**20.20A ELIGIBILITY FOR PUNITIVE DAMAGES**

The plaintiff has requested that you award [him] [her] [it] punitive damages. Punitive damages are a separate amount of money awarded for the purpose of punishing the defendant and deterring the defendant and others from repeating similar acts.

At this time, you must determine whether the plaintiff is eligible for an award of punitive damages. The plaintiff is eligible for an award of punitive damages only if the plaintiff proves by clear and convincing evidence that the defendant's conduct which forms the basis of your verdict demonstrated reckless indifference to the interests of others, or was outrageous. Outrageous conduct includes acts done with malice or bad motives.

I will now define what it means to prove something by clear and convincing evidence. An alleged fact is established by clear and convincing evidence if the evidence leads you to believe that the alleged fact is highly probable. It is not necessary that the alleged fact be certainly true or true beyond a reasonable doubt or conclusively true. However, it is not enough to show that the alleged fact is more likely true than not true.

At this time, you must only decide whether the plaintiff is eligible for an award of punitive damages. You should not discuss or decide the amount of any punitive damage award. If you decide that the plaintiff is eligible for an award of punitive damages, I will give you additional instructions regarding a punitive damage award.

# Use Note

AS 09.10.020 provides for a two-phase procedure for awarding punitive damages. The first phase – eligibility for punitive damages – is addressed in the jury’s initial deliberations. This instruction is intended for use in the eligibility phase. If the jury decides that the plaintiff is eligible for a punitive damage award, the parties will present evidence and argument regarding the amount of the award, and the jury will deliberate a second time. Instruction 20.20B is intended for the second phase. It instructs the jury on how to determine the amount of the punitive damages award.

Instruction 20.20A should not be given if eligibility for a punitive damage award has already been established as a result of a prior criminal proceeding.

Comment

This instruction incorporates the standards for awarding punitive damages as set forth in AS 09.17.020. The statute applies to causes of action that accrued on or after August 7, 1997.

In *Lamb v. Anderson*, 147 P.3d 736 (Alaska 2006), the Supreme Court stated that the determination under AS 09.17.020(b) "means that [the defendant] is eligible for punitive damages rather than that punitive damages must be imposed." *Id*. at 745. After an affirmative finding on eligibility, the jury must be instructed regarding the factors in AS 09.17.020(c). The inquiry under AS 09.17.020(c) "permits, but does not require, an award of punitive damages." *Id*.

Punitive damages are a remedy, not a cause of action. *Doe v. Colligan*, 753 P.2d 144, 145 n.2 (Alaska 1988). They are a harsh remedy not favored in law. *Chizmar v. Mackie*, 896 P.2d 196, 210 (Alaska 1995). Punitive damages are to be allowed only with caution and within narrow limits. *Id.; State Farm Mutual Ins. Co. v. Weiford,* 831 P.2d 1264, 1266 (Alaska 1992).

The purpose of punitive damages is two-fold: to punish the wrongdoer and to deter the wrongdoer and others from repeating the offensive act. *Brandner v. Hudson*, 171 P.3d 83 (Alaska 2007); *Doe v. Colligan*, 753 P.2d 144, 145 (Alaska 1988); *Providence Washington Ins. Co. v. City of Valdez,* 684 P.2d 861 (Alaska 1984).

Since punitive damages are a remedy and not an independent cause of action, punitive damages may be awarded only if the plaintiff prevails on one or more causes of action. *DeNardo v. GCI Communication Corp.,* 983 P.2d 1288, 1292 (Alaska 1999). Punitive damages may be recovered even though the plaintiff has only received an award of nominal damages. *Oaksmith v. Brusich*, 774 P.2d 191, 201 (Alaska 1989). The court has not determined if punitive damages may be awarded in the absence of at least a nominal damage award. *See Zok v. State*, 903 P.2d 574, 579 n.6. (Alaska 1995). The Court has indicated, however, that in cases where actual damages are not an essential element of the cause of action, once culpability of the defendant is established, a verdict for punitive damages is permitted even if there is no award of nominal damages. *Id.*, citing *Haskins v. Shelden*, 558 P.2d 487, 493 (Alaska 1976) (affirming punitive damage award when plaintiff recovered possession of a tractor but no compensatory damages).

In order to receive punitive damages, the plaintiff must prove by clear and convincing evidence that the wrongdoer’s conduct was outrageous, such as acts done with malice or bad motives or a reckless indifference to the interests of another person. *Brandner v. Hudson*, 171 P.3d 83, 89 (Alaska 2007); *Chizmar v. Mackie*, 896 P.2d 196, 210 (Alaska 1995); AS 09.17.020(b). Actual malice need not be proved. Rather, reckless indifference to the rights of others and conscious action in deliberate disregard of them may provide the necessary state of mind to justify a punitive damage award. *Wal-Mart, Inc. v. Stewart,* 990 P.2d 626, 636 (Alaska 1999). Reckless misconduct does not occur unless the act or omission is itself intended, notwithstanding that the actor knew of facts which would lead any reasonable person to realize the extreme risk to which it subjected the safety of others. *Hayes v. Xerox Corp.,* 718 P.2d 929, 935 (Alaska 1986) (quoting Restatement (Second) of Torts § 500, comment b). Reckless misconduct therefore differs from negligence, because reckless conduct requires a conscious choice of action. *Id. See also Chizmar*, 896 P.2d at 210. Punitive damages are not awarded for mere inadvertence, mistake, errors in judgment and the like, which constitute ordinary negligence, but are restricted to conduct involving some measure of outrage similar to that usually found in crime. *Pederson v. Barnes,* 139 P.3d 552, 563 (Alaska 2006) (quoting Restatement (Second) of Torts § 908, comment b).

