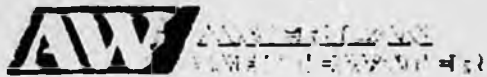


ALASKA LEGISLATURE COMMITTEE FILES 2007-2008 SJUD 12576



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Liability And Recreational Use Statutes

posted December 11, 2000 by Jason Robertson

American Whitewater has prepared this table with substantial help from the International Mountain Biking Association (IMBA) and the American Association for Horsemanship Safety (AAHS) as a tool for understanding the differences between state recreational use statutes on a national basis. This table is a valuable tool; however it is not the final word on liability law in America. Exercise your own good judgement when using the material and verify the status of your state statutes independently with an attorney before relying on this data.

What are Recreational Use Statutes and how do they work?

Clarification of terms used in this table.

Credits and Appreciation.

STATE	YEAR PASSED	DUTY TO DUTY		ASSURANCE OF SAFETY	LIABILITY FOR MISCONDUCT PROTECTION	
		KEEP SAFE	TO WARN		WILFUL/WANTON	LOST IF FEE CHARGED
Alabama						
<u>Alabama Code §35-15-1</u>	1965, 1981	No	No	No	Yes	No, if use of land is non-commercial
Alaska						
<u>Alaska Stat. §09.65.200</u>	1980	Not Specified	Not Specified	Not Specified	Yes	Yes
Arizona						
<u>Arizona Rev. Stat. Ann. §33-1551</u>	1983	Not Specified	Not Specified	Not Specified	Yes	Yes
Arkansas						
<u>Arkansas Stat.</u>	1965,	No	No	No	Yes	Yes, but fees

Des. Pul land fee

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<u>Ann. §18-11-301</u>	1983, 1991						from land leased to public agency allowed
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California

<u>California Govt. Code §2-2-3-2-846</u>	1963, 1988	No	No	No	Yes		Yes, but fees from land leased to public agency allowed
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Colorado

<u>Colorado Rev. Stat. §33-41-101</u>	1963, 1970	Not Specified	Not Specified	No	Yes		Yes, but fees from land leased to public agency allowed
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Connecticut

<u>Connecticut Gen. Stat. §52-557(f)</u>	1971, 1990	No	No	No	Yes		Yes, but fees from land leased to public agency allowed
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Delaware

<u>Delaware Code Ann. §7-VI-5901</u>	1953	No	No	No	Yes		Yes, but fees from land leased to public agency allowed
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Florida

<u>Florida State Ann. §XXVIII-375.251</u>	1963	No	No	No	Yes	Yes	
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Georgia

<u>Georgia Code Ann. §51-3-20</u>	1965	No	No	No	Yes		Yes, but fees from land leased to public agency allowed
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Hawaii

<u>Hawaii Rev. Stat. §3-28-520-1</u>	1969	No	No	No	Yes		Yes, but fees from land leased to
--------------------------------------	------	----	----	----	-----	--	-----------------------------------

						public agency allowed
Idaho						
<u>Idaho Code 636-16</u>	1976, 1988	No	No	No	Not Specified	Yes
Illinois						
<u>Illinois Ann. Stat. §745-65-1</u>	1965	No	No	No	Yes	Yes, but fees from land leased to public agency allowed
Indiana						
<u>Indiana Code Ann. §14-22-10</u>	1969, 1995, 1998	No, for recreation trails; not specified for other locations.	Not Specified	No	Yes	Yes
Iowa						
<u>Iowa Code Ann. §XI-2-461(C)</u>	1967	No	No	No	Yes	Yes, but fees from land leased to public agency allowed
Kansas						
<u>Kansas Stat. Ann. §58-3201</u>	1965, 1988	No	No	No	Yes	Yes, but fees from land leased to public agency allowed
Kentucky						
<u>Kentucky Rev. Stat. Ann. §XXXVI-411-190</u>	1968, 2000	No	No	No	Yes	Yes, but fees from land leased to public agency allowed
Louisiana						
<u>Louisiana Rev. Stat. Ann. §9-III-V-2-2791 & 2795</u>	1964, 1989	No	No	No	Yes	Yes

Maine

<u>Maine Rev. Stat. Ann. §14-1-7-159(A)</u>	1979, 1995	No	No	No	Yes	Yes, but fees from land leased to public agency allowed
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Maryland

<u>Maryland Nat. Res. Code Ann. §5-1101</u>	1957, 1998	No	No	No	Yes	Yes, but fees from land leased to public agency allowed
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Massachusetts

<u>Massachusetts Gen. Law Ann. §I-21-17(C)</u>	1972	Not Specified	Not Specified	Not Specified	Yes	Yes, but voluntary payments are allowed
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Michigan

<u>Michigan Comp. Laws Ann. §324.73301</u>	1994	No	No	No	Yes	Yes, but may charge a fee for "U-Pick" crops & not lose immunity
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Minnesota

<u>Minnesota Stat. Ann. §604(A)20</u>	1961, 1994	No	No	No	Yes	Yes, but fees from land leased to public agency allowed
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Mississippi

<u>Mississippi Code Ann. §89-2-1</u>	1978, 1986	No	No	No	Yes	Yes, but fees from land leased to public agency allowed
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Missouri

<u>Missouri §XXXVI-537.345</u>	1983	No	No	No	Yes	Yes
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Montana

<u>Montana Rev. Code Ann. §70-</u>	1965, 1995	No	Not Specified	No	Yes	Yes
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Nebraska

<u>Nebraska Rev. Stat. §37-730</u>	1965, 1998	No	No	No	Yes	Yes, except can charge group rates & not lose immunity
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Nevada

<u>Nevada Rev. Stat. §41.510</u>	1963, 1995	No	No	No	Yes	Yes
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New Hampshire

<u>New Hampshire Rev. Stat. Ann. §XVIII-212-34</u>	1961, 1982	No	No	No	Yes	Yes, but may charge a fee for "U-Pick" crops & not lose immunity
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New Jersey

<u>New Jersey Stat. Ann. §13-1(B)B-15-133</u>	1968, 1984	No	No	No	Yes	Yes
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New Mexico

<u>New Mexico Stat. Ann. §17-4-7; §66-3-1013; §16-3-9</u>	1973	No	Not Specified	No	Yes	Yes, but fees from land leased to public agency allowed
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New York

