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IN THE SUPREME COURT FOR THE STATE OF ALASKA

ASSOCIATION OF VILLAGE COUNCIL PRESIDENTS REGIONAL HOUSING AUTHORITY, Appellant/Cross-Appellee, v. DIETRICH MAEL, on his own behalf and on behalf of his minor children D.K. and E.M., and ROSE MAEL, and THOMAS MAEL, Appellees/Cross-Appellants, v. STATE OF ALASKA, Appellee.	)	Nos. S-17802/17821

Superior court: 4BE-17-00061CI

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I certify, pursuant to App. R. 513.5, that the Brief of Appellees was prepared in 13-point proportionately spaced Times New Roman typeface.

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Appellant/Cross-Appellee,

v.

DIETRICH MAEL, on his own behalf and on behalf of his minor children D.K. and E.M., and ROSE MAEL, and THOMAS MAEL,
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v.

STATE OF ALASKA,
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APPEAL FROM THE SUPERIOR COURT OF THE STATE OF ALASKA
FOURTH JUDICIAL DISTRICT AT BETHEL
THE HONORABLE TERRENCE HAAS, PRESIDING

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Filed in the Supreme Court
for the State of Alaska on
this 3rd of March, 2021
Meredith Montgomery, Clerk
of the Appellate Courts

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Former 24 CFR § 805.306

(d) *IHA Responsibilities in MH and Turnkey III Projects*. The IHA shall enforce those provisions of a Homebuyer's agreement under which the Homebuyer is responsible for maintenance of the house. The IHA shall have overall responsibility to HUD for assuring that the housing is being kept in decent, safe and sanitary condition, and that the home and grounds are maintained in a manner that will preserve their condition, normal wear and depreciation excepted. Failure of a Homebuyer to meet his obligations for maintenance shall not relieve the IHA of responsibility in this respect. Accordingly, the IHA shall conduct a complete interior and exterior examination of his home at least once a year, and shall furnish a copy of the inspection report to the Homebuyer. The IHA shall take appropriate action, as needed, to remedy conditions shown by the inspection, including steps to assure performance of the Homebuyer's obligations under the Homebuyer's agreement.

AS 09.17.010

(a) In an action to recover damages for personal injury or wrongful death, all damages for noneconomic losses shall be limited to compensation for pain, suffering, inconvenience, physical impairment, disfigurement, loss of enjoyment, loss of consortium, and other nonpecuniary damage.

(b) Except as provided under (c) of this section, the damages awarded by a court or a jury under (a) of this section for all claims, including a loss of consortium claim, arising out of a single injury or death may not exceed $400,000 or the injured person's life expectancy in years multiplied by $8,000, whichever is greater.

(c) In an action for personal injury, the damages awarded by a court or jury that are described under (b) of this section may not exceed $1,000,000 or the person's life expectancy in years multiplied by $25,000, whichever is greater, when the damages are awarded for severe permanent impairment or severe disfigurement.

(d) Multiple injuries sustained by one person as a result of a single incident shall be treated as a single injury for purposes of this section.

ISSUES PRESENTED

I. Did the Housing Authority have a duty actionable in tort to inspect the Maels' home non-negligently?

II. Did the Housing Authority's duty to inspect continue into 2016?

III. Did the superior court properly instruct the jury on negligence?

IV. Did the superior court correctly deny the Housing Authority's post-judgment attempts to overturn the jury's negligence verdict?

V. Did the superior court properly deny the Housing Authority's motion for a new trial regarding whether the boiler manufacturer supplied a defective boiler?

VI. If the superior court erred in admitting the medical records as exhibits, was the error harmless because the records were cumulative of the testimony?

VII. Does the statutory damages cap on non-economic damages apply separately to claims for negligent infliction of emotional distress?

STATEMENT OF FACTS

Background to the Boiler Explosion

In 1984, Thomas and Rose Mael moved into a home in Chefornak. [9/23 Tr. 53, 63] The house was constructed by the Association of Village Council Presidents Regional Housing Authority [hereinafter "AVCP RHA" or "the Housing Authority"] with funds provided by the Department of Housing and Urban Development in accordance with the Mutual Help Home Ownership Program. [At. Br. 6][1]

Some years after moving in, the Maels and AVCP RHA signed a Mutual Help and Occupancy Agreement, or MHOA, which sets forth the rights and obligations of the parties. [Exc. 156] The MHOA is a form contract prescribed by HUD.[2] Under the MHOA, the Maels were required to pay a small amount each month and, upon completion of all contract obligations, could receive title to the home; until that time, AVCP RHA remained the legal owner. [Exc. 155-94][3]

Central to this appeal are the inspection and maintenance provisions of the MHOA. As the superior court observed, the name "Mutual Help" accurately describes these provisions of the MHOA. [9/25 Tr. 52-53] Because program participants are low-income families without experience in homeownership, the contract is designed to teach the

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[1] This Court described aspects of the Mutual Help Home Ownership Program in *Interior Regional Housing Authority v. James*, 989 P.2d 145, 148 (Alaska 1999), and *Kopanuk v. AVCP Regional Housing Authority*, 902 P.2d 813, 815 (Alaska 1995).

[2] *See* 42 U.S.C. § 1437bb(e). A copy of this statute is provided at Exc. 575-80. *See also Kopanuk*, 902 P.2d at 815.

[3] This Court characterized the MHOA as a "hybrid contract," containing provisions characteristic of both a lease and an installment contract. *See James*, 989 P.2d at 148-49.

occupants about the responsibilities of maintaining a home, while also ensuring that the home remains a safe place to live even if the occupants do not perform necessary maintenance. [*Id.*; *see also* 9/23 Tr. 51 (AVCP RHA's CEO testified, "we work together; we help each other")] Thus, while the MHOA assigns the homebuyers principal responsibility for maintaining the home, it also requires the Housing Authority to inspect periodically to identify problems and to educate the homebuyers on what they must do. [Exc. 166-67 (MHOA §§ 5.1(b), 5.2(a), (b)(1)] Importantly, the MHOA requires that, when a "condition of the property creates a hazard to the life, health or safety of the occupants" and the homebuyer does not remedy the condition, the Housing Authority "shall have the work done." [Exc. 168 (MHOA § 5.2 (b)(2))]

AVCP RHA inspected the Maels' house regularly – almost annually – for many years.[4] The boiler that heated the house was a part of each inspection, but the inspections were visual only: Housing Authority inspectors were directed not to touch anything, and they never operated the pressure relief valve on the boiler or asked the homebuyer to do that while the inspector watched.[5] AVCP RHA performed no inspections after 2011. [9/23 Tr. 74] The Housing Authority did not advise the Maels that it would cease inspecting [9/18 Tr. 156-57], and the Maels continued to assume the Housing Authority remained

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[4] Inspection reports document inspections in 1986, 1987, 1989, 1991, 1995, and every year from 1997 through 2011. [Exc. 250-69; *see also* 9/23 Tr. 74 (AVCP RHA's CEO testified that the MHOA required inspections and the Housing Authority inspected annually through 2011)]

[5] *See* 9/18 Tr. 155, 172; 9/23 Tr. 72-73; 9/24 Tr. 8, 18-19, 35; *see also* 9/24 Tr. 19 (acknowledging that a visual inspection could not establish whether the pressure relief valve was working properly).

responsible for any repairs that they could not handle on their own. [9/18 Tr. 56, 178]

The Boiler Explosion

In January 2016, not quite five years following the last inspection, the boiler in the Maels' home exploded. [9/19 Tr. 197-200] Experts agreed that the cause was the failure, due to internal corrosion, of the pressure relief valve. [9/20 Tr. 99, 132-33; 9/24 Tr. 60] When AVCP RHA representatives examined the boiler after the explosion, the exterior was visibly corroded and rusted, which, to an expert, evidenced problems with the pressure relief valve. The problem would have been apparent to Housing Authority inspectors if they had inspected prior to the explosion. [9/20 Tr. 99] AVCP RHA admitted at trial that, if inspections had continued, the boiler would not have exploded. [9/20 Tr. 134]

The explosion seriously injured Dietrich Mael. [9/19 Tr. 202-03] The explosion also caused severe emotional distress to his family members who were in the house at that time or came running after hearing the noise. In the immediate aftermath of the explosion, they witnessed Dietrich's extensive burns and the obvious extreme pain he suffered. [9/17 Tr. 94, 98-99; 9/18 Tr. 60-61 (Thomas); 9/18 Tr. 81-89, 94-95, 98-99 (Dillon), 103-06 (Erica), 159-62 (Rose)]

Course of Proceedings

The parties' pleadings

Dietrich Mael filed suit against AVCP RHA in 2017, alleging breach of contract and negligence. Both the contract and tort claims were based on the Housing Authority's failure to inspect the house properly and its failure to arrange for necessary maintenance and repair of the boiler. [R. 2618-21; Exc. 1-5] As co-plaintiffs, Dietrich's children Erica

and Dillon asserted claims for negligent infliction of emotional distress ("NIED"). [Exc. 2, 4] Dietrich's parents, Thomas and Rose, later asserted NIED claims, too. [R. 132-37]

AVCP RHA denied liability. [R. 2628-32; Exc. 14-19] It filed a third-party complaint against Thomas and Rose Mael, asserting that they were responsible in whole or part for Dietrich's injuries because they failed to inspect and repair the boiler. [Exc. 6-12]

The third-party complaint also sued Burnham LLC, the company that manufactured the boiler. AVCP RHA alleged that the boiler was a defective product. [Exc. 9-11] Before trial, the Maels settled with Burnham, and Burnham was dismissed as a party. [Exc. 357-58, 421-22] Burnham remained in the case for the purpose of AVCP RHA asking jurors to find and apportion fault to Burnham. [Exc. 421-22; R. 1686-88]

Summary judgment motion

AVCP RHA moved for summary judgment on both the breach of contract and the tort claims. [Exc. 20-53] As to the contract claim, it asked the court to interpret the MHOA as not imposing any duty on it to inspect, maintain, or repair the boiler and to find that Dietrich could not sue on the contract because he was not an intended third-party beneficiary. [Exc. 34-43] As to the tort claims, AVCP RHA argued the court should find that the Housing Authority had no tort duty as a matter of law. [Exc. 44-46] The Maels filed an opposition [Exc. 122-49], and AVCP RHA replied. [Exc. 332-49]

The superior court denied summary judgment. [Exc. 401-10] Interpreting the MHOA as a whole, rather than focusing on isolated provisions as AVCP RHA did, the court concluded that the contract established that both the Housing Authority and the homebuyers have duties regarding maintenance of the home. [Exc. 405-07] In finding that

AVCP RHA had a duty to inspect the house and to arrange for repairs of hazardous conditions, the court relied on the plain language of MHOA Sections 5.1 and 5.2, as well as on the federal law in effect at the time the contract was signed. [Exc. 405-07][6] In finding that Dietrich was an intended third-party beneficiary, the court noted that MHOA Section 5.2(b)(2) expressly requires the Housing Authority to repair conditions that are hazardous to the home's "occupants," using this broader term here as distinct from other provisions that define duties owed to the "homebuyer." [Exc. 407-08 (referring to Exc. 168)] As to tort duties, the court determined that established case law provides that a party with a duty to inspect has a duty to inspect non-negligently, and failure to fulfill that duty is actionable as an independent tort.[7]

Trial

The case went to trial in September 2019. [9/17 Tr. through 9/27 Tr.][8]

During the trial, the parties presented evidence related to both the contract and tort claims set forth in the complaints. At the close of the evidence, with the goal of simplifying the jury instructions, the Maels elected to drop their breach of contract claim and to proceed solely on their tort claims. [9/26 Tr. 8] The judge accepted that decision, stating his

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6 The court referred to MHOA §§ 5.1(b), 5.2 [Exc. 166-68] and 24 CFR § 950.428(c) [Exc. 242-43]. The regulation actually in effect in 1989 was former 24 CFR § 805.306(d) [R. 2280], but the error is not significant because the inspection and repair requirements are materially similar. *See infra* at n.21.

