHER RESOLVED that Tanana Chiefs Conference, Inc. Board of Directors request that Governor Tony Knowles and The State Legislature support the efforts of Rural Alaska in their fight against alcohol and drug abuse; and

BE IT FURTHER RESOLVED that Tanana Chiefs Conference, Inc. Board of Directors request that the State Legislature consider written law to make bootleggers and drug dealers accessory to crimes committed by the people to whom they have sold liquor or illegal drugs to and confiscate property purchased by profits of the illegal sale of the drugs and alcohol.

C E R T I F I C A T I O N

I hereby certify that this resolution was duly passed by the Tanana Chiefs Conference, Inc. Board of Directors on March 16, 1995 at Fairbanks, Alaska and a quorum was duly established.



[Handwritten Signature]

Secretary-Treasurer

Koyukuk Tribal Council

TANANA CHIEFS CONFERENCE, INC.
BOARD OF DIRECTORS
Resolution No. 95-71

YOUTH DECLARATION OF WAR ON ALCOHOL AND DRUG ABUSE

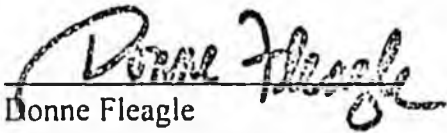
- WHEREAS,** alcohol and drug abuse causes many accidents and other tragedies; and
- WHEREAS,** alcohol contributes to problems of child abuse, sexual abuse and domestic violence; and
- WHEREAS,** alcohol and drug abuse contributes to low-self esteem; and
- WHEREAS,** alcohol and drug abuse contributes to high school drop out rates and loss of employment; and
- WHEREAS,** alcohol and drug abuse often causes families to break apart; and
- WHEREAS,** alcohol and drug abuse threatens the Alaskan Native cultures;

NOW THEREFORE BE IT RESOLVED that the youth declare a War on Alcohol and Drugs and that the Tanana Chiefs Conference, Inc. Board of Directors directs TCC staff to support in every way possible the Alaska Native Sobriety movement; and

BE IT FURTHER RESOLVED that the chain of passing alcohol and substance abuse between generations be broken.

CERTIFICATION

I hereby certify that this resolution was duly passed by the Tanana Chiefs Conference, Inc. Board of Directors on March 16, 1995 at Fairbanks, Alaska and a quorum was duly established.


Donne Fleagle
Secretary/Treasurer

Submitted by: Youth Delegates



TANANA CHIEFS CONFERENCE, INC.
Board of Directors

Resolution No. 87-1

Supporting Native Elders in Their Fight Against Alcohol and Drugs

WHEREAS, there are many problems which threaten our survival as a Native people, but none have such a devastating impact on our villages and families as does the problem of alcohol and drug abuse; and

WHEREAS, the use of alcohol and drugs offers nothing to our Native villages but broken spirits, broken families, pain, grief, suffering and death; and

WHEREAS, the use of alcohol and drugs never has been and never will be of any value to our Native culture and Native people; and

WHEREAS, since its introduction from other cultures, Native elders have warned their villages that alcohol and drugs are the greatest threat to health, life and cultural values; and

WHEREAS, as the keepers and teachers of Native culture, the elders of today speak stronger than ever against alcohol and drugs and have committed themselves to bring their message against alcohol and drugs to their villages; and

NOW THEREFORE BE IT RESOLVED that the Tanana Chiefs Conference Board of Directors request that Governor Steve Cowper and every Alaska State legislature and member of Alaska's delegation in Congress support the efforts of the Interior villages in their fight against alcohol and drug abuse; and

BE IT FURTHER RESOLVED that the Tanana Chiefs Conference Board of Directors direct TCC to pursue state, federal, local, and private sector funding to institute comprehensive region wide alcohol and drug prevention programs utilizing elders, concerned village volunteers, village councils and youth in each village and that these concerned village teams be afforded training and ongoing support; and

BE IT FURTHER RESOLVED that the Village Councils and village courts pass ordinances against alcohol and drugs and strictly enforce these ordinances through their village courts; and

BE IT FURTHER RESOLVED to protect our children and families, Village Councils and courts strongly consider the use of traditional Native justice mechanisms and banish bootleggers and drug pushers from our village; and

BE IT FURTHER RESOLVED each school in each village includes a comprehensive drug prevention to their curriculum and actively implement preventive education at every grade level; and

BE IT FURTHER RESOLVED as an example to our children and to each other, no alcohol to be served at any TCC function from this day forward; and

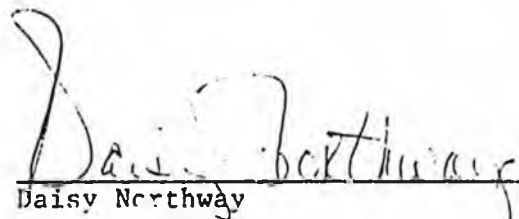
BE IT FURTHER RESOLVED any TCC employee determined to have a drug or alcohol problem be given the option to receive treatment or be immediately terminated from employment; and

BE IT FURTHER RESOLVED each Native person of strong body and mind lend their hand to help their elders and village leaders in this, their most serious tas ; and

BE IT FURTHER RESOLVED for the spiritual well being of our children and families and for the survival and strengthening of our villages, from this day forward, let it be known that the elders of the Athabascan Nation have declared war on all those who are associated with alcohol and drug abuse.

C E R T I F I C A T I O N

I hereby certify that this resolution was duly passed by the Tanana Chiefs Conference, Inc. Board of Directors on March 19, 1987 at Fairbanks, Alaska and a quorum was duly established.


Daisy Northway
Secretary-Treasurer
Tanana Chiefs Conference, Inc.

Submitted by: Elder Delegates

3.06 LEGAL CAUSE

I will now define "legal cause" for you. A legal cause of harm is an act or failure to act which is a substantial factor in bringing about the harm. An act or failure to act is a substantial factor in bringing about harm if it is more likely true than not true that:

1. the act or failure to act was so important in bringing about the harm that a reasonable person would regard it as a cause and attach responsibility to it; and

2. the harm would not have occurred but for the act or failure to act.

[There is, however, one exception to the requirement that the harm would not have occurred but for the act, or failure to act, or the defendant. If two forces operated to cause the harm, one because of the defendant and the other not, and each force by itself was sufficient to cause the harm, then the defendant's act or failure to act is a cause of the harm if it was so important in bringing about the harm that a reasonable person would regard it as a cause and attach responsibility to it.]

Use Note

This instruction should be used as the "proximate cause" instruction. The bracketed paragraph should be given in appropriate circumstances. See Comment to Instruction 3.07.

If concurring or superseding cause is an issue, the instruction for those doctrines should be given immediately following this instruction. See Instruction 3.07.

Comment

This instruction is derived from Restatement (Second) of Torts § 431 (1965). "Proximate" is a term that may be meaningful

to lawyers because of familiarity with the concept, but it is not so understood by jurors. All too often "proximate" confuses rather than enlightens the layperson trier of fact.

"Legal cause" language and the "substantial factor" rule have been used in Alaska. See Sharp v. Fairbanks North Star Borough, 569 P.2d 178, 181 (Alaska 1977); State v. Abbott, 498 P.2d 712, 727 (Alaska 1972).

The definitions of legal cause and substantial factor are consistent with the Restatement position. See Restatement (Second) of Torts § 430 and comment d, § 431 and comment a (1965), as cited in Sharp v. Fairbanks North Star Borough, 569 P.2d at 181, and in State v. Abbott, 498 P.2d at 727.

In City of Fairbanks v. Nesbett, 432 P.2d 607, 610-11 (Alaska 1967), the Supreme Court stated that it is not necessary for the actor's conduct to be "the" legal cause of an injury, it is only necessary that such conduct be "a" legal cause.

While several Alaska cases have endorsed the "substantial factor" test, the Alaska Supreme Court did question this test to a certain degree in McCarthy v. McCarthy, 153 P.2d 137, Op. No. 3285 (Alaska, April 1, 1988). The case involved an automobile accident in which both the plaintiff and defendant were negligent. Both parties' negligence was a "but for" cause of the accident. However, despite the fact that there were no attenuating causation facts, the jury concluded that the defendant's negligence was not a "substantial factor" in causing the accident. The supreme court reversed, holding that no reasonable jury could have found a lack of legal cause. Id. at 3.

The court in McCarthy first recognized that the "substantial factor" test has been criticized. Id. at 4-5 (quoting W. Keeton, D. Dobbs, R. Keeton & R. Owen, Prosser and Keeton on the Law of Torts, at 278 (5th Ed. 1984)). The court states that this criticism "seems valid", Id. at 5, but finds it unnecessary to make a definitive ruling on the test because the case presented none of the "unforeseeable or indirect consequences as those presented in the classic case of Palsgraff"

In conclusion, while the court questions the substantial factor test, it neither invalidates the test, overrules prior cases endorsing the test, nor suggests an alternate test.