In *Murray v. Feight*, 741 P.2d 1148, 1158 (Alaska 1987), the court indicated that the language of this pattern instruction adequately conveyed the requirement that the jury find malicious or reckless acts. However, in other cases the court found no error in instructions in which the word “outrageous” was not used. *Teamsters Local 959 v. Wells,* 749 P.2d 349, 361 n.25 (Alaska 1988); *Ben Lomond, Inc. v. Campbell*, 691 P.2d 1042, 1047 (Alaska 1984).

If the evidence does not give rise to an inference of actual malice or of conduct sufficiently outrageous to be deemed to be equivalent to actual malice, the trial court should not submit the issue of punitive damages to the jury. *See Pederson v. Barnes*, 139 P.3d 552 (Alaska 2006) (error to deny directed verdict on punitive damage claim); *Hagens Ins. Inc. v. Roller*, 139 P.3d 1216, 1225 (Alaska 2006) (affirming direct verdict dismissing punitive damage claim); *Robles v. Shoreside Petroleum, Inc.,* 29 P.3d 838, 846 (Alaska 2001) (affirming summary judgment order striking punitive damage claim and rejection of requested instruction on punitive damages, because a reasonable jury could not find malice or reckless disregard); *Chizmar,* 896 P.2d at 210 (affirming directed verdict dismissing punitive damage claim); *State Farm Fire and Casualty Co. v. Nicholson*, 777 P.2d 1152 (Alaska 1989) (error to instruct on punitive claim); *Alyeska Pipeline Service Co. v. Beadles*, 731 P.2d 572, 574 (Alaska 1987) (summary judgment); *Ross Laboratories v. Thies*, 725 P.2d 1076 (Alaska 1986) (summary judgment dismissing punitive claim as to one defendant affirmed; submission of punitive damages claim as to co-defendant reversed); *Hayes v. Xerox Corp.,* 718 P.2d 929, 936 (Alaska 1986) (summary judgment); *Zeman v. Lufthansa German Airlines*, 699 P.2d 1274 (Alaska 1985) (summary judgment); *State v. Haley*, 687 P.2d 305, 320 (Alaska 1984); *Alaska Northern Development, Inc. v. Alyeska Pipeline Service Co.,* 666 P.2d 33 (Alaska 1983) (summary judgment); *Alyeska Pipeline Service Co. v. O’Kelley,* 645 P.2d 767 (Alaska 1982) (refusal to instruct jury on punitives). In one case, the court affirmed the dismissal of a complaint for failure to state a claim on which relief may be granted because there were no allegations which, liberally construed, gave rise to punitive damages. *Mattingly v. Sheldon Jackson College*, 743 P.2d 356, 364 (Alaska 1987).

Plaintiff has the burden of proving a punitive damage claim by clear and convincing evidence. AS 09.17.020. Clear and convincing proof is evidence establishing that something is highly probable. *In re Reinstatement of Wiederholt,* 89 P.3d 771, 772 n. 6 (Alaska 2004). *See also Denuptiis v. Unocal Corp.,* 63 P.3d 272, 275 n. 3 (Alaska 2003); *Spenard Action Committee v. Lot 3, Block 1,* 902 P.2d 766, 774 n.3 (Alaska 1995); *Curran v. Mount,* 657 P.2d 389, 391 n. 4 (Alaska 1982). Other Alaska cases state that clear and convincing evidence is evidence that "produces a firm belief or conviction about the existence of the fact." *In re Johnstone*, 2 P.3d 1226, 1234 (Alaska 2000); *Alaska Marine Pilots v. Hendsch*, 950 P.2d 98, 111 (Alaska 1997); *Buster v. Gale*, 866 P.2d 837, 844 (Alaska 1994). In determining whether to submit a punitive damage claim to the jury, the trial judge does not determine whether the evidence supporting the claim is "clear and convincing." The inquiry is whether the evidence is sufficient to allow the jury to find malice or reckless indifference. *Wal-Mart*, 990 P.2d at 636-37.

Punitive damages are not recoverable for breach of contract unless the conduct constituting the breach constitutes an independent tort for which punitive damages are recoverable. *Reeves v. Alyeska Pipeline Service Co.,* 56 P.3d 660, 671 (Alaska 2002); *Wien Air Alaska v. Bubbel*, 732 P.2d 627, 631 (Alaska 1986), quoting Restatement (Second) of Contracts § 355, comment A (1981). Punitive damages may not be awarded for breach of the implied covenant of good faith and fair dealing in an employment contract. *ARCO Alaska, Inc. v. Akers*, 753 P.2d 1150 (Alaska 1988).

Punitive damages are not recoverable against the State of Alaska. *See* AS 09.50.280 and *University of Alaska v. Hendrickson*, 552 P.2d 148 (Alaska 1976). Punitive damages may not be awarded against municipalities absent statutory authorization. *Hazen v. Municipality of Anchorage*, 718 P.2d 456 (Alaska 1986); *Richardson v. Fairbanks North Star Borough*, 705 P.2d 454 (Alaska 1985). Punitive damages may not be recovered from the estate of a deceased tortfeasor. *Doe v. Colligan*, 753 P.2d 144 (Alaska 1988).

An employer's vicarious liability for punitive damages is governed by AS 09.17.020(k). The employer is vicariously liable only if the employer or a management level employee authorized the act or omission and the manner in which the act was performed or the omission occurred; or the employer or a management level employee ratified or approved the act or omission after it occurred; or the employee was unfit to perform the act or avoid the omission and the employer or a management level employee acted recklessly in employing or retaining the employee; or the employee was employed in a managerial capacity and was acting within the scope of his or her employment.