HB

103

IOUSE COMMITTEE REPO

(7)

Date Referred to Committee: April 15, 2005 **FURTHER REFERRALS:**

Date of Committee Action: April 21, 2005

The RULES Committee considered: **HB 103**

HOUSE BILL NO. 103 **CLAIMS AGAINST THE STATE**

"An Act requiring an actionable claim against the state to be tried without a jury."

Recommends it be replaced with [ ] HCS *or* **[ ] CS** *for* HB 103 (RLS)
For Senate Bills with new title: [ ] Technical Title [ ] New Title: HCR_____ [ ] Same Title [ ] New Title

[ ] attach amendments
[ ] add new referral to _____Committee
[ ] Letter of Intent_____Committee

List of Abbrev for Depts.:
ADM
CED
COR
CRT
EED
DEC
DFG
GOV
HSS
LEG
LAW
LWF
MVA
DNR
DPS
REV
DOT
UA

NEW **FISCAL NOTES** *Assigned by Chief Clerk's Office				
List by Dept(s):	*FN#	Fiscal	Indet.	Zero

PREVIOUS **FISCAL NOTES**				
List by Dept(s):	FN#	Fiscal	Indet.	Zero
CRT	1	✓		
LAW	2	✓		

Signing with recommendations	**Printed Last Name**	**DP**	**DNP**	**NR**	**AM**
	HARRIS			X	
	Kohring				X
	Gough			✓	
	Kerttula		X		
	Berkowitz		✓		
Chair:	Roketenz			✓	
Chair:					

24-LS0403\F
Bullock
4/19/05

CS FOR HOUSE BILL NO. 103( )

IN THE LEGISLATURE OF THE STATE OF ALASKA

TWENTY-FOURTH LEGISLATURE - FIRST SESSION

BY

Offered:
Referred:

Sponsor(s): REPRESENTATIVES KELLY, Elkins, McGuire, Foster

A BILL

FOR AN ACT ENTITLED

"An Act requiring an actionable claim against the state to be tried without a jury unless a jury trial is requested by the state."

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

*** Section 1.** AS 09.50.250 is amended by adding a new subsection to read:

(b) Unless the state requests a jury trial, an actionable claim against the state under (a) of this section shall be tried by a court without a jury.

FISCAL NOTE

STATE OF ALASKA
2005 LEGISLATIVE SESSION

Fiscal Note Number: 1
Bill Version: HB 103
(H) Publish Date: 3/4/05

Revision Date/Time (Note if correction):
Dept. Affected:
Title: Claims Against the State
BRU: Alaska Court System
Component: Trial Courts
Sponsor: Representative Kelly
Requester:
Component No.: 768

Expenditures/Revenues (Thousands of Dollars)

Note: Amounts do not include inflation unless otherwise noted below.

OPERATING EXPENDITURES	FY 2006	FY 2007	FY 2008	FY 2009	FY 2010	FY 2011
Personal Services						
Travel						
Contractual	(16.0)	(16.0)	(16.0)	(16.0)	(16.0)	(16.0)
Supplies						
Equipment						
Land & Structures						
Grants & Claims						
Miscellaneous						
TOTAL OPERATING	**(16.0)**	**(16.0)**	**(16.0)**	**(16.0)**	**(16.0)**	**(16.0)**
CAPITAL EXPENDITURES						
CHANGE IN REVENUES ( )						

FUND SOURCE (Thousands of Dollars)

1002 Federal Receipts						
1003 GF Match						
1004 GF	(16.0)	(16.0)	(16.0)	(16.0)	(16.0)	(16.0)
1005 GF/Program Receipts						
1037 GF/Mental Health						
Other (Specify Type--Do not abbreviate)						
TOTAL	**(16.0)**	**(16.0)**	**(16.0)**	**(16.0)**	**(16.0)**	**(16.0)**

Estimate of any current year (FY2005) cost: 0.0
Mark this box (X) if funding for this bill is included in the Governor's FY 2006 budget proposal:

POSITIONS

Full-time						
Part-time						
Temporary						

ANALYSIS: *(Attach a separate page if necessary)*

House Bill 103 would require that claims against the state be tried by a court without a jury. Court records and information from the Department of Law show that over the past five years there have been an average of roughly four jury trials a year where the state was a defendant. Court records also show that the average jury trial costs the court $4,000 in jury fees, travel, meals and lodging. This fiscal note reflects the average yearly jury costs that would be saved by passage of this bill.

Prepared by: Douglas Wooliver, Administrative Attorney
Phone: 463-4750
Division: Alaska Court System
Date/Time: 3/2/05 3:56 PM
Approved by: Doug Wooliver for Stephanie Cole, Administrative Director
Date: 3/2/2005
Agency: Alaska Court System

(Revised 9/2002 OMB)

FISCAL NOTE

STATE OF ALASKA
2005 LEGISLATIVE SESSION

Fiscal Note Number: 2
Bill Version: HB 103
(H) Publish Date: 3/4/05

Revision Date/Time (Note if correction):
Dept Affected: LAW
Title "An Act requiring an actionable claim against the state to be tried without a jury."
RDU CIVIL
Component Torts & Workers' Compensation, Labor & State Affairs
Sponsor Representative Kelly
Requester House State Affairs
Component No.

Expenditures/Revenues (Thousands of Dollars)

Note: Amounts do not include inflation unless otherwise noted below.

OPERATING EXPENDITURES	FY 2006	FY 2007	FY 2008	FY 2009	FY 2010	FY 2011
Personal Services	(********)	(********)	(********)	(********)	(********)	(********)
Travel	(********)	(********)	(********)	(********)	(********)	(********)
Contractual	(********)	(********)	(********)	(********)	(********)	(********)
Supplies	(********)	(********)	(********)	(********)	(********)	(********)
Equipment	(********)	(********)	(********)	(********)	(********)	(********)
Land & Structures						
Grants & Claims						
Miscellaneous						
TOTAL OPERATING	(********)	(********)	(********)	(********)	(********)	(********)
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 (Specify Type--Do not abbreviate)						
TOTAL	(********)	(********)	(********)	(********)	(********)	(********)

Estimate of any current year (FY2005) cost: 0.0
Mark this box (X) if funding for this bill is included in the Governor's FY 2006 budget proposal:

POSITIONS

Full-time						
Part-time						
Temporary						

ANALYSIS: *(Attach a separate page if necessary)*

This bill adds a new subsection under AS 09.50.250 requiring that actionable claims against the state falling under this statute be tried by a court without a jury.