<u>New York Gen. Oblia. Law §9-103</u>	1963	No	No	No	Yes	Yes, but fees from land leased to public agency allowed
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North Carolina

<u>North Carolina Gen. Stat. §113(A)-6-95</u>	1987 Trails Act, 1993	Not Specified	Not Specified	Not Specified	Not Specified	Only applies to trails & not other uses of land
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North Dakota

<u>North Dakota Cent. Code §53-</u>	1965, 1993	No	No	No	Yes	Yes, but fees from land
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08-1 leased to public agency allowed

Ohio

<u>Ohio Rev. Code Ann. §XV-33-18</u>	1963, 1995	No	Not Specified	No	Not Specified	Yes
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Oklahoma

<u>Oklahoma Stat. Ann. Title §76-10</u>	1965, 1994	No	No	No	Yes	Yes, but fees from land leased to public agency allowed
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Oregon

<u>Oregon Rev. Stat. §105.672</u>	1971, 1995	No	No	No	Yes	Yes, but fees from land leased to public agency allowed
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Pennsylvania

<u>Pennsylvania Stat. Ann. §68-11-477</u>	1965	No	No	No	Yes	Yes, but fees from land leased to public agency allowed
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Rhode Island

<u>Rhode Island Gen. Law §32-6-1</u>	1978	No	No	No	Yes	Yes, but fees from land leased to public agency allowed
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South Carolina

<u>South Carolina Code Ann. §27-3-10</u>	1962	No	No	No	Yes	Yes, but fees from land leased to public agency allowed
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South Dakota

<u>South Dakota Comp. Laws Ann. §20-9-11</u>	1966, 1990	No	No	No	Yes	Yes, but nonmonetary gifts up to \$100 allowed
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Tennessee

<u>Tennessee Code Ann. §11-10-101</u>	1988	No	No	No	Yes	Yes, but fees from land leased to public agency allowed
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Texas

<u>Texas Stat. & Codes §4-75.001</u>	1965, 1999	No	Not specified	No	Yes	No. Revenue from charges may not exceed 2x prop. taxes
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Utah

<u>Utah Code Ann. §57-14-1</u>	1971, 1997	No	No	No	Yes	Yes, but fees from land leased to public agency allowed
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Vermont

<u>Vermont Stat. Ann. §10-020-441 & §12-5791</u>	1967, 1993	No	Not Specified	No	Yes	Yes
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Virginia

<u>Virginia Code §29.1-509</u>	1950	No	No	No	Yes	Yes, but may charge fees to maintain the land & not lose immunity
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Washington

<u>Washington Rev. Code Ann. §4-24.200</u>	1967, 1997	Not Specified	Not Specified	Not Specified	Yes	Yes, but may charge for cutting firewood & not lose immunity
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West Virginia

<u>West Virginia Code §19-25-1</u> Also see <u>West Virginia's Whitewater Responsibility</u>	1965	No	No	No	Yes	Yes
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<u>Act §20-3b-1 to 5</u>						
Wisconsin						
<u>Wisconsin Stat. Ann. §895.52</u>	1963, 1995	No	No	No	Not Specified	No, so long as total revenues don't exceed \$2000 annually
Wyoming						
<u>Wyoming Stat. Ann. §34-19-101</u>	1965	No	No	No	Yes	Yes, but fees from land leased to public agency allowed

CLARIFICATION OF TERMS:

YEAR PASSED: When was the recreational use statute passed or modified?

DUTY TO KEEP SAFE: Does the owner owe a duty of care to keep their premises safe for entry and use by others for recreational purposes?

DUTY TO WARN: Does the owner owe any duty to warn visitors of hazardous conditions, structures, or activities on their property to persons entering for recreational purposes?

ASSURANCE OF SAFETY: Does the owner who gives permission to another for recreational activities on their property thereby extend any assurance that the premises are safe?

LIABILITY FOR MISCONDUCT WILFUL/WANTON: Does the statute limit the landowner's liability for wilful or malicious failure to guard or warn against known dangerous conditions, uses, structures, or activities?

PROTECTION LOST IF FEE CHARGED: Does the statute limit the landowner's liability for injuries suffered in any case where access permission is granted for commercial enterprise or profit? In other words, does the landowner lose their protection under the statute if they charge an access fee?

CREDITS:

American Whitewater collected the majority of this data via private research, correspondence, and assistance from the following sources:

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ALASKA STATE LEGISLATURE House District 35

MEMORANDUM

TO: Senate Resources
FROM: Representative Paul Seaton
DATE: March 5, 2007
RE: HB 25

I am submitting this memo to respond in detail to the questions that came up during the discussion of HB 25 in Senate Resources on Friday March 2nd.

Adverse Possession

HB 25 protects a landowner by not allowing an adverse possession or a proscriptive easement claim against the landowner on the basis of allowing free recreational use of his or her land. Senator Wagoner brought up the point that adverse possession was already covered to include recreational use in existing statute. While the passage of AS 09.10.030 in 2003 notably limited the basis for adverse possession claims, the effect it would have on permissive recreational use is unclear. AS.09.25.052 states "the uninterrupted adverse notorious use...of private land for...public access purposes, including...trails, by the public...for a period of 10 years or more, vests an appropriate interest in that land" (see attached statute). The courts have not yet interpreted how adverse possession applies since the passage of AS 09.10.030. The court could decide to apply an adverse possession or proscriptive easement claim under either AS 09.25.052 or AS 09.10.030 with different outcomes. For example, without the adverse possession language in HB 25 a user could claim adverse possession after 10 years of use. However the previous land owner could come back at any time in the future and re-claim the land granted to the user. HB 25 provides clarity to both parties and assures landowners that they will not have to give up or lose control of a portion of their land in the future if they allow recreational use. I have included a legal memo addressing adverse possession from last session (please note it references HB 415, identical legislation to HB 25 introduced last session).

