IN THE SUPREME COURT FOR THE STATE OF ALASKA

ASSOCIATION OF VILLAGE COUNCIL PRESIDENTS REGIONAL HOUSING AUTHORITY, Appellant/Cross-Appellee, vs. DIETRICH MAEL, on his own behalf and on behalf of his minor children D.K. and E.M.; THOMAS MAEL; and ROSE MAEL, Appellees/Cross-Appellants, vs. STATE OF ALASKA, Appellee.	Case Nos. S-17802 / S-17821 Trial Court No. 4BE-17-00061 CI

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APPEAL FROM THE SUPERIOR COURT,
FOURTH JUDICIAL DISTRICT AT BETHEL,
THE HONORABLE TERRENCE P. HAAS, PRESIDING

REPLY BRIEF OF APPELLANT/CROSS-APPELLEE ASSOCIATION OF VILLAGE COUNCIL PRESIDENTS REGIONAL HOUSING AUTHORITY

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24 C.F.R. § 1000.318(b)(2)

No Mutual Help or Turnkey III unit will be considered FCAS 24 months after the date the unit became eligible for conveyance, unless the tribe, TDHE, or IHA provides evidence from a third party, such as a court or state or federal government agency, documenting that a legal impediment continues to prevent conveyance. FCAS units that have not been conveyed due to legal impediments on December 22, 2016 shall be treated as having become eligible for conveyance on December 22, 2016.

25 U.S.C. § 4152(b)(1)(D)

In this paragraph, the term “reasons beyond the control of the recipient” means, after making reasonable efforts, there remain—

(i) delays in obtaining or the absence of title status reports;

(ii) incorrect or inadequate legal descriptions or other legal documentation necessary for conveyance;

(iii) clouds on title due to probate or intestacy or other court proceedings; or

(iv) any other legal impediment.

25 U.S.C. § 4163(b) - Periodic monitoring

Not less frequently than annually, each recipient shall review the activities conducted and housing assisted under this chapter to assess compliance with the requirements of this chapter. Such review shall include an appropriate level of onsite inspection of housing to determine compliance with applicable requirements. The results of each review shall be included in the performance report of the recipient submitted to the Secretary under section 4164 of this title and made available to the public.

ARGUMENT

I. AVCP RHA Had No Tort Duty to Inspect with Care

The Maels want this Court to endorse their use of a contract breach to recover tort damages. As one leading commentator has stated:

> The distinction between tort and contract liability, as between parties to a contract, has become an increasingly difficult distinction to make. It would not be possible to reconcile the results of all cases. The availability of both kinds of liability for precisely the same kind of harm has brought about confusion and unnecessary complexity.

Prosser and Keeton, *Law of Torts* § 92 at 655 (5th ed. 1984). Plaintiffs used this confusion and complexity to their advantage, jumping from breach of contract to tort late in the trial to enhance their damage award. They convinced the trial judge and jury that the failure to perform the contract promise to continue to inspect breached a general tort duty to act with reasonable care.

In defending their trial actions, the Maels argue on appeal that a party to a contract has a tort duty to act with care in addition to specific duties imposed by the contract.[1] Taken to its logical ends, the Maels' position would mean all contracts would be subject to tort damages whenever a contracting party acts "unreasonably" or "negligently" or "without care" in performing (or not performing) a contract promise.

[1] Plaintiffs cite *Jarvis v. Ensminger*, 134 P.3d 353 (Alaska 2006), for this proposition. But that case did not imply an independent tort duty to act with care into every contract (thereby making every contract subject to tort). Instead, that case held that the plaintiff had properly asserted breach of a general duty of care "to refrain from the tort of intentional misrepresentation" independent of the contract. *Id.* at 363. *Jarvis* had nothing to do with a general tort duty to exercise reasonable care.

This Court has already soundly rejected this hybrid approach.[2] Merging tort and contract into a single doctrine would have many detrimental impacts, including exposing contracting parties to emotional distress and punitive damages not otherwise available under contract law.[3] AVCP RHA owed no independent tort duty to inspect with care. But even if it did, that tort duty would have ended with performance of the last inspection in 2011.

A. The Contract Is Not the Source of the Tort Duty to Inspect with Care

The Maels first argue that the contract imposes the tort duty to inspect with care. This argument ignores this Court's long line of precedent that promises set forth in a contract – such as a promise to inspect – must be enforced by an action on that contract and not an action in tort.[4] A tort duty must be separate, distinct, and

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[2] *See, e.g., id.*, at 363 (failure to fulfill contractual obligation that breaches a duty of reasonable care does not give rise to tort claim); *Alaska Pac. Assurance Co. v. Collins*, 794 P.2d 936, 946 (Alaska 1990) ("We decline to hold that where a party breaches a contractual promise 'negligently,' such conduct may form the basis for a tort action."); *Walt v. State*, 751 P.2d 1345, 1351 (Alaska 1988) (plaintiff cannot change claim for breach of contract into tort by alleging common law tort of negligent failure to exercise reasonable care).