Caveat: Although the state conducts approximately 5 to 10 jury trials per year, the number of actual jury trials only reveals part of the picture. Statistically, the greatest group of civil cases for damages (not just cases filed against the state) are worked extensively through motion and pretrial practice, and then settled after much of the motion and pretrial work has been completed (greater than 92% is the figure often quoted for cases settled, rather than tried). It is anticipated that HB 103 would effect not only the number of cases that are actually tried, but also result in savings in a much greater group of cases during the pretrial phase of litigation.

Prepared by: Kathryn Daughhetee, Director
Phone 465-3673
Division Administrative Services Division
Date/Time 3/2/05 4:30 PM
Approved by: K. Daughhetee for Scott Nordstrand, Attorney General
Date 3/2/2005
Agency Department of Law

(Revised 9/23/2004 OMB)

FISCAL NOTE #2

STATE OF ALASKA **BILL NO. HB 103**
2005 LEGISLATIVE SESSION

ANALYSIS CONTINUATION

Indeterminate savings to the state should result because of the following factors:

1. Cases may resolve without trial because there is more predictability of anticipated results with a court trial;

2. If the case is a court trial rather than a jury trial, the length of jury trials should be shortened by an average of two days because there would be no jury selection, no jury instructions, and some witnesses or evidence may not need to be produced at trial;

3. If the case is tried by the court rather than a jury there would be less pretrial preparation time and expense. For example, the parties will not need to draft instructions, draft jury voir dire or jury questionnaires, and they may not generate evidentiary motions.

4. In cases where summary judgment is currently precluded because there are genuine issues of material fact, the judge could do abbreviated, summary trials limited to the contested issues of fact that are relevant to the summary judgment motion.

5. It is also anticipated that some number of cases that are currently settled may be tried by a court because of the greater predictability in a court trial.

Alaska State Legislature

House of Representatives

State Capitol, Rm. 214
Juneau, Ak 99801-1182
(907) 465-3764

Official Business

COMMITTEE ON RULES
Representative Norman Rokeberg, Chairman

HB 103

Please add the attached to your Rules file on this legislation.

This information was requested by the Rules Committee yesterday and delivered to our office today by the Department of Law

April 22, 2005

STATE OF ALASKA
DEPARTMENT OF LAW
OFFICE OF THE ATTORNEY GENERAL

FRANK H. MURKOWSKI, GOVERNOR
1031 WEST 4TH AVENUE, SUITE 200
ANCHORAGE, ALASKA 99501-5903
PHONE: (907)269-5190
FAX: (907)258-0760

April 1, 2005

The Honorable Lesil McGuire
Alaska State Legislature
State Capitol, Room 118
Juneau, Alaska 99801-1182

The Honorable Les Gara
Alaska State Legislature
State Capitol, Room 418
Juneau, Alaska 99801-1182

Re: HB 103, An Act requiring an actionable claim against the state to be tried without a jury.

Dear Representative McGuire and Representative Gara:

During the March 16, 2005, hearing in the House Judiciary Committee on HB 103, committee members and the chair requested that the Department provide information on the amount of dollars paid out on claims brought pursuant to AS 09.50.250.

The below information was assembled from two sources: the Division of Risk Management and from Judgment Bills passed during the last several sessions, as well as figures for FY 2005 to date. The Judgment Bill figures contain only those amounts paid to plaintiffs for claims brought pursuant to AS 09.50.250. The figures from Risk Management include personal injury (excluding workers compensation category and property loss) and include case costs, such as court reporters, experts, etc. but not assistant attorney general defense time.

FY 2000 = $ 5,792,511.00 (Risk Management)
FY 2001 = $11,921,452.00 (Risk Management)
FY 2002 = $ 9,166,624.00 (Risk Management)

The Judgment Bill totals for these 3 fiscal years are not included above; the majority of settlements or judgments were Risk Management matters, which were directly funded by that Division.

FY 2003 = $ 7,730,493.82 (Derived from the Judgment Bill for claims brought pursuant to AS 09.50.250)
$10,735,143.00 (Risk Management)
$18,465,636.82 Total AS 09.50.250 FY 2003

FY 2004 = $1,119,534.55 (Judgment Bill)
$4.514.535.00 (Risk Management)
$5,634,069.55 Total AS 09.50.250 FY 2004

FY 2005 = $1,604,975.46 (As of 3/18/05 included in this year's Judgment Bill)
$4.660.366.62 (Risk Management as of 3/30/05)
$6,265,342.08 Total AS 09.50.250 to date FY 2005

Please feel free to contact me if you have any further questions.

Sincerely,

DAVID W. MÁRQUEZ
ATTORNEY GENERAL

By: Gail T. Voigtlander
Gail T. Voigtlander
Assistant Attorney General

DWM:GTV:pr

cc: David W. Marquez
Deborah Behr
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Brad Thompson, Director, Division of Risk Management

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Representative Mike Kelly

House District 7

HB 103

"An Act requiring an actionable claim against the state to be tried without a jury."

HB 103 makes a small but important change to the manner in which claims against the state will be adjudicated. The doctrine of "sovereign immunity", originally taken from English common law, is a familiar one within our legal system. The doctrine precludes the institution of a suit against the sovereign [government] without its consent. This concept is intrinsic to our legal system.

We see this doctrine manifest itself in the 11th Amendment to the United States Constitution, and by extension this power is granted to the states through the 10th Amendment. More importantly, the Alaska State Constitution addresses the issue of sovereign immunity in Article 2, sec. 21 when it expressly grants the legislature sole authority to determine the manner in which suits against the state will be tried. Without that addition, the language in Article 1, sec.16 which specifically refers to "common law" would presuppose that sovereign immunity is absolute in Alaska.