3.07 MULTIPLE CAUSES/SUPERCEEDING CAUSE

There may be more than one legal cause of harm. A person's negligence may combine with another cause (either the acts of another person or some force of nature) to produce harm. If you find a person's negligence is a legal cause of harm, that person may not avoid legal responsibility merely because some other cause also caused or helped cause the harm.

[However, (defendant) (plaintiff) claims that (his) (her) (its) conduct was not a legal cause of (plaintiff's) (defendant's) harm and that another cause was the superceeding cause of the harm. In order for (defendant) (plaintiff) to prevail on this claim, you must decide that it is more likely true than not true that

1. the harmful effects of the other cause occurred after the (defendant's) (plaintiff's) negligence;
2. the other cause was not reasonably foreseeable; and
3. the other cause brought about harm different in kind than what could be reasonably expected from (defendant's) (plaintiff's) negligence.

If you find that any of these things are more likely true than not true, then you must find that the defendant's conduct was not the legal cause of the harm.]

Use Note

This instruction should be given immediately following instruction 3.06, if appropriate.

The section starting with the second paragraph should be included only in cases where the facts present an issue of an intervening cause which may be a superseding cause.

Comment

In City of Fairbanks v. Nesbett, 432 P.2d 607 (Alaska 1967), the Alaska Supreme Court held that it was proper to find a defendant's negligent conduct was the legal cause of plaintiff's injury if the negligent act was a substantial factor in bringing about the injury. 432 P.2d at 610. The court further stated that it is not necessary for the actor's conduct to be the only legal cause of an injury for liability to attach to the actor. 432 P.2d at 610-611. The court in State v. Abbott, 498 P.2d 712 at 726-727 (Alaska 1972), explains that this is consistent with the position taken by the Restatement (Second) of Torts § 430, comment d at 428 (1965).

The court, however, has recognized a significant exception where two forces are operating to cause the injury. If one force is the defendant's negligence and the other is not, and if each force itself is sufficient to cause the injury, then the defendant's negligence may be found to be a legal cause of the harm. See State v. Abbott, 498 P.2d 712 at 727 (Alaska 1972), citing Restatement (Second) of Torts § 432(2) (1965).

Furthermore, if the harm to the plaintiff would have occurred only with the concurrence of the negligence of the defendant and any other actor, but would not have occurred if either party had been exercising reasonable care, it is proper to impose liability on the defendant. State v. Abbott, 498 P.2d 712 at 727 (Alaska 1972).

Alaska, however, has recognized that there is a point at which an intervening act may become the superceding legal cause of the plaintiff's injuries. See City of Fairbanks v. Nesbett, 432 P.2d 607, 611 n. 7 (Alaska 1967); Sharp v. Fairbanks North Star Borough, 569 P.2d 178 at 182 (Alaska 1977) (adopting the Restatement (Second) of Torts definition of intervening force and superseding cause).

The Restatement (Second) of Torts § 442 (1965) formulation of six factors to be considered in determining whether an intervening cause is a superseding cause is quoted in Sharp v. Fairbanks North Star Borough, supra, 569 P.2d at 183. These factors should be considered in appropriate cases.

Only in exceptional circumstances is the duty to prevent harm to another threatened by an actor's negligent conduct shifted to a third person, so as to make that third person's conduct a superseding cause of the harm. Osborne v. Russell, 609 P.2d 550 (Alaska 1983).

If there is a basis for diversity of opinion among reasonable persons as to whether a third party's actions constituted a superseding or intervening cause which would relieve the defendant of liability, the jury may decide the issue. City of Fairbanks v. Nesbett, 432 P.2d 607, 610 (Alaska 1967).

Position Paper

Tanana Chiefs Conference, Inc.

Subject: Civil liability for illegal sale of alcohol
 Date: January 22, 1996
 Bill Number: House Bill 22
 Sponsor: Representative Ivan
 Status: (H) Jud (single committee referral)

Issue: According the sponsor's statement, current law seemingly exempts those who sell liquor without a license (bootleggers) from any civil liability for the damages that may be caused by their illegal acts. The basis of House Bill 22 is to remove that exemption and make bootleggers strictly liable for their actions.

TCC Position: In the spirit of the War on Alcohol led by the Elders and multiple convention resolutions calling for the crackdown on bootlegging, Tanana Chiefs Conference supports HB 22.

Post-it® Fax Note	7671	Date	1/24/97	# of pages	6
To	Rep. GREEN	From	Lisa Jaeger		
Co./Dept.	HOUSE JUDICIARY	Co	TCC		
Phone #		Phone #			
Fax #		Fax #			

Wesses to State
 [799 P2 1318]
Gonzales v State
 608 P2 23 (AK'80)
 (Restitution to State)
 12.55.100

punitive damages
 see
 exclusio rule
 Sprague
 590 P2 410 (AK'79)
 Haybarger
 606 P2 385 (AK'80)

HJC rec'd 1/28/97

Alaska State House of Representatives House District 39

Session
Alaska State Capital
Juneau, Alaska 99801-1182
Phone: (907) 465-4942



Interim
P.O. Box 137
Akiak, Alaska 99552
Phone: (907) 765-7526

Representative Ivan M. Ivan

CHANGES IN CSHB 22 (), DRAFT 0-LS0148\K, DATED 1/12/97

There have been a number of changes in CSHB 22, Draft LS0148\K, from the original bill. The changes adopted in the committee substitute were recommendations from House Judiciary Committee members, the Department of Law and House Judiciary staff.

SECTION 1

Language was added to explicitly express the intent of the original bill.

- A person who sells or barter alcohol illegally is strictly liable (1) to the recipient or another person for civil damages and (2) the cost to the state or political subdivision of the state to criminally prosecute the person receiving the illegal alcohol.
- The person who receives the illegal alcohol must be under the influence and the alcohol must substantially contribute to the civil damages.
- A definition of civil damages under subsection (b) includes damages for personal injury, death or injury to a person's property to include the state or political subdivision.
- A person who illegally sells or barter alcohol cannot use as a defense that the recipient voluntarily consumed or was voluntarily under the influence.

SECTION 2

This new section parallels section 1 of the draft committee substitute and addresses civil liability of a person who sell or barter a controlled substance as defined under AS 11.71.900.

1/15/97

Bootlegging
Ct. of Apps

per Tom Wright

- 96 Kinney v S
- 93 S v McHayntin
- 91 Harlow

Chokwak v Whorl
 Op. No. 4323
 3/96
 912 P2d 1248

the State to assume custody over "any who had needs the child's parents could meet." Opinion at 1241. As noted above, I agree that such a reading would be too broad. That does not mean, however, that this court's reading is correct.

The court argues that the better way to interpret subsection (A) is "in accordance with its plain intent..." Opinion at 1241. I agree. I read subsection (A), however, to express a different intent.

Because the court misinterprets subsection (A), it erroneously concludes that inability is irrelevant to a CINA adjudication under that subsection. To repeat, the inability to care is relevant to both conditions which have to be met under subsection (A) in a case like this. There must first be no parent or other eligible caregiver who is in fact "caring" at present for the child, i.e., there must be a present failure of care. Second, there must be no other parent or caregiver "willing to provide care" if the child's custody were to be changed to some other eligible caregiver. The court erroneously reads "caring" and "willing to provide care" to be two separate alternatives. It reads willingness as a substitute for ability. Its reading fails to distinguish between the status quo and the future. Assuming the current caregiver is presently failing to provide the necessary care, a CINA adjudication is nonetheless inappropriate if some other eligible caregiver is able to provide care in the future. Willingness alone is no substitute for an ability to perform. The court looks at willingness in isolation, and fails to give appropriate weight to the clause "to provide care."

For these reasons, this court should not overrule its prior opinions in which it found inability to provide care to be relevant to a subsection (A) inquiry. See *A.M. v. State*, 891 P.2d 815, 824 (Alaska 1995); *In re T.W.R.*, 887 P.2d 911, 915 (Alaska 1994); *In re J.L.F.*, 828 P.2d 160, 170 (Alaska 1992). I would consequently disavow the language in *F.T.*, 862 P.2d at 860, by which the court rejected an argument that inability to care could support a finding that a child was

CINA under subsection (A). I would not overrule the explicit holding in *F.T.*

In the case now before us, the record does not warrant a finding that S.A. and D.A. are CINA under AS 47.10.010(a)(2)(A), because the facts do not justify a conclusion that N.A. was, at the time of the trial, unable or unwilling to provide the kind of care contemplated under subsection (A). I consequently agree that the termination of N.A.'s parental rights should be reversed.



Phillip CHORWAK, Appellant,

v.

Les WORLEY and Ron
Worley, Appellees.

No. S-6353.

Supreme Court of Alaska.

March 8, 1996.