[3] *See, e.g., Galipeau v. Bixby*, 476 P.3d 1129, 1136 (Alaska 2020) (punitive damages not available for breach of contract absent independent tort).

[4] *See id.*, at 1137 n.30 (independent tort claim requires legal duty that arises separately from any duty imposed in a contract); *GeoTek Alaska, Inc. v. Jacobs Eng'g Grp., Inc.*, 354 P.3d 368, 379 n.70 (Alaska 2015) (citing *Alaska Pac. Assurance Co.*, 794 P.2d at 946 ("Promises set forth in a contract must be enforced by an action on that contract.")); *Perotti v. Corr. Corp. of Am.*, 290 P.3d 403, 411 (Alaska 2012) (violation of agreement standing alone does not constitute separate tort); *Sowinski v. Walker*, 198 P.3d 1134, 1146 (Alaska 2008) ("[W]e have previously rejected the argument that a breach of contract alone – without an independent viable theory of tort recovery – could give rise to damages in tort."); *Jarvis*, 134 P.3d at 363 (violation of duty arising from contract does not give rise to tort claim); *K & K Recycling, Inc. v. Alaska Gold Co.*, 80 P.3d 702, 717 (Alaska 2003) (claims that concern contractual

independent from the contract.[5] The common law tort of negligent failure to exercise reasonable care is not sufficiently distinct from a contract as to give rise to damages in tort.[6]

Here, if there were no MHO agreement, there would be no duty to inspect with reasonable care.[7] The Maels concede AVCP RHA "would have had no duty to inspect or repair the Maels' house" if the home was not part of the mutual help and occupancy program. [Appellee Br. at 12]. They also admit "they relied on the contractually-imposed duty to inspect" for their negligence claim. [Appellee Br. at 31]. The duty to inspect with care would not have existed "but for" the MHO agreement. This was a contract promise, not a tort duty.[8]

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breaches and disputes sound in contract, rather than tort); *Kalenka v. Taylor*, 896 P.2d 222, 228 (Alaska 1995) ("[B]reach of covenant claims sound in contract, rather than tort."); *State, Dep't of Nat. Res. v. Transamerica Premier Ins. Co.*, 856 P.2d 766, 772 (Alaska 1993) (party cannot use tort action to enforce duty arising solely from contractual promise); *Alaska Pac. Assurance Co.*, 794 P.2d at 946 (action for breach of contractual duty sounds in contract and not in tort); *ARCO Alaska v. Akers*, 753 P.2d 1150, 1154 (Alaska 1988) (breach of covenant in contract does not constitute a tort).

[5] *See Galipeau*, 476 P.3d at 1137 n.30 (tort claim may accompany breach of contract if tort duty arises separately and independently from any duty imposed in the contract). Examples of such independent torts include fraud (*Alaska Pac. Assurance Co.*), professional malpractice (*State, Dep't of Nat. Res.*), intentional misrepresentation (*Jarvis*), and intentional infliction of emotional distress (*ARCO Alaska*) – not breach of a duty to use reasonable care in performing or not performing a contract promise.

[6] *See Walt*, 751 P.2d at 1351 (allegations of common law tort of negligent failure to exercise reasonable care cannot change claim for breach of contract into tort).

[7] *See Galipeau*, 476 P.3d at 1137 ("An independent tort, by definition, is one that would exist even if there were no contract").

[8] The Maels cite *John's Heating Serv. v. Lamb*, 46 P.3d 1024 (Alaska 2002), for the proposition that a homeowner can sue a heating service company in tort for injuries resulting from negligent performance of its contract to inspect a furnace. However,

B. Common Law Is Not the Source of the Tort Duty to Inspect with Care

The Maels also argue that when a defendant has a duty to inspect (even if required by contract), the inspection must be performed with reasonable care. Whether true or not, this does not mean the failure to perform that inspection with reasonable care gives rise to a claim in tort independent of the contract.[9] The duty to

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John's Heating Serv. was a professional negligence case that turned on duty rules different from the simple negligence case at bar. *See id.* at 1037 ("[T]he superior court did not err by treating this case as one for professional negligence."); *see also State, Dep't of Nat. Res.*, 856 P.2d at 772 (professional may be sued in tort for malpractice despite existence of contractual relationship because duty of professional care is one the law imposes, not the contract). Plaintiffs also cite *Allstate Ins. Co. v. Kenick*, 435 P.3d 938 (Alaska 2019), to assert that an insurance adjuster's tort duty to act non-negligently in adjusting a claim arises from a contractual relationship. To be clear, "[a]n adjuster's duties to the insured do not arise from an insurance contract because an adjuster is not a party to the contract" but arise independently under the tort of negligent adjustment. *Id.* at 946. Lastly, the Maels cite *Rathke v. Corrs. Corp. of America, Inc.*, 153 P.3d 303 (Alaska 2007), to suggest that an inmate who claimed a drug test was not conducted with care might have a tort cause of action against the testing company for negligently performing its contractual duty. In fact, what this Court held was: "We make no determination as to whether [the inmate's] complaint can be read to support a claim for negligence against [the testing company] (for failure to carry out testing duties as prescribed in the contract)" and on remand the court may consider the question. *Id.*, at 312 n.37. This Court never held that the inmate was owed such a tort duty and never held that every contract includes a tort duty to use reasonable care.