Although HB 103 does change from the current standard of a trial by jury in a claim against the state, it returns to the standard that was in place from statehood until 1975. Our legal research revealed that Sen. John Butrovich (R-Fairbanks) sponsored SB 80, which changed to the current standard of a jury trial. Our research has further revealed that during the same period in 1975, the University of Alaska was in the midst of a lawsuit in which it had petitioned the court for a trial by jury and was denied. Although we have not been able to make the explicit connection, it seems that SB 80 was a legislative response to the controversy arising from that case.

Since that time, there have been a number of cases that have resulted in exorbitant jury awards against the state that may have been more reasonable had the court, rather than a jury tried them. Frequently, these awards are reversed on appeal, thus doubling the court time required for resolution. While responsible government requires the state make whole any person or entity that it harms in the course of its business, responsible government also dictates that we prevent such abuses and minimize exposure to the state. HB 103 accomplishes both ends with a simple and direct statutory change.

We further anticipate that the Alaska Court System will realize an additional benefit of less court time being consumed and thus a reduction in court operating expenses that will also allow our already overburdened courts the opportunity to address other cases with greater ease and expediency.

It is for these reasons that we appreciate your consideration and encourage you to support HB 103.

Member: House Finance Committee

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Representative Mike Kelly

House District 7

SAMPLE JURY AWARDS

(Prepared by the Attorney General's Office)

Garry Johnson v. DOC: prisoner at Ketchikan Correctional Center fell down a set of stairs when another inmate opened a door on the landing where plaintiff had been standing. As a result of the jury verdict, judgment was entered against the State in the amount of $2,356,293. The case was tried in Anchorage. The judgment was reversed on appeal, and the case was later settled. The case is reported at 2 P.3d 56 (Alaska 2000).

Kiokun v. State: claim of negligent failure to launch a search and rescue operation in a timely manner. Bethel jury verdict in the amount of $7.8 million (fault allocated 51% to the State, 49% to the Olruns). The judgment was reversed on appeal. The case is reported at 74 P.3d 209 (Alaska 2003).

Greg Bacon v. State (Alaska Marine Highway System): claim by injured ferry worker. Juneau jury awarded $350,000. of which approximately ½ of the verdict was for future pain and suffering. Plaintiff was back to work when the case went to trial.

Lance Miller v. State: claim by private pilot with seven months experience who lost control of his airplane attempting to land in windy winter conditions at a rural airport. Claim was that the accident was caused by the condition of the windsock. Bethel jury found no comparative negligence by Plaintiff, rendering verdict against the state in the amount of $1,300,000. (Post trial motions pending) 4BE-01-445 Civ.

Member: House Finance Committee

LEGAL SERVICES

DIVISION OF LEGAL AND RESEARCH SERVICES
LEGISLATIVE AFFAIRS AGENCY
STATE OF ALASKA

(907) 465-3867 or 465-2450
FAX (907) 465-2029
Mail Stop 3101

State Capitol
Juneau, Alaska 99801-1182
Deliveries to: 129 6th St., Rm. 329

MEMORANDUM January 20, 2005

SUBJECT: The repeal of AS 09.50.290 in 1975
(Work Order No. 24-LS0403\A)

TO: Representative Mike Kelly
Attn: Heath Hilyard

FROM: Donald M. Bullock Jr.
Legislative Counsel

At your request, I researched what little information is available regarding the repeal of AS 09.50.290 in 1975. AS 09.50.290 required that claims against the state be tried by a judge without a jury. I found no reference to *University of Alaska v. National Aircraft Leasing, Ltd.*[1] in the journals, the bill file, or committee minutes. As you know from the previous memorandum, *National Aircraft Leasing* approved the trying of a claim against the state before a judge without a jury under AS 09.50.290.

The bill repealing AS 09.50.290, SB 80, was sponsored by Senators Butrovich, Ziegler, and Meland and introduced on January 28, 1975.[2] The bill was enacted as introduced, without an amendment being offered in either house.

The Senate Judiciary Committee considered the bill on February 4, 1975. The minutes reported that the bill was favored by the office of the attorney general, but offered no further enlightenment.

The bill file for the House Judiciary Committee includes a letter from Howard Staley, an attorney with Merdes, Schaible, Staley & DeLisio.[3] Mr. Staley opined in favor of the repeal of AS 09.50.290 as follows:

> The present law [AS 05.50.290] requiring a trial to a judge is usually explained as giving the state the "protection" from the possible passion and prejudice of a jury. From the standpoint of an attorney who has

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[1] 536 P.2d 121, 128 (Alaska 1975).

[2] 1975 Senate Journal 70.

[3] Letter from Howard Staley, Merdes, Schaible, Staley, & DeLisio, Inc., to Terry Gardner, House Judiciary Committee (March 25, 1975).

> frequently represented the state and its insurance carriers, I know that this does not stand up in practice. The state is often treated far more harshly by a judge than it would be by a jury. I am enclosing an example of this in the form of an Alaska Supreme Court Opinion in *State v. I'Anson*, issued by the Alaska Supreme Court on November 29, 1974. . . . The case was tried to a judge and an advisory jury, since the statute has been interpreted as allowing the judge to empanel an advisory jury. It should be noted that when an advisory jury is empanelled the expense to the state is just the same as if the trial was to a judge and an advisory jury was not used. The advisory jury found in the state's favor, but the judge decided, as he is entitled to do under the law, to disregard the verdict of the advisory jury and entered a verdict against the state.
>
> I don't believe that there is any valid reason to believe that jurors would favor the state because of having an interest as taxpayers in the outcome of litigation against the state. There are jury trials in actions brought against Alaska cities where the taxpayer's interest is far more direct than in an action against the state and there has certainly been no indication that jurors tend to be lenient with Alaskan cities because the jurors are taxpayers.
>
> If the amendment allowing the state and litigants against it the right to a jury trial is passed, there will undoubtedly be individual cases in which the state is either hurt or helped by having the claims against it tried to a jury, but that is not the issue. I believe the issue is whether or not the state as well as litigants against the state have a right to a jury trial in litigation of this sort. I don't think there is any valid reason for giving the state any more or any less privilege than any other litigant in this regard.