Minor who was injured in automobile accident after he consumed alcohol at party brought personal injury action against hosts. The Superior Court, Third Judicial District, Anchorage, Dana Fabe, J., granted summary judgment for hosts, and minor appealed. The Supreme Court, Matthews, J., held that: (1) statute granting immunity to "a person who provides alcoholic beverages" is not limited to licensees and grants civil immunity to social hosts who provide liquor to minors; (2) in light of such statute, cause of action for civil damages could not be implied under criminal statute dealing with furnishing alco-

hol to minors; and (3) rational basis existed for conferring immunity on social hosts.

Affirmed.

1. Intoxicating Liquors \S 299

Statute conferring upon "a person who provides alcoholic beverages" to another civil immunity from liability for injuries resulting from intoxication of that person encompasses social hosts who provide liquor to minors, notwithstanding contention that legislative history of statute indicated that it was aimed only at licensees and that applying it to licensees who unlawfully furnished liquor to minors reached absurd result. AS 04.21.020.

See publication *Words and Phrases* for other judicial constructions and definitions.

2. Statutes \S 18(1)

In interpreting statute, objective is to determine intent of legislature, with due regard for meaning that language employed in statute conveys to others.

3. Statutes \S 217.4

The plain language of the statute, the more convincing contrary legislative history must be.

4. Action \S 5

Private cause of action for civil damages against social host who illegally provides alcohol to minor could not be implied from criminal prohibition on furnishing alcohol to minors in light of subsequent legislation reflecting apparent legislative intent to grant broad immunity from civil liability to those who provide alcohol to minors. AS 04.16.051(a), 04.21.020.

5. Action \S 5

Cause of action "implied" from criminal statute generally cannot be harmonized with later statute expressly abrogating civil liability.

6. Constitutional Law \S 215(1), 301(1)

In context of equal protection and due process challenges, rational basis existed for

statute granting civil immunity to nonlicensees, e.g., social hosts, who furnished alcohol to minors, such immunity could rationally be based on view that it is undeniably preferable with normal hospitality to require social hosts to monitor guests' alcohol consumption, and primary actor responsible for harm caused by drunken person is drunken person. Const. Art. 1, \S 1, 7; AS 04.21.020.

7. Constitutional Law \S 251.3

If any conceivable legitimate public policy for enactment is either apparent or inferred, enactment will survive due process scrutiny under Alaska Constitution so long as factual basis for justification is not disproved. Const. Art. 1, \S 7.

8. Constitutional Law \S 211.021

Under relaxed scrutiny test for determining whether enactment violates equal protection provision of Alaska Constitution, court inquires as to whether questioned classification has legitimate governmental purpose and whether there is fair and substantial relationship between the act and the reason. Const. Art. 1, \S 1.

Appeal from the Superior Court of the State of Alaska, Third Judicial District, Anchorage, Dana Fabe, Judge.

Michael W. Flaungan, Walter & Flaungan, Anchorage, for Appellant.

Paul W. Waggoner, Law Offices of Paul Waggoner, Anchorage, for Appellees.

Before MOORE, C.J., and RABINOWITZ, MATTHEWS, COMPTON and EASTAUGH, JJ.

OPINION

MATTHEWS, Justice.

I. FACTS AND PROCEEDINGS

Phillip Chokwak, a minor, became intoxicated at a party hosted by Les and Ron

Worley. The Worleys, ages 15 and 17, had furnished a keg of beer and a punch drink mixed with grain alcohol for their classmates at Wasilla High School. Approximately seventy-five to a hundred people attended the party. The Worleys did not limit the availability of alcohol to any of their underage guests, and did not restrain their intoxicated guests from driving. While driving from the party Chokwak was in an automobile accident in which he suffered permanent paralyzing injuries. He sued the Worleys for providing intoxicating liquor to him. The Worleys moved for summary judgment, claiming statutory immunity from civil liability under AS 04.21.020. Their motion was granted and judgment was entered in their favor.

Chokwak appeals. Two arguments are presented: first, that AS 04.21.020 does not grant civil immunity to social hosts who unlawfully provide liquor to minors; and second, that if the statute does grant civil immunity to hosts who unlawfully furnish liquor to minors, the statute so completely lacks rationality that it is unconstitutional.

II. DISCUSSION

A. Does AS 04.21.020 Grant Civil Immunity to Social Hosts Who Provide Liquor to Minors?

[1] We turn first to the statutory question. AS 04.21.020 provides:

A person who provides alcoholic beverages to another person may not be held civilly liable for injuries resulting from the intoxication of that person unless the person who provides the alcoholic beverages holds a license authorized under AS 04.11.080-04.11.220, or is an agent or employee of such a licensee and

(1) the alcoholic beverages are provided to a person under the age of 21 years in violation of AS 04.16.051, unless the licensee, agent, or employee secures in good faith from the person a signed statement, liquor identification card, or driver's license meeting the requirements of AS

04.21.050(a) and (b), that indicates that the person is 21 years of age or older; or

(2) the alcoholic beverages are provided to a drunken person in violation of AS 04.16.030.

Although the phrase "a person who provides alcoholic beverages" is not limited to those who are licensed to provide alcoholic beverages, Chokwak argues that it should be construed to be so limited. He contends that the legislative history of section .020 indicates that it was aimed only at licensees. Further, he argues that reading the statute to apply to nonlicensees who unlawfully furnish liquor to minors reaches an absurd result which could not have been intended by the legislature because it lacks any rational basis and is against public policy. In reply, the Worleys argue that section .020 should be read literally and as so read it precludes a civil action against a nonlicensee for furnishing liquor to minors; that this court has in a number of cases indicated that section .020 immunizes social hosts from civil liability; and that social host immunity is a permissible legislative objective.

Chokwak's argument that the legislature intended section .020 to apply only to licensees is supported by some of the legislative history of the statute. Section .020 was enacted in 1980 as part of an act which comprehensively revised the Alaska Statutes pertaining to alcoholic beverages. Ch. 131, SLA1980. Section .020 was a new provision. See § 5, ch. 131, SLA1980. The section-by-section analysis of the act prepared by the Senate Judiciary Committee states the legislative intent of section .020 as follows:

It is the intent of this section that a licensee, his agent, or employee who lawfully furnishes an alcoholic beverage to a person who is 19 years of age or older, or a person who is not drunken, may not be held civilly liable for injuries resulting from the consumption of said alcoholic beverage by the above described persons or a third party.

Senate Journal Supp. No. 23 at 20
Senate Journal 613.

[2,3] In interpreting a statute the objective is to determine the intent of the legisla-

ture, with due regard for the meaning that the language employed in the statute conveys to others. *Marlow v. Municipality of Anchorage*, 889 P.2d 599, 602 (Alaska 1995). In the process of interpretation we have "rejected a mechanical application of the plain meaning rule in favor of a sliding scale approach." *Peninsula Marketing Ass'n v. State*, 817 P.2d 917, 922 (Alaska 1991). Under the approach we use, the plainer the language of the statute, the more convincing contrary legislative history must be. *Marlow*, 829 P.2d at 602.¹

The phrase "a person who provides alcoholic beverages" employed in section .020 is certainly broad enough to cover social hosts and other nonlicensee providers as well as licensees. On the other hand, the section-by-section analysis specifically limits, as a matter of legislative intent, the coverage of section .020 to licensees, indeed to licensees who "lawfully furnish alcohol to others." If the section-by-section analysis were the only legislative history available a close question would be presented as to whether it is sufficiently convincing to require that section .020 be interpreted to apply only to licensees. However, there is other legislative history which points to the conclusion that the legislature intended section .020 to apply to nonlicensees and thus weakens the impact of the section-by-section analysis.

1. Our discussion in *State v. Alex*, 646 P.2d 703, 209 n. 4 (Alaska 1982), provides a fuller explanation for the method we have adopted.

The true issue in interpreting enacted law is the conflict between the meaning the enacting body intended and the meaning conveyed to others. 2A Sutherland, Statutory Construction § 48.02, at 18-5 (4th ed. 1973). The conflict is between what the sender meant and what the receiver understands. *Id.* § 45.08, at 22. The "plain meaning" rule has its basis in this conflict. Obviously, there are elements of unfairness where legislative intent is used to vary the apparent meaning of statutory words. *Id.* § 48.02, at 185-86. This has led some members of the judiciary to reject completely the consideration of legislative intent. Justice Holmes once remarked that "we do not inquire what the legislature meant; we ask only what the statute means." *Id.* § 45.07, at 20. On the other hand, most decisions speak in terms of legislative intent as if nothing else mattered in interpretation. *Id.*

Neither extreme expressed above provides a realistic and workable approach to the recon-

struction of the meaning that the act containing section .020 also passed another act which was in substance identical to section .020. This act, House Committee Substitute for Committee Substitute for Senate Bill (HCS CSSB) 115 (Rules) (SB 115), would have added a new section, AS 09.65.097, to the Alaska Statutes, part (a) of which provided:

(a) A person who provides intoxicating liquor to an individual may not be held civilly liable for injuries resulting from the intoxication of that individual unless

(1) that person holds a license authorized under AS 04.10.020-04.10.146, or is an agent or employee of such a licensee; and