7 Exc. 408-10, citing *Kay v. Danbar, Inc.*, 132 P.3d 262, 270 (Alaska 2006); *Van Biene v. ERA Helicopters, Inc.*, 779 P.2d 315, 321 (Alaska 1989); *Wallace v. State*, 557 P.2d 1120, 1121 (Alaska 1976).

8 Testimony and exhibits relevant to specific arguments are discussed below in connection with the arguments.

understanding of the law and the plaintiffs' choice as follows:

> The duty [to inspect] can arise as a matter of a contractual duty. And if violation of that duty is the sort of violation which would give rise to a classic tort duty, and duty to inspect is actually one which has been explicitly adopted in Alaska in a number of cases, then it can be pursued as a tort.

[9/26 Tr. 35] The court saw no reason why plaintiffs also would need to pursue the breach of contract as a separate claim. [*Id.*] Plaintiffs' counsel concurred, commenting in particular that "[i]t would be anomalous if the plaintiffs could bring a tort claim if the promise was not in writing, but they could not bring a tort claim if the promise is in writing." [9/26 Tr. 36]

Thus, the jury was advised that the court had determined that the contract required the Housing Authority to perform periodic inspections of the house and to exercise reasonable care to discover and remedy hazardous conditions, that the contract was in effect at the time of the explosion, and that negligence may be based on failure to exercise reasonable care in fulfilling a duty set forth in a contract. [Exc. 430-31]

The jury returned a verdict finding AVCP RHA liable to Dietrich for harm resulting from its negligence, and liable to Dillon, Erica, Thomas, and Rose for NIED. [Exc. 432-33] The jury awarded Dietrich $1,672,000 for past and future economic loss and $1,580,000 for past and future non-economic loss. [Exc. 435] It awarded $50,000 each to Dillon, Erica, and Rose and $25,000 to Thomas on their NIED claims. [*Id.*] Jurors found that Burnham did not supply a defective boiler and that Thomas and Rose Mael were not negligent, and thus apportioned 100% of the fault to AVCP RHA. [Exc. 433-34, 436]

AVCP RHA moved for jnov and a new trial. [Exc. 441-62, 465-77] Following full

briefing and argument,[9] the superior court granted AVCP RHA's motion to reduce the award of non-economic damages to Dietrich in accordance with the $1,000,000 cap set forth in AS 09.17.010(c). [Exc. 685-87][10] The court denied the remainder of the Housing Authority's post-verdict motions. [Exc. 684-85, 688-96; 2/26 Tr. 74 (page of oral order omitted from excerpt)]

THE GOVERNING STATUTES AND REGULATIONS

Several of AVCP RHA's arguments on appeal and the Maels' responses to them depend upon an understanding of the federal statutes and regulations that control the Mutual Help Homeownership Opportunity Program. Thus, before responding to the Housing Authority's arguments, it is efficient to begin with an overview of key statutory and regulatory provisions.

The Mutual Help Homeownership Opportunity Program was established and initially administered by the predecessor to the federal Department of Housing and Urban Development.[11] It was given formal statutory authorization by Congress in 1988.[12] Congress replaced the MHHO Program in 1996 with the Native American Housing and

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9 *See* Exc. 494-96 (Maels' response to AVCP RHA's arguments on the damages cap as it relates to damages for NIED), 499-525, 527-40 (Maels' oppositions to motion for jnov and new trial), 541-73, 602-10 (AVCP RHA's reply memoranda); 2/26 Tr. 44-72 (oral argument).

10 That ruling is the subject of Dietrich Mael's cross-appeal in case No. S-17821.

11 *See Marceau v. Blackfeet Housing Authority*, 455 F.3d 974, 976-77 (9th Cir. 2006), *aff'd in part & rev'd in part on other grounds*, 540 F.3d 916 (9th Cir. 2008); *Dewakuku v. Martinez*, 271 F.3d 1031, 1034 (Fed. Cir. 2001).

12 *See* 42 U.S.C. § 1437bb (1988) (adding provisions to the Indian Housing Act of 1937). [Exc. 575-80]

Self-Determination Act ("NAHASDA"),[13] but all contracts entered into under the earlier program remained in effect.[14]

The goal of the MHHO Program was to assist with the housing needs of low-income Native Americans.[15] Under this program, in very general terms, HUD provided funding to regional housing authorities, and a housing authority then contracted with an eligible family. The statute defined eligibility for the program and key terms for the contract that the parties would enter, titled a "Mutual Help and Occupancy Agreement" or MHOA.[16] For purposes of this case, a key statutory provision required the housing authority to "have in effect procedures determined by the Secretary to be sufficient for ensuring the timely periodic maintenance of the dwelling by the family."[17]

The Maels signed their contract – the MHOA at issue in this case – in 1989. [Exc. 156] Every contract implicitly incorporates the applicable laws in existence at the time the contract is signed.[18] In 1989, the governing regulations were set forth in 24 CFR Part 805. [R. 2278-81] In pertinent part, these regulations stated that the housing authority must inspect each house built pursuant to the program "at least once a year."[19] The regulations

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13 *See* 25 U.S.C. §§ 4101 *et seq.* [R. 2288-90]

14 *See* Fed. Reg. Vol. 83, No. 17, page 4085 (Jan. 27, 1998).

15 *See* 42 U.S.C. § 1437bb(a). [Exc. 575-76]

16 *See* 42 U.S.C. § 1437bb(e), (f). [Exc. 576-78]

17 *See* 42 U.S.C. § 1437bb(e)(3). [Exc. 577]

18 *See Ellingstad v. State, Dep't of Nat. Res.*, 979 P.2d 1000, 1008 (Alaska 1999); *Eastwind, Inc. v. State*, 951 P.2d 844, 849 n.11 (Alaska 1997).

19 Former 24 CFR § 805.306(d). [R. 2280]

further provided that the housing authority

> shall have overall responsibility to HUD for assuring that the housing is being kept in decent, safe and sanitary condition. . . . Failure of a Homebuyer to meet his obligations for maintenance shall not relieve the [housing authority] of responsibility in this respect.[20]

The regulatory scheme made clear that the annual inspection requirement was established to ensure that the housing authority stays aware of the house's condition so it can, as required, "take appropriate action, as needed, to remedy conditions shown by the inspection."[21]

The MHOA tracks this regulation. While it makes the homebuyer responsible for maintenance, it also explicitly requires AVCP RHA to inspect the house and to repair any hazardous condition if the homebuyer does not do so. [Exc. 167-68 (MHOA § 5.2)][22] AVCP RHA's statement of policy explains the two clear purposes of assigning these inspection and repair responsibilities to the Housing Authority: (1) it ensures that the housing authority takes steps to protect HUD's investment, and (2) it ensures that the family occupying the house remains in a safe residence. [Exc. 112-13]

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20 *Id.*

21 *Id.* The regulations in Part 805 were repealed and replaced in 1998 with regulations in Part 950 [Exc. 240-43] following passage of NAHASDA. Both NAHASDA and the regulations in 24 CFR Part 950 maintain the requirement for regular inspections by the Housing Authority and the requirement that the Housing Authority perform maintenance if the homebuyer fails to do so. *See* 25 U.S.C. § 4163(b) [R. 2289]; 24 CFR § 950.428. [Exc. 242-43]

22 *See also James*, 989 P.2d at 148 (construing a comparable MHOA also governed by 42 U.S.C. § 1437bb(e)(3) and holding that it required the homebuyer to be responsible for maintenance and also required the Housing Authority to have a procedure to ensure timely periodic maintenance).

STANDARDS OF REVIEW

The Maels accept the statements of standards of review set forth in AVCP RHA's brief.

ARGUMENTS

I. AVCP RHA HAD A DUTY ACTIONABLE IN TORT TO INSPECT THE MAELS' HOME WITH CARE.

Alaska law is clear that a party to a contract can have a tort duty to act with care, imposed as a matter of law, in addition to specific duties established by the contract: "[W]hen a party's actions violate a general duty of care, its actions may give rise to an action in tort, even if the violation also breaches a contract."[23]

To determine whether a defendant owes a plaintiff a duty of reasonable care, this Court has said:

> we first determine whether a duty is imposed by statute, regulation, contract, undertaking, the parties' preexisting relationship, or existing case law. If these sources do not resolve the issue, we apply the multi-factor approach discussed in *D.S.W.* . . . to determine whether an actionable duty exists.[24]

Several of these sources provide a basis for holding that the Housing Authority had an

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[23] *Jarvis v. Ensminger*, 134 P.3d 353, 363 (Alaska 2006).

[24] *Geotek Alaska, Inc. v. Jacobs Eng'g Group, Inc.*, 354 P.3d 368, 376 (Alaska 2015) (footnotes and internal quotation marks omitted); *see McGrew v. State, Dep't of Health & Soc. Servs.*, 106 P.3d 319, 322 (Alaska 2005) (quoted in *Geotek*); *Bryson v. Banner Health Sys.*, 89 P.3d 800, 804 (Alaska 2004) ("To determine whether an actionable duty exists in a given case, we look first for statutes, rules, or existing precedent creating a duty." (footnote omitted)); *Wongittilin v. State*, 36 P.3d 678, 681 (Alaska 2001) ("Actionable duty is a question of law and public policy: an expression of the sum total of those considerations of policy which lead the law to say that the particular plaintiff is entitled to protection." (internal quotation marks and footnotes omitted); *D.S.W. v. Fairbanks N. Star Borough Sch. Dist.*, 628 P.2d 554, 555 (Alaska 1981) (setting forth seven factors to consider when deciding whether to recognize a new actionable duty).

actionable duty to Dietrich to inspect the house the Housing Authority owned and to do so non-negligently so as to discover hazardous conditions that then could be corrected.