The bill passed in the Senate by a vote of 19 - 0 with one senator excused;[4] the House approved the bill by a vote of 36 - 0 with four representatives excused.[5]

In conclusion, while the bill history contains expressions of support for repealing AS 09.50.290, I could not find statements in support for keeping the statute in place. The litigation involving the university and National Aircraft Leasing was not mentioned in the files I reviewed.

If I may be of further assistance, please advise.

DMB:jad
05-039.jad

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[4] 1975 Senate Journal 158.

[5] 1975 House Journal 1512.

reviewable by the courts. In the end, the senate rules committee, which heard the evidence, did not find sufficient cause for the full senate and house to proceed with the matter.

Section 21. Suits Against The State

The legislature shall establish procedures for suits against the State.

The long-standing common law doctrine of sovereign immunity prevents the government from being sued. However, the federal government and most state governments have waived through statute their immunity from suit in certain types of cases. A few state constitutions still prohibit all suits against the state, but even here various exceptions and evasions have been devised so that justice may be served. This section of Alaska's constitution, which commands the legislature to establish procedures for suits against the state, has only a few counterparts elsewhere; typically, state constitutions that address sovereign immunity make the matter of its waiver permissive.

The Alaska legislature has complied with this constitutional directive in AS 09.50.250, which authorizes a person or corporation to bring a contract, quasi-contract, or tort claim against the state. This law is based on the federal tort claims act. Like its federal counterpart, the state statute contains certain exceptions to the waiver of immunity from suit, one of which is for the exercise of policy-making discretion by state officials. The supreme court has often rejected the use of this defense by the state, however, ruling that once a policy decision has been made to do something (e.g. maintain a road in winter), it must be done with reasonable care (see for example, *Carlson v. State*, 598 P.2d 969, 1979).

The state's limited waiver of sovereign immunity does not extend to suits against the state in federal court. It does not mean that money judgments against the state are paid automatically. These may require a legislative appropriation (AS 09.50.270).

such rental acceleration clauses.[8] While this court has not decided the question, we decline to do so here where the enforceability issue was not raised below.[9]

Affirmed.

UNIVERSITY OF ALASKA, Petitioner,

v.

NATIONAL AIRCRAFT LEASING, LTD., and Alaska International Air, Inc., for themselves and for Insurers at Lloyds of London and certain other Insurance underwriters, Respondents.

No. 2365.

Supreme Court of Alaska at Fairbanks.

May 30, 1975.

Action was brought against University of Alaska for damage to aircraft in attempting to land on experimental floating ice strip maintained by the university. The Superior Court, Fourth Judicial District, Victor D. Carlson, J., denied university's request for jury trial and university petitioned for review. The Supreme Court, Dimond, J. pro tem, held that despite the degree of constitutional as well as statutory autonomy the university possesses and despite university's unique corporate character and its power to sue and be sued in its own name, university falls within ambit of language of statute governing suits against the state, and trial by jury is not allowed in actions against the university; and that distinction between proprietary and governmental functions will not be made in suits involving the state or its agencies.

Order affirmed.

Erwin, Boochever and Burke, JJ., did not participate.

1. Appeal and Error ⇐70(6)

Interlocutory order striking University of Alaska's demand for jury trial in action for damages against university would be reviewed to avoid possibility that postponing review until time for normal appeal could result in the necessity of a new trial. AS 09.50.250–09.50.300, 09.50.290; Rules of Civil Procedure, rule 38(b); Rules of Appellate Procedure, rule 23(e).

2. Jury ⇐18
States ⇐191(2)

Despite degree of constitutional as well as statutory autonomy possessed by the University of Alaska, university is an integral part of the state educational system mandated by the constitution and neither the corporate status of the university nor its power to sue and be sued in its own name militate against conclusion that university falls within ambit of statute governing suits against the state, including

8. Among the cases enforcing rental acceleration clauses are the following: Maddox v. Hobbie, 228 Ala. 80, 152 So. 222 (1934); Jimmy Hall's Morningside, Inc. v. Blackburn & Peck Enterprises, Inc., 235 So.2d 344 (Fla.App.1970); Erickson v. O'Leary, 127 Kan. 12, 273 P. 414 (1929); Shepard Realty Co. v. United States Stores Co., 193 La. 211, 190 So. 383 (1939); Pierce v. Hoffstot, 211 Pa.Super 380, 236 A.2d 828 (1967).

On the other hand, courts in New York and California have refused to enforce acceleration clauses. *See, e. g.*, Ricker v. Rombough, 120 Cal.App.2d Supp. 912, 261 P.2d 328 (1953); 884 W. End Ave. Corp. v. Pearlman, 201 App.Div. 12, 193 N.Y.S. 670 (1922). For additional cases from other jurisdictions see Annot., 58 A.L.R. 300 (1929), Annot., 128 A.L.R. 750 (1940).

9. University of Alaska v. Simpson Bldg. Supply Co., 530 P.2d 1317, 1324 (Alaska 1975); Padgett v. Theus, 484 P.2d 697, 700 (Alaska 1971); Lumbermen's Mut. Cas. Co. v. Continental Cas. Co., 387 P.2d 104, 109 (Alaska 1963). We note that the trial court gave the lessee the right of use of the premises for the balance of the term, and as noted in this opinion at page 118, lessee had the right to use the premises during the entire term of the lease. Otherwise, we might have waived the rule in order to consider the rent acceleration clause as well as possible duty of the lessor to mitigate damages.

provisions that trial by jury is not allowed in actions against the state. Const. art. 7, § 1 et seq.; AS 09.50.250–09.50.300, 14.40.-040.