(2) the intoxicating liquor is provided to an individual under the age of 19 years in violation of AS 04.15.020(a), 04.15.060(b) or 04.15.080, unless the licensee, employee, or agent secures in good faith from the individual a signed statement, liquor identification card, or driver's license, meeting the requirements of AS 04.15.060(b), AS 18.65.310(a), or AS 04.15.065, respectively, and indicating that the individual is 19 years of age or older; or

(3) provides intoxicating liquor to an intoxicated person in violation of AS 04.15.020(a).

elation of the intent and meaning approaches to the interpretation of enacted law. Part of the problem stems from ambiguity being a relative concept. Words have no intrinsic meaning; what is clear to one person is ambiguous and obscure to another. *Id.* § 45.02, at 4-5. As one court stated, "We think the statute is plain on its face, but since words are necessarily inexact and ambiguity is a relative concept, we may turn to the legislative history, mindful that the plainer the language, the more convincing contrary legislative history must be." *United States v. United States Steel Corp.*, 482 F.2d 449, 444 (7th Cir.), cert. denied 414 U.S. 909, 90 S.Ct. 229, 38 L.Ed.2d 147 (1973). In our recent decision of *State v. City of Haines*, 627 P.2d 1047, 1049 n. 6 (Alaska 1981), we interpreted *North Slope Borough v. Salina Petroleum Corp.*, 585 P.2d 534, 540 n. 7 (Alaska 1978) as having adopted just such a sliding scale approach as articulated in *United States Steel*.

HCS CSSB 115 (Rules), 11th Leg. 2nd Sess. (May 15, 1980).

On June 20, 1980, the Governor vetoed this act. His veto message is significant. It states:

I have vetoed HCS CSSB 115 (Rules) (relating to the civil liability of providers of intoxicating liquor) inasmuch as the Department of Law has advised me that among other undesirable features it will significantly reduce the liability of those illegally dispensing alcohol as well as those dispensing it legally.

1980 Senate Journal 1744. Ten days later the Governor signed FC CSSB 239 which became chapter 131 SLA 1980. See 1980 Senate Journal 1753. Section 5 of this act became AS 04.21.020, which, as noted, contained language identical in substance to that of the vetoed HCS CSSB 115 (Rules).²

The Governor's veto message shows that in the view of the Governor and the Department of Law, SB 115 applied to nonlicensees. SB 115 did not reduce the liability of licensees dispensing alcohol illegally. However, if applied to nonlicensees it did reduce their liability, for no longer would they be civilly liable for giving liquor to an intoxicated per-

2. Section 13 of FC CSSB 239 repealed AS 09.65.097, added by HCS CSSB 115 (Rules), contingent upon the later taking effect. § 17, FC CSSB 239. As 115 did not take effect because of the Governor's veto, neither did section 13. The legislative journals do not indicate the Governor's reasons for signing a bill into law with language nearly identical to that so recently vetoed. We will not speculate on his reasons for doing so.

3. Although this court had not ruled as of 1980 that one who provided liquor unlawfully could be civilly liable for injuries so caused, the United States District Court for the District of Alaska had so ruled, applying Alaska law. *Vance v. United States*, 355 F.Supp. 756 (D.Alaska 1973), and the Alaska Attorney General correctly opined that this court would so rule. Op. Att'y Gen., 4/2/79, 1-66-569-79. We did so in *Nazareno v. Urie*, 638 P.2d 671 (Alaska 1981).

4. Senate Bill 115 as introduced by Senator Ziegler on February 7, 1979, provided:

For an Act entitled: "An Act relating to the civil liability of gratuitous servers of alcoholic beverages."

son or minor.³ Thus the veto message statement that SB 115 would significantly reduce the liability of those dispensing alcohol illegally only has meaning if the act applied to nonlicensees.

There is evidence that the legislature believed that SB 115 applied to nonlicensees. As originally introduced by Senator Ziegler, immunity for social hosts was its sole purpose.⁴ The bill went through various metamorphoses. When it arrived at the House Rules Committee it provided in relevant part:

*Sec. 2. AS 09.65 is amended by adding a new section to read:

Sec. 09.65.097. LIMITATIONS ON THE CIVIL LIABILITY OF LAWFUL BEVERAGES PROVIDERS. (a) A person who provides an intoxicating liquor to an individual may not be held civilly liable for injuries resulting from the intoxication of that individual unless the intoxicating liquor is furnished to that individual in violation of a law prohibiting furnishing intoxicating liquor to a minor or an intoxicated person.

HCS CSSB 115 (Finance), 11th Leg., 1st Sess. (Apr. 29, 1979).

BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF ALASKA:

*Section 1. The legislature declares that the gratuitous social furnishing of alcoholic beverages to an individual may not be held to be the proximate cause of injuries sustained by that individual or inflicted by that individual on a third party.

*Sec. 2. AS 09.65 is amended by adding a new section to read:

Sec. 09.65.097. LIMITATIONS ON THE CIVIL LIABILITY OF GRATUITOUS BEVERAGE SERVERS. (a) A person who gratuitously furnishes an alcoholic beverage to an individual may not be held civilly liable for injuries resulting from the intoxication of that individual.

(b) The protections of this section do not apply to a person licensed under the provisions of AS 04, or to an employee or agent of a person licensed under the provisions of AS 04, who gratuitously furnishes an alcoholic beverage on a premises licensed under AS 04.

SB 115, 11th Leg. 1st Sess. (Feb. 7, 1979).

Cite as 912 P.2d 1248 (Alaska 1996)

Representative Cotten of the House Rules Committee wrote a memo soliciting comments on a proposed substitute bill which would clearly be limited only to licensees.⁵ Senator Ziegler responded, voicing no objection to the proposal, but stating a preference for social host immunity:

What you propose to do to good old SB 115 meets with my approbation.

I only wish you could carry it one step further and provide protection for noncommercial purveyors like you and me when we pour in our homes.

However, protecting the owner/operator is a step in the right direction.

Letter from Senator Robert H. Ziegler, Sr., to Representative Samuel R. Cotten (March 10, 1980) (available in Senate Judiciary Committee files). Subsequently, the proposed substitute bill which applied solely to licensees referred to by Rep. Cotten was not adopted. Instead, the final version of SB 115 as passed by the legislature applied to "a person who provides."

This history tends to indicate that SB 115 as passed by the legislature was not meant to be limited to licensees. As section 5 (which became § .020) of SB 239 is nearly identical to SB 115, it is logical to believe that the legislature acted with a similar intent regarding that section.

The legislative history described above provides some evidence that the statement of legislative intent concerning section .020 in the section-by-section analysis is not fully

5. The memo stated:

The Rules Committee is considering a committee substitute for HCS CSSB 115. I would appreciate your comments on it. The following is the proposed change:

Sec. LIMITATION ON CIVIL LIABILITY. A licensee, or the employee or agent of a licensee, who furnishes an alcoholic beverage to an individual on premises licensed under this title may not be held civilly liable for injuries resulting from the intoxication of that individual unless the furnishing of alcoholic beverages occurred in violation of AS 04.15.020(a) and (d), 04.15.060(c), or 04.15.080.

inclusive. Because of this we do not find the section-by-section analysis to be sufficiently strong legislative history to require that the literal language of section .020 be narrowed by interpretation to apply only to licensees.

[4] Chokwak's second statutory argument is, in essence, a harmonization argument. Relying primarily on *Haukanson v. Wakefield Seafoods, Inc.*, 600 P.2d 1087 (Alaska 1979), he argues that when a statute that bars a cause of action conflicts with the intent of another statute, the two should be read together in a way that preserves the intent of the second statute. In *Haukanson*, this court applied Alaska's general tolling statute for minors to an unmodified two year limit on filing wrongful death claims in order to preserve the public policy that favors safeguarding the interests of minors. *Id.* at 1090. Chokwak argues that the court should similarly read AS 04.21.020 in light of the criminal prohibition on furnishing alcohol to minors in AS 04.16.051(a).⁶ Thus, in order to preserve the public policy of protecting minors from the deleterious effects of alcohol, we should construe AS 04.21.020(a) not to apply to nonlicensees who furnish liquor to minors.

[5] Chokwak's argument assumes that AS 04.16.051(a) provides by implication a private cause of action for civil damages against a social host who illegally provides alcohol to minors. It may fairly be argued that a line of cases dealing with the statutory predecessors to the 1980 revisions so held.⁷ Chokwak's argument fails because a

Memo from Representative Samuel R. Cotten to Representative Donald Holt, et al. (March 6, 1980) (available in Senate Judiciary Committee files).

6. AS 04.16.051(a) provides: "A person may not furnish or deliver an alcoholic beverage to a person under the age of 21 years." AS 04.16.180(a) makes violation a class A misdemeanor.

