ALASKA False Arrest and False Imprisonment

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Civil Pattern Jury Instructions

The Alaska Civil Pattern Jury Instructions were drafted by University of Virginia Professors Harvey S. Perlman and Stephen A. Saltzburg in 1981 under contract to the Alaska Court System. The instructions were reviewed and edited by a committee of lawyers and judges appointed by the Alaska Supreme Court. The Civil Pattern Jury Instructions Committee continues to meet monthly to review and revise the instructions. Please contact Hanley Robinson with questions or comments about these instructions:

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15.01 False Imprisonment – Other than False Arrest

In this case, the plaintiff (name) claims that the defendant (name) improperly interfered with the plaintiff's right to be free from confinement.

In order for the plaintiff to establish this claim, you must decide that the following four things are more likely true than not true:

(1) The defendant did something or said something which resulted in the plaintiff being confined; and

(2) The defendant acted with the intend to keep the plaintiff confined; and

(3) The plaintiff knew of the confinement [or was seriously harmed by the confinement]; and

(4) The plaintiff did not [consent] [and/or say anything or do anything to cause the defendant reasonably to believe the plaintiff consented] to being confined.

I will now explain to you some of the words I just used.

Use Note

This instruction should be used in false imprisonment cases other than those involving arrest. For arrest cases, use Instructions 15.03 – 15.05. This instruction must be followed by Instruction 15.02A and 15.02C.

Comment

Alaska case law recognizes the tort of false imprisonment. Malvo v. J.C. Penney Co., Inc., 512 P.2d 575 (Alaska 1973); City of Nome v. Ailak, 570 P.2d 162 (Alaska 1977). In neither case did the Alaska Supreme Court detail the elements of the tort, although there is nothing to suggest that Alaska would depart from the established traditional rules. This instruction is based on Restatement (Second) of Torts § 35-45A (1965). See also, Prosser, Torts § 11 (1971).

Restatement (Second) of Torts § 42 requires the plaintiff know of the confinement or be harmed by it. There is little case law on whether a person may recover where the person is harmed by but does not know of the confinement. The "harmful" language is bracketed to suggest caution should such a case arise.

The Alaska Supreme Court has held that false arrest is one method of effectuating a false imprisonment and that a plaintiff may not recover under both claims. City of Nome, 570 P.2d at 168.

In City of Nome, 570 P.2d at 169-70, the court recognized that the consent of the plaintiff to the confinement would bar recovery. The Alaska court has not clearly stated who bears the burden of proof on the issue of consent. The Restatement provides that for invasions of personal security, as distinguished from property interests, the plaintiff must show the absence of consent. Restatement (Second) of Torts § 10.

In arrest cases, the primary issue is whether there is an arrest. Once an arrest is made, the voluntary submission to the custody of the defendant will not defeat a false arrest claim if probable cause is lacking. This result is suggested in City of Nome, 570 P.2d at 170.

The borderline between consent which bars recovery and consent resulting from duress which does not is not easily drawn in false imprisonment cases. In the absence of Alaska law, no attempt is made to propose an instruction for this issue. It should be noted, however, that if the confinement is accomplished by state or local officials, unless they have a warrant they almost certainly will have to show consent to

justify their actions. See generally Schneckloth v. Bustamonte, 412 U.S. 218 (1973).

15.02A Nature of Confinement

The first word I will define for you is "confined." The plaintiff is confined if the plaintiff is kept from leaving any identifiable area. [The area need not have been a jail or a room, but it cannot have been so large that the plaintiff was not really confined in an area but rather was excluded from some other area.]

The plaintiff is not confined in an area if the plaintiff knows of a reasonably way to leave the area.

Use Note

This instruction should follow Instruction 15.01.

Comment

Restatement (Second) of Torts § 36 Comment (b) (1965) draws the distinction between confinement and exclusion and suggests it is a matter "for the judgment of the court or jury." The bracketed sentence could be used to submit the issue to the jury when the issue is raised. There is no Alaska case law that speaks to the issue.

The last sentence of this instruction expands on the concept of confinement which in most cases is self-evident. There are, however, cases where the confinement is complete only as to the plaintiff viewed subjectively, i.e., an open window accessible to a normal person but not to the arthritic plaintiff, or whether confinement is not the result of

physical barriers, i.e., the defendant leaves a door open but takes the plaintiff's clothes. See Restatement (Second) of Torts § 36 (1965).

15.02B CONFINEMENT DEFINED – WITHDRAWN

Use Note

This instruction has been incorporated as part of Instruction 15.02A, and is therefore withdrawn as a separate instruction.