Contract as a source of tort duty: The MHOA explicitly required the Housing Authority to inspect the Maels' home periodically and to "have the work done" when "the condition of the property creates a hazard to the life, health or safety of the occupants." [Exc. 168 (MHOA §§ 5.1(b), 5.2(b)(2))][25] Dietrich was not a party to the MHOA, but he was an intended beneficiary of the inspection obligation.[26] AVCP RHA's duties to Dietrich arose from the contractual and legal relationship between the Housing Authority and Thomas and Rose Mael. In other words, the Housing Authority would have had no duty to inspect or repair the Maels' house if it were a house that AVCP RHA did not own under the MHHO Program. Under the common law, as discussed in the next section, AVCP RHA was required to fulfill its contract-based inspection duties non-negligently.[27]

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[25] Rejecting arguments by the Housing Authority that the contract duty to inspect expired in 2009, the trial court interpreted the contract duty to inspect to continue into 2016. [9/25 Tr. 52-60] Argument II below shows that this ruling was correct both as a matter of contract interpretation and also as a matter of applying the law that mandated inspections.

[26] *See infra* at 17-18.

[27] A recent case from a different factual setting provides an analogy. In *Allstate Ins. Co. v. Kenick*, 435 P.3d 938 (Alaska 2019), this Court discussed the duty of an insurance adjuster to perform her adjustment non-negligently. An adjuster is not a party to the contract between the insurer and the insured, but has a duty to act non-negligently in adjusting the claim; that duty arises from the contractual relationship but breach of the duty of care is actionable in tort. *See id.* at 946 & n.21; *see also Rathke v. Corrs. Corp. of America, Inc.*, 153 P.3d 303, 312 n.37 (Alaska 2007) (suggesting that, where the defendant private prison contracted with a company to perform drug tests on samples from inmates, an inmate who claimed his drug test was not conducted with care might have a tort cause of action against the company that negligently performed its contractual duty); *John's Heating Serv. v. Lamb*, 46 P.3d 1024, 1028-29, 1037-38 (Alaska 2002) (assuming without

Contrary to the Housing Authority's claims, the holding that AVCP RHA could be sued in tort for not inspecting carefully does not run afoul of the principle that a typical breach of contract may be enforced only through an action on the contract. [At. Br. 15] This case fits squarely into the exception: "Only where the duty breached is one imposed by law, such as a traditional tort law duty furthering social policy, may an action between contracting parties sound in tort."[28] Further, besides being imposed by the common law, the duty to inspect was imposed by statute and regulation, independent of the contract.[29]

Common law as a source of tort duty: A solid line of precedent in this state recognizes that, when a defendant has a duty to inspect (whatever its source), the inspection must be performed with reasonable care, such that hazardous conditions are discovered so that they can be corrected and guarded against.

For example, in *Adams v. State*,[30] this Court held that victims of a hotel fire had a cause of action in tort against the state, which inspected the hotel but failed to take action after discovering dangerous conditions.[31] This Court explained that, once the state undertook the inspection, it had a duty to exercise reasonable care in conducting the

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discussion that homeowner could sue heating service company in tort for injuries resulting from negligent performance of its contract to inspect the furnace).

28 *Alaska Pacific Assurance Co. v. Collins*, 794 P.2d 936, 946 (Alaska 1990); *see Lynden, Inc. v. Walker*, 30 P.3d 609, 614 (Alaska 2001) ("it is axiomatic that every person owes a duty to all persons to exercise ordinary care to guard against any injury which may naturally flow as a reasonably probable and foreseeable consequence of his act" (brackets and internal quotation marks omitted)).

29 *See infra* at 16-17.

30 555 P.2d 235 (Alaska 1976).

31 *See id.* at 240-42.

inspection, and liability would attach when there was a negligent failure to discover hazards that would have been discovered in the exercise of reasonable care.[32]

Van Biene v. ERA Helicopters, Inc.,[33] relied on *Adams*. There, the estates of two pilots sued the deceaseds' employer (ERA Helicopters) for overworking the pilots. They also sued the employer's insurer, alleging that the insurer had negligently inspected, certified, and authorized the working conditions.[34] This Court affirmed the dismissal of claims against the employer pursuant to the exclusive remedy provision of the Workers' Compensation Act,[35] but held that the negligence claim against the insurer could proceed.[36] Because the insurer had undertaken to render certain services to promote safe operations, this Court held that it had the duty to perform that undertaking non-negligently.[37]

Factually closer to the current case is *Kay v. Danbar, Inc.*,[38] where this Court recognized that a property management company, with a contract to manage rental property, owed a duty of care to tenants that included taking reasonable steps to discover dangerous conditions in common areas and to protect tenants against non-obvious dangers, either by warning tenants or arranging for repair.[39]

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[32] *See id.* at 240.

[33] 779 P.2d 315 (Alaska 1989).

[34] *See id.* at 316.

[35] *See id.* at 318-19.

[36] *See id.* at 321-22.

[37] *See id.* at 322.

[38] 132 P.3d 262 (Alaska 2006).

[39] *See id.* at 271-72.

These cases and others establish that the duty to inspect with reasonable care applies regardless of whether the duty to inspect was voluntarily assumed or imposed by a contract or a statute.[40] Although there may be more cases that explicitly address the duty of care that attaches when a defendant *voluntarily* assumes a duty to inspect, it would be anomalous if a volunteer could be liable in tort for failure to discharge that duty with care, but someone inspecting pursuant to a law or contract would have no liability for failure to act with reasonable care. [9/26 Tr. 36][41] Likely, more of the reported cases discussing the actionable duty of care address inspection duties that are voluntarily assumed, because those cases *expand* the well-established duty of care that exists when the duty to inspect is expressed in a contract or statute.

Nor does the duty of care under the common law apply only if the defendant *actually* inspects but negligently overlooks a hazard, as the Housing Authority has asserted. [Exc. 450] A defendant cannot shield itself from liability by completely failing to perform its duty. Sometimes, the most negligent kind of inspection may be the failure to inspect at all. Every property owner has a duty to act reasonably to maintain his property. An owner can

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[40] *Compare, e.g.*, *Van Biene*, 779 P.2d at 322 (defendant who voluntarily assumed a duty to inspect had a tort duty to inspect with care) *with Kay*, 132 P.3d at 271-72 (defendant who had a contract to manage property had a tort duty to inspect with care); *see also Howell v. Ketchikan Pulp Co.*, 943 P.2d 1205, 1206, 1208 (Alaska 1997) (company that had a contract to repair a boiler could be liable in tort to a person injured when the boiler exploded, although the tort claim at issue in that case was time-barred); *Coburn v. Burton*, 790 P.2d 1355, 1356-57 (Alaska 1990) (landowner has duty imposed by law to maintain common premises in a safe condition and may be liable in tort for failure to exercise due care in performing that duty).

[41] Additionally, as the Maels observed in the trial court, the voluntary signing of a contract can be considered one way of voluntarily assuming the duties stated in the contract. [9/26 Tr. 35]

be held liable for negligence if he fails to act as a reasonable person and someone on the premises is injured as a result, whether his lack of care involved an unreasonable failure to discover a problem or an unreasonable failure to remedy a known problem.[42] The same principle applies here.

Statutes and regulations as a source of tort duty[43]: Independent of the MHOA, the statute and regulations in effect when the contract was signed imposed on AVCP RHA a duty to inspect the Maels' home. As described above, the statute creating the Mutual Help Home Ownership Opportunity Program required each housing authority to "have in effect procedures determined by the Secretary to be sufficient for ensuring the timely periodic maintenance of the dwelling by the family."[44] One of the procedures required by the Secretary was a plan for regular inspections by the housing authority; a requirement to inspect the house "at least once a year" is embodied in the regulation in effect when the Maels and AVCP RHA signed the MHOA.[45] The regulation also required the Housing Authority to assure that the house was well-maintained: "Failure of the Homebuyer to meet his obligation for maintenance shall not relieve the Indian Housing Authority of

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42 *See generally Webb v. City & Borough of Sitka*, 561 P.2d 731, 733 (Alaska 1977) ("A landowner or owner of other property must act as a reasonable person in maintaining his property in a reasonably safe condition in view of all the circumstances, including the likelihood of injury to others, the seriousness of the injury, and the burden on the respective parties of avoiding the risk." (footnote omitted)).

43 *See Dore v. City of Fairbanks*, 31 P.3d 768, 792 (Alaska 2001) ("We look first to statutes to determine whether an actionable duty exists."); *see also* cases cited, *supra*, n.24.

44 42 U.S.C. § 1437bb(e)(3). [Exc. 577] *See also supra* at 8-10.

45 Former 24 CFR § 805.306(d). [R. 2280]

responsibility in this regard."[46]

The Housing Authority would have had these duties even if they were not written into the MHOA. They were written into the MHOA because the statute and regulation imposed these duties. Breach of the legally-imposed duties can be the basis for an action in tort by someone who is not a party to the contract. Under well-established doctrine, violation of a safety regulation can be evidence of negligence or negligence per se.[47]

AVCP RHA's duty to inspect with reasonable care applied to all the occupants of the Maels' household: In a footnote, AVCP RHA argues that, even if the contract imposed on it an ongoing duty to inspect and repair the house, that contract duty did not

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46 *Id.* The regulation continues, "The Indian Housing Authority shall take appropriate action, as needed, to remedy conditions shown by the inspection."

47 *See generally State Mechanical, Inc. v. Liquid Air, Inc.*, 665 P.2d 15, 18-19 (Alaska 1983); *Ferrell v. Baxter*, 484 P.2d 250, 258-65 (Alaska 1971); Alaska Civil Pattern Jury Instructions Nos. 03.04A and 03.04B (2008).

The Maels proposed instructions on negligence and negligence per se based on violation of the applicable federal regulations. [9/25 Tr. 255-57; R. 999-1003] The trial court declined to give the instructions, reasoning that the case was presented to the jury under theories of breach of contract and breach of duties under state common law, rather than breach of federal law. [9/25 Tr. 257] If this Court were to conclude that the superior court erred in its analysis of the source of a tort duty, the negligence per se theory would offer an alternative ground for upholding the verdict. This Court may affirm a judgment on any basis established by the record, whether or not it was relied on by the superior court or even raised by the parties. *See Riley v. Simon*, 790 P.2d 1339, 1343 n.7 (Alaska 1990); *Demoski v. New*, 737 P.2d 780, 786 (Alaska 1987).

Whether a regulation supports an instruction on negligence per se is a question of law to which this Court applies its independent judgment. *See State Mechanical*, 665 P.2d at 19; *see also Ayuluk v. Red Oaks Assisted Living, Inc.*, 201 P.3d 1183, 1201-02 (Alaska 2009) (holding as a matter of law that the superior court should have instructed on negligence per se based on violation of a regulation); *Harned v. Dura*, 665 P.2d 5, 14 (Alaska 1983) (reversing, rather than remanding, when superior court declined to give a negligence per se instruction).

extend to Dietrich, because Dietrich was not a party to the MHOA. [At. Br. 26 n.62] This argument is largely irrelevant to this appeal, since the Maels dropped their contract claims. The verdict at issue in this appeal does not depend on Dietrich's ability to enforce the contract.