7. See *Alaska v. Urie*, 634 P.2d 1387 (Alaska 1980) (allowing private right of action against liquor licensee for statutory violations, noting that "[i]n light of Alaska's crime and physical injury to persons can be traced to alcohol abuse"; *Nazareno v. Urie*, 638 P.2d 671, 674-75 (Alaska

cause of action "implied" from a criminal statute generally cannot be harmonized with a later statute expressly abrogating civil liability. Civil remedies based on criminal statutes are not "implied" in the usual sense of that word. The legislature may not in fact have intended a civil action to flow from a given criminal statute, yet the civil action is permitted because the courts believe that it is consistent with the statute and furthers the policy which underlies the statute.⁸ Where, as here, there is express language and an apparent legislative intent to grant broad immunity from civil liability to those who provide alcohol to others, judicially construing a criminal statute to carry with it a civil remedy in conflict with the rule of immunity would be inappropriate.

Chokwak contends a literal reading of section .020 may immunize outrageous conduct in ways that render the statute without any rational basis. He hypothesizes scenarios in which the statute might abridge, for example, illegal unlicensed vendors, fraternities which haze initiates, and hosts of high school drinking parties. By reading AS 04.21.020 to apply only to the civil liability of licensees, he argues, the court could avoid such "absurd" results.

As difficult as it is to defend a policy specifically immunizing those who unlawfully furnish liquor to minors from civil liability,

1981) (recognizing general common law duty of care for vendors, holding that violation of statute prohibiting provision of alcohol to minor or intoxicated person constituted negligence per se for vendor); *Morris v. Farley Enterprises, Inc.*, 661 P.2d 167 (Alaska 1983) (applying negligence per se doctrine to vendor who sold alcohol to minor in violation of statute).

8. See W. Page Keeton, et al., *Prosser and Keeton on the Law of Torts* § 36, at 220-22 (5th ed. 1984) (footnotes omitted).

Many courts have, however, purported to "find" in the statute a supposed "implied," "constructive," or "presumed" intent to provide for tort liability. . . . In the ordinary case inquires into legislative intent are pure fiction, concocted for the purpose. The obvious conclusion must usually be that when the legislators said nothing about it, they either did not have the civil suit in mind at all, or deliberately omitted to provide for it.

we agree with the Worleys that a policy immunizing social hosts in general from liability for injuries caused by intoxicated persons to whom they have served liquor is not indefensible. The legislature could regard a rule requiring a host to closely monitor his or her guests as placing an unwarranted pall on ordinary social hospitality. The legislature could also wish to encourage individuals to assume responsibility for their own actions when consuming alcohol. The "absurdities" that Chokwak suggests result not from construing AS 04.21.020 to apply to social hosts, but from failing to carve out an exception for furnishing liquor to minors. Given the plain language of the statute and the absence of convincing contrary legislative history, we cannot by statutory interpretation construe section .020 to be inapplicable to nonlicensees who illegally furnish liquor to minors.

B. Is AS 04.21.020 Unconstitutional?

[6] Chokwak makes both equal protection⁹ and due process¹⁰ arguments in support of his claim that AS 04.21.020 is unconstitutional insofar as it immunizes nonlicensees who furnish alcohol to minors. Both arguments depend on whether the rule of immunity is lacking in rationality.

[7,8] This court has observed that the due process clause of the state constitution

Perhaps the most satisfactory explanation is that the courts are seeking, by something in the nature of judicial legislation, to further the ultimate policy for the protection of individuals which they find underlying the statute, and which they believe the legislature must have had in mind. The statutory standard of conduct is simply adopted voluntarily, out of deference and respect for the legislature.

9. Article I, section 1 of the Alaska Constitution dedicates the constitution to the principles that "all persons are equal and entitled to equal rights, opportunities, and protection under the law, and that all persons have corresponding obligations to the people and to the State."

10. The first sentence of article I, section 7 of the Alaska Constitution provides: "No person shall be deprived of life, liberty, or property, without due process of law."

requires that legislation be "at least minimally rational." *Gonzales v. Safeway Stores, Inc.*, 882 P.2d 389, 397 (Alaska 1994). "If any conceivable legitimate public policy for the enactment is either apparent or offered," the enactment will survive due process scrutiny so long as the factual basis for the justification is not disproved. *Id.* at 397-398 (quoting *Keyes v. Humana Hospital Alaska, Inc.*, 750 P.2d 343, 351-52 (Alaska 1988)). Similarly, this court's equal protection analysis under the Alaska Constitution for cases such as the present, which receive review under the "relaxed scrutiny test," involves an inquiry as to whether a questioned classification has a legitimate governmental purpose and whether there is a fair and "substantial relationship" between the act and the reason. *Id.* at 396 (citing *State, Dept. of Revenue v. Cosin*, 858 P.2d 621, 629 (Alaska 1993)).

It is our view that section .020 is not so completely lacking in rationality or legitimacy of purpose as to be unconstitutional. As noted, immunizing social hosts from liability caused by their guests' conduct can rationally be based on a view that it is an undesirable interference with normal hospitality to require a social host to monitor guests' alcohol consumption. Further, the primary actor responsible for harm caused by a drunken person is the drunken person. This was the basis for the "historic common law immunity" of those who furnish liquor to others. *Gonzales*, 882 P.2d at 397. That common law immunity has been replaced in some circumstances through dram shop legislation shifting partial responsibility to the licensed server of alcohol. Retaining this immunity in any case where liquor is unlawfully furnished to minors is questionable and difficult to defend. Still, the legislative desire not to turn social hosts into the policemen of their guests and a recognition of the ultimate personal responsibility of all those who consume alcoholic beverages, including minors, suffice, in our view, to afford the requisite level of minimal rationality and legitimacy of purpose to section .020.

III. CONCLUSION

For the above reasons, we conclude that AS 04.21.020 grants civil immunity to social

hosts who unlawfully provide liquor to minors and that this grant of immunity is not unconstitutional. The judgment is therefore AFFIRMED.



In the Matter of J.L.F. and K.W.F.,
Minors Under the Age of
Eighteen (18) Years.

K.F., Mother of the Above Named
Minors, Appellant and Cross-
Appellee.

STATE of Alaska, DEPARTMENT OF
HEALTH & SOCIAL SERVICES,
Appellee and Cross-Appellant.

Nos. S-6230, S-6240.

Supreme Court of Alaska.

March 15, 1996.

Following remand in child welfare proceeding, 828 P.2d 166, the Superior Court, Third Judicial District, Anchorage, Peter A. Michalski and John Reese, JJ., concluded that children were children in need of aid and terminated mother's parental rights. Mother appealed and guardian and state cross-appealed. The Supreme Court, Matthews, J., held that: (1) relatives' ability to provide care for children was not component of statutory "willing to provide care" standard; (2) even if ability was component, evidence did not support finding that children's aunt and her husband lacked such ability; (3) where

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Kinney v. State (11/29/96) ap-1501

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IN THE COURT OF APPEALS OF THE STATE OF ALASKA

DEAN C. KINNEY,)	
)	Court of Appeals No. A-5812
Appellant,)	Trial Court No. 4BE-94-634 Cr
)	
v.)	O P I N I O N
)	
STATE OF ALASKA,)	
)	
Appellee.)	[No. 1501 - November 29, 1996]

Appeal from the Superior Court, Fourth Judicial District, Bethel, Mark I. Wood, Judge, pro tem.

Appearances: Scott Jay Sidell, Anchorage, for Appellant. Eric A. Johnson, Assistant Attorney General, Office of Special Prosecutions and Appeals, Anchorage, and Bruce M. Botelho, Attorney General, Juneau, for Appellee.

Before: Bryner, Chief Judge, and Coats and Mannheimer, Judges.

MANNHEIMER, Judge.

Dean C. Kinney was convicted of arranging a sale of liquor in a local-option community fl a community where, by local vote, the sale of liquor was banned. AS 4.16.200(b). Kinney argues that his conviction is invalid because the jury never determined whether Kinney knew that he was breaking the law when he arranged the sale of the liquor. We hold that the State was not required to prove that Kinney knew he was breaking the law.

Kinney also argues he was entitled to an acquittal because he obtained no monetary profit from the sale of the liquor. The legislature has enacted a "no personal profit" defense for people charged with distributing liquor without a license, but this defense is not available to people charged with distributing liquor in local-option communities. Kinney argues that the legislature violated the due process clause of the Alaska Constitution when it made the "no personal profit" defense inapplicable to sales in local-option communities. We hold that the legislature had a rational basis for drawing this distinction.

Facts of the Case

During January and February of 1994, the state troopers conducted an investigation of bootlegging in Bethel. One of their undercover informants was Rick Wilson. Wilson had arranged to purchase liquor from A.A., a suspected bootlegger, on February 1st, but when Wilson arrived for the transaction, A.A. demurred. Instead, A.A. offered to introduce Wilson to another bootlegger. He then took Wilson to the Hammer Manor Apartments, where he introduced him to the manager, Dean Kinney. Kinney offered to sell liquor to Wilson, but Wilson declined. (EN1)

The next day, Wilson returned to the Hammer Manor Apartments and attempted to purchase alcohol from Kinney. This time, Kinney told Wilson that he would have to make a telephone call first. Kinney made the call and, soon thereafter, someone knocked at Kinney's door. Kinney went out to speak to the person at his door; when Kinney came back in, he was carrying a bottle of vodka. Kinney gave the bottle to Wilson, and Wilson gave Kinney \$50.00 in pre-recorded buy money. Upon leaving Kinney's apartment, Wilson took the bottle to his trooper supervisor and reported this transaction. Based on this sale, the troopers obtained a warrant to record ensuing transactions between Wilson and Kinney.