ALASKA STATE LEGISLATURE
REPRESENTATIVE PAUL SEATON
House District 35

Airstrip liability

Chairman Huggins brought up the question of the liability level for a private airstrip near a home or structure. Existing statute AS 09.65.093 covers aircraft runways, airfields, and landing areas. Under AS 09.65.093 a private owner or operator of an airstrip is not civilly liable unless gross negligence or recklessness or intentional misconduct can be proven, which is the same standard HB 25 proposes for free recreational use of other private land (see attached statute). However, if the airstrip is abandoned – not being maintained as an airstrip - the outcome is less clear. AS 09.65.200 "Tort immunity for personal injuries or death occurring on unimproved land" specifically includes (c) (2) an abandoned aircraft landing area. Therefore, the standard for the private landowner is "gross negligence or reckless or intentional misconduct." However, if the old strip is mowed as a lawn or field or is close to a building this could place the landowners property into the improved land classification for which the liability standard would be simple negligence, unless protected by HB 25.

Indirectly Allow

Attorney Michael Schneider raised the concern that the term "indirectly allow" used in the bill granted broad and inappropriate immunity. The House Judiciary Committee debated at length about the term "indirectly" and came up with no appropriate substitute. The intent of the legislation is to cover landowners who have no objection to their land being used for recreation but may not have knowledge of every instance or have given expressed consent (written or verbal) to each user. Removal of the term "indirect" would create a burden to give that written or verbal permission to each user. After extensive conversations with legislative legal and discussion among the three lawyers on House Judiciary, it was determined that the term "indirectly allow" was appropriate in order to maintain the integrity of the bill. Furthermore, the terms "directly or indirectly" are used very frequently in Alaska Statute (192 times in 35 out of 47 titles). Please see the attached memo that was provided to House Judiciary for examples.

You will also notice that p.2 lines 15-17 explicitly removes any potential conflict with liability release agreements to ensure that this broader immunity does not limit the liability provisions in written waivers.

Please feel free to contact my office if you have any additional concerns about HB 25 or wish to discuss the items in this memo further.

Sec. 09.45.052. Adverse possession.

(a) The uninterrupted adverse notorious possession of real property under color and claim of title for seven years or more, or the uninterrupted adverse notorious possession of real property for 10 years or more because of a good faith but mistaken belief that the real property lies within the boundaries of adjacent real property owned by the adverse claimant, is conclusively presumed to give title to the property except as against the state or the United States. For the purpose of this section, land that is in the trust established by the Alaska Mental Health Enabling Act of 1956, P.L. 84-830, 70 Stat. 709, is land owned by the state.

(b) Except for an easement created by Public Land Order 1613, adverse possession will lie against property that is held by a person who holds equitable title from the United States under paragraphs 7 and 8 of Public Land Order 1613 of the Secretary of the Interior (April 7, 1958).

(c) Notwithstanding AS 09.10.030, the uninterrupted adverse notorious use of real property by a public utility for utility purposes for a period of 10 years or more vests in that utility an easement in that property for that purpose.

(d) Notwithstanding AS 09.10.030, the uninterrupted adverse notorious use, including construction, management, operation, or maintenance, of private land for public transportation or public access purposes, including highways, streets, roads, or trails, by the public, the state, or a political subdivision of the state, for a period of 10 years or more, vests an appropriate interest in that land in the state or a political subdivision of the state. This subsection does not limit or expand the rights of a state or political subdivision under adverse possession or prescription as the law existed on July 17, 2003.

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MEMORANDUM

March 27, 2006

SUBJECT: Effect of AS 09.65.202(d) on adverse possession or prescriptive easement issues (HB 415 (Work Order No. 24-LS1446I))

TO: Representative Paul Seaton
Attn: Ian Laing

FROM: Dennis C. Bailey 
Legislative Counsel

You have asked me to summarize the effect of AS 09.65.202(d), part of HB 415, on adverse possession or prescriptive easements. That section provides:

(d) Except as provided for under AS 09.45.052(d), land use allowed by a land owner for recreational activity without charge may not form the basis of a claim for adverse possession, prescriptive easement or a similar claim.

Following our discussions yesterday, I drafted an amendment clarifying that the limitation applies only to activity occurring after the effective date of the act, not to recreational activity which may have happened in the past.

Adverse possession is addressed in AS 09.45.052.

AS 09.45.052. Adverse possession. (a) The uninterrupted adverse notorious possession of real property under color and claim of title for seven years or more, or the uninterrupted adverse notorious possession of real property for 10 years or more because of a good faith but mistaken belief that the real property lies within the boundaries of adjacent real property owned by the adverse claimant. is conclusively presumed to give title to the property except as against the state or the United States. For the purpose of this section, land that is in the trust established by the Alaska Mental Health Enabling Act of 1956, P.L. 84-830, 70 Stat. 709, is land owned by the state.

(b) Except for an easement created by Public Land Order 1613, adverse possession will lie against property that is held by a person who holds equitable title from the United States under paragraphs 7 and 8 of Public Land Order 1613 of the Secretary of the Interior (April 7, 1958).

(c) Notwithstanding AS 09.10.030, the uninterrupted adverse

notorious use of real property by a public utility for utility purposes for a period of 10 years or more vests in that utility an easement in that property for that purpose.

(d) Notwithstanding AS 09.10.030, the uninterrupted adverse notorious use, including construction, management, operation, or maintenance, of private land for public transportation or public access purposes, including highways, streets, roads, or trails, by the public, the state, or a political subdivision of the state, for a period of 10 years or more, vests an appropriate interest in that land in the state or a political subdivision of the state. This subsection does not limit or expand the rights of a state or political subdivision under adverse possession or prescription as the law existed on July 17, 2003.

The underlined language in subsection (a) was added in 2003, and placed restrictions on the availability of adverse possession.

A prescriptive easement claim is similar to a claim for adverse possession. A prescriptive easement is a claim for a right to use property, while adverse possession is a claim for an ownership right.¹

AS 09.45.052(d) is referenced in the draft bill as an exclusion. Paraphrased, it states, that adverse possession is available to the state or a political subdivision for listed projects and that the adverse possession or prescriptive rights of the state or a political subdivision are not limited or expanded by the enactment of the 2003 revisions.

