20.18A AVOIDABLE CONSEQUENCES

The plaintiff is not entitled to be paid for any loss or for part of any loss (he) (she) could have avoided with reasonable efforts and without undue risk, hardship or embarrassment, even though the loss originally resulted from an act or omission for which the defendant is legally responsible. If you decide that it is more likely true than not true that the plaintiff could have avoided any loss or part of any loss with reasonable efforts and without undue risk, hardship or embarrassment, you may not require the defendant to pay the amount the plaintiff could have reasonably avoided.

[In these instructions I have asked you to decide in two separate contexts whether the plaintiff's actions were reasonable and I want to make sure you understand the difference. Earlier I told you how to decide whether the plaintiff's failure to use reasonable care caused plaintiff's loss. If you decide it did, you were asked to compare the plaintiff's negligence with the negligence, if any, of the defendant. Now I am asking you to decide whether after the loss occurred, the plaintiff failed to use reasonable efforts to minimize or avoid the loss. If you decide (he) (she) did, then you may not compensate for the loss which could have been reasonably avoided.]

# Use Note

This instruction should be used only where it is claimed that the plaintiff failed to mitigate damages.

The second bracketed paragraph may be given in cases where both comparative negligence and the rule of avoidable consequences are raised.

Instruction 20.18B should be used when the plaintiff claims avoidance expenses.

See Instruction 24.10 for the rule of avoidable consequences in a contract action.

In cases governed by AS 09.17 et seq., failure to mitigate is treated as “fault,” AS 09.17.900, and must be apportioned pursuant to AS 09.17.080. In such a case, the following instruction should be substituted for the one above:

The plaintiff is not entitled to be paid for any loss or for part of any loss (he) (she) could have avoided with reasonable efforts and without undue risk, hardship or embarrassment, even though the loss originally resulted from an act or omission for which the defendant is legally responsible. If you decide that it is more likely true than not true that the plaintiff could have avoided any loss or part of any loss with reasonable efforts and without undue risk, hardship or embarrassment, then you must assign a percentage of fault to the plaintiff equal to the percentage of the damages caused by the plaintiff’s failure to do so.

# Comment

The Alaska Supreme Court has recognized the basic principle that a plaintiff with an otherwise valid right of action may not recover for losses resulting from failure to use reasonable efforts to avoid or prevent them. This rule applies whether the action is in tort or breach of contract and is known as the avoidable consequences rule. Anchorage Independent School District v. Stephens, 370 P.2d 531, 533 (Alaska 1962). The determination of whether the plaintiff’s mitigation efforts were reasonable is normally an issue of fact for the jury to decide. Murray E. Gildersleeve Logging Co. v. Northern Timber Corp., 670 P.2d 372, 380 (Alaska 1983).

The court has approved instructions on the duty to mitigate losses arising out of torts. See ERA Helicopters, Inc. v. Digicon Alaska, Inc., 518 P.2d 1057, 1059 n.2 (Alaska 1974) (property damage), and Irving v. Bullock, 549 P.2d 1184, 1186 n.2 (Alaska 1976) (personal injury).

Instructions on the duty to mitigate damages are not given in every case, but are given only when there is sufficient evidence to suggest that the plaintiff may have breached this duty. See Spruce Equipment Co. v. Maloney, 527 P.2d 1295, 1301-02 (Alaska 1974); Irving v. Bullock, 549 P.2d at 1186-87. See also Alaska Children’s Services, Inc. v. Smart, 677 P.2d 899, 903 (Alaska 1984).