15.02C INTENT DEFINED

The second word I will define for you is "intent." The defendant acts intentionally is the defendant desires to confine the plaintiff, or the defendant believes that it was substantially certain that the defendant's acts would result in plaintiff's confinement. The defendant's actions may be intentional even if not malicious or the result of hostile feelings toward the plaintiff.

Use Note

This instruction must follow Instruction 15.01 and 15.02A. Where the defendant claims a privilege, Instructions 15.06 and/or 15.08 should follow this instruction.

Comment

There is no Alaska case law defining intent in a false imprisonment case. This instruction is derived from Instruction 12.03C (Assault or Battery – Intent).

15.03A False Arrest – Arrest Without Warrant; Fact of Arrest Contested

In this case, the plaintiff (name) claims that the defendant (name) improperly arrested the plaintiff.

In order for the plaintiff to establish this claim, you must decide that it is more likely true than not true that the defendant arrested the plaintiff. The defendant arrested the plaintiff if you decide it is more likely true than not true that the following things happened:

[Insert evidence of facts which, if true, would establish an arrest.]

If you decide this is true, [you must return a verdict for the plaintiff] [you must decide whether the law allowed the defendant to make the arrest]. Otherwise you must [determine whether plaintiff was confined in some other way] [return a verdict for the defendant].

Use Note

The tort of false imprisonment generally protects a person's right to be free from an unlawful "confinement." (See Instruction Number 15.02A.) An arrest is one way in which to effectuate the "confinement." Thus, where an arrest occurs, "confinement" is presumed. Where it is questioned whether an arrest actually occurred and where it is later determined that an arrest in fact did not occur, the plaintiff may still seek to prove that an unlawful "confinement" occurred by some other means. Accordingly, caution must be exercised drafting instructions which conform to plaintiff's theories of liability.

This instruction should be used in cases where the plaintiff asserts false imprisonment by means of an arrest without a warrant and the fact of

the arrest is contested. It applies to arrests by citizens as well as by peace officers.

Where the fact of an arrest is not contested, use Instruction 15.03B.

Where the defendant claims the arrest was lawful, use Instruction 15.04 after this instruction.

Where a plaintiff seeks to prove a false arrest and, if it is later determined that an "arrest" did not actually occur, seeks to prove that a confinement occurred in some other way, use both Instruction Numbers 15.01 and 15.03A.

Where a detention short of an arrest occurs and where the defendant peace officer claims that such detention was lawful, use Instruction 15.06 after Instructions 15.01, 15.02A, 15.02C and this instruction.

Comment

False arrest and false imprisonment are not separate torts. A false arrest always amounts to a false imprisonment. City of Nome v. Ailak, 570 P.2d 162 (Alaska 1977). The elements of a false arrest claim are: (1) a restraint upon plaintiff's freedom (2) without proper legal authority. Hazen v. Municipality of Anchorage, 718 P.2d 456, 461 (Alaska 1986).

An "arrest" is defined by two Alaska statutes. AS 12.25.160 provides: "Arrest is the taking of a person into custody in order that he may be held to answer for the commission of a crime." AS 12.25.050 provides: "An arrest is made by the actual restraint of a person or by his submission to the custody of the person making the arrest." It is not clear whether the issue of what constitutes an arrest in a civil context of a false imprisonment case is for the court or jury. The court in City of Nome v. Ailak, 570 P.2d at 169, recognizes some role for the jury. However, it is not clear whether the jury should be instructed generally as to a definition of arrest or whether the jury should only resolve factual

disputes. In many cases, there exists a tension between allowing the jury to determine whether an arrest occurred and allowing the court to exercise control over this determination. If a timely jury demand is made, a party has a right to have factual disputes resolved by the jury. On the other hand, where there is a question of whether an arrest occurred, the court may need to exercise more control over the question because a defendant's claim of privilege will differ depending on whether an arrest occurred (Instruction 15.04) or whether a detention short of arrest occurred (Instructions 15.06 and 15.08). See Terry v. Ohio, 392 U.S. 1 (1968).

The instruction, like the pattern jury instructions in California (BAJI 7.60) and New York (PJI 3:5), is drafted to provide the jury with an opportunity to resolve factual disputes necessary for the court to determine whether an arrest was in fact made. As in the case of determining reasonable cause, special interrogatories directed at facts necessary to create an arrest may be advisable. See Comment to Instruction 15.05.