AS 09.10.030 is the companion statute to AS 09.45.052. It addresses adverse possession by limiting the time available for bringing an action for recovery of real property or possession of it to 10 years. AS 09.10.030 was also modified in 2003 by adding new subsection (b). AS 09.10.030 states:

(b) An action may be brought at any time by a person who was seized or possessed of the real property in question at some time before the commencement of the action or whose grantor or predecessor was seized or possessed of the real property in question at some time before commencement of the action, and whose ownership interest in the real property is recorded under AS 40.17, in order to

(1) quiet title to that real property; or

¹ Obtaining rights in another's property by prescription is similar to obtaining rights by adverse possession. "Both doctrines permit acquisition of property rights through the passage of time, if certain conditions are met, but prescription is applied to servitudes while adverse possession is applied to possessory estates." Thus, the focus in a prescriptive easement claim is on "use," whereas the focus in an adverse possession case is on "possession." *Interior Trails Pres. Coalition v. Swope*, 115 P.3d 527, 529 (Alaska 2005)

Representative Paul Seaton

March 27, 2006

Page 3

(2) eject a person from that real property.

This subsection arguably consumes the general rule by allowing a person to bring an action to recover possession at any time if the person previously had possession of a recorded interest in the land. My research shows that the effect of AS 09.10.030(b) has not been interpreted at the appellate level of the Alaska courts, but it has notably limited the doctrine of adverse possession in Alaska.

If HB 415 passes, and assuming that it included the amended language limiting its effect to after the effective date of the bill, recreational activity under the provisions of the bill could not be used as the basis of a claim. Thus, as we discussed, if a person had an adverse possession claim based on recreational use that required additional time to mature after the effective date of the act, in my judgment, that right would be barred by the effect AS 09.65.202(d), if enacted by HB 415.

If I may be of further assistance, please advise.

**DCB:ljw
06-158.ljw**

Sec. 09.65.093. Civil liability relating to aircraft runways, airfields, and landing areas.

(a) Except as provided in (c) of this section, a person who without compensation constructs, maintains, or repairs an aircraft runway, airfield, or landing area may not be held civilly liable, except for an act or omission that constitutes gross negligence or recklessness or intentional misconduct, for the injury to or death of a person or for damage to an aircraft, resulting from the use of the runway, airfield, or landing area to take off, land, park, or operate an aircraft.

(b) A person who is the owner or operator of an aircraft runway, airfield, or landing area is not civilly liable, except for an act or omission that constitutes gross negligence or recklessness or intentional misconduct, for the injury to or the death of a person or for damage to an aircraft, resulting from the use or attempted use of the runway, airfield, or landing area to take off, land, park, or operate an aircraft while the runway, airfield, or landing area is

(1) marked as closed by placement of a large "X" on the runway, in accordance with Federal Aviation Administration guidelines; and

(2) listed or charted, and designated as closed in the appropriate aeronautical charts and publications published by the Federal Aviation Administration.

(c) The immunity from civil liability under (a) of this section does not limit the liability of an owner or operator of an aircraft runway, airfield, or landing area to a provider of flight services or its passengers under contract with the owner or operator.

Alaska State Legislature

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Representative Paul Seaton@legis.state.ak.us

REPRESENTATIVE Paul Seaton

District 35

MEMORANDUM

TO: House Judiciary Committee
FROM: Representative Paul Seaton
DATE: February 2, 2007
RE: The use of "directly" and "indirectly" in Alaska Statute

In House Judiciary on February 1, 2007 the concern was raised that the terms "directly or indirectly" are not commonly found in Alaska Statute. In a Folio word search of "Alaska Statutes – Text Only", I came up with 192 hits for the term "directly or indirectly." The following titles are all the places where the statement "directly or indirectly" is found in Alaska Statute. Please note that out of 47 titles, only 12 do not include the term "directly or indirectly" I have also included a number of samples of Alaska Statute where "directly or indirectly" can be found for your reference. To make locating the terms easier, directly is in all caps [DIRECTLY]

Alaska Statutes where "directly or indirectly" is found:

TITLE 2. AEROUNAUTICS

TITLE 5. AMUSMENTS AND SPORTS

TITLE 6. BANKS AND FINANCIAL INSTITUTIONS

TITLE 8. BUSINESS AND PROFESSIONS

TITLE 9. CODE OF CIVIL PROCEDURE

- TITLE 10. CORPORATIONS AND ASSOCIATIONS
- TITLE 11. CRIMINAL LAW
- TITLE 12. CODE OF CRIMINAL PROCEDURE
- TITLE 13. DECENDENTS', ESTATES, GAURDIANSHIPS, TRANSFERS AND TRUSTS
- TITLE 14. EDUCATION, LIBRARIES AND MUSEUMS
- TITLE 15. ELECTIONS
- TITLE 16. FISH AND GAME
- TITLE 17. FOOD AND DRUGS
- TITLE 18. HEALTH, SAFTEY AND HOUSING
- TITLE 19. HIGHWAYS AND FERRIES
- TITLE 21. INSURANCE
- TITLE 23. LABOR AND WORKERS' COMPENSATION
- TITLE 24. LEGISLATURE
- TITLE 25. MARITAL AND DOMESTIC RELATIONS
- TITLE 27. MINING
- TITLE 28. NAVAGATIONL, HARBORS AND SHIPPING
- TITLE 31. OIL AND GAS
- TITLE 32. PARTNERSHIP
- TITLE 34. PROPERTY
- TITLE 35. PUBLIC BUILDING, WORKS AND IMPROVMENTS
- TITLE 37. PUBLIC FINANCE
- TITLE 38. PUBLIC LAND
- TITLE 39. PUBLIC OFFICERS AND EMPLOYEES

TITLE 42. PUBLIC UTILITIES AND CARRIERS

TITLE 43. REVENUE AND TAXATION

TITLE 44. STATE GOVERNMENT

TITLE 45. TRADE AND COMERCE

TITLE 46. WATER, AIR, ENERGY AND ENVIRONMENTAL CONSERVATION

TITLE 47. WELFARE, SOCIAL SERVICES AND INSTITUTIONS

Examples of the use of "directly or indirectly" in Alaska Statute:

Sec. 02.15.260. Definitions.

(16) "utility" includes a corporation, company, individual, or association of individuals, or a lessee, trustee, or court-appointed receiver, that owns, operates, manages, or controls a line, plant, pipeline, or system for furnishing, producing, generating, transmitting, or distributing power, electricity, communications, telecommunications, water, gas, oil, petroleum products, coal or other mineral slurry, steam, heat, light, chemicals, air, sewage, drainage not connected with airport drainage, irrigation, or similar products including publicly owned fire and police signal systems and street lighting systems that DIRECTLY or inDIRECTLY serve the public or a segment of the public; "utility" also includes a corporation, company, individual, or association of individuals, or a lessee, trustee, or court-appointed receiver that owns, operates, manages, or controls a system for furnishing transportation of goods or persons by means of a railway, tramway, cableway, conveyor, flume, canal, tunnel, pipeline, or a similar means;

.....
Sec. 05.10.130. Participation in purse or conducting sham contest.