On February 4th, Wilson returned to Kinney's apartment and asked if he could buy another bottle of liquor. This second transaction occurred in much the same way as the first: Kinney made a telephone call, a bottle was delivered outside Kinney's apartment, and Kinney sold the bottle to Wilson for \$50.00. During the negotiation of this sale, Wilson asked Kinney if he could "give [him] a break on the price". Kinney replied that he was only making a profit of \$5.00 on each sale and he therefore could not lower the price.

On February 18th, Wilson made a third purchase from Kinney. Wilson went to Kinney's apartment and told Kinney that he wanted to make a purchase. This time, Kinney asked Wilson how many bottles he wished to purchase; Wilson replied that he wanted just one. Again, Wilson offered Kinney \$50.00, but this time Kinney told Wilson to return one hour later. Both men left Kinney's apartment. Approximately one hour later, Kinney returned to the apartment, and Wilson arrived soon thereafter. Kinney had a bottle of liquor for Wilson upon his return. During this third transaction, Wilson again asked Kinney to give him a break on the price, but Kinney again refused, adding that he "wasn't making anything".

Kinney was ultimately indicted on three counts of felony bootlegging under AS 4.11.010(a) and AS 4.16.200(b). Following a jury trial in the Bethel superior court, Kinney was convicted for the second and third sales (the ones that had been recorded).

In a prosecution for bootlegging, must the government prove that the defendant knew his conduct was illegal?

At trial, Kinney asked the judge to instruct the jury that Kinney could not be convicted unless the government proved that he was "aware that his conduct was of an illegal nature". The trial judge declined to give this instruction. On appeal, Kinney argues that his proposed instruction was constitutionally required.

Kinney's argument hinges on language taken from *Hentzner v. State*, 613 P.2d 821 (Alaska 1980), a case in which the supreme court interpreted the culpable mental state required for the crime of selling unregistered securities. Hentzner was prosecuted under AS 45.55.210(a) [now AS 45.55.925(a)], which provides criminal penalties for anyone who "wilfully" violates the Securities Act. The supreme court had to decide what "wilfully" meant. Hentzner, 613 P.2d at 825.

To interpret this statute, the supreme court relied on the principle that a person may not be convicted of a crime (with the exception of minor violations and public welfare offenses) unless the government proves that the defendant acted with "criminal intent", in the broad sense of "a culpable mental state". See *Speidel v. State*, 460 P.2d 77, 78 (Alaska 1969); AS 11.81.600(a). (EN2) Referring to this basic requirement of criminal intent, the court said:

Where the crime involved may be said to be malum in se, that is, one which reasoning members of society regard as condemnable, awareness of the commission of the act necessarily carries with it an awareness of wrongdoing. In such a case[,] the requirement of criminal intent is met upon proof of conscious action, and it would be entirely acceptable to define the word "wilfully" to mean no more than consciousness of the conduct in question. See *Alex v. State*, 484 P.2d 677, 680-82 (Alaska 1971) [holding that, in a prosecution for escape, the government need not show that the defendant knew that he was breaking the law]. However, where the conduct charged is malum prohibitum[,] there is no broad societal concurrence that it is inherently bad. Consciousness on the part of the actor that he is doing the act does not carry with it an implication that he is aware that what he is doing is wrong. In such cases, more than mere conscious action is required to satisfy the criminal intent requirement. ...

The crime of offering to sell or selling unregistered securities is malum prohibitum, not malum in se. Thus, criminal intent in the sense of consciousness of wrongdoing should be regarded as a separate element of the offense[.]

Hentzner, 613 P.2d at 826.

Kinney contends that the crime of bootlegging, like the crime of selling unregistered securities, is malum prohibitum. He therefore argues that, like the defendant in Hentzner, he too could not be convicted unless the State proved that he acted with "consciousness of wrongdoing". According to Kinney, this means proving that he understood that his conduct violated the law.

The distinction between crimes that are "mala prohibita" and those that are "mala in se" has not only shaped but, to a

certain extent, also bedeviled the law. Basically, a crime is termed "malum prohibitum" if it is "not inherently evil [but is] wrong only because prohibited by the legislature". A crime is "malum in se" if it is "wrong in [itself], inherently evil". Wayne R. LaFave and Austin W. Scott, Jr., *Substantive Criminal Law* (1986), sec. 1.6(b), Vol. 1, p. 45.

However, as LaFave and Scott point out, this terminology has never been precise. *Id.* at 45-48. Generally, common-law crimes are called "mala in se" and statutory crimes are called "mala prohibita", but courts also say that a crime is "malum in se" if it involves "moral turpitude". These criteria sometimes point in different directions. For instance, the offenses of embezzlement and obtaining money by false pretenses are statutory expansions of the common-law crime of larceny, see LaFave and Scott, sec. 8.6(a) and sec. 8.7(a), Vol. 2, pp. 368 and 383, yet few would dispute their classification as crimes of moral turpitude.

A third criterion is stated in Rollin M. Perkins & Ronald N. Boyce, *Criminal Law* (3rd edition 1982), p. 896: If a statute proscribes conduct that is "intolerably below the level of proper moral behavior", then the offense is malum in se. If, on the other hand, the defined conduct is not "morally culpable" (Perkins gives the example of overtime parking), then the offense is malum prohibitum.

The Hentzner decision itself suggests yet a fourth criterion. In the above-quoted passage, the supreme court refers to mala in se crimes as those offenses "which reasoning members of society regard as condemnable", while mala prohibita crimes are those proscribing conduct as to which "there is no broad societal concurrence that it is inherently bad". Hentzner, 613 P.2d at 826.

Given criteria like these, there is little wonder that courts reach differing answers when asked to classify the same offense. For instance, the crimes of driving while intoxicated and possession of drugs have been classified by some courts as mala in se, while other courts have found them to be mala prohibita. LaFave & Scott, sec. 1.6(b), Vol. 1, p. 46. LaFave and Scott conclude that "[t]he difficulty of classifying particular crimes as mala in se or mala prohibita suggests ... that the classification should be abandoned[.]" *Id.* at 48.

As an intermediate appellate court, we are loath to abandon a classification that our supreme court has expressly relied on. Rather, our task should be to interpret how that classification applies to the case before us.

Hentzner declares that a crime is malum prohibitum if "there is no broad societal concurrence that [the proscribed conduct] is inherently bad". One could argue that even though unlicensed sale of liquor is normally malum prohibitum, sale in a local-option community is malum in se. If a person sells liquor in a community where sale is legal but restricted to certain license-holders, then the crime is simply a violation of laws regulating commercial transactions. But if a community has seen the need to prohibit all sales of alcohol, then there may be "broad societal concurrence" that the act of selling alcohol is condemnable.

Despite this potential argument, we will assume for purposes of deciding Kinney's appeal that all laws prohibiting the sale or distribution of alcohol create mala prohibita crimes. Nevertheless, we reject Kinney's assertion that, under Hentzner, the State had to prove that Kinney understood the law and knew that he was breaking it.

As noted above, Hentzner involved a prosecution for the crime of offering securities that had not been registered with the Department of Commerce and Economic Development. The defendant, who was attempting to raise money for a gold-mining venture, offered to sell his to-be-mined gold for the price of \$80.00 an ounce (substantially below market value) to anyone who would pay the purchase price immediately. That is, Hentzner was asking people to

give him money in exchange for his promise that, in several months, they would be repaid in gold at the extremely favorable rate of one ounce for every \$80.00 they advanced him. Hentzner, 613 P.2d at 822.

The State alleged that Hentzner's fund-raising effort constituted the offering of a "security" (more specifically, an "investment contract") under AS 45.55.130(12) [now, AS 45.55.-990(12)]. The State's theory was that, by offering to sell gold that had not yet been mined, Hentzner was in effect asking people to invest money upon the promise that they would share in future gold-mining profits to be derived from Hentzner's entrepreneurial or managerial efforts. Hentzner, 613 P.2d at 823-24.

Hentzner represented a collision between the practice of "grubstaking" (EN3), a traditional way for western miners to raise capital, and Alaska's securities act in particular, the labyrinth of definitions and exemptions codified in AS 45.55.900 and AS 45.55.980-990. Under Alaska's securities laws, the request for a grubstake is the offer of a "security", and a miner who wishes to ask for a grubstake must register this offering.