In any event, it is clear that Dietrich was an intended beneficiary of the duty to inspect that was established by the MHOA and the relevant law. [Exc. 407-08] The MHOA states expressly that the Housing Authority's obligation to inspect the house and repair hazardous conditions extends to the *occupants* of the house, not just to the homebuyers: "If the conditions of the property create a hazard to the life, health or safety of the occupants, the IHA shall have the work done, and charge the cost thereof to the Homebuyer[.]" [Exc. 168 (MHOA § 5.2(b)(2))] The MHOA specifically names the children of a homebuyer and the children's children as lawful occupants. [*Id.* (MHOA § 5.4(a))] The careful usage, within one sentence, of both "occupants" and "homebuyer" shows a clear intent to have all *occupants* benefit from the inspection and repair obligation.[48]

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[48] *See generally Antenor v. State, Dep't of Corrs.*, 462 P.3d 1, 8 n.30 (Alaska 2020) (Alaska follows the RESTATEMENT (SECOND) OF CONTRACTS § 302 (1979) for determining when someone is an intended third-party beneficiary). Under Section 302, a beneficiary of a promise is an intended beneficiary "if recognition of a right to performance in the beneficiary is appropriate to effectuate the intention of the parties and . . . the circumstances indicate that the promisee intends to give the beneficiary the benefit of the promised performance." Additionally, pursuant to cmt. d, an "overriding policy, which may be embodied in a statute" may require recognition of the rights of a third-party beneficiary, without regard to the intent of the parties. Both these provisions support the conclusion that Dietrich was an intended third-party beneficiary of the MHOA's inspection and repair provisions.

Conclusion: The superior court did not err in holding that Dietrich could assert a tort claim against AVCP RHA for negligently fulfilling its duties to inspect and repair the house that it owned.

II. THE HOUSING AUTHORITY'S DUTY TO INSPECT CONTINUED INTO 2016 AND DID NOT TERMINATE IN 2009.

For purposes of the appeal, the Housing Authority acknowledges that the MHOA "directed AVCP RHA to conduct annual inspections of the house, including its boiler." [At. Br. 2] It disputes how long that obligation lasted. [At. Br. 19-26]

The trial court ruled that the duty to inspect continued in force so long as AVCP RHA remained the legal owner of the home, which it indisputably was in 2016 when the boiler exploded. [9/25 Tr. 52-60] This interpretation of the contract was correct, and the Housing Authority's arguments challenging the ruling should be rejected.[49]

Additionally or alternatively, this Court could determine that the interpretation of the MHOA does not matter because, independent of the contract, the governing statute and regulations required the Housing Authority to continue annual inspections as long as the house was not conveyed to the homebuyers.[50]

A. THE CONTRACTUAL DUTY TO INSPECT DID NOT END IN 2009.

The goal of contract interpretation is to give effect to the reasonable expectations of

[49] The arguments in this section also refute AVCP RHA's claim in a footnote to its Argument IV, contending that the superior court erred in instructing the jury that AVCP RHA "promised to conduct routine annual inspections of the boiler . . . until full ownership of the home was conveyed to Thomas and Rose Mael." [At. Br. 37 n.80, referring to Exc. 429]

[50] *See supra* at 8-10; *infra* at 25-27.

the contracting parties.[51] Interpretation should start with the language of the contract as a whole.[52] The Court may also consider extrinsic evidence, such as the conduct of the parties.[53] The sections that follow show that these factors support the interpretation that AVCP RHA's inspection obligation continued into 2016 and did not abruptly end in 2009, simply because that was 25 years after the Maels moved into the house.

1. The MHOA as a whole supports the interpretation that the Housing Authority's obligations to inspect and repair remain in effect until the house is conveyed to the homebuyer.

The MHOA contains no specific expiration date. [Exc. 155-94] AVCP RHA's main witness on why the inspection obligation ostensibly terminated in 2009 agreed that the MHOA contains no expiration date. [9/24 Tr. 163]

AVCP RHA cites to Section 3.2. [At. Br. 23] That section, read in conjunction with Section 7.2(b), establishes a 25-year amortization period; it provides that the homebuyer's monthly payments are determined based on this schedule, and that the *lease* expires when the initial purchase price has been fully amortized. [Exc. 163, 173 (MHOA §§ 3.2, 7.2(b))] Even if the purchase price was fully paid after 25 years, the expiration of the lease is not the same as the expiration of the contract. If the contract expired, it would mean that the family would continue to live in a house, with legal title still held by the Housing Authority, but neither party would have any obligations to the other. Contracts

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51 *See Sowinski v. Walker*, 198 P.3d 1134, 1143 (Alaska 2008); *Neal & Co., Inc. v. Ass'n of Village Council Presidents Reg'l Housing Auth.*, 895 P.2d 497, 502 (Alaska 1995).

52 *See Gunn v. Gunn*, 367 P.3d 1146, 1150 (Alaska 2016).

53 *See id.* at 1150-51; *Sowinski*, 198 P.3d at 1143-44; *Neal*, 895 P.2d at 502.

should not be given a nonsensical interpretation.[54]

More important, in this case the evidence is clear that the Maels had *not* paid the full purchase price after 25 years. [R. 4572-73 (showing accounts receivable – i.e., amounts owed by the Maels – in 2009)] AVCP RHA recorded on its Ledger History Report: "Has TARS [Tenant Account Receivable], Not Eligible as of 01/15/2009." [R. 4577 (emphasis added)] The Ledger History Report shows an account receivable even as of the time of the explosion in 2016. [R. 4566; *see generally* R. 4566-77][55]

The notation that the house was not eligible for conveyance in 2009 was a correct reading of the MHOA. Section 7.5 provides that a house may not be conveyed, even after 25 years, if the Housing Authority does not determine that the homebuyer is financially capable of paying the costs associated with ownership, such as insurance and utilities, as well as paying a promissory note to the Housing Authority if the full purchase price has not yet been paid. [Exc. 175-76 (MHOA § 7.5)][56]

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[54] *See Futuresource LLC v. Reuters Ltd.*, 312 F.3d 281, 284 (7th Cir. 2002); *Washington Public Util. Dists. Utils. Sys. v. Public Util. Dist. No. 1*, 771 P.2d 701, 707 (Wash. 1989); *see also In re: Armstrong Energy, Inc.*, 613 B.R. 529, 536 (8th Cir. 2020).

[55] The excerpt contains just the first page of the Ledger History Report. [Exc. 674] The reference there to "CONVEY ELIG: 12/12/2009" is, in context, just the determination of when 25 years would elapse from the move-in date.

[56] The MHOA contains further procedures that must be followed before the Housing Authority may require the homebuyer to purchase the house. After making the requisite financial determinations, the Housing Authority must give notice to the homebuyer of the requirement to purchase. [Exc. 175 (MHOA § 7.5(b))] The parties then must set a settlement date, at which time conveyance documents shall be provided to the homebuyer. [Exc. 174 (MHOA § 7.4(d))] No evidence was presented at trial that AVCP RHA gave the Maels notice that they were required to purchase the house or took any of the remaining steps necessary to prepare for conveying the house. [9/18 Tr. 65, 157]

Most significantly, the MHOA is explicit that, even if the Housing Authority gives formal notice of the requirement to purchase, "until the Homebuyer purchases the Home he shall have all the rights of a Homebuyer." [Exc. 176 (MHOA § 7.5(c))] In other words, the MHOA states unambiguously that no rights of the homebuyer under the contract (including the right to rely on the Housing Authority's obligation to inspect and repair hazardous conditions) expire *until the homebuyer purchases the home*.

Finally, other sections of the MHOA confirm the intention of the parties that both the Housing Authority and the homebuyer must continue to meet all their obligations to each other until legal title to the house is transferred. Section 11.3(a) specifies that, prior to the actual transfer of ownership, the Housing Authority shall carry all the insurance required by HUD. [Exc. 184 (MHOA § 11.3(a))] Section 11.3(b) provides that, if the house is damaged before the transfer of ownership, HUD retains the ultimate authority to determine whether the house should be repaired. [Exc. 184 (MHOA § 11.3(b))] It would be illogical to read the MHOA as relieving the Housing Authority of the responsibility of inspecting and maintaining its property, while the MHOA explicitly requires the Housing Authority to insure the house and grants HUD the authority to decide whether to repair the house if it is damaged.

In short, the MHOA as a whole compels the interpretation that the Housing Authority's duties to inspect and repair continued into 2016 because the house was not yet conveyed to the Maels.

2. Extrinsic evidence supports the conclusion that the parties did not expect the duty to inspect to end after 25 years.

Contrary to the Housing Authority's claims [At. Br. 22-25], the conduct of the parties over the years supports the conclusion that the parties did not intend that the inspection obligation in the MHOA would expire in 2009.

First, AVCP RHA continued the annual inspections until 2011, two years after the time AVCP RHA contends that the house became "eligible for conveyance." [Exc. 268-69] The Housing Authority asserted at trial that the post-2009 inspections were "mistakes," probably due to new staff [9/24 Tr. 14], but it is equally plausible that in 2010 and 2011 AVCP RHA believed it was required to continue annual inspections – perhaps because its personnel recognized that the 2008 Guidance had expired.[57] Before this litigation, AVCP RHA did not share with anyone its theory that the MHOA excused it from continuing inspections after 2009. Its subsequent, self-serving interpretation has no probative value.[58] And the view within AVCP RHA was not uniform: In fact, the Housing Authority's designated representative, under Civil Rule 30(b)(6), admitted that AVCP RHA should continue doing inspections even after a house is eligible for conveyance. [9/20 Tr. 93, 102; Exc. 386]

Second, AVCP RHA continued in all other respects to act as if the MHOA remained in effect. Most notably, it took charge of the repair of the house after the explosion. [9/18

[57] *See infra* at 25-26 for further discussion of the Guidance.

[58] *See Kay v. Danbar, Inc.*, 132 P.3d 262, 269 n.20 (Alaska 2006) (testimony by a party as to its subjective intention concerning the meaning of the contract has no probative value if it was not expressed to the other party when the contract was formed).

Tr. 59-60; 9/23 Tr. 104-05, 108] It removed the old boiler, selected and installed the new boiler, and repaired the blown-out walls. [9/18 Tr. 58-60; 9/23 Tr. 105] None of these actions is consistent with a belief that the MHOA had expired or that, by 2016, the Housing Authority no longer had an obligation to protect the occupants against hazardous conditions.

In support of its claim that the Maels' conduct demonstrated that they believed the inspection and repair obligation had ended, AVCP RHA points to evidence that the Maels attempted some modest repairs after the Housing Authority ceased inspection. [At. Br. 22] This conduct, however, is not inconsistent with a belief by the Maels that the Housing Authority still had a duty to inspect and to keep the house safe. From the start of a homebuyer's occupancy, the MHOA assigns the homebuyer a responsibility for maintenance [Exc. 167 (MHOA § 5.2(a))], and the evidence established that the Maels undertook some maintenance during the first 25 years of their occupancy, including attempting to tend to the boiler. [9/17 Tr. 91-92; 9/18 Tr. 35, 42-43, 127] When the Maels continued to perform the small repair projects that they were capable of doing after 2009, they were fulfilling their obligations under the MHOA; their conduct is not evidence they believed the contract was no longer in effect. Contrary to AVCP RHA's claim, the fact that the Maels never called the Housing Authority to request an inspection after 2011 proves nothing. No evidence suggests the Maels *ever* requested an inspection; each year, they simply awaited notice from the Housing Authority about when the next inspection would occur. [9/18 Tr. 155] Continuing that same pattern did not demonstrate that they believed the duty to inspect had ended.