A person or a member of any group of persons or corporation promoting wrestling or boxing exhibitions or contests who participates DIRECTLY or inDIRECTLY in the purse or fee of a manager of a boxer or wrestler or a boxer or a wrestler, and a licensee who conducts or participates in any sham or fake boxing contest or sparring match or exhibition, forfeits the license granted under this chapter and the commission shall declare the license cancelled and void and the licensee may not thereafter receive another license.

.....
Sec. 08.98.250. Definitions.

In this chapter,

(1) "accredited veterinary school" means a veterinary college or division of a university or college that offers the degree of Doctor of Veterinary Medicine, or its

equivalent as determined by the board, and conforms to the standards required for accreditation by the American Veterinary Medical Association;

(2) "animal" means any animal other than a human being including mammals, birds, fish, and reptiles, wild or domestic, living or dead;

(3) "board" means the Board of Veterinary Examiners;

(4) "department" means the Department of Commerce, Community, and Economic Development;

(5) "practice of veterinary medicine"

(A) means for compensation to

(i) diagnose, treat, correct, change, relieve, or prevent animal disease, deformity, defect, injury, or other physical or mental condition, including the prescription or administration of a drug, biologic apparatus, anesthetic, or other therapeutic or diagnostic substance;

(ii) use a manual or mechanical procedure for testing for pregnancy or correcting sterility or infertility; or

(iii) render advice or recommendation with regard to any matter listed in (i) or (ii) of this subparagraph;

(B) means to represent, DIRECTLY or inDIRECTLY, publicly or privately, an ability or willingness to do any act in (A) of this paragraph for compensation;

(C) means to use a description, title, abbreviation, or letters in a manner or under circumstances tending to induce the belief that the person using it or them is qualified or licensed to do any act in (A) of this paragraph whether or not for compensation;

(D) does not include, whether or not for compensation,

(i) practices related to artificial insemination and the use of a title, abbreviation, or letters in a manner which induces the belief that the person using them is qualified to perform artificial insemination;

(ii) the practices of a farrier done in the performance of the farrier's profession;

(iii) standard practices commonly performed on farm or domestic animals in the course of routine farming or animal husbandry, when performed by an owner or the owner's employee unless ownership of the animal is transferred for the purpose of avoiding application of this chapter or the primary purpose of hiring the employee is to avoid application of this chapter;

(6) "veterinary technician" means a person who performs functions delegated by a veterinarian licensed under this chapter.

.....
CORPORATIONS AND ASSOCIATIONS

Sec. 10.06.990. Definitions.

In this chapter, unless the context otherwise requires,

(1) "acknowledged" means that a document is accompanied by a certificate of its acknowledgment as provided in AS 09.63.010 - 09.63.130;

(2) "affiliate" means a person that DIRECTLY or inDIRECTLY through one or more intermediaries controls, or is controlled by, or is under common control with, a corporation subject to this chapter;

.13.990. Definitions.

In this chapter,

Sec. 11.56.590. Jury tampering.

(a) A person commits the crime of jury tampering if the person **DIRECTLY** or **inDIRECTLY** communicates with a juror other than as permitted by the rules governing the official proceeding with intent to

- (1) influence the juror's vote, opinion, decision, or other action as a juror; or
- (2) otherwise affect the outcome of the official proceeding.

(b) Jury tampering is a class C felony.

.....
(c) An individual, or one acting **DIRECTLY** or **inDIRECTLY** on behalf of that individual, may not solicit or accept a contribution

(1) before the date for which contributions may be made as determined under AS 15.13.074(c); or

(2) later than the day after which contributions may not be made as determined under AS 15.13.074(c).

Please contact me if you have any questions.

Staff contact, Katie Shows x2028

Alaska State Legislature

State Capitol, Room 103
Juneau, AK 99802
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Fax: 465-3472
Toll Free (800) 665-2689
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345 W. Sterling Highway
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REPRESENTATIVE Paul Seaton

District 35

Senator Huggins, Chair
Senate Resources Committee

April, 2 2007

Dear Sen. Huggins,

I have received correspondence dealing with technical legal questions and standards from a couple of trial lawyers. Several of these issues were addressed in House Judiciary such as the terminology and judicial application of "direct and indirect" and applicability of the legislation only with specific written permission for a user to recreate on private land. Requiring written agreement defeats the general purpose of the HB 25. I provided to the committee an analysis of the terminology discussion and legislative legal opinion on March 5, 2007.

There was also a question raised by the trial lawyers about the meaning of "gross negligence" within the context of Alaska civil law. I have pointed out that the "gross negligence" standard is the standard currently incorporated into Alaska Statutes covering landowners' liability on unimproved land, abandoned airstrips, and operating private airstrips. I have included with this memo a legal opinion with the definition of gross negligence and its application.

The trial lawyers also disagreed with the "duties of a landowner" section (Section 09.65.202(1-3)). Please reference the state by state comparison chart showing that 45 other states address this liability in a similar manner I provided in the bill packet.

Thank you for your consideration of these matters.

Sincerely,

Rep. Paul Seaton

cc: Members of the Senate Resources Committee

LEGAL SERVICES

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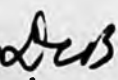
State Capitol
Juneau, Alaska 99801-1182
Deliveries to: 129 6th St., Rm. 329

MEMORANDUM

March 21, 2007

SUBJECT: Defining "gross negligence" (HB 25, Work Order No. LS0174A)

TO: Representative Paul Seaton
Attn: Katie Shows

FROM: Dennis C. Bailey 
Legislative Counsel

You have asked for a definition of or case law interpreting "gross negligence."

The common law definition of "gross negligence," as expressed, in pertinent part, in *Black's Law Dictionary*, Seventh Edition is:

1. A lack of slight negligence or care.
2. A conscious, voluntary act or omission in reckless disregard of a legal duty and of the consequences to another party, who may typically recover exemplary damage.--Also termed reckless negligence; wanton negligence; hazardous negligence.