The definition of a security and the rules governing registration are not matters of common knowledge. Thus, the supreme court faced a situation in which a miner who pursued a traditional capital-raising practice, who engaged in no misrepresentation, and who (at least arguably) acted reasonably in failing to discover the need to register his fund-raising effort, could nevertheless face felony conviction for his failure to register the grubstake offer with the Department of Commerce and Economic Development. Given this context, it is hardly surprising that the supreme court ruled that "wilfully" failing to register the grubstake offer required proof of something more than mere failure to register.

Kinney interprets Hentzner as saying that this "something more" must be proof that the defendant understood that his conduct violated the law. This is how the State of Alaska interpreted Hentzner when it filed its petition for rehearing. In its petition, the State argued that the supreme court was "breaking new ground in requiring the [government] to prove [the defendant's] knowledge of the law". [Petition for Rehearing in Hentzner v. State, File No. 3649, p. 2] The State asked the court to amend its opinion to clarify that "the prosecution, to prove Hentzner guilty, must prove that he acted with intent to do wrong, but that this ... does not include knowledge of the penal law". [Petition, p. 3]

In a tersely worded order, the supreme court rejected the State's petition and the State's interpretation of Hentzner:

On consideration of the petition for rehearing filed June 27, 1980,

The opinion cannot reasonably be read to require that the prosecution prove the defendant had knowledge of the law and knew that he was breaking it; that meaning of the word "wilfully" is specifically rejected. [Slip Op. p. 12].

The Petition for Rehearing is therefore denied.

Order dated July 23, 1980 in Hentzner v. State, File No. 3649.

The supreme court's denial of the State's petition for rehearing cites page 12 of its slip opinion (Opinion No. 2103). On that page, the court stated:

The issue before us is the meaning of the word "wilfully" as used in AS 45.55.210(a). There are several possibilities. One is that the defendant must act intentionally in the sense that he is aware of what he is doing;

another is that the defendant must be aware that what he is doing is illegal; and a third is that the defendant must know that what he is doing is wrong. It is in this last sense that we think "wilfully" should be interpreted as it is used in Section 210.

Hentzner, 613 P.2d at 825 (footnote omitted). This language from Hentzner indicates that the supreme court did not think it had imposed the mens rea requirement that Kinney argues for in the present appeal if the purported requirement that the government prove that the defendant acted with "knowledge of the law" and awareness "that he was breaking it".

With respect to securities prosecutions, this court has interpreted Hentzner's "awareness of wrongdoing" requirement to mean that the State must prove that the defendant "recklessly disregarded" the fact that he was unlawfully selling unregistered securities if that the defendant consciously disregarded a substantial and unjustifiable risk that his conduct would result in a violation of the law. Wheeler v. State, 659 P.2d 1241, 1251-52 (Alaska App. 1983). Wheeler remains the controlling authority on this point.

More relevant to Kinney's appeal, both Wheeler and Steve v. State, 875 P.2d 110, 122-23 (Alaska 1994), interpret Hentzner as a case in which the supreme court's "primary concern was to avoid application of strict liability in cases where the accused could be subjected to severe criminal penalties". Wheeler, 659 P.2d at 1251. Hentzner was charged with a felony, not for offering his investment scheme, but for failing to register it. Thus, Hentzner's crime was one of omission. "The gist of [Hentzner's] crime was ... the defendant's failure to perform an act required by law if registering the securities before offering them to the public." Steve, 875 P.2d at 122.

As this court noted in Steve, when a crime is defined in terms of a failure to act, "the prevailing view is that one may not be held liable if one does not know the facts indicating a duty to act". Id. (quoting LaFave and Scott, sec. 3.3(b), Vol. 1, p. 289). Thus, Steve interprets Hentzner as saying that if a person reasonably fails to perceive that his business activities fall within the securities laws, so that his failure to register is an act of reasonable inadvertence, then that person should not be guilty of a felony for failing to register.

Kinney's case is substantially different. Kinney was charged with selling alcohol; his crime was one of commission, not omission. Kinney's sales of alcohol did not arise through inadvertence or neglect. Moreover, it is common knowledge in our society that one is not permitted to sell alcohol without a license, and it is common knowledge in Alaska that various localities have voted themselves dry. Under these circumstances, [w]hat is essential is not an awareness that a given conduct is a "wrongdoing" in the sense that it is proscribed by law, but rather, an awareness that one is committing the specific acts which are defined by law as a "wrongdoing". It is ... no defense that one was not aware his acts were wrong in the sense that they were proscribed by law. So long as one acts intentionally, with cognizance of his behavior, he acts with the requisite awareness of wrongdoing. In the words of Justice Holmes:

If a man intentionally adopts certain conduct in certain circumstances known to him, and that conduct is forbidden by the law under those

circumstances, he intentionally breaks the law in the only sense in which the law ever considers intent.

Ellis v. United States, 206 U.S. 246, 257, 27 S.Ct. 600, 602, 51 L.Ed. 1047, 1053 (1907).

Alex v. State, 484 P.2d at 681-82 (citations omitted).

It was not necessary for the State to prove that Kinney was aware of the bootlegging law and knew that his conduct violated that law. We therefore uphold the trial judge's refusal to give Kinney's proposed jury instruction.

Did the legislature violate the constitution by not allowing a "no personal profit" defense when a defendant is charged with bootlegging in a dry community?

Under AS 4.11.010(a), no person may "manufacture, sell, offer for sale, possess for sale or barter, traffic in, or barter an alcoholic beverage" unless they have the proper license or permit. Under AS 4.16.200(a)-(b), a person who violates this licensing law is guilty of a class A misdemeanor unless the violation occurs in a local-option community, in which case the crime is a class C felony.

In AS 4.16.200(c), the legislature has provided a limited exception to the licensing requirement: a person charged with unlicensed trafficking in liquor may defend by proving that "no profit was involved in the solicitation or receipt of [the] order for the delivery of [the] alcoholic beverage". There are two instances in which this "no personal profit" defense does not apply: when the defendant is charged with selling or offering to sell alcoholic beverages to a minor, and when the defendant is charged with liquor trafficking in a local-option community.

Kinney asserts that the legislature had no valid reason for restricting the "no personal profit" defense in this fashion. He argues that, because there is no rational basis for restricting the scope of the defense, the due process clause of the constitution requires that the defense be available to anyone accused of unlicensed sale of liquor, even if the offense occurred in a local-option community.

We disagree. The two limitations on the "no personal profit" defense appear to be based on the same rationale: lack of profit is no defense to unlicensed sale of liquor when it would be illegal for anyone to sell liquor under the same circumstances. Thus, the defense is not available to someone who sells liquor to a minor, nor is it available to someone who sells liquor in a community that has voted to ban liquor sales. In these situations, unlicensed sale of liquor is not just a violation of statutes that regulate alcohol sales and restrict the number of alcohol sellers; rather, the unlicensed sale violates society's determination that no one should sell alcohol under such circumstances. Because there is a rational basis for the legislature's decision to restrict the scope of the "no personal profit" defense, Kinney's due process attack fails. *Concerned Citizens of South Kenai Peninsula v. Kenai Peninsula Borough*, 527 P.2d 447, 452 (Alaska 1974); *Harrelson v. State*, 687 P.2d 332, 343-44 (Alaska App. 1984).

Conclusion

The judgement of the superior court is AFFIRMED.

1. Wilson was wearing electronic monitoring equipment, and he was afraid that, if he monitored Kinney, this would violate the terms of the warrant authorizing the monitoring; the warrant mentioned only Wilson's anticipated conversations with A.A..

2. AS 11.81.600, which is entitled, "General Requirements of Culpability" provides:

(a) The minimal requirement for criminal culpability is the performance [of] ... a voluntary act or the omission to perform an act that the person is capable of performing.

(b) [With the limited exceptions listed below,] [a] person is not guilty of an offense unless the person acts with a culpable mental state[.]

3. A "grubstake" is "[m]oney or supplies advanced to a prospector in return for a share in any findings". Webster's New World Dictionary of American English (3rd College Edition, 1988), p. 597.

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State v. Mclaughlin (10/8/93) ap-1316

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THE COURT OF APPEALS OF THE STATE OF ALASKA

STATE OF ALASKA,)	
)	Court of Appeals No. A-4590
Petitioner,)	Trial Court No. 4FA-S92-980CR
)	
v.)	
)	O P
· I N I O N)	
DAVID L. MCLAUGHLIN,)	
)	
Respondent.)	[No. 1316 - October 8, 1993]

Petition for Review from the Superior Court,
 Fourth Judicial District, Fairbanks, Jay
 Hodges, Judge.

Appearances: William H. Hawley, Assistant
 Attorney General, Office of Special Prosecu-
 tions and Appeals, Anchorage, and Charles E.
 Cole, Attorney General, Juneau, for Petition
 er. Arthur Lyle Robson, Robson Law Office,
 Fairbanks, for Respondent. Marcia E.
 Holland, Assistant Public Defender,
 Fairbanks, and John B. Jalemi, Public
 Defender, Anchorage, as amicus curiae.

Before: Bryner, Chief Judge, Coats and
Mannheimer, Judges.