In sum, the extrinsic evidence, as well as the contract language, supports the superior court's conclusion that the Housing Authority's duties to inspect and to repair hazardous conditions continued into 2016, because AVCP RHA had not yet conveyed the house to the Maels.

B. INDEPENDENT OF THE MHOA, THE LAW REQUIRED AVCP RHA TO CONTINUE INSPECTING WHILE IT OWNED THE HOUSE.

The governing law, from the time the Maels signed the MHOA, is discussed *supra* at 8-10. As quoted there, the law required the Housing Authority to inspect each house it built under the MHHO Program "at least once a year."[59]

To try to justify ignoring this obligation, the Housing Authority relied principally on a Guidance issued by HUD in 2008. [9/24 Tr. 13; 9/26 Tr. 153; Exc. 679-82] A Guidance, as the name suggests, is intended to guide housing authorities in fulfilling their obligations; it does not have the force of law. [9/24 Tr. 140-41] The 2008 Guidance states that annual inspections may stop after a home "should have been conveyed" (a term that is not defined). [Exc. 681] Whatever the 2008 Guidance meant, it expired in 2010. [Exc. 679, 683] It was replaced by a Guidance issued in 2012, which "modifie[d] and update[d]" the 2008 Guidance. [Exc. 675] The 2012 Guidance remained in effect through 2016. [*Id.*]

The 2012 Guidance states explicitly: "For Mutual Help homes developed under Sec. 202 of the United States Housing Act of 1937 [i.e., 42 U.S.C. § 1437bb] . . . , the recurring inspection obligation expires *when unit ownership is conveyed* to the homebuyer/purchaser." [Exc. 677 (emphasis added)] The 2012 Guidance correctly

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[59] Former 24 CFR § 805.306(d). [R. 2280]

interprets the governing law; the 2008 Guidance did not. By 2008, new housing projects were governed by NAHASDA and the regulations in 24 CFR Part 950. Both maintain the requirement for regular inspections of homes built and owned by a housing authority with HUD funds.[60] No exception exists for houses "eligible for conveyance."

The Housing Authority's claim that it could cease inspecting in 2009 rests on its argument that the Maels' house became eligible for conveyance in 2009 while the 2008 Guidance was in effect. Thus, AVCP RHA argues that its obligation to inspect ended – and the duty did not resume when the 2012 Guidance came into effect. [At. Br. 20 n.45] This position is multiply flawed. As discussed earlier, the house in fact was not eligible to be conveyed in 2009. Further, as the superior court correctly observed, the reading that the 2008 Guidance continued to control makes no legal sense. [9/25 Tr. 56-57] The 2012 Guidance on its face applies to every MHHO Program house still owned by AVCP RHA. [Exc. 675-78] Moreover, a Guidance cannot trump the statute, regulations, and contract language that control the parties' relationship. For sound reasons, these all require regular inspections so long as the Housing Authority continues to own the house, because inspections by the Housing Authority protect both HUD's investment and the house's occupants.[61]

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60 *See* 25 U.S.C. § 4163(b) [R. 2289]; 24 CFR § 950.428(b)(3), (4). [Exc. 242-43; *see also* R. 2287 (reprint of 24 CFR § 950.428(b)(3), (4), showing it unchanged as of 2018)]

61 AVCP RHA has also argued that its inspection obligation should cease after 25 years, because after that time HUD no longer pays it to inspect its properties. [9/25 Tr. 56, 59; At. Br. 20 n.45] HUD's policy not to pay for inspections after 25 years can be seen as an incentive to the Housing Authority to complete the process of transferring ownership when 25 years are up. A key purpose of the MHHO Program – to provide safe housing for low-income families – would be defeated if the Housing Authority unilaterally could

The superior court did not err in concluding that the Housing Authority's duty to inspect continued in 2016.

III. THE SUPERIOR COURT PROPERLY INSTRUCTED THE JURY ON NEGLIGENCE.

AVCP RHA contends that the court erred in instructing the jury that "[n]egligence can be found by a person or entity failing to exercise reasonable care in performing a duty or promise set out in a contract." [At. Br. 35, quoting Exc. 431] The appeal argument essentially restates the argument advanced by AVCP RHA as its Argument I [At. Br. 12-19], to which the Maels responded in their Argument I.

As shown above, the trial court did not err in concluding that the Housing Authority had a duty to act with reasonable care in inspecting the Maels' home while AVCP RHA remained the legal owner. The court was correct that, although the duty to inspect the house and to remedy hazardous conditions arose from the contract between the Housing Authority and Thomas and Rose Mael, failure to fulfill that contract duty with reasonable care was actionable by Dietrich as a tort.[62] Additionally, the duty to inspect and to remedy hazardous conditions was imposed on the Housing Authority by law, independent of the contract.[63] A tort cause of action exists here because common law precedent establishes that, when a duty to inspect exists, it must be fulfilled non-negligently, whether the source

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decide not to bother conveying the house and then use that decision as a basis to stop inspecting the aging home.

62 *See supra* at 12-16.

63 *See supra* at 16-17.

of the duty is a contract, statute or regulation, or the duty was voluntarily assumed.[64]

In short, the jury instruction that AVCP RHA challenges is correct on its face, even if it does not include all the steps of the analysis that lead to the conclusion that AVCP RHA could be held liable to Dietrich for failure to exercise reasonable care in fulfilling the duty to inspect and to remedy hazardous conditions. All steps of the analysis do not need to be explained to the jury. This Court reviews instructions as a whole.[65] As a whole, the instructions are legally correct, and giving Instruction 55 did not allow the jury to find against AVCP RHA on an improper legal basis.

IV. THE SUPERIOR COURT CORRECTLY DENIED THE HOUSING AUTHORITY'S POST-JUDGMENT ATTEMPTS TO OVERTURN THE JURY'S NEGLIGENCE VERDICT.

A. THE SUPERIOR COURT CORRECTLY DENIED THE HOUSING AUTHORITY'S MOTION FOR JNOV ON DIETRICH'S NEGLIGENCE CLAIM.

Following trial, AVCP RHA moved for jnov on a number of grounds [Exc. 447-57], and it renews some of these arguments on appeal. [At. Br. 27-35] It also raises one new argument based on the superior court's explanation for denying jnov. [At. Br. 28, citing 2/26 Tr. 82] None of the appellate claims has merit.

1. The superior court properly denied jnov on the legal question of duty.

AVCP RHA's jnov motion asked, first, that the superior court reconsider its legal ruling that the Housing Authority had an actionable tort duty to inspect the Maels' house

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64 *See supra* at 15.

65 *See Todeschi v. Sumitomo Metal Mining Pogo, LLC*, 394 P.3d 562, 570 (Alaska 2017); *City of Hooper Bay v. Bunyan*, 359 P.3d 972, 978 (Alaska 2015).

non-negligently. [Exc. 449-54] The court declined to reverse its ruling. [Exc. 691-92]

Where, as here, the denial of a jnov motion turns on a legal question, this Court reviews the legal question de novo[66] – and its review therefore should focus on the correctness of the trial court's pre-verdict ruling, not on what the court said in denying jnov. For the reasons set forth in Argument I, this Court should affirm the superior court's conclusion that AVCP RHA had a tort duty to inspect with care, and therefore also affirm the superior court's denial of the part of the jnov motion that asked the court to reverse itself on that legal question.

On appeal, AVCP RHA focuses on isolated sentences in the court's oral ruling denying jnov. [At. Br. 27-30] As shown below, those comments were not error – but, more important, those comments do not much matter. The question before this Court is not whether, post-verdict, the trial court properly explained its pre-verdict ruling on legal duty, but whether that pre-verdict ruling on the law was correct, which it was.

AVCP RHA starts its appellate argument with the claim that, at trial, the Maels abandoned their claim that the Housing Authority failed to inspect with reasonable care and relied solely on their claim that the Housing Authority failed to inspect at all after 2011. [At. Br. 27] AVCP RHA cites nothing that shows this supposed abandonment, and the record refutes it. The Maels' counsel argued to the jury, without objection from AVCP

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66 *See Alaska Interstate Constr., LLC v. Pacific Diversified Investments, Inc.*, 279 P.3d 1156, 1162 (Alaska 2012) (to the extent a ruling on a motion for jnov involves questions of law, this Court reviews those questions de novo); *Alaska Tae Woong Venture, Inc. v. Westward Seafoods, Inc.*, 963 P.2d 1055, 1062 (Alaska 1998) (when a trial court, in ruling on a jnov motion, "chooses among competing legal theories in making its ruling, we review its choice of theory *de novo*").

RHA, that the evidence showed that the Housing Authority failed to exercise care in fulfilling its duty to inspect. [*E.g.*, 9/26 Tr. 139; 9/27 Tr. 14-16, 26, 27]

More important, AVCP RHA's attempt on appeal to distinguish between a duty to inspect regularly and a duty to inspect with care is artificial and unfounded. In this case, in the way the Maels presented their claims to the jury, the Housing Authority's failure to exercise due care in inspection encompassed both its failures related to the nature of the inspections that occurred – for example, the Housing Authority's recurrent failure to have inspectors operate the pressure relief valve to determine whether it was still working as intended [*E.g.*, 9/26 Tr. 139; 9/27 Tr. 14-16, 26-27] – and the Housing Authority's failure to inspect for nearly five years. [*E.g.*, 9/26 Tr. 140; 9/27 Tr. 33] In other words, the Maels contended both that the Housing Authority's cursory visual examinations were negligent inspections (and the cause of harm to Dietrich) because that type of inspection was not a reasonable way to discover whether the boiler posed a hazard to the house's occupants, and that the Housing Authority's failure to send inspectors to the house at all was an even less reasonable way to fulfill a duty of care to inspect and discover hazards so they could be fixed (and this failure also was a cause of Dietrich's injuries). The testimony was clear that, with regular inspections, even without touching the boiler, AVCP RHA personnel would have observed the exterior corrosion and rusting that were clear indicators of a problem with the pressure relief valve, and thus the explosion could have been prevented. [9/20 Tr. 99, 118-19, 134]

AVCP RHA also says that the Maels abandoned reliance on the claim that the Housing Authority voluntarily assumed a duty to inspect. [At. Br. 28] Although this

assertion is superficially accurate, the Housing Authority misapprehends the significance of the Maels' counsel's statement.[67] The Maels withdrew the claim that the Housing Authority *voluntarily* assumed a duty to inspect, because they relied on the contractually-imposed duty to inspect and on the fact that the common law treats breach of a duty to inspect with care as a tort, regardless of the source of the duty.[68]

The Housing Authority asserts that "the duty to inspect with care *is* an assumed duty." [At. Br. 28] But this is wrong. The source of the duty to inspect in a particular case can vary based on the circumstances.[69] The cases that AVCP RHA cites[70] hold that one who voluntarily assumes a duty to inspect must inspect non-negligently; they do not establish that defendants who inspect pursuant to a duty imposed by contract or by law do not also have a duty to inspect with care.