The Alaska pattern jury instruction defining gross negligence reads:

3.14 GROSS NEGLIGENCE DEFINED

I will now define gross negligence for you. A person was grossly negligent if: (1) that person's act or failure to act created an unreasonable risk of harm to another; and (2) if either that person had knowledge of facts that would disclose to a reasonable person that the act or failure to act involved a high degree of probability that the harm would occur, or the person knew that the act or failure to act involved a high degree of probability that the harm would occur.

To qualify as gross negligence or recklessness, the conduct must involve a risk of injury or death substantially greater in amount than that which is necessary for negligence. See *Restatement (Second) of Torts* sec. 500 comment g at 590 (1965) (regarding recklessness); *Storrs v. Lutheran Hospital and Homes Society of America*, 661 P.2d 632, 634 (Alaska 1983) (regarding gross negligence); *Bunting v. U.S.*, 884 F.2d 1143, 1147 (9th Cir. 1989) (regarding gross negligence).

Ordinary or simple negligence is a failure to act as a reasonable person would in the same circumstances. Simple negligence often results from incompetence or failure to take

Representative Paul Seaton

March 21, 2007

Page 2

precautions that are ordinarily taken in that situation. In contrast, gross negligence is an act or omission that creates an unreasonable risk of harm and includes a high degree of probability that the harm will occur. *Leavitt v. Gillaspie*, 443 P.2d 61 (Alaska 1968).

I am sending you a copy of the *Storrs* case and the *Leavitt* case (see text marked on pgs. 2 - 3).

If I may be of further assistance, please advise.

DCB:med
07-193.med

Enclosure

Teleconference Order Form FAX TO 465-2864

Sponsor and or Committee Name			Date
Representative Paul Seaton SENATE JUDICIARY			4/16/07

Start/End Time	Chairing site	Juneau Room	Testimony Yes __ No __ Invitational __

Contact Person and	Phone Number	Other sites may add?	Testimony Limit
Katie Shows	465-2028	yes	

Subject of meeting and or Bills on agenda

HB 25 - delineating duties of landowners who allow free recreational use of their lands

Sites - LIOs		Sites - Offnets	Phone #
Anchorage	x		
Barrow			
Bethel			
Cordova			
Delta Junction			
Dillingham			
Fairbanks	x		
Glennallen			
Homer	x		
Juneau			
Kenai			
Ketchikan			
Kodiak			
Kotzebue			
Matsu			
Nome			
Petersburg			
Seward	x		
Sitka			
Tok			
Valdez			
Wrangell			

Notes

LAW OFFICES

Michael J. Schneider, P.C.

TELEPHONE (907) 277-9306

880 "N" STREET, SUITE 202

FAX (907) 274-8201

ANCHORAGE, ALASKA 99501

VIA FACSIMILE: (907) 465-3175

March 16, 2007

The Honorable Paul Seaton
Alaska State Legislature
State Capitol, Room 403
Juneau, AK 99801-1182

RE: HB 25 – RECREATIONAL LAND USE LIABILITY/ADVERSE POSSESSION

Dear Representative Seaton:

Thank you very much for visiting with me recently, and thanks to you and your staff for copying me with your memorandum of March 5, 2007, to Senate Resources.

You suggested to me that you were very anxious to see this bill become law. We can both agree that increased access for the public to private improved land is often desirable. The intent of your bill as stated, is to relieve private land owners who unreasonably maintain their improved real estate of the responsibility that normally attends such failings. The justification for this gift to the careless is the "*quid pro quo*" of public access. I respectfully suggest that without language in the bill enforcing the *quid pro quo*, the bill does little or nothing for the public while immunizing those whose acts and omissions will foreseeably injure and kill members of the public.

The "directly or indirectly" problem.

During our visit, I explained that I have consulted with an experienced local real estate attorney and been advised that any private property owner could grant a "temporary revocable appurtenant easement" to the public. This recorded document would specify the land, or portion of the land, available for free public access and would leave no doubt in anyone's mind about what property, owned by others, they could or could not access for recreational purposes. It will eliminate the real and foreseeable problem that a negligent property owner would claim the benefit of this bill after the fact of injury, while never really giving the public free recreational access before the injury.

You responded that there were a number of legal impediments to this approach. Frankly, I am unable to debate you because this is beyond my depth. I can only say that upon repeating as much of our discussion as I could remember and understand to those more capable than I, it remains their opinion that a temporary revocable appurtenant easement would do the job. You advised me that such an easement would require "acceptance" by the state or municipality. My legal consultants tell me that such is simply not the case unless the state or municipality is the grantee of the easement in question.

Despite the above, and without regard to where the technical truth lies, there are other easy ways to make sure that negligent property owners do not get a free ride on the back of your injured constituents, a clearly foreseeable but unintended consequence of this bill. The recorder's office will accept virtually anything for filing. Section 1 (Sec. 09.65.202) could be amended to read as follows:

- (a) A land owner that ~~directly or indirectly~~ allows a recreational activity on the land owner's land by filing a "notice of availability for recreational activity" in form specified herein, with the appropriate recorder's office, does not, by allowing that activity,

While I can assure you I have no pride of authorship nor depth of skill in this area, such a "notice" might look like the following:

Notice of Availability for Recreational Activity

Notice is hereby given, pursuant to AS 09.65.202, that the following described real property is available for recreational activity by the public, without charge, or at a charge no greater than specifically authorized by this statute:

[Legal Description of Property, or portion thereof, or Metes and Bounds description of property and/or portion thereof intended to be open for recreational access.]

Date: _____

Signature by Land Owner: _____

The statutory language and the related notice can be further refined or modified to limit the nature or type of recreation involved. Some land owners may be very inclined to allow cross-country skiing or fishing or small game hunting on their property but disinclined to allow snowmachining, fireworks, or paintball wars.

I respectfully suggest that without some formal commitment by the owner to open their property for recreational access, and without some way for the recreational public to understand in advance where they can go and where they can't go, and what they can do when they get there, this bill gets the public little or nothing while immunizing from personal responsibility of those who unreasonably maintain their property.

The "charge" loophole needs to be closed.