BRYNER, Chief Judge.
COATS, Judge, dissenting.

INTRODUCTION

David L. McLaughlin was charged by the state with misconduct involving weapons in the first degree in violation of former AS 11.61.200(a)(1)1 -- possession of a concealable firearm by a previously convicted felon. McLaughlin's case was scheduled for a jury trial before Superior Court Judge Jay Hodges. At the outset of trial, McLaughlin indicated his willingness to concede that he had previously been convicted of a felony.

Since McLaughlin conceded the existence of a prior conviction, Judge Hodges found no need for the jury to consider whether McLaughlin was a previously convicted felon and ruled that the jury would decide only whether McLaughlin knowingly possessed a concealable firearm. Because McLaughlin's criminal history appeared to have no bearing on any issue remaining in dispute, the judge further concluded that evidence of McLaughlin's prior convictions would be inadmissible unless it became relevant to specific issues arising during the course of trial. Over the state's objection, the judge ordered the prosecution to refrain from mentioning or attempting to prove McLaughlin's prior convictions unless the court first determined them to be relevant to a specific disputed issue.

The state petitioned this court to review the superior court's order; we granted the state's petition and directed the parties to submit briefs on the merits.²

DISCUSSION

1. Issue Presented

Both in Alaska and elsewhere, courts have recognized that evidence concerning the number and nature of a defendant's

prior convictions can pose a serious risk of prejudice when introduced in a case in which a prior conviction is an element of the offense charged. For this reason, appellate courts have generally agreed that the trial court has broad discretion to limit the amount of evidence allowed on the issue and to regulate the form in which it is presented, particularly when the defendant does not dispute the prior conviction's existence.³

The precise issue presented for review in this case is somewhat different, however: whether the trial court in a felon-in-possession prosecution may, in reliance on the defendant's willingness to concede the existence of a prior felony conviction, bar proof of the prior-conviction element entirely and withdraw the issue from the jury.

On review, the state argues that the trial court lacked authority to force the prosecution to accept McLaughlin's concession of a prior conviction and to bar proof on this issue. Although the state acknowledges that the disputed evidence was not relevant on any issue other than the issue McLaughlin was prepared to concede -- that McLaughlin had previously been convicted of a felony -- the state contends that the court had no discretion to rule as it did.

2. Standard of Review

As presented by the state, this claim involves a pure question of law, which is subject to the de novo standard of review. *Landon v. Champion*, 745 P.2d 1371, 1372 n.2 (Alaska 1987).

3. Analysis

No Alaska case has squarely decided the issue presented in this case.⁴ Courts in other jurisdictions are not entirely unanimous, but a vast majority, espousing the traditional view that the government need not accept the accused's proposed

concession to an element of an offense,⁵ holds that a trial judge cannot altogether bar the prosecution from introducing evidence to prove a necessary element of its case, even when the element is undisputed.⁶

The state urges us to follow the majority view and to reverse the trial court's ruling in McLaughlin's case. The state argues that the court had no authority to preclude the state from proving a necessary element of the offense, that the court's ruling amounted to an improper judicial amendment of the first-degree weapons misconduct statute, and that it deprived the state of its right to a jury trial. We need consider only the first of these arguments.

The state maintains that it is improper to preclude the prosecution from proving an element of an offense and asserts that, in the present case, "excluding all evidence that [McLaughlin] has a prior conviction is unfair." In support of this contention the state cites Wigmore for the proposition that it should not be required to stipulate to a "colorless admission" of an element of the offense, since such a stipulation would unjustifiably deprive it "of the legitimate moral force of [its] evidence." IX John H. Wigmore, Evidence 2591 (Chadbourn rev. 1981).

In our view, however, the crucial issue is not whether the state has the right to present the "legitimate moral force of its evidence" -- an unassailable proposition in the abstract -- but rather whether any "moral force" gained by proving McLaughlin's prior convictions retains legitimacy given McLaughlin's willingness to concede the point. This issue is a close one; its resolution depends largely on whether it is viewed as a narrow question of evidentiary relevance or a broader question involving policies that are not strictly evidentiary.

From the narrow standpoint of evidentiary relevance -- the standpoint argued by McLaughlin here -- a strong case can be

made that the evidence of McLaughlin's prior convictions should properly be excluded. The specific circumstances of some felon-in-possession cases might give the state legitimate reasons to introduce evidence of prior convictions even though the defendant is willing to concede the prior-conviction element. In most cases, however, once the defendant concedes the prior-conviction element, evidence of prior convictions would have no evidentiary relevance except to establish the defendant's general propensity to commit crimes -- an impermissible, and therefore illegitimate, purpose under Alaska Rule of Evidence 404(b)(1).

The present case provides a good illustration. McLaughlin fully and unequivocally conceded that his prior felony conviction precluded him from possessing a concealable firearm. Given McLaughlin's concession, the trial court would be able to inform the jury that McLaughlin has agreed that he was forbidden by law from carrying a concealable firearm. The state did not argue below and does not contend here that McLaughlin's prior criminal record has any evidentiary relevance except as proof of the element McLaughlin is prepared to concede. Moreover, the trial court has expressly left the door open to reconsideration should McLaughlin's prior convictions become relevant to any disputed issue that might arise during the course of trial.

Under these circumstances, McLaughlin's prior crimes are wholly superfluous from a purely evidentiary standpoint: their only evidentiary relevance is on an issue that has been conceded and therefore requires no further proof. Because of the obvious danger of prejudice this evidence would create as otherwise inadmissible proof of McLaughlin's general criminal propensity, see Alaska Rule of Evidence 404(b)(1), the legitimacy of its "moral force" may be properly questioned:

[W]hen the defense offers the prosecution a full, unequivocal stipulation of an ultimate, historical fact, there is an "utter absence of a legitimate state interest" justifying

the rejection of the offer. The introduction of evidence is a means to the end. The only legitimate purpose for introducing evidence is to prove the ultimate, historical propositions disputed between the parties. In a given case, a prosecutor may hope that the admission of an item of prejudicial evidence will affect the jury's determination of factual issues in addition to the issue the judge admits the evidence to prove. However, if that hope is realized, the jury will be misusing the evidence and perhaps returning a wrongful verdict.⁷

The state's "legitimate moral force" argument nevertheless looks beyond the narrow issue of evidentiary relevance. The state raises a valid -- and, we think, ultimately persuasive -- concern: it points out that McLaughlin's jury has a legitimate right to be informed of all of the elements of the crime charged and of the proof bearing on those elements so that jurors will not be misled to think they are being asked to convict McLaughlin for mere possession of a firearm.

The state argues that if the jury is left with the inaccurate impression that McLaughlin is being prosecuted for conduct that most jurors surely know to be permissible, the jury may be tempted to nullify the law by returning a not guilty verdict, even though convinced that McLaughlin possessed a concealable firearm. As the state correctly points out, many courts have cited this danger as justifying the rejection of defense concessions in felon-in-possession cases.⁸

The prospect of nullification is certainly a legitimate concern. Two courts have nonetheless concluded that the danger of nullification can be avoided by appropriate jury instructions. The California Supreme Court found the nullification argument unpersuasive in *People v. Hall*, 616 P.2d 826 (Cal. 1980) (en banc):

Instructions can be framed in such a manner that the potentially prejudicial prior conviction is not mentioned to the jury yet the jury can be informed that possession of a concealable firearm is not criminal under all

circumstances.

Id. at 832 (footnote omitted).

Similarly, in *State v. Davidson*, 351 N.W.2d 8, 12 (Minn. 1984), the Minnesota Supreme Court stated:

In this case we believe that the potential for unfair prejudice clearly outweighed the relevance, if any, that the evidence had to other issues. The court should have granted the defendant's motion and should have instructed the jury to the effect that defendant had stipulated that under Minnesota law he was not entitled to possess a pistol and that therefore the jury should direct its attention to the issue of whether or not the state had established beyond a reasonable doubt that he possessed the pistol, either actually or constructively.

In our view, however, jury instructions cannot cure the problem, and, in fact, might exacerbate it. As a purely practical matter, we think it highly questionable whether any useful purpose can be served by precluding proof of a prior conviction and instructing the jury that the defendant was prohibited by law, for some reason that cannot be disclosed, from possessing a firearm.

For many jurors -- those with a modicum of awareness -- such an instruction would simply be tantamount to being told that the defendant has previously been convicted of a felony.⁹ For other jurors -- those with less awareness but a modicum of imagination -- the instruction could be far worse, for it would amount to little more than an open invitation for speculation. The demons of imagination could hardly be lulled by bland admonishments to refrain from speculating on the issue; once awakened, those demons would be free to roam a landscape of boundless dimension. Apart from distracting the jury from the facts at issue, speculation of this sort would pose the far more pernicious risk that jurors might decide guilt based on inaccurate assumptions about the reasons behind the prohibition against the defendant's possession of a firearm.

Compared to the inevitable prospect of uncontrolled jury speculation, the alternative of informing the jury of the true elements of the charged crime and of the ba