3. Jury ⇐18

Fact that University of Alaska is not a department of the executive branch allocated among the principal departments did not place university beyond purview of statute providing that actions against the state shall be tried by the court without a jury inasmuch as university enjoyed in some relative respects a status which was coequal rather than subordinate to that of the executive or legislative arms of government. Const. art. 3, § 22; AS 09.50.-290, 44.15.010.

4. States ⇐193

Distinction between proprietary and governmental functions will not be made in suits against the state or its agencies under statute authorizing such suits on contract, quasi-contract or tort claim. AS 09.50.-250–09.50.300.

Howard P. Staley, of Merdes, Schaible, Staley & DeLisio, Inc., Fairbanks, for petitioner.

William B. Rozell, of Faulkner, Banfield, Doogan, Gross & Holmes, Juneau, for respondents.

OPINION

Before RABINOWITZ, C. J., CONNOR, J., and DIMOND, Justice Pro Tem.

DIMOND, Justice Pro Tem.

Within certain limitations, one is authorized by statute to sue the State of Alaska on a contract, quasi-contract or tort claim.[1] One of these limitations is that the action must be tried by the court; under AS 09.-50.290 a trial by jury is not allowed in actions against the state.[2]

It is this statutory condition upon the state's waiver of sovereign immunity which gave rise to this petition for review. The petitioner, University of Alaska, has been sued for damages by the respondents, National Aircraft Leasing, Ltd., and Alaska International Air, Inc. The suit arose when an aircraft being operated by Alaska International Air, Inc., was damaged in attempting to land on an experimental floating ice air strip maintained by the University. The University demanded a trial by jury under Civil Rule 38(b).[3] Applying AS 09.50.290, however, the trial judge refused to grant a jury trial on the grounds that the University and the state are the same for purposes of AS 09.50.250–.300 which set forth the conditions under which suits against the state may be maintained. The court's reasoning was that the protections afforded the state by AS 09.-50.250–.300 apply to all entities that are similarly situated, e. g., possessing publicly owned assets and dependent upon the taxpayers for support. The petitioner asserts that the trial court erred in this ruling.

[1] This matter is before us, not on appeal from a final judgment, but on petition for review from an interlocutory order. In the exercise of our discretion we have granted review at this stage of the proceedings in order to avoid the possibility that postponing review of this question until the time for a normal appeal could result in the necessity of a new trial. The unnecessary delay and expense attendant upon such a possibility can be avoided by

1. AS 09.50.250–.300.

2. AS 09.50.290 provides:
Actions against the state under §§ 250–300 of this chapter shall be tried by the court without a jury.

3. Civil Rule 38(b) provides:
(b) *Demand.* Any party may demand a trial by jury of any issue triable of right by a jury by serving upon the other parties a demand therefor in writing at any time after the commencement of the action and not later than 10 days after the service of the last pleading directed to such issue. Such demand shall be made in a separate written document signed by the party making the demand or by his attorney.

deciding the question now.[4] Moreover, the issue here presented is of sufficient importance to "justify deviation from the normal appellate procedure by way of appeal and to require the immediate attention of this court . . . ."[5]

All governmental authority in Alaska originates in the people of this state and is founded upon their will only.[6] The people formulated the basic government of our state by ratifying the Alaska Constitution which was drafted by delegates elected by the people to represent them at a constitutional convention. It is the Alaska Constitution, therefore, that forms the basis for the fundamental government of this state.

Article VII of the constitution frames the mandate whereby the health, education and welfare of the people are provided for. Section 1 of article VII directs the legislature to establish and maintain by general law a system of public schools open to all children of the state, and allows the legislature to provide for other public educational institutions. Section 2 of article VII, the import and construction of which is crucial to the resolution of this case, provides:

> The University of Alaska is hereby established as the state university and constituted a body corporate. It shall have title to all real and personal property now or hereafter set aside for or conveyed to it. Its property shall be administered and disposed of according to law.

The question before us is whether the University of Alaska constitutes in function and character such an arm or instrumentality of the state as to bring it within the scope of those statutes which govern the conditional waiver of sovereign immunity in this state. If it is, then the ruling of the trial court on the applicability of AS 09.50.290 to this action must be affirmed.

By constitutional provision, the University as a corporate entity holds title to all property which is conveyed or set aside to it. The disposition and administration of such property, however, is made expressly subject to a degree of legislative control. The board of regents is empowered by the constitution to "govern" the university. Nevertheless it is obliged to formulate policy as well as appoint its chief executive "in accordance with law." The regents, moreover, hold office by virtue of the approval of both the governor and both houses of the legislature.[7]

Through legislative enactments, the University enjoys a considerable degree of statutory independence. Not only does the board of regents have the constitutional authority to appoint the president of the University, formulate policy, and act as the governing body for the institution, but the legislature has specifically empowered it to fix the president's compensation and the compensation of all teachers, professors, instructors and other officers; to confer such appropriate degrees as it may determine; to have care, control and management of all the real and personal property and all money of the University; and to

4. Appellate Rule 23(6) provides in part that an aggrieved party may petition this Court for review of nonappealable orders
> [w]here postponement of review until normal appeal may be taken from a final judgment . . . will result in injustice because of impairment of a legal right, or because of unnecessary delay, expense, hardship or other related factors.

5. Appellate Rule 24(a)(1). *See, e. g.*, Peter v. State, 531 P.2d 1263 (Alaska 1975).

6. Alaska Const. art. I, § 2 provides:
> All political power is inherent in the people. All government originates with the people, is founded upon their will only, and is instituted solely for the good of the people as a whole.