Section (b) of the bill makes it clear that the bill is not intended to benefit land owners who collect "a charge for entry" onto the land for recreational activities. Nevertheless, subsection (e)(1)(C) of the bill swallows up this protection by the wording employed.

(C) a contribution in kind, service, or cash from a user if all of the contribution is used to improve access to trails, to remedy or reduce damage, to provide warning of a hazard, or to remove a hazard from the land [is not a charge].

As this is worded, and contrary to your intent as you explained it to me, I could be charged a \$1,000.00 trespass fee to hunt brown bear on someone's land, fall into some barely visible mine shaft, suffer catastrophic injuries, and have my claim subject to a complete bar if, after the fact, the land owner in question used my \$1,000.00 to cover up the shaft I fell in to. To solve this problem, I would suggest language something like the following:

(C) a contribution in-kind, service, or cash from a user if there is in existence before the injury giving rise to the claim, a documented program in place to use 100% of such contributions to improve access or trails, to remedy or reduce damage, to provide warning of hazard, or to remove a hazard from the land;

The "land" loophole needs to be closed and expressly harmonized with Alaska's nuisance statute (AS 09.45.230).

It would be poor public policy for this bill to get in the way of abatement of private nuisances. Abatement is authorized by AS 09.45.230. I would suggest an amendment to Section (c) as follows:

(c) This section may not be construed to conflict with, nor does it have any effect on, a liability release agreement between a participant in a recreational activity and a land owner, or where an action based on private nuisance is authorized by AS 09.45.230.

I am quite concerned about the definition contained at Section (e)(2)(E) that includes within the definition of the "land" immunized by the bill "buildings, structures, other improvements, machinery, and equipment on the land;" I hope that all of the sponsors, and all the members of the legislature, appreciate that they are immunizing a list of horrors by this broad language. By this language, those that support this bill immunize people that "don't get around to fixing" the thin cable strung across a trail by making it visible or eliminating it with a safer barricade. If some bright light leaves a large piece of equipment unsecured, unattended, and with the keys in it next to the junior high school, that person or entity's insurance company gets a free ride on the back of some injured or killed kid when the inevitable happens. And, of course, if the child is injured seriously or if his health insurance is inadequate, the public then pays for this private stupidity, anointed and blessed by this legislation in its current form. I would strongly encourage limitations and tightening of the language in this section. However, much of the difficulty with this section might be solved

by reigning in Section (a) 2. See below.

The "known hidden" hazard loophole.

Section (a)(2) tells the negligent land owners among us that they do not:

(2) owe a duty to warn persons using the land for a recreational activity of any dangerous condition, known or unknown, apparent or hidden;

You cannot be liable, even if you act in a grossly negligent or intentional manner, under circumstances where you owe no duty. As the Alaska Supreme Court has observed on many occasions, a *prima facie* tort consists of the elements of duty, breach thereof, causation, and damages. No duty means no tort. In this section of the bill, the legislature is immunizing property owners who know of a hidden hazard from all liability. Because no duty exists, a finding of grossly negligent breach is not going to do much for the scout troop that falls into the carefully camouflaged mine shaft, as the property owner and his insurance company chuckle all the way to the bank.

More appropriate language for this section is suggested below:

(2) owe a duty to warn persons using the land for recreational activity of any dangerous condition, of which the user knew, or should have known. A land owner has a duty to warn of hidden dangers.

Conclusion.

Thank you for allowing me to comment on this bill, and I am anxious to work with you toward a version that better protects your constituents from the foreseeable consequences of unreasonable acts and omissions by property owners.

Your very truly,

LAW OFFICES
MICHAEL J. SCHNEIDER, P.C.


Michael J. Schneider

MJS/clm

cc: Senate Resources Committee

LEGAL SERVICES

DIVISION OF LEGAL AND RESEARCH SERVICES
LEGISLATIVE AFFAIRS AGENCY
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State Capitol
Juneau, Alaska 99801-1182
Deliveries to: 129 6th St., Rm. 329

MEMORANDUM

April 24, 2007

SUBJECT: Potential liability, under HB 25, in a hypothetical situation where a landowner places an unmarked cable on a landowner's property that causes the decapitation of a four wheel all-terrain vehicle driver using the property for recreational use (HB 25, Work Order No. 25-LS0174A)

TO: Representative Paul Seaton
Attn: Katie Shows

FROM: Dennis C. Bailey
Legislative Counsel

You have asked for an opinion addressing how HB 25 would apply to the hypothetical circumstance where a landowner places an unmarked cable up on their property that results in the decapitation of the driver of a four-wheel all-terrain vehicle using the property for recreational purposes. This analysis is based on the discussion of the concepts of ordinary negligence and gross negligence provided in my March 27, 2007 memo.

Ordinary or simple negligence is a failure to act as a reasonable person would in the same circumstances. Simple negligence often results from incompetence or failure to take precautions that are ordinarily taken in that situation. In contrast, gross negligence is an act or omission that creates an unreasonable risk of harm and includes a high degree of probability that the harm will occur.¹ To qualify as gross negligence or recklessness, the conduct must involve a risk of injury or death substantially greater in amount than that which is necessary for negligence.² Whether a defendant acted negligently is a question of fact properly determined by the jury.³

¹ *Leavitt v. Gillaspie*, 443 P.2d 61 (Alaska 1968).

² See *Restatement (Second) of Torts* sec. 500 comment g at 590 (1965) (regarding recklessness); *Storrs v. Lutheran Hospital and Homes Society of America*, 661 P.2d 632, 634 (Alaska 1983)

³ *Dobos v. Ingersoll*, 9 P.3d 1020, 1026 (Alaska 2000); see also, *Gordon v. Alaska Pac. Bancorporation*, 753 P.2d 721, 725 (Alaska 1988) (whether particular conduct is negligent or reasonable is a question of fact for the jury), *Schumacher v. City & Borough of Yakutat*, 946 P.2d 1255, 1256 (Alaska 1997).

Representative Paul Seaton
April 24, 2007
Page 2

Depending on the facts of a particular case, a jury could decide that placing on one's property an unmarked cable that decapitated a rider was negligent, meaning the landowner failed to act as a reasonable person under the circumstances. Under HB 25, assuming the use by the four-wheeler was recreational, the plaintiff would not be able to recover damages for ordinary or simple negligence. A defendant landowner would face liability only if a jury decided that the landowner's conduct created a risk of injury substantially higher than the standard for ordinary negligence.