Contrary to the Housing Authority's claim, the trial court did not allow the jury to "infer" a duty." [At. Br. 28-29 (referring to Exc. 692)] In the sentence preceding the one that AVCP RHA quotes in its brief, the judge correctly stated: "The jury doesn't get to

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67 *See also* At. Br. 31 & n.75 (discussing Housing Authority's mistaken view that the trial court conflated concepts of contractual duty and voluntarily assumed duty).

68 9/26 Tr. 34-35, 47-49, 54; *see supra* at 15.

69 This Court in *Interior Regional Housing Authority v. James*, 989 P.2d 145 (Alaska 1999), discussed the possibility that a housing authority might voluntarily assume a duty to inspect and to discover problems with a furnace, but the parties in that case did not suggest that a tort duty could be imposed based on the contract, common law, and/or the governing statute and regulation. *See id.* at 150-51. Nothing in *James* is inconsistent with determining in this case that the duty to inspect was imposed by the contract, the common law, and the applicable statute and regulation.

70 *See* At. Br. 28 n.67, citing *Anderson v. PPCT Mgmt. Sys., Inc.*, 145 P.3d 503, 511 (Alaska 2006); *Bryson v. Banner Health Sys.*, 89 P.3d 800, 805 n.12 (Alaska 2004).

decide whether the duty exists. That's something that I instructed the jury about[.]" [Exc. 692] The record bears this out: the trial court unequivocally determined as a matter of law that AVCP RHA had a duty to inspect annually and to correct hazardous conditions in the house, and that it was required to fulfill these duties with care. The court instructed the jury on these duties. [Exc. 429-31] It directed the jury to find as a question of fact whether the Housing Authority acted with reasonable care. [Exc. 431-33] If, in the sentence the Housing Authority quotes, the trial judge misspoke, the comment in the unscripted remarks explaining the prior ruling is immaterial.[71] Moreover, it is not clear that the judge misspoke. The rambling sentence that AVCP RHA quotes (which is typical of spoken rather than written explanations) must be read in context of both the statements that preceded and followed it. In context, the judge's comments most plausibly mean that he concluded that the facts allowed the jury to find both that the Housing Authority violated the duty that the judge instructed the jurors about and that the violation resulted in injury to Dietrich Mael. [Exc. 692]

The court did not err in denying jnov regarding the legal theory on which it instructed the jury.

2. The superior court properly denied jnov on the factual issue of liability.

AVCP RHA's arguments on this issue begin with the same mistake discussed above – the assertion that the Maels abandoned any claim that the jury could find negligent

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[71] *See supra* at 29 (this Court reviews the underlying legal theory, not the judge's explanation post-verdict).

inspection in addition to or instead of a negligent failure to inspect. [At. Br. 31] As already discussed, in this case the two concepts are closely intertwined.[72] The Maels argued both theories, and the record permitted a reasonable jury to find for plaintiffs on either or both theories.

On appeal, the Housing Authority does not contend that the evidence was insufficient to support a verdict based on a finding that AVCP RHA negligently failed to inspect annually. [At. Br. 31-35][73] Ample evidence at trial supported the finding that the Housing Authority's failure to inspect after 2011 was negligent and a cause of Dietrich's injuries.[74] Thus, this Court need not consider the Housing Authority's arguments related to the alternative ground for finding negligence and causation based on lack of care in the inspections that occurred.

If the Court reaches that issue, it should find that jnov properly was denied on the alternative theory that Dietrich was injured as a result of the Housing Authority's negligence when it did inspect. AVCP RHA's arguments improperly view the record in the light most favorable to itself. [At. Br. 31-35] In the light most favorable to upholding the verdict, the evidence allowed the jury to find that the boiler inspections the Housing Authority conducted before 2012 were negligently done, and this negligence caused

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72 *See supra* at 30.

73 AVCP RHA filed a motion for new trial on that question. The Maels respond to the appeal from the denial of that motion, *infra*, at Argument IV.B.

74 *See infra* at 35-37 (discussing evidence that AVCP RHA was negligent to cease inspecting); 9/20 Tr. 134 (AVCP RHA's representative testified that the explosion would not have occurred if regular inspections had continued).

Dietrich's injuries.

The Housing Authority's inspections indisputably involved only *looking* at the boiler. [9/18 Tr. 155, 172; 9/20 Tr. 114-15] Doing more, such as lifting the lever on the pressure relief valve or disassembling the valve and examining its interior, could indicate to an experienced inspector (though not necessarily to a layperson) whether the pressure relief system was working properly. [9/20 Tr. 138; 9/23 Tr. 44][75] AVCP RHA's expert testified that, if someone's job was to inspect a boiler to determine whether it was operating properly, the inspection normally should include testing the valve, not just looking at it. [9/24 Tr. 77] Further, the jury could find that merely lifting the lever would not have been sufficient inspection of an aging boiler, since that would not necessarily alert the inspector to internal corrosion. [9/23 Tr. 44] The sample pressure relief valve that AVCP RHA brought to court contained a warning label advising that a professional should remove and inspect the valve and its components at least every three years. [*Id.*] The evidence established that AVCP RHA's inspectors never did that. [9/18 Tr. 172; 9/20 Tr. 115; 9/24 Tr. 35] A witness testified that the standard life expectancy of a pressure relief valve is five years. [9/20 Tr. 103-04][76] The Maels' valve was not replaced by the Housing Authority in over 25 years. [9/24 Tr. 20] One AVCP RHA witness testified that experienced inspectors would know that an aging boiler, with an aging pressure relief valve, might be hazardous. [9/24 Tr. 20-21] Another Housing Authority employee

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75 Evidence established that the Maels did not understand the boiler well and were incapable of professional-level diagnosis or repair. [*E.g.*, 9/18 Tr. 54, 156]

76 AVCP RHA is wrong that the record contains no evidence on how long it might take a pressure relief valve to fail. [At. Br. 34]

testified that an unmaintained boiler puts occupants at risk. [9/20 Tr. 106] This evidence gave the jury a sound basis for finding that the Housing Authority's inspections that did occur were negligent and that having the inspectors do nothing more than look at the boiler through 2011 was a substantial cause of the explosion that followed. The trial court did not err in denying the motion for jnov.

B. THE SUPERIOR COURT CORRECTLY DENIED THE HOUSING AUTHORITY'S MOTION FOR A NEW TRIAL ON WHETHER AVCP RHA ACTED NEGLIGENTLY WHEN IT FAILED TO INSPECT AFTER 2011.

The Housing Authority argues in a footnote that, even assuming the duty to inspect continued through 2016, the trial court erred in denying its motion for a new trial on the question whether AVCP RHA's decision to stop inspecting after 2011 was negligent. [At. Br. 42 n.91] This argument relies entirely on the testimony of Bill Nibbelink, AVCP RHA's expert on Indian housing, who stated that, across the country, housing authorities cease inspecting houses when they become eligible for conveyance, based on the 2008 Guidance.[77] That Guidance, of course, was reversed in 2010.[78]

The trial court did not err in denying the motion for new trial. The evidence supporting the jury's finding that AVCP RHA acted unreasonably by ceasing its inspections was not "completely lacking" or "so slight and unconvincing" as to require the trial court to order a new trial.[79] As the jury was correctly instructed, jurors are never

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[77] *See* At. Br. 42 n.91, citing 9/25 Tr. 74-75; *see also* 9/26 Tr. 152-57 (AVCP RHA's closing argument).

[78] The Guidances are discussed in greater detail, *supra*, at 25-26.

[79] *Hunter v. Philip Morris USA Inc.*, 364 P.3d 439, 449 (Alaska 2015) (stating the standard this Court applies when reviewing a denial of a new trial motion).

required to accept the testimony of any witness, including an expert. [R. 1664-66] Jurors here had ample reason not to accept as credible Nibbelink's opinion that AVCP RHA acted reasonably. After Nibbelink opined that no further inspections were required after 2009 [9/24 Tr. 137-41], he was forced to admit that the trial court had ruled as a matter of law that the MHOA required regular inspections until the house was conveyed. [9/25 Tr. 52-60, 71] Having heard Nibbelink acknowledge that a key portion of his testimony was inaccurate and unreliable, the jury reasonably could disregard all of his testimony.[80] Even if the jury believed Nibbelink that all other housing authorities cease inspecting when a house becomes eligible for conveyance, jurors still could have found AVCP RHA acted unreasonably when it failed to continue regular inspections. An industry-wide practice may be unreasonable.[81] The jury had both the 2008 and 2012 Guidances as exhibits, and the attorneys argued about their meaning and significance. [Exc. 675-83; 9/26 Tr. 139, 152-55] Based on the exhibits and the arguments, the jury properly could conclude that the Housing Authority acted unreasonably in adhering to the 2008 Guidance in 2016, when it unquestionably expired in 2010 and was replaced in 2012. Finally, jurors could use their

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80 *See* R. 1665 (superior court gave the standard jury instruction that advised, "[i]f you believe that part of a witness's testimony is false, you may also choose to distrust other parts of that witness's testimony").

81 *See Keogh v. W.R. Grasle, Inc.*, 816 P.2d 1343, 1349 (Alaska 1991) ("It is well-established that . . . industry custom evidence is not conclusive as to liability in tort[.]" (citing *The T.J. Hooper*, 60 F.2d 737, 740 (2d Cir. 1932))); *Northern Lights Motel, Inc. v. Sweaney*, 561 P.2d 1176, 1191-92 (Alaska 1977) ("Even an entire industry, by adopting such careless methods to save time, effort or money, cannot be permitted to set its own uncontrolled standard." (quoting W. PROSSER, THE LAW OF TORTS § 33, at 167 (4th ed. 1971))).

common sense to conclude that an agency that owns a house acts unreasonably when it discontinues inspections when the house and its boiler are over 25 years old, particularly after hearing witnesses, including Housing Authority employees, acknowledge that an uninspected, unmaintained boiler is a ticking time bomb that may severely injure the house's occupants. [9/20 Tr. 118; 9/24 Tr. 35]

The court did not err in denying the motion for new trial.