The Alaska Court has not indicated specifically who has the burden of proof that an arrest was lawful. The general rule in other jurisdictions is that an allegation by the plaintiff of an arrest without a warrant followed by damage is sufficient and that the defendant has the burden of showing the arrest was lawfully authorized. See Kaufman v. Brown, 93 Cal. App. 508, 209 P.2d 156 (1949); Brown v. Meier & Frank Co., 160 Ore. 608, 86 P.2d 79 (1939). This is clearly the case now in warrantless arrest cases when suppression is sought. See Saltzburg, Standards of Proof and Preliminary Questions of Fact, 27 Stan. L. Rev. 271 (1975). Language in City of Nome, supra at 170, might suggest that the burden rests on the plaintiff to show an absence of probable cause. The court approved an instruction it interpreted to require "the jury to find both an involuntary entry and an absence of probable cause" to find for plaintiff. The jury instructions reviewed in the case apparently did not specify who had the burden of proof. 570 P. 2d at 169 n.14. The Court's concern was merely to demonstrate that lack of probable cause and consent were two separate issues. In the absence of a clear holding, this instruction

assumes the plaintiff has only the burden of showing an arrest without a warrant was made.

No provision directed at "consent" is included in this instruction. Proof of an arrest would seem to negate any voluntary submission of the plaintiff to the custody of the defendant. Any issue of consent would be included as part of the insertion directed at the issue of whether thee was an arrest. See generally Restatement (Second) of Torts § 41 (1965).

15.03B FALSE ARREST–ARREST WITHOUT WARRANT; FACT OF ARREST NOT CONTESTED

In this case, the plaintiff was arrested by the defendant. The plaintiff claims the arrest was improper.

You must decide whether the law allows the defendant to make the arrest.

Use Note

This instruction should be used in cases where the plaintiff asserts false imprisonment by means of an arrest without a warrant, and the fact that an arrest occurred is not contested. This instruction applies to arrest by citizens as well as by peace officers.

Where the fact of an arrest is contested, use Instruction 15.03A.

Instruction 15.04 should be used after this instruction.

Comment

See Comment to Instruction 15.03A.

15.04 False Arrest – Privilege of Peace Officer or Private Citizen to Arrest Without Warrant

The defendant claims that the arrest of the plaintiff was privileged. In order for the defendant to establish this claim, you decide it is more likely true than not true that:

(here set forth the evidence of facts which, if true, would establish reasonable cause for the defendant to believe that the plaintiff was committing or was attempting to commit a misdemeanor in the defendant's presence or that the defendant had reasonable cause to believe that the plaintiff had committed a felony as a matter of law.)

If you decide the law allows the defendant to arrest the plaintiff, you must return a verdict for the defendant. If you decide otherwise, you must return a verdict for the plaintiff.

Use Note

This instruction should be used where the defendant asserts a privilege to arrest. It applies to both peace officers and private citizens. It should follow Instruction 15.03.

This instruction is designed to encompass only the most common instances of arrest without a warrant. Alaska law authorizes warrantless arrests in specific contexts not covered by this instruction. See AS 12.25.030(b) (1985 Supp.) (assault against member of household); AS 12.25.033 (1978 Supp.) (arrest in certain motor vehicle offenses).

The Alaska Supreme Court has held that where there is no factual dispute, what constitutes reasonable cause to make an arrest is a matter of law to be decided by the court. City of Nome v. Ailak, 570 P.2d 162 (Alaska 1977). This instruction submits to the jury conflicts over facts that if true would establish reasonable cause.

In complex cases, the court should submit special interrogatories to determine the juries factual findings necessary to support a legal conclusion of reasonable cause. See, Malvo v. J.C. Penney Co., Inc., 512 P. 2d 575 (Alaska 1973), suggesting the "best method" of instructing the jury in an analogous situation is by using special interrogatories.

Comment

As a defense to an action for false arrest, a peace officer or private citizen may assert a privilege to arrest. The power of a peace officer or private citizen to make an arrest without a warrant in Alaska is governed by AS 12.25.030 (Supp. 1985). The Alaska Court has assumed that the statutory provision applies to civil false arrest cases. City of Nome v. Ailak, 570 P.2d 162 (Alaska 1977). The general provisions of the statute read as follows:

(a) A private person or a peace officer without a warrant may arrest a person

(1) for a crime committed or attempted in his presence;

(2) when the person has committed a felony, although not in his presence;

(3) when a felony has in fact been committed, and he has reasonable cause for believing the person to have committed it.

(b) In addition to the authority granted under (a) of this section, a peace officer without a warrant may arrest a person when the peace officer has reasonable cause for believing that the person has committed

a crime under AS 11.41, AS 11.46.330 or AS 11.61.120, or has violated an ordinance with elements substantially similar to the elements of a crime under AS 11.41, AS 11.46.330, or AS 11.61.120, when the victim is a spouse or a former spouse of the person who committed the crime; a parent, grandparent, child or grandchild of the person who