The jury's decision is based on the facts of each case. Adding additional facts to your hypothetical might sway a jury to decide that the landowner's conduct is either ordinary or gross negligence. As an extreme example, a jury would be more likely to decide that the conduct is grossly negligent (or possibly intentional) if the cable was nearly invisible, placed head-high or across a well traveled path where four-wheelers often traveled, or placed where four-wheelers traveled at high rates of speed. A jury might consider whether the accident happened during the day or at night. On the other hand, a jury may preclude liability by deciding that the conduct was ordinary or simple negligence, if, for example, the cable was large enough to be seen without marking (assuming that the driver was traveling at a reasonable speed); or was part of a group of cables; or was placed at the head of a driveway or where one may reasonably expect a cable to act like a gate, or where four-wheelers would have difficulty going at a high speed; or if the cable was connected to a utility pole where one might expect cables.

The hypothetical circumstance you have posed appears on the surface to present a case in which the jury would find gross negligence.⁴ However, additional facts might result in a result in a finding of ordinary negligence.

If I may be of further assistance, please advise.

DCB:ljw
07-226.ljw

⁴ This memo focuses on the how a jury might decide whether the conduct is considered ordinary versus gross negligence. I have not addressed other elements in a negligence analysis such as comparative negligence, causation, or damages.

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MEMORANDUM

April 24, 2007

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Depending on the facts of a particular case, a jury could decide that placing on one's property an unmarked cable that decapitated a rider was negligent, meaning the landowner failed to act as a reasonable person under the circumstances. Under HB 25, assuming the use by the four-wheeler was recreational, the plaintiff would not be able to recover damages for ordinary or simple negligence. A defendant landowner would face liability only if a jury decided that the landowner's conduct created a risk of injury substantially higher than the standard for ordinary negligence.

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If I may be of further assistance, please advise.

DCB:ljw
07-226.ljw

⁴ This memo focuses on the how a jury might decide whether the conduct is considered ordinary versus gross negligence. I have not addressed other elements in a negligence analysis such as comparative negligence, causation, or damages.

LEGAL SERVICES

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

MEMORANDUM

April 24, 2007

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Representative Paul Seaton

April 24, 2007

Page 2

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Montgomery, AL 36103
Phone: 205-462-2000
Fax: 205-462-2001

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MEMORANDUM

April 24, 2007

SUBJECT: Potential liability, under HB 25, in a hypothetical situation where a landowner places an unmarked cable on a landowner's property that causes the decapitation of a four wheel all-terrain vehicle driver using the property for recreational use (HB 25, Work Order No. 25-LS0174\A)

TO: Representative Paul Seaton
Attn: Katie Shows

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Legislative Counsel

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The hypothetical circumstance you have posed appears on the surface to present a case in which the jury would find gross negligence.⁴ However, additional facts might result in a result in a finding of ordinary negligence.

If I may be of further assistance, please advise.

DCB:ljw
07-226.ljw

⁴ This memo focuses on the how a jury might decide whether the conduct is considered ordinary versus gross negligence. I have not addressed other elements in a negligence analysis such as comparative negligence, causation, or damages.

LEGAL SERVICES

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

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FAX (907) 465-2029
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State Capitol
Juneau, Alaska 99801-1182
Deliveries to: 129 6th St., Rm. 329

MEMORANDUM

April 24, 2007

SUBJECT: Potential liability, under HB 25, in a hypothetical situation where a landowner places an unmarked cable on a landowner's property that causes the decapitation of a four wheel all-terrain vehicle driver using the property for recreational use (HB 25, Work Order No. 25-LS0174A)

TO: Representative Paul Seaton
Attn: Katie Shows

FROM: Dennis C. Bailey
Legislative Counsel

You have asked for an opinion addressing how HB 25 would apply to the hypothetical circumstance where a landowner places an unmarked cable up on their property that results in the decapitation of the driver of a four-wheel all-terrain vehicle using the property for recreational purposes. This analysis is based on the discussion of the concepts of ordinary negligence and gross negligence provided in my March 27, 2007 memo.

Ordinary or simple negligence is a failure to act as a reasonable person would in the same circumstances. Simple negligence often results from incompetence or failure to take precautions that are ordinarily taken in that situation. In contrast, gross negligence is an act or omission that creates an unreasonable risk of harm and includes a high degree of probability that the harm will occur.¹ To qualify as gross negligence or recklessness, the conduct must involve a risk of injury or death substantially greater in amount than that which is necessary for negligence.² Whether a defendant acted negligently is a question of fact properly determined by the jury.³

¹ *Leavitt v. Gillaspie*, 443 P.2d 61 (Alaska 1968).

² See *Restatement (Second) of Torts* sec. 500 comment g at 590 (1965) (regarding recklessness); *Storrs v. Lutheran Hospital and Homes Society of America*, 661 P.2d 632, 634 (Alaska 1983)

³ *Dobos v. Ingersoll*, 9 P.3d 1020, 1026 (Alaska 2000); see also, *Gordon v. Alaska Pac. Bancorporation*, 753 P.2d 721, 725 (Alaska 1988) (whether particular conduct is negligent or reasonable is a question of fact for the jury), *Schumacher v. City & Borough of Yakutat*, 946 P.2d 1255, 1256 (Alaska 1997).

Representative Paul Seaton
April 24, 2007
Page 2

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STATE OF ALASKA

NOT RECORDED
DATE RECORDED
FILE NUMBER

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Peninsula Veterinary Services
Jerry Nybakken, DVM
P.O. Box 1763
Soldotna, Alaska 99669-1763
(907) 260-5850

February 20, 2008

Dear Alaska State Legislature

I encourage passage of H.B. 25
"Recreational Land Use Liability/Adverse
Possession".

As the population of Alaska increases,
new homes are, and will continue to be, built
over our ancestral trail system closing
many of these trails. A bill such as H.B. 25
passed into law will encourage landowners
to keep access to those trails open while
protecting their efforts and investment.

I commend Rep. Seaton and Rep. Wilson
for sponsoring this bill.

Thank you
Jerry Nybakken DVM

JERRY NYBAKKEN, DVM