V. THE SUPERIOR COURT PROPERLY DENIED THE MOTION FOR NEW TRIAL REGARDING WHETHER BURNHAM SUPPLIED A DEFECTIVE BOILER.

AVCP RHA joined Burnham LLC, the manufacturer of the boiler, as a third-party defendant, claiming that Burnham was liable for having manufactured a defective product. [Exc. 6, 9-11] The jury instructions at trial properly advised jurors that they could find the boiler was defective under either of two tests: (1) the boiler failed to perform as safely as an ordinary consumer would expect when used in an intended or reasonably foreseeable manner; or (2) the product's design was a legal cause of injury to plaintiff and the defendant failed to prove that, on balance, the benefits of the design outweighed the risks of danger inherent in the design. [Exc. 426] Guided by these instructions, the jury rejected the Housing Authority's claim that the boiler was defective. [Exc. 433]

AVCP RHA moved for a new trial as to Burnham's liability, alleging that the evidence failed to support the verdict that the boiler was not defective. [Exc. 465-75] The superior court denied the motion. [Exc. 693-95] On appeal, AVCP RHA argues, first, that "uncontradicted evidence at trial proved that the boiler failed to perform as safely as an ordinary consumer would expect when used in an intended or reasonably foreseeable

manner." [At. Br. 40] Second, it argues that, even if the jury could reject that claim, the Maels failed to rebut the Housing Authority's expert's testimony that the benefits of the Burnham boiler's design were outweighed by the risks inherent in the design. [At. Br. 41]

For both arguments, AVCP RHA relies principally on the testimony of its expert witness Steve Virostek. [At. Br. 40-41] Virostek testified to his opinion that the boiler did not perform as safely as an ordinary consumer would expect it to perform when used as intended. [9/24 Tr. 55-56] He also testified that the risks of the design outweighed the benefits. [9/24 Tr. 62-64] In his view, although many boilers use a pressure relief valve similar to the one on the Burham boiler, the design is defective because the valve may fail; he said that other devices not commonly used on boilers, such as a rupture disc, could provide a more reliable pressure relief mechanism. [9/24 Tr. 63-65, 69-70]

The jury did not need to accept either part of Virostek's opinion that the boiler was defective. The jury was instructed without objection that it need not accept the opinion of an expert, even if it is uncontradicted. [R. 1666] The jury here had reasonable bases for not accepting Virostek's opinions.

As a basis for rejecting the claim that the boiler failed to perform as safely as an ordinary consumer would expect, jurors had uncontradicted evidence establishing that Burnham boilers in general, and the Maels' boiler in particular, performed safely for decades.[82] Although Virostek asserted that the boiler was well-maintained as far as he

[82] *See* 9/20 Tr. 133 (expert boiler repairman testified that Burnham boilers in homes around Bethel performed fine "for years, and years, and years" if properly maintained); 9/19 Tr. 137-38 (Rose testified that the family's 30-year-old boiler was working fine before the explosion).

could tell [9/24 Tr. 60-61], a trained repairman testified that the boiler obviously was not well-maintained, and that was the reason for the explosion. [9/20 Tr. 99-100, 132-33] Thus, the jurors could find that the boiler was not maintained. As reasonable, ordinary consumers, the jurors also could find that the ordinary consumer does not expect a complicated piece of machinery to continue functioning indefinitely if it is not maintained. (Even Virostek agreed that devices should be inspected and maintained. [9/24 Tr. 74]) In other words, an explosion after nearly 30 years does not indicate the boiler was defective.

As to the Housing Authority's alternative theory of defectiveness, the jury had two solid bases for rejecting that claim. First, the jury had a sound basis for finding that the design was not the cause of the explosion; rather, as just discussed, testimony supported finding that the explosion occurred because the boiler was not properly maintained. Consequently, the jury did not even need to consider the benefit/risk balance. However, if jurors did examine that issue, they had a sound basis for rejecting Virostek's opinion that the risks outweighed the benefits of the design. After stating his conclusory opinion that the boiler was defectively designed, he declined to opine that AVCP RHA should replace all the Burnham boilers it had installed. [9/24 Tr. 79] And he stopped short of saying that the alternative device he mentioned, a rupture disc, *would* be more reliable or that manufacturers *should* use them.[83] Testimony of other witnesses also undermined Virostek's opinion. Uncontested evidence established that AVCP RHA had installed

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[83] Virostek testified, "There are other devices that can provide pressure relief that may not have some of the same issues that this one had." [9/24 Tr. 69] He continued, "I'm not testifying that it should've been done," nor was he saying that the boiler was defective because it did not have a rupture disc. [9/24 Tr. 70-71]

hundreds of Burnham boilers in homes in Western Alaska, and it selected another Burnham boiler with the same type of valve to replace the one that exploded. [9/20 Tr. 118; *see also* 9/18 Tr. 60 (19 other homes in Chefornak had Burnham boilers); 9/20 Tr. 137 (Burnham boilers are prevalent in Western Alaska)][84] An AVCP RHA inspector testified that no one had told him that Burnham boilers are defective and should all be replaced. [9/24 Tr. 43] The jury could infer from AVCP RHA's actions that, outside of the trial, even AVCP RHA did not regard the boilers as defectively designed.

Given the testimony that the trial judge outlined [Exc. 693-95], the evidence supporting the verdict was not so completely lacking or so slight and unconvincing as to require granting a new trial as to Burnham's liability.[85]

VI. ANY ERROR IN THE SUPERIOR COURT'S RULING ADMITTING MEDICAL RECORDS WAS HARMLESS.

During trial, Dietrich Mael's experts Dr. Donald Lehman and Jill Friedman testified about Dietrich's medical condition, referring in detail to the medical records they reviewed when developing their expert opinions. [9/18 Tr. 112-15, 138-40; 9/19 Tr. 8-23] AVCP RHA's counsel then cross-examined the experts and Dietrich by referring to certain pages

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84 The Housing Authority's designated representative under Civil Rule 30(b)(6) also testified to his opinion that the boiler was not defectively designed. [9/20 Tr. 100, 132-33] AVCP RHA objected to this opinion testimony at trial, but on appeal challenges its weight rather than its admissibility. [At. Br. 41-42] Once the testimony was admitted, the jury could accept the opinion as evidence supporting the finding that the boiler was not defective. Even if the testimony was improperly allowed, the judge ruled post-trial that the error would not have substantially affected the jury. [Exc. 694-95] AVCP RHA has not challenged that conclusion on appeal.

85 *See Hunter*, 364 P.3d at 449.

of the medical records. [9/18 Tr. 119-21, 124-29, 133; 9/19 Tr. 37-55; 9/20 Tr. 39-54] The witnesses and the attorneys treated the records as accurate business records. The Housing Authority's own expert also based a large part of his testimony on his review of the medical records. [9/25 Tr. 85, 88-89, 93-96, 98-99, 108-09, 119]

Following the testimony of plaintiffs' witnesses, the Maels' counsel moved to admit the medical records as exhibits. [9/23 Tr. 4-5] Over objection by the Housing Authority, the court admitted the medical records as business records, without requiring the Maels to call a records custodian to lay the standard, formal foundation. [9/23 Tr. 6-9; *see* R. 3912-4109, 4112-4525 (Exhibits 1 & 3)]

Neither at trial nor on appeal did AVCP RHA contend that the records submitted are not accurate or authentic copies or that they do not qualify as business records. The objection was – and is – purely the technical one that medical records, as business records, should not be admitted without a records custodian answering five formulaic questions. [9/23 Tr. 6; At. Br. 48-50]

Even if the trial court abused its discretion by opting to streamline the trial and not to require the Maels to present one or more records custodians, AVCP RHA has not shown that any error in admitting the records as exhibits affected the outcome of the trial; it has not even seriously attempted to make this showing. [At. Br. 48-50]

As appellant, the Housing Authority has the burden of proving both error and prejudice.[86] An evidentiary error is harmless, and will not support reversing a verdict,

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[86] Alaska Civ. R. 61 ("No error in . . . the admission . . . of evidence . . . is ground for granting a new trial . . . or for vacating, modifying or otherwise disturbing a judgment or

unless the appellant shows, from the entire record, that the erroneously admitted evidence appreciably affected the verdict.[87] Here, the medical records could not possibly have affected the liability verdicts. In theory, something in the medical records might have affected the jury's determination of damages – but AVCP RHA has not offered any theory of what the effect might have been. The fact that Dietrich was badly injured and remained in excruciating pain was obvious and uncontested: even the defense expert acknowledged he was in real pain. [9/25 Tr. 109-10][88]

AVCP RHA does not highlight anything that the jury might have discovered in the records that no witness testified about. [At. Br. 48-50] Its prejudice argument is contained in a single sentence that refers to the volume of the records, not their contents. [At. Br. 50] However, the fact that voluminous medical records existed was easily inferred from the

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order, unless refusal to take such action appears to the court inconsistent with substantial justice."); *Municipality of Anchorage v. Devon*, 124 P.3d 424, 432 (Alaska 2005) (even assuming admission of medical records was error, appellant must prove it was prejudiced by the error); *Zerbinos v. Lewis*, 394 P.2d 886, 889-90 (Alaska 1964) (appellant has burden of proving both error and prejudice); *see also Dobos v. Ingersoll*, 9 P.3d 1020, 1023 (Alaska 2000) ("We reverse only if upon review of the record as a whole, we are left with a firm and definite conviction that the trial court erred in its ruling and the error affected the substantial rights of a party." (footnote omitted)).

[87] *Devon*, 124 P.3d at 432 (citing, *inter alia*, *Wyatt v. State*, 981 P.2d 109, 115 (Alaska 1999) ("A non-constitutional error is harmless if it did not 'appreciably affect the jury's verdict.'")); *see Dobos*, 9 P.3d at 1024 ("Under the harmless error test the members of this court must necessarily put themselves, as nearly as possible, in the position of the jury in order to determine whether, as reasonable [people], the error committed probably affected the verdict." (internal quotation marks and footnote omitted)); *Love v. State*, 457 P.2d 622, 629-32 (Alaska 1969) (appellant claiming evidentiary error must establish that the erroneous admission of evidence appreciably affected the verdict).

[88] Testimony describing Dietrich's excruciating pain and the lengthy, unsuccessful history of medical treatment included 9/18 Tr. 112-14, 166; 9/19 Tr. 9-25, 191; 9/20 Tr. 29-35, 37, 63; 9/25 Tr. 109-10, 124-25, 162-63, 177-78.

testimony: Hundreds of pages of records would be generated for any person who was hospitalized for a week and had many follow-up appointments, as Dietrich did. The Housing Authority's expert brought the pile of medical records to the stand and agreed there were around 600 pages. [9/25 Tr. 108] The records themselves were cumulative of the testimony. Cumulative evidence is not prejudicial.[89]

If error, the admission of the medical records was harmless and does not support reversing the judgment.

VII. THE STATUTORY DAMAGES CAP ON NON-ECONOMIC DAMAGES APPLIES SEPARATELY TO CLAIMS FOR NEGLIGENT INFLICTION OF EMOTIONAL DISTRESS.

Alaska Statute 09.17.010 sets caps on the amount that may be awarded for non-economic damages in an action for personal injury or wrongful death. In broad terms, the statute limits non-economic damages in most cases to $400,000, and to $1,000,000 when damages are awarded for severe permanent impairment.[90]

The jury awarded Dietrich $1,580,000 in non-economic damages, which the trial judge reduced to $1,000,000. [Exc. 435, 687] That reduction is at issue in the cross-appeal, but for purposes of the present brief the Maels will assume that the statute capped the non-economic damages award to Dietrich at $1 million.