7. Alaska Const. art. VII, § 3 provides:
> The University of Alaska shall be governed by a board of regents. The regents shall be appointed by the governor, subject to confirmation by a majority of the members of the legislature in joint session. The board shall, in accordance with law, formulate policy and appoint the president of the university. He shall be the executive officer of the board.

receive, manage and invest money or property obtained from sources other than the state legislature or by way of federal appropriation.[8] In addition, the legislature has provided that title and control or possession of land and personal property, other than monies, which are devised, bequeathed or given to the University, shall be taken by the University in its corporate capacity acting through the regents or an authorized agent, and shall be entered in the perpetual inventory of the University.[9] The board of regents is also authorized to execute leases for mining, agriculture, or other purposes to the lands granted by Congress to the University for the benefit of an agricultural college and school of mines.[10] In addition, the board of regents may select the lands granted to Alaska by the Act of Congress approved January 21, 1929, and may sell or lease such lands.[11]

But the University is also subject to some executive and legislative control. As mentioned, the constitution provides that the regents of the University shall be appointed by the governor, subject to confirmation by the legislature.[12] Furthermore, as has been pointed out, the formulation of university policy as well as the administration and disposition of University property are made subject to legislative enactment. At the beginning of each regular session of the legislature the board of regents is required to make a written report to the legislature showing the condition of University property, all receipts and expenditures, and the educational and other work performed.[13] In addition, the board must make an annual report to the governor which shall include a statement of all trust funds the University possesses.[14]

All monetary gifts, bequests or endowments received for the University expansion program or other uses must be turned over to the Department of Revenue where they are placed in a separate fund.[15] This fund, denominated as a trust fund, shall also include all monies derived by the University from the sale or lease of lands granted by act of Congress. These funds shall be invested by the Department of Revenue in interest-bearing securities as approved by the governor.[16] The proceeds from the sale or lease of lands granted to Alaska for University purposes by acts of Congress shall be deposited in the state treasury by the board of regents.[17] The governor is the person authorized to make all certificates required by law or by regulations of the federal Departments of Agriculture or Interior to entitle the state to grants of money for the benefit of state colleges of agricultural and mechanical arts authorized under acts of Congress.[18]

Finally, there is the matter of financing the operations of the University from state funds. In 1974 the total funding of the University of Alaska was over 41 million dollars. Approximately 65 per cent of that amount, 26½ million dollars, was appropriated by the legislature from the state's general fund.[19]

[2] Despite the degree of constitutional as well as statutory autonomy the University clearly possesses, we are of the opinion that it must be considered to be an integral part of the state educational system mandated by the constitution. In its constitutional status it stands as the single governmental entity which was specifically created by the people to meet the statewide need for a public institution of higher education. In this light, the University must be regarded as uniquely an instrumentality of the state itself. Unlike other public educational institutions created to meet the

8. AS 14.40.170; AS 14.40.250.
9. AS 14.40.280.
10. AS 14.40.350.
11. AS 14.40.360.
12. Note 7 *supra*.
13. AS 14.40.190.
14. AS 14.40.370.
15. AS 14.40.280.
16. AS 14.40.460.
17. AS 14.40.360.
18. AS 14.40.450.
19. § 17, ch. 147, SLA 1974.

needs of local areas, it exists constitutionally to act for the benefit of the state and the public generally.

We reach this conclusion not only from article VII of the constitution, which we construe to be the expression of the will of the people of this state that there shall be an institution of higher learning within the scope of the constitutional mandate providing for public education, but also from the degree of control over the affairs of the University which is exercised by the executive and legislative branches of our government, and from the financial dependence the University has upon the state.

It is true that the constitution has established the University as a body corporate.[20] The fact that the University has had conferred upon it the status of a juristic person is not dispositive, however, of our ruling in this case. There are several reasons why this structural approach may have been taken.[21] It may have been created as a corporation so as to simplify its transactions with the federal government in accepting grants of lands, and to facilitate its dealings with other persons in leasing and selling the lands it acquires or in conducting general business activities. Also, this corporate status may have been chosen in order to shield the individual members of the board of regents from personal liability in actions which might lead to a judgment for money damages against the University.

Whatever the framers' intentions, we have in the past recognized that corporate status alone is not determinative of the question of whether or not an entity performing public or governmental functions is an agent or instrumentality of the state. In Alaska State Housing Authority v. Dixon, 496 P.2d 649, 651 (Alaska 1972), we concluded that ASHA was a "state agency" within the intendment of the Administrative Procedure Act even though it was created as a "public corporate authority." In *Dixon* we also construed the holding in Bridges v. Alaska Housing Authority, 349 P.2d 149 (Alaska 1959), to the effect that the Alaska Housing Authority was not the state for purposes of eminent domain proceedings, to mean only that that agency was not "identical" with the state.[22]

The same general conclusion was reached in DeArmond v. Alaska State Development Corp., 376 P.2d 717 (Alaska 1962). There we held that the act creating ASDC as an "instrumentality of the state within the Department of Commerce" was constitutional even though it also provided that the agency was a corporation with a "legal existence independent of and separate from the state." We concluded that this latter provision was nothing more than "a declaration of the legal relationship that most corporations have with respect to their creators."[23] Such corporate status did not have the effect of removing ASDC from the Department of Commerce.[24]

Although these decisions are not wholly dispositive of the question before us,[25] they are indicative of the fact that this Court has not been disposed to treat independent corporate status as sufficient to require the conclusion that a given entity is not in fact part of the State of Alaska. We recognize that the guideposts for such an inquiry are to be found more in political and functional realities than in organizational formali-

20. Alaska Const. art. VII, § 2.

21. Unfortunately the records from our constitutional convention offer no help in disclosing the thinking of the drafters on this matter.

22. 496 P.2d at 651 n. 4.

23. 376 P.2d at 724.

24. *See also* Walker v. Alaska State Mortgage Ass'n, 416 P.2d 245 (Alaska 1966), where the reasoning of *DeArmond* was followed in concluding that ASMA was not by virtue of its independent corporate nature an agency not within the Department of Commerce.

25. We are aware of the crucial fact that each of these cases dealt with a corporate entity which had been specifically declared in its organic act to be "within" a given executive department of the state. That is not the case here.

ties. This approach is in harmony with that of leading authorities in the area.[26]

Other courts have reached various conclusions as to the status and standing of their state universities with respect to the issue of sovereign immunity; there is a marked split of authority on the question.[27] There is, nevertheless, sound authority for the proposition that even where created as a corporate entity, a state university, because of its relation to the state, is a mere agent or instrumentality of the state to carry out its public purpose.[28] Morevoer, there are two jurisdictions whose decisions on this question are particularly persuasive since they have considered the unique status of universities created as constitutional corporations.

In People, for Use of Regents of University of Michigan v. Brooks, 224 Mich. 45, 194 N.W. 602 (1923), the Supreme Court of Michigan observed that the regents of the University of Michigan had been created as a "constitutional corporation." The court concluded that for the purposes of a statute authorizing proceedings by "the state" to condemn private property for public use, this constitutional corporation, although a separate entity independent from the state as to the management and control of the University, was nevertheless "a department of the state government, created by the Constitution to perform state functions . . . ."[29]

In a later case, the Court of Appeals of Michigan, in Branum v. State, 5 Mich. App. 134, 145 N.W.2d 860 (1966), considered the status of the University of Michigan's board of regents with respect to that state's statutory waiver of governmental immunity. It was concluded that the statute was applicable to the board even though, as a constitutional corporation, it was not subject to legislative control as to many university affairs. In so doing, the court specifically held that

> [i]n spite of its independence, the Board of Regents remains a part of the government of the state . . . .. The University of Michigan is an independent branch of the government of the state of Michigan, but it is not an island. Within the confines of [its exclusive constitutional powers] it is supreme. Without these confines, however, there is no reason to allow the Regents to use their independence to thwart the clearly established public policy of the people of Michigan [waiving governmental immunity to tort actions].[30]

A United States district court, considering the unique constitutional status of the board with respect to its immunity from suit under maritime law, concluded that the University of Michigan's board of regents was "a unique constitutional corporation . . . similar to a department of the

26. *See, e. g.*, 1 K. Davis, Administrative Law § 1.01, at 1 (1958) (where the author recognizes that administrative agencies may be designated by many names, including that of "corporation"), *as quoted in* Dixon, 496 P. 2d at 651.

27. *See generally* Annot., 33 A.L.R.3d 703, § 4[d] (1970); Annot., 86 A.L.R.2d 489, § 7 (1962); Annot., 160 A.L.R. 7, § 4 (1946); 15 Am.Jur.2d Colleges and Universities §§ 7, 15, 35 (1964); 72 Am.Jur.2d States, Territories and Dependencies §§ 104–106 (1974); 14 C.J.S. Colleges and Universities §§ 2, 18 (1939).

28. *See, e. g.*, Wolf v. Ohio State University Hospital, 170 Ohio St. 49, 162 N.E.2d 475 (1959) (recognizing that the state university and its hospital are "instrumentalities of the state" which may not be sued until the legislature enacts statutes determining "the manner in which such suits may be brought against the state."); University of Maryland v. Maas, 173 Md. 554, 197 A. 123 (1938); State v. Miser, 50 Ariz. 244, 72 P.2d 408, 412 (1937) (deciding that the fact that the University of Arizona is incorporated "does not make it any of the less an arm, branch or agency of the state for educational purposes").

29. 194 N.W. at 603.

30. 145 N.W.2d at 862.

state" which consequently enjoyed the immunity of the state from such suits.[31]

The character of the University of Minnesota's board of regents, also created as a "constitutional corporation," has been viewed by the supreme court of that state in this same general light. In State ex rel. University of Minnesota v. Chase, 175 Minn. 259, 220 N.W. 951 (1928), it was decided that while the legislature could not subject the board to executive control in matters reserved by the state constitution to the board alone, the board was nevertheless

> an agency of government to accomplish a state purpose, just as a municipal corporation, however independent it may be under its charter, is an agency of [local] government for the accomplishment of local purposes.[32]

More recently, a United States district court observed in Reid v. University of Minnesota, 107 F.Supp. 439, 442 (N.D.Ohio 1952), that

> [t]he "Regents of the University of Minnesota" is a constitutional corporation created to carry out State purposes and the acts of the Regents are, therefore, the acts of the State of Minnesota.

We conclude from the foregoing that the corporate status of the University of Alaska under the Alaska Constitution does not militate against our conclusion that the University falls within the ambit of the language of AS 09.50.250–.300 which governs suits against the State of Alaska. Furthermore, this Court's actions in the recent case of University of Alaska v. Chauvin, 521 P.2d 1234 (Alaska 1974), do not, as is urged by petitioner, require a contrary ruling.[33]

Petitioner also argues that the University is not subject to AS 09.50.250–.300 since the legislature has chosen to confer upon it the statutory power to "sue and be sued" in its own name.[34] This fact is not dispositive of the issue at hand. As a constitutional corporation, owing its existence not to the legislature but to a charter from the ultimate sovereign, the will of the people of this state, this basic corporate power would inhere in the University regardless of the legislature's declaration.[35]

In short, it is our conclusion that neither the University's unique corporate character nor its power to sue and be sued in its own name detracts in any degree from what we consider most significant and controlling in this case: that the University, in performing its constitutional functions, acts for the benefit of the state and of the public generally in the process of government; and that it was created to pursue the govern-

31. Huckins v. Board of Regents of University of Michigan, 263 F.Supp. 622, 624 (E.D. Mich.1967).

32. 220 N.W. at 953.

33. In *Chauvin*, where we ultimately concluded that under the fourteenth amendment to the Consitution of the United States a tenured employee of the University was entitled to a hearing before termination of his employment, this Court denied the University's motion for a stay of execution pending appeal under Rule 62(e) of the Alaska Rules of Civil Procedure. Rule 62(e) provides that no supersedeas bond is required when a stay of execution is granted pending an appeal by the state or its officers or agencies. In denying its motion, we did not specifically rule on the question of the University's status as an agency of the state for purposes of Rule 62. Moreover, we do not feel constrained in this case to decide whether the applicability of AS 09.50.290 to the University is dispositive of the University's standing with respect to Rule 62.

34. AS 14.40.040 provides:
General powers of the university. There is created and established a corporation to be called the University of Alaska. It may in that name
(1) sue and be sued;
(2) receive and hold real and personal property;
(3) contract and be contracted with;
(4) adopt, use and alter a corporate seal;
(5) do and have done all matters necessary for the purpose of any function set forth in this chapter.

35. Such a power, for example, is recognized to be a normal incident and attribute of corporate status per se. *See, e. g.*, H. Henn, Law of Corporations § 79, at 109 (1970).

mental task of providing education in accordance with an express mandate of the constitution, the fundamental and basic government of this state.

Article III, section 22 of the Alaska Constitution requires that all executive and administrative offices, departments, and agencies of the state government shall be allocated by law among and within not more than twenty principal departments. Petitioner contends that the University is not subject to AS 09.50.290 since it is not a department of the executive branch allocated among the 17 principal departments now identified under AS 44.15.010.[36]

[3] The answer to this contention is that the University could not be so allocated. In the light of our foregoing consideration of the unique character of the University as a constitutional corporation, we are persuaded that it is an instrumentality of the sovereign which enjoys in some limited respects a status which is co-equal rather than subordinate to that of the executive or the legislative arms of government.[37] We therefore conclude that it is not necessarily subject to such allocation under AS 44.15.010.

[4] Lastly, petitioner argues that in maintaining an experimental air strip on floe ice, the University was acting in a "proprietary," rather than "governmental" capacity, and that therefore, consistent with the common law principle in such cases, the privileges incident to sovereignty should not be recognized in this case.

We are aware of the historic force of this distinction and acknowledge that it would appear to be honored in many jurisdictions.[38] We note, however, that some states have recognized that the distinction between proprietary and governmental functions has little if any relevance in actions involving the question of the immunity or liability of the state, as opposed to its political subdivisions, in connection with the activities of public schools or institutions of higher learning.[39] We observe that the proprietary-governmental distinction was abandoned by this court with respect to municipal tort liability in the case of City of Fairbanks v. Schaible.[40] We take this opportunity to extend that ruling to suits involving the state or its agencies under AS 09.50.250–.300.

We reach the conclusion that the University of Alaska is an integral part of the state government and an instrumentality of the state in performing its educational function. This being so, AS 09.50.290, which provides that a suit against the state

36. AS 44.15.010 provides:
Offices and departments. There are in the state government the following principal offices and departments:
(1) Office of the Governor
(2) Department of Administration
(3) Department of Law
(4) Department of Revenue
(5) Department of Education
(6) Department of Health and Social Services
(7) Department of Labor
(8) Department of Commerce
(9) Department of Military Affairs
(10) Department of Natural Resources
(11) Department of Fish and Game
(12) Department of Public Safety
(13) Department of Public Works
(14) Department of Economic Development
(15) Department of Highways
(16) Department of Environmental Conservation
(17) Department of Community and Regional Affairs

37. *See* State ex rel. Sholes v. University of Minnesota, 54 N.W.2d 122, 125–26 (Minn. 1952).

38. *See* Annot., 33 A.L.R.3d 703, §§ 7 et seq. (1970).

39. *See* McCoy v. Board of Regents, 196 Kan. 506, 413 P.2d 73 (1966); Holsworth v. State, 298 N.W. 163 (1941).

40. 375 P.2d 201, 208 (Alaska 1962). It is significant that our decision in *Schaible* was predicated upon a statutory waiver of governmental immunity which, in all respects material to this case, is the functional equivalent of AS 09.50.250.

shall be tried by the court without a jury, is applicable in this case.

The order striking petitioner's demand for a jury trial is affirmed.

ERWIN, BOOCHEVER and BURKE, JJ., not participating.

EMPLOYERS COMMERCIAL UNION COMPANY, a Foreign Corporation and Aspeotis Construction Company, Appellants,

v.

Peter LIBOR and Alaska Workmen's Compensation Board, Appellees.

No. 2119.

Supreme Court of Alaska.

June 6, 1975.

Review was sought with regard to award made to claimant by Workmen's Compensation Board. The Superior Court, Third Judicial District, Anchorage, Eben H. Lewis, J., affirmed Board's decision, and appeal was taken. The Supreme Court, Connor, J., held that substantial evidence, apart from statutory presumption that a claim for compensation is within Workmen's Compensation Act, supported Board's finding that claimant's herniated disc was caused by work-related injury and that Board, in making award to claimant, could additionally rely on statutory presumption.

Affirmed.

1. Workmen's Compensation ⇐1532

Substantial evidence, apart from statutory presumption that a claim for compensation is within Workmen's Compensation Act, supported Workmen's Compensation Board's finding that claimant's herniated disc was caused by work-related injury occurring when he was struck in small of back by accidentally dislodged rock as he was bent over in a ditch. AS 23.30.120(1).

2. Workmen's Compensation ⇐1357

Workmen's Compensation Board, in making award to claimant, could additionally rely on statutory presumption that a claim is within Workmen's Compensation Act where such presumption was not overcome by substantial evidence to contrary. AS 23.30.120(1).

Sanford M. Gibbs, of Hagans, Smith & Brown, Anchorage, for appellants.

Suzanne C. Pestinger and William K. Jermain of Birch, Jermain, Horton & Bittner, Anchorage, for appellee Libor.

OPINION

Before RABINOWITZ, C. J., and CONNOR, ERWIN, BOOCHEVER and FITZGERALD, JJ.

CONNOR, Justice.

This is an appeal from the judgment of the superior court reviewing a decision of the Alaska Workmen's Compensation Board.

About May 24, 1969, Peter Libor, while employed by the Aspeotis Construction Company, was struck in the small of his back by a rock which had been accidentally dislodged. At the time, appellee was in a bent over position standing in a ditch. The rock, which fell from above, was approximately eight inches across and weighed between four and five pounds. The injury was diagnosed as a fracture of the transverse process of the right side of vertebrae L2 and L3. Libor was absent from work for about two weeks. He then returned to work until February 25, 1971, at which time, because of increased pain in his low back, he went to see Dr. Tryon Wieland in Anchorage.

Dr. Wieland prescribed exercise and physical therapy. When that procedure afforded little relief, Libor consulted Dr. George A. Lyon, who diagnosed Libor's