[9] *See Catlin Underwriting Agencies, Ltd. v. ALLETE*, Inc., No. A13-2078, 2014 WL 3800595, 2014 Minn. App. Unpub. LEXIS 848, at *9-12 (Minn. App. Aug. 4, 2014) (failing to exercise reasonable care while performing contract is breach of duty imposed by contract and not imposed by law); *Gagnon v. W. Bldg. Maint., Inc.*, 306 P.3d 197, 200 (Idaho 2013) (breach of contract for failing to inspect with reasonable care does not give rise to tort action); *Embry v. Innovative Aftermarket Sys. L.P.*, 247 P.3d 1158, 1161 (Okla. 2010) ("There is simply no general duty to use reasonable care in the performance of a contract."); *Locke v. Ozark City Bd. of Educ.*, 910 So. 2d 1247, 1254 (Ala. 2005) (negligent failure to perform contract is breach of contract and not tort); *Fultz v. Union-Commerce Assocs.*, 683 N.W.2d 587, 590-92 (Mich. 2004) (no tort action because common law duty to exercise reasonable care in performing contractual duties not separate and distinct from contract); *Lockhart v. Airco Heating &*

use reasonable care – if it applies – merely describes how a party is to perform its contractual obligations, not that the duty arises independent of the contract sufficient to support a separate tort claim.[10]

As this Court has held, where a party breaches a contractual promise by failing to exercise reasonable care, such conduct may not form the basis for a tort action.[11] A plaintiff cannot convert a breach of contract into a tort simply by alleging breach of the common law tort of negligent failure to exercise reasonable care.[12]

Cooling, 567 S.E.2d 619, 624 (W. Va. 2002) (plaintiff cannot maintain action in tort for alleged breach of contractual duty of care); *Schuler v. Cmty. First Nat'l Bank*, 999 P.2d 1303, 1305 (Wyo. 2000) (breach of contract does not lead to tort liability where defendant owed duty of reasonable competence under contract); *Erlich v. Menezes*, 981 P.2d 978, 984 (Cal. 1999) ("If every negligent breach of a contract gives rise to tort damages the limitation would be meaningless, as would the statutory distinction between tort and contract remedies."); *Richmond Metro. Auth. v. McDevitt St. Bovis*, 507 S.E.2d 344, 347 (Va. 1998) ("A tort action cannot be based solely on a negligent breach of contract."); *Hewitt v. Walker*, 487 S.E.2d 603, 604 (Ga. App. 1997) (no tort duty for negligent failure to perform duty imposed by contract); *Greenberg v. Stewart Title Guar. Co.*, 492 N.W.2d 147, 152 (Wis. 1992) (separate tort duty independent of duty to perform contract with care necessary for tort action).

[10] *See Steer Am., Inc. v. Niche Polymer, LLC*, No. 5:17-CV-0343, 2018 WL 3993850, 2018 U.S. Dist. LEXIS 141799, at *10-11 (N.D. Ohio Aug. 21, 2018) (although each contract contains common law duty to perform contract with care, this does not establish any duty independent of the contract so there is no separate cause of action for breach of the duty to use reasonable care); *Wells Fargo Bank, N.A. v. Fifth Third Bank*, 931 F. Supp. 2d 834, 840 (S.D. Ohio 2013) (duty to use reasonable care merely describes how party is to perform its contractual obligations not that duty arises independent of contract); *Dana Ltd. v. Aon Consulting, Inc.*, 984 F. Supp. 2d 755, 767 (N.D. Ohio 2013) (even if each contract contains common law duty to perform contract with care, such duty only "describes how party is to perform its contractual obligations, i.e., it does not establish a duty independent of the contract.").

[11] *See Alaska Pac. Assurance Co.*, 794 P.2d at 946.

[12] *See Walt*, 751 P.2d at 1351.

But even assuming the Maels could bring a tort claim based on the failure to inspect with care, that claim would be limited in scope to the inspection performed in 2011. It would not extend to the failure to continue to inspect after 2011.[13] The Maels are trying to bootstrap a general duty to exercise reasonable care into a continuing contract duty to perform annual inspections in perpetuity. But the case law cited by Plaintiffs dealing with inspections involved instances of actual inspections voluntarily assumed – not a failure to inspect as required by a contract.[14] The Maels cite to no cases that expand this common law doctrine to use due care to the failure to inspect required by a contract.[15]

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[13] *See Fultz*, 683 N.W.2d at 593 ("[I]f defendant fails or refuses to perform a promise, the action is in contract."); *State ex rel. William Ranni Assocs., Inc. v. Hartenbach*, 742 S.W.2d 134, 140 (Mo. 1987) ("the mere failure to perform a contract cannot serve as the basis of tort liability for negligence.")

[14] *See Van Biene v. ERA Helicopters, Inc.*, 779 P.2d 315, 322 (Alaska 1989) (insurer may be held liable for negligent performance of voluntary undertaking to render services if insurer *actually* inspected working conditions prior to accident in negligent manner); *Adams v. State*, 555 P.2d 235, 240 (Alaska 1976) ("[O]nce an inspection has been undertaken the state has a further duty to exercise reasonable care in conducting fire safety inspections.").

[15] Plaintiffs suggest *Kay v. Danbar, Inc.*, 132 P.3d 262 (Alaska 2006), may support this proposition, but that case also concerned the voluntary assumption of a duty to protect a tenant from physical harm where the property management company undertook "an even broader range of duties than the management responsibilities explicitly mentioned in the rental agreement." *Id.*, at 271. This Court held that a reasonable juror could logically find, under the voluntary assumption of duty instruction given, that the property management company assumed significant property management responsibilities, including a duty to protect tenants. *Id.*, at 271-72. The contract itself did not impose a duty of due care; the duty was voluntarily assumed by undertaking. That is not the case here. And if it was, Plaintiffs waived voluntary assumption of duty anyway as discussed later in this brief. [Tr. 9/26/19 at 48-49].

Regardless, this Court has foreclosed the Maels' argument with its holding in *GeoTek Alaska, Inc. v. Jacobs Eng'g Group, Inc.*[16] There, a sub-subcontractor sued the general contractor for negligently failing to ensure that the sub-subcontractor would be paid:

> GeoTek alleged in its amended complaint that Jacobs was responsible for DSI's payments to GeoTek because of Jacob's *negligent failure* (1) to require DSI to post a performance bond to ensure the payment of its subcontractors, *as required by Jacob's form contract*; (2) to follow the provisions of its proposed risk management plan regarding a 15 percent retainage and signed releases from DSI's second-tier subcontractors; and (3) to inform GeoTek that it had not taken these steps.[17]

The sub-subcontractor also argued that the development of a risk management plan was a voluntary undertaking that extended liability.[18] This Court rejected these arguments and affirmed the summary judgment finding of no common law negligence duty where the defendant *negligently failed* to perform the contract promise to require a performance bond. A promise in a contract must be enforced by an action on that contract.[19]

The same is true here. The Maels insist that AVCP RHA negligently failed to perform its contract promise to inspect and to continue inspections until title conveyance. "To found an action in tort, there must be a breach of duty apart from the non-performance of a contract."[20] Failing to perform a contract promise – such as

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[16] 354 P.3d 368 (Alaska 2015).

[17] *Id.*, at 376 (emphasis added).

[18] *Id.*, at 378 n.61.

[19] *Id.*, at 379 n.70.

[20] *Steiner Corp. v. Am. Dist. Tel.*, 683 P.2d 435, 438 (Idaho 1984) (cited with approval in *Alaska Pac. Assurance Co.*) (internal quotes omitted).

the promise to continue to inspect or the promise to require a performance bond to ensure payment to subcontractors – does not give rise to a tort.[21]

For practical and policy reasons, this Court should reject the Maels' effort to bootstrap a tort duty to a contract promise. Otherwise, every contract case involving the failure to perform a contract promise – which by definition is a breach of contract – would also give rise to a tort claim.[22] Not only has this Court already recognized and rejected this hybrid approach, but the added exception of a duty to use due care would completely subvert the rule that promises set forth in a contract must be enforced by an action on that contract.[23] Tort and contract would essentially merge into one hybrid theory where a plaintiff could recover tort damages for breach of a contract promise when a party fails to exercise reasonable care in performing or not

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[21] *See Sowinski v. Walker*, 198 P.3d 1134, 1146 (Alaska 2008) (failure to maintain access road free of hazards does not give rise to damages in tort even if state had contractual obligation to maintain road); *Jarvis v. Ensminger*, 134 P.3d 353, 363 (Alaska 2006) (failure to fulfill contractual obligations does not make defendant liable in tort).

[22] *See* Black's Law Dictionary 188 (6th ed. 1990) (defining "breach of contract" as the "[f]ailure, without legal excuse, to perform any promise which forms the whole or part of a contract")

[23] *See K & K Recycling, Inc. v. Alaska Gold Co.*, 80 P.3d 702, 717 (Alaska 2003) (rejecting purported tort claims for trespass, conversion, and wrongful withholding in case involving contract for transfer of goods or realty because otherwise every such contract would be turned into a tort action). If allowed to stand, Plaintiffs' hybrid theory would also mean every party who breaches a contract – especially if done intentionally – could also be exposed to punitive damages. *See Francis v. Lee Enters.*, 971 P.2d 707, 716 (Hawaii 1999) ("Presently, contract law allows--and at times even encourages--intentional breaches of contract.") This hybrid theory has many problems, including the fact that the fear of punitive damages for an erroneous interpretation of a contract if punitive damages were available would undermine zealous advocacy of contract interpretations that are subject to reasonable dispute. *See Int'l Bhd. of Teamsters v. King*, 572 P.2d 1168, 1176 (Alaska 1977).

performing that contract promise. "Creating a broader tort remedy would disrupt the certainty of commercial transactions and allow parties to escape contractual allocation of losses."[24] "Allowing the possibility of a new and independent duty on these facts expands the law in a direction it does not need to go,"[25] brings further confusion and complexity to the distinction between tort and contract liability, and undermines, if not overrules, almost a dozen cases.

C. Plaintiffs Abandoned Their Claim Based on a Tort Duty to Inspect with Care in 2011 to Focus the Jury on the Undisputed Failure to Continue to Inspect after 2011

Assuming AVCP RHA did owe a common law tort duty to inspect the home with care, that duty ended in 2011 after the last inspection. As the trial court noted, there were two duties at issue in this case – the duty to inspect with care in 2011 and the duty to continue to inspect after 2011.[26] Plaintiffs abandoned the former duty at the close of trial and relied on the undisputed failure to continue to inspect after 2011 to support their negligence claim.

While finalizing jury instructions, the Maels told the trial judge that "the plaintiffs are dropping a claim based on a voluntarily assumed duty" and proceeding instead

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[24] *State, Dep't of Nat. Res. v. Transamerica Premier Ins. Co.*, 856 P.2d 766, 774 (Alaska 1993).

[25] *See Burnett v. Gov't Emples. Ins. Co.*, 389 P.3d 27, 33 (Alaska 2017) (Maassen, J., dissenting) (internal quotes omitted).

[26] The trial court ruled on summary judgment:

> Thus, failure to provide the contracted services of a home inspection is a breach of a specific promise which by itself sounds in contract, while the duty to conduct the required inspection with the appropriate care is a separate legal duty traditionally imposed by law and that may sound in tort.

[Exc. 409].

on the duty based on the contract. [Tr. 9/26/19 at 48-49]. They then withdrew their proposed jury instruction that relied on *Interior Regional Housing Authority v. James* that said negligence could be found by an entity failing to exercise reasonable care in performing a voluntarily assumed duty to perform periodic inspections of a boiler and to discover and remedy any hazardous problems with it. [R. 998]; [Tr. 9/26/19 at 49, 54]. As a result, the trial judge ruled, and Plaintiffs agreed, that "[n]egligence from breach of voluntarily assumed duty is going to be deleted" and the Maels would be relying on the contract duty. [Tr. 9/26/19 at 54].

The Maels then argued to the jury that AVCP RHA had an obligation under the contract to do inspections, that AVCP RHA "stopped four years before the explosion" doing those inspections, and that stopping those inspections was "a breach of their obligations under the agreement." [Tr. 9/26/19 at 139-140, 142]. Plaintiffs insisted during their closing argument that the problem with the boiler occurred after the last inspection and "would have been caught if there had been an inspection after 2011 before the explosion" as required by the contract. [Tr. 9/27/19 at 33].

Because Plaintiffs withdrew their jury instruction, the jury was never instructed about any assumed duty to use reasonable care in performing an inspection.[27] Instead, the jury was instructed about a contract duty to inspect periodically that was in effect at the time of the boiler explosion. [Exc. 431]. The issue at trial, and the basis for the jury's verdict, was the perceived failure to continue to inspect after 2011 as

[27] *Cf. Kay v. Danbar, Inc.*, 132 P.3d 262, 271 (Alaska 2006) (quoting jury instruction given that one who voluntarily undertakes to render services may be liable for failure to exercise reasonable care in performing undertaking).

required by the contract, not the argument the Maels now make regarding a failure to inspect with reasonable care in 2011. Plaintiffs waived this argument for tactical reasons and cannot now resurrect it to try and justify the jury's verdict after the fact.[28]

D. Statutes and Regulations Are Not the Source of the Tort Duty to Inspect with Care

Lastly, the Maels argue that statutes and regulations in effect in 1989, when the MHO agreement was signed, imposed a duty to inspect the Mael home because "[e]very contract implicitly incorporates the applicable laws in existence at the time the contract is signed." [Appellee Br. at 9, 16].[29] In other words, the statutes and

[28] The trial court confirmed that Plaintiffs had abandoned the assumed duty to inspect with care in 2011 when it denied the JNOV motion, in part, because the jury could have inferred a duty to conduct an inspection with care in 2011 "not as an assumed duty" (because that duty had been abandoned), "but just based on the performance of the parties" after they entered the MHO agreement. [Tr. 2/26/20 at 82]. But even if Plaintiffs did not abandon the tort duty to inspect with care in 2011, and such a duty exists, this Court should still not affirm the judgments. Instead, if this Court upholds the trial court rulings on the JNOV motion, this Court should remand for a new trial on the alleged failure to inspect with care in 2011 given the impossibility of knowing whether the jury based its decision solely on that failure (tort), or, more likely, the undisputed failure to continue to inspect after 2011 (contract). *See Matomco Oil Co. v. Arctic Mech.*, 796 P.2d 1336, 1343 (Alaska 1990) (remanding for new trial given "the impossibility of knowing whether the general verdict was based upon a properly submitted issue or an improperly submitted issue").

[29] The Maels also discuss HUD Guidance later in their brief to argue that the 2012 Guidance better interpreted NAHASDA than the 2008 Guidance. But they acknowledge such Guidance is not law and not binding, and, therefore, cannot serve as the basis for a tort duty. *See Fort Peck Hous. Auth. v. United States HUD*, No. 05-CV-00018-RPM, 2012 WL 3778299, 2012 U.S. Dist. LEXIS 124049, at *16 (D. Colo. Aug. 31, 2012) (no reason to give deference with respect to Guidance because Guidance is not a rule or regulation established under the rule making procedure required by federal law).

regulations in effect in 1989 became a part of the MHO agreement "as though they had been expressly set forth in the contract."[30]

The statute in place at the time – the IHA – did not require annual inspections. [Exc. 575-80]. However, its implementing regulations did.[31] But any such inspection obligations applied to AVCP RHA not as a separate and independent statutory duty, but because of its incorporation into the MHO agreement. The IHA did not impose obligations directly on the Indian housing authority; it required the Indian housing authority to include the obligations in an MHO agreement. The duty to inspect was contractual, not statutory, and would not have existed but for the MHO agreement.

But even if AVCP RHA had a statutory duty (separate from the contract) to inspect under the IHA back in 1989, that statutory duty expired upon repeal of the IHA and its implementing regulations in 1996. The IHA imposed no statutory duty to inspect in 2016 when the boiler burst because the IHA no longer existed. Recognizing this potential problem in their argument, the Maels suggest that NAHASDA may be the statutory basis for a tort duty to inspect because NAHASDA maintained "the requirement for regular inspections" previously required by the IHA. [Appellee Br. at 10 n.21 and 26]. However, Plaintiffs are estopped from arguing that NAHASDA applies in any way.

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[30] *See Ellingstad v. Dep't of Nat. Res.*, 979 P.2d 1000, 1008 (Alaska 1999) ("As a general rule, applicable laws in existence at the time of a contract's formation about which the parties are presumed to know are incorporated into the contract and become a part of it as though they had been expressly set forth in the contract.")

[31] *See* former 24 C.F.R. § 905.417(c). That regulation was later repealed when Congress enacted NAHASDA. *See* 63 Fed. Reg. 4076, 4086 (Jan. 27, 1998) (Indian Housing Act regulations cancelled as of October 1, 1997).

"The doctrine of quasi-estoppel precludes a party from taking a position in litigation that is inconsistent with a position taken earlier by that same party – but only if allowing that party to maintain the latter, inconsistent position would be unconscionable."[32] At trial, the Maels argued and convinced the court that the IHA, and not NAHASDA, applied to this case. [Tr. 9/17/19 at 7-8]. The Maels sought enhanced attorney fees, in part, by arguing bad faith by AVCP RHA in suggesting that the IHA may not apply. [Tr. 2/26/20 at 12]; [R. 2020-21]. And in opposition to the JNOV motion, Plaintiffs again insisted that the IHA governed this case. [Exc. 511-16]. It would be unconscionable to allow the Maels to double back on their prior impassioned pleas and now argue that NAHASDA does apply.

But even if the Maels could rely on NAHASDA, there still would be no statutory duty to inspect. Assuming 25 U.S.C. § 4163(b) requires some "onsite inspection," that statutory requirement applies only to housing "assisted" under NAHASDA. The Mael home was no longer "assisted" once funding stopped upon eligibility for conveyance in 2009. [Tr. 9/23/19 at 111]. And even if the Mael home could somehow be considered "assisted" stock after eligibility for conveyance, HUD regulations capped that time to 24 months after the date of eligibility for conveyance absent extraordinary circumstances which are not present here.[33] So, even under NAHASDA, there would

[32] *Sowinski v. Walker*, 198 P.3d 1134, 1147 (Alaska 2008).

[33] *See* 24 C.F.R. § 1000.318(b)(2) (no mutual help home will be considered assisted stock 24 months after the date the unit became eligible for conveyance absent evidence from a court or government agency documenting a legal impediment to conveyance); *see also* 25 U.S.C. § 4152(b)(1)(D) (legal impediments include delay or absence of title report, incorrect or inadequate legal descriptions, and clouds on title).

be no obligation to inspect after 2011. As a result, no statute or regulation served as the source of a tort duty to inspect with care in 2011 or to continue to inspect after 2011. AVCP RHA owed no tort duty independent from the MHO agreement.

II. AVCP RHA Owed No Contractual Duty to Inspect After 2009

Contrary to the Maels' position, both the language of the contract and conduct of the parties support the conclusion that the contract expired in 2009 "because that was 25 years after the Maels moved into the house." [Appellee Br. at 20].

A. Language of the Contract

First, the Maels insist that the MHO agreement contains no specific expiration date and misleadingly cite testimony from AVCP RHA's Indian housing expert that he "agreed that the MHOA contains no expiration date." [Appellee Br. at 20]. However, on the next page of his testimony, the expert further explained his testimony by stating that "the MHOA expires after 25 years." [Tr. 9/24/19 at 164].