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89 *See Devon*, 124 P.3d at 432; *Fairbanks N. Star Borough v. Tundra Tours, Inc.*, 719 P.2d 1020, 1035 (Alaska 1986); *Jackson v. White*, 556 P.2d 530, 534 n.13 (Alaska 1976); *see also Dobos*, 9 P.3d at 1025 (erroneous admission of hearsay was harmless where the statement played a very small part in the trial and other evidence supporting the evidence was strong).

90 *See* AS 09.17.010(a)-(c).

The jurors also awarded $50,000 each to Dillon, Erica, and Rose on their claims of negligent infliction of emotional distress ("NIED"), and $25,000 to Thomas, who, unlike the other three, was not in the house when the boiler exploded but ran there within minutes because he heard the explosion. [Exc. 435] In post-verdict briefing, AVCP RHA asked the trial court to include these awards for non-economic damages within the same cap that applied to Dietrich – so that the non-economic damages awarded to all family members would total $1 million and not more. [Exc. 458-62, 569-72] The trial court denied that motion, based on its reading of the statute. [Exc. 684-85; 2/26 Tr. 74]

This Court should affirm the superior court's conclusion that AS 09.17.010 does not require aggregating and capping at $1 million the non-economic damages awarded to all the plaintiffs in this case. The plain reading of the statute, as well as the purposes of the statute and the relevant case law,[91] all support treating the individual plaintiffs' NIED claims separately and not subject to a common cap.

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."[92] In support of its argument that this language requires subjecting all of the Maels' claims to a single damages cap, AVCP RHA relies largely on two cases [At. Br. 44-47] – but neither supports the result the

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[91] In construing any statute, this Court considers the plain language of the statute, relevant legislative history, relevant past cases, and the policy underlying the statute. *See Cox v. Estate of Cooper*, 426 P.3d 1032, 1035 (Alaska 2018); *Central Recycling Servs., Inc. v. Municipality of Anchorage*, 389 P.3d 54, 57 (Alaska 2017). This Court adopts the interpretation most consistent with "reason, practicality, and common sense." *Cox*, 426 P.3d at 1035.

[92] AS 09.17.010(b).

Housing Authority urges.

Chronologically first was *C.J. v. State, Department of Corrections.*[93] There, this Court held that a woman who was raped three ways in a single, ongoing attack was the victim of three separate torts; interpreting AS 09.17.010(d), the Court called each type of sexual penetration a separate "incident."[94] Because each incident caused distinct injuries, this Court held that the victim was entitled to a separate award of non-economic damages, up to the statutory cap, for each assault.[95] The Court observed that the damages cap statute is in derogation of the common law and therefore the Court "must construe it narrowly so as to effect the least possible change in the common law."[96] As applied to the current case, *C.J.* supports the superior court's reading of the statute. If each separate act of penetration was a separate incident, then the boiler explosion, followed by each family member's separate act of witnessing Dietrich, each at a slightly different moment after the explosion, must all be considered separate incidents, each subject to its own damages cap.[97]

The second case the Housing Authority cites, *L.D.G., Inc. v. Brown,*[98] was a wrongful death case, where the woman who died left two dependent sons. This Court

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93 151 P.3d 373 (Alaska 2006).

94 *Id.* at 382.

95 *See id.* at 382-84.

96 *Id.* at 383 n.52.

97 *See also State Farm Mut. Auto. Ins. Co. v. Dowdy*, 192 P.3d 994, 999 (Alaska 2008) (parents who asserted NIED claims after witnessing their daughter's serious injuries were not injured in the "same accident" as their daughter).

98 211 P.3d 1110, 1117 (Alaska 2009).

affirmed the superior court's determination that the non-economic damages cap applied to the aggregate award to both children.[99] As this Court explained, the sons' non-economic damages awards were for loss of consortium, which were derivative of the single death caused by the accident.[100] This holding was mandated by the explicit statutory language declaring that loss of consortium claims are claims "arising out of" a death.[101]

NIED claims are different from loss of consortium claims. An NIED claimant's damages do not derive from or arise out of the injury to another in the same way that a family member's loss of consortium claim arises from the injury to the person who was hurt or killed. While declaring that loss of consortium claims are derivative, this Court has said that NIED claims are not derivative, since they concern injuries the NIED plaintiff suffered directly.[102]

The derivative nature of loss of consortium claims means these types of claims must be joined with the negligence claim on behalf of the injured or deceased relative.[103] By

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99 *See id.* at 1133-35.

100 *See id.* at 1135.

101 AS 09.17.010(b).

102 *See State Farm Mut. Auto. Ins. Co. v. Lawrence*, 26 P.3d 1074, 1078-79 (Alaska 2001); *but see Schack v. Schack*, 414 P.3d 639, 643 (Alaska 2018) (calling the *Lawrence* statement dicta). Other state courts agree that NIED claims are not derivative of the tort claim brought on behalf of the physically injured relative. *See, e.g., Finnegan ex rel. Skoglind v. Wisc. Patients Compensation Fund*, 666 N.W.2d 797, 805 (Wisc. 2003); *see also* cases cited *infra* at n.111.

103 *See Schreiner v. Fruit*, 519 P.2d 462, 466-67 (Alaska 1974) (spouse's loss of consortium claim must be joined with claim by injured spouse); *Hibpshman v. Prudoe Bay Supply, Inc.*, 734 P.2d 991, 997 (Alaska 1987) (child's loss of consortium claim must be joined with claim of the injured parent whenever feasible); AS 09.55.580 (defining claims

contrast, NIED claims may be brought separately and may be filed even if the physically injured relative does not sue at all.

To treat awards to an injured plaintiff and his relatives asserting NIED claims as subject, in the aggregate, to a single statutory cap would lead to nonsensical and undesirable results. For example, a 12-year-old child who suffers severe emotional distress by witnessing an accident that seriously injures her parent has eight years from the accident to bring her suit for NIED, while the injured parent has only two years to assert tort claims.[104] If the parent brings a timely suit and receives an award at or near the statutory cap for his or her own non-economic damages, then few if any dollars would be available to the child when she brings her timely NIED suit years later, if a single cap applies. Nothing in the legislative history suggests an intent to deprive any child of the right to recover for damages she can prove in a timely suit.

The caps were enacted as part of an omnibus "tort reform" bill.[105] The legislature's stated purposes were to discourage frivolous litigation and to decrease the cost and complexity of litigation "without diminishing the protection of innocent Alaskans' rights to reasonable, but not excessive, compensation for tortious injuries, caused by others."[106] To deny, or sharply limit, compensation for severe emotional distress to a child who files

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of statutory beneficiaries in a wrongful death case and how they must be brought in one action by the administrator of the estate).

104 *Compare* AS 09.10.140(a) *with* AS 09.10.070(a).

105 *See* 1997 SLA, ch. 26.

106 *Id.* § 1(1).

after the severely injured adult relative would disserve these goals.

The same is true when NIED claimants file simultaneously with their injured relative: the policy to protect their right to reasonable compensation is disserved if they are effectively precluded from recovering for their own distress because their relative was so grievously injured as to be awarded non-economic damages equal to the statutory cap. Illogically, bystanders who observe a less seriously injured relative would be more likely to receive fair compensation for their injuries than bystanders who witness a terrible accident that horrifically injures a relative.

AVCP RHA cites to the legislative history, as this Court did in *L.D.G.*,[107] but, unlike in *L.D.G.*, the legislative history does not support the result the trial defendant urges. The legislative history includes two essentially identical sectional analyses prepared for the legislature; these describe the caps on non-economic damages as "per occurrence, and not per claimant"[108] – but the phrase "per occurrence" does not appear in the bill, and the sectional analysis was not formally adopted by the legislature.[109] Assuming that the legislature meant to cap for all claimants the total award for non-economic damages

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107 *See* 211 P.3d at 1135, referring to Minutes, Senate Rules Comm. Hearing on HB 58 (Apr. 15, 1997) (statement by Rep. Porter).

108 *See* Folder on HB 58, Draft: Sectional Summary of Senate CS for CS for SS for HB 58 § 9 (Apr. 15, 1997); Draft: Sectional Summary for RLS C.S. § 9 (Apr. 16, 1997).

109 Neither does there appear to have been discussion of the phrase. The legislature held 12 committee hearings on HB 58. Apart from Rep. Porter's summary of the sectional analysis (Minutes, Senate Rules Comm. Hearing at No. 75 (Apr. 15, 1997)), there was no discussion of how that phrase should be applied. *See generally* *http://www.akleg.gov/basis/Bill/Detail/20?Root=HB 58* (links to "Minutes").

"arising out of a single injury or death," this still leaves open the question whether damages for NIED "aris[e] out of" the injury or death of the relative, or whether, as this Court has stated, NIED damages arise out of a separate accident, when the NIED claimant witnesses the aftereffects of the tort that injured her relative.[110]

"Per occurrence" is a term frequently used in the insurance industry – and numerous cases address the specific language of a specific policy to determine what coverage is available. None of these cases is of much help in interpreting a statute that does not use the term "occurrence," but to the extent the Court chooses to consider the insurance-policy cases that AVCP RHA cites on appeal [At. Br. 46 n.106], those cases actually favor the statutory interpretation that the Maels urge. Consistent with this Court's cases, the cited cases all hold that an NIED claim is an independent, direct claim, not a derivative claim resulting from the injury to another.[111] Accordingly, each holds that the "per occurrence" limit, rather than the "per person" limit, applies. In their recognition that bystanders' NIED claims are individual claims, not part of the claim of the person who was severely physically injured, those cases support the same conclusion here: the NIED claims of Erica, Dillon, Rose, and Thomas are individual claims, not "arising out" of Dietrich's injuries, and therefore the limit on Dietrich's damages does not also apply to the independent claims of other family members.

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110 *See Dowdy*, 192 P.3d at 999.

111 *See Pekin Ins. Co. v. Hugh*, 501 N.W.2d 508, 511-12 (Iowa 1993); *Crabtree v. State Farm Ins. Co.*, 632 So. 2d 736, 738-42 (La. 1994); *Auto Club Ins. Ass'n v. Hardiman*, 579 N.W.2d 115, 117-18 (Mich. App. 1998); *Wolfe v. State Farm Ins. Co.*, 540 A.2d 871, 873 (N.J. A.D. 1988).

For all these reasons, this Court should affirm the superior court's conclusion that the awards for NIED to other family members should not be aggregated with Dietrich's non-economic damages for purposes of determining the maximum award allowed by the statutory caps.

CONCLUSION

This Court should reject AVCP RHA's arguments and should affirm in all respects the portions of the judgments the Housing Authority has appealed.

Respectfully submitted, this __ day of February, 2021.

/s/ Susan Orlansky	/s/ Russell L. Winner	/s/ Myron Angstman
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