Second, the Maels try to refute the expiration language in Section 3.2 of the MHO agreement that says the term of the Homebuyer's lease shall expire when the purchase price has been fully amortized by arguing that "expiration of a lease is not the same as the expiration of the contract." [Appellee Br. at 20]. But this Court has said that the MHO agreement describes itself as a lease that contains provisions

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There was no evidence at trial from a court or government agency establishing a legal impediment to conveyance to the Maels. Title was not conveyed because the homebuyers did not return documents needed to convey. [Tr. 9/23/19 at 77].

typical of both lease/option contracts and installment contracts.[34] "Lease" and "contract" are interchangeable.

Third, the Maels argue that because they had not paid the full purchase price after the 25 years, somehow the agreement did not expire. Plaintiffs waived this argument by not making it to the trial court.[35] [Exc. 499-525]. But even if they had made this argument, the contract expired after the 25-year amortization period whether tenant accounts receivable remained or not. [Exc. 642]. If there were amounts still owing after the 25 years, they could be repaid through a promissory note as part of title conveyance. [Tr. 9/23/19 at 75-76].[36]

Fourth, the Maels rely on Section 7.5 of the MHO agreement to suggest that the agreement is still in place, even after the 25 years, because the home cannot be conveyed until AVCP RHA determines that the Maels are financially capable of paying the costs associated with home ownership. But the CEO of AVCP RHA testified that after 25 years a home is conveyed whether the homebuyers show they can afford the costs associated with ownership or not. [Tr. 9/23/19 at 75-77]. The Indian housing expert testified that Section 7.5 applies only during the 25-year term and only when the homebuyer's income increases such that he or she may no longer be considered

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[34] *See Interior Reg'l Hous. Auth. v. James*, 989 P.2d 145, 148-49 (Alaska 1999).

[35] *See Bunton v. Alaska Airlines, Inc.*, No. S-17110, 2021 WL 649153, 2021 Alas. LEXIS 18, at *12 (Feb. 19, 2021) ("Appellants must show they have raised an issue in the superior court to preserve the issue for appeal.")

[36] Plaintiffs also quote language from the Ledger History Report that states "Not Eligible as of 1/15/2009." [Appellee Br. at 21]. While true, this notation is irrelevant because the home was not eligible for conveyance until 12/12/2009. [Exc. 674].

low income entitled to a government subsidy and would then be obligated to purchase the home. [Tr. 9/24/19 at 165-70]. The expert also testified that after 25 years the homebuyer has no further rights under the MHO agreement. [Tr. 9/25/19 at 27]; [Tr. 9/24/19 at 170]. The language of the contract establishes that AVCP RHA owed no contractual duty to inspect after 2009.

B. Conduct of the Parties

As to the subsequent conduct of the parties, the Maels first speculate that because AVCP RHA conducted mistaken inspections in 2010 and 2011 that perhaps AVCP RHA believed it was required to continue inspections. But that does not then explain the fact that AVCP RHA stopped inspections after realizing its mistake and conducted no more inspections for almost five years before the boiler explosion.

Second, the Maels argue that AVCP RHA acted as if the contract was still in effect by repairing the home after the explosion. But this argument again ignores the fact that AVCP RHA stopped inspections almost five years before the explosion. AVCP RHA replaced the boiler because there was insurance in place. [Tr. 9/23/19 at 105].

Third, the Maels attempt to minimize the fact they never requested an inspection after 2011 by saying they never requested an inspection ever. But the Maels admitted they expected AVCP RHA "to arrive every year" for inspections. [Tr. 9/18/19 at 155]. When AVCP RHA did not arrive in 2012, 2013, 2014, or 2015, Plaintiffs did not inquire, complain, object, or insist on further inspections by AVCP RHA. The Maels simply inspected and maintained the boiler themselves (including acknowledging they planned to get the boiler serviced the summer before the

explosion but never followed up on it). [Tr. 9/19/19 at 133]. The fact that AVCP RHA never inspected the home after 2011 "provides the strongest evidence that it was not contractually obligated to do so."[37]

III. Jury Instruction No. 55 Was Wrong and Prejudicial as a Matter of Law

In *Alaska Pac. Assurance Co. v. Collins*, this Court declined "to hold that where a party breaches a contractual promise 'negligently,' such conduct may form the basis for a tort action."[38] Jury Instruction No. 55 – the only instruction on duty – stated the exact opposite: "Negligence can be found by a person or entity failing to exercise reasonable care in performing a duty or promise set out in a contract." [Exc. 431]. The Maels refused to address this inconsistency in their brief. [Appellee Br. at 27-28]. The jury instruction cannot be squared with this Court's case law.

Also, by instructing the jury "that the contract was in effect at the time of the boiler explosion," the trial court impermissibly tied the instruction to breach of the contract promise to continue to inspect, not to a tort duty to use reasonable care. If AVCP RHA had a tort duty to use reasonable care, that duty would have existed whether the contract was still in effect or not.

IV. The Trial Court Should Have Granted JNOV

In arguing for the JNOV ruling, the Maels ask this Court to focus on the correctness of the ruling and "not what the court said in denying jnov." [Appellee Br. at 29]. Plaintiffs essentially concede that the trial court's reasoning was wrong. The

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[37] *Sowinski*, 198 P.3d at 1145.

[38] 794 P.2d 936, 946 (Alaska 1990) (holding instead that "an action for negligence in breaching a specific contractual duty sounds in contract").

Maels introduced no evidence that the failure to physically touch the pressure relief valve in 2011 caused the boiler to explode in 2016. While they reference testimony that the standard life expectancy for a pressure relief valve is five years, they also state in the next sentence of their brief that the valve on the boiler in the Mael home had not been replaced in over 25 years. [Appellee Br. at 34]. If a valve fails after five years from lack of physical inspection, the valve in the Mael home should have failed long before the 2016 incident. Absent speculation, the jury could not have found that the failure to physically touch the boiler in 2011 caused the boiler to explode in 2016.

V. The Trial Court Should Have Granted a New Trial on the Product Liability Issues

The Maels argue that the boiler performed as safely as an ordinary consumer would expect given that the boiler performed safely for decades. But the expert testified that as the most important safety device and the last line of defense against overpressure, a pressure relief valve should never fail. [Tr. 9/24/19 at 55-60]. An ordinary consumer does not expect a boiler to explode (even if the boiler is not well maintained).

The Maels agree the jury did not consider the benefit/risk balance. [Appellee Br. at 39]. They speculate, instead, that the jury might have determined the explosion occurred because the boiler was not properly maintained. But the jury was not asked that question on the verdict form and the jury never answered the causation question specific to product liability. [Exc. 434]. Because AVCP RHA introduced evidence that the injury was proximately caused by the boiler's design, the burden shifted to Plaintiffs to provide "evidence that, on balance, the benefits of the challenged design

outweigh the risk of danger inherent in such design." [Tr. 9/24/19 at 62-65].[39] Whether testimony from other witnesses undermined the expert's opinion is immaterial because Plaintiffs offered no evidence showing the various trade-offs in the design process. They did not satisfy their burden once the expert opined that the design proximately caused the injury.

VI. The Statutory Cap Applies to NIED Claims

Finally, the Maels contend the plain language of AS 09.17.010 precludes capping all non-economic damages in this case at $1 million because the NIED claims are independent, direct claims. The Maels concede that the "key statutory language states that the cap applies to 'all claims, including a loss of consortium claim, arising out of a single injury or death.'" [Appellee Br. at 44]. There is no dispute that an NIED claim seeks non-economic damages. There is also no dispute that the other Plaintiffs would not have had a claim as bystanders but for the injury to Dietrich Mael. His injury is the single injury occurrence out of which all other claims arose.[40]

Whether an NIED injury is direct, or derivative, of this single occurrence is not the question. The question is how should this Court interpret the phrase "arising out of" within the context of the statute and whether or not a plain reading of the statute

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[39] *See Caterpillar Tractor Co. v. Beck*, 593 P.2d 871, 885 (Alaska 1979).

[40] *See* Restatement (Third) of Torts: Phys. & Emot. Harm § 47 cmt b (2012) ("Although the 'bystander' rule is often viewed as an expansion of the 'zone of danger' rule, it actually is quite different. The bystander rule addresses recovery for harm that is derivative of and based upon negligence toward a third person. The claim for emotional harm arises from the harm to the third person. By contrast, the zone-of-danger rule . . . is based on an actor's negligent conduct that directly places the other person in danger of bodily harm and because of that danger causes emotional harm to that person.")

supports inclusion of NIED claims within "all claims . . . arising out of a single injury." While this Court has not directly answered this specific question, the legislature has provided the answer by choosing *not* to exclude NIED claims from the cap.

A plain reading states that "all claims, including a loss of consortium claim, arising out of a single injury or death" are captured within the limits of the cap. The legislative history identifies numerous instances where these statutory limitations were discussed on a "per occurrence" basis, meaning any claim arising from the singular negligent act that resulted in Dietrich's injury is encompassed in a single cap. The underlying policy considerations strongly favor capping all non-economic damages to provide certainty in the procurement of insurance, certainty in the costs of insurance premiums, and certainty in the litigation process.[41] NIED claims are included within the cap.

CONCLUSION

Based on the opening brief and this reply brief, this Court should vacate the jury's verdict and resulting judgments, reverse the trial court's order denying JNOV, and remand for entry of judgment for AVCP RHA consistent with the Court's opinion.

[41] *See* 1997 SLA, ch. 26, §§ 1(3) & (5).

CERTIFICATE OF TYPFACE

Pursuant to Alaska Rule of Appellate Procedure 513.5(c)(2), the typeface and point size used in this document are Arial, 12.5 point, proportionally spaced.

CERTIFICATE OF SERVICE

The undersigned hereby certifies that on the 23rd day of March, 2021, a true and correct copy of the foregoing was served via electronic delivery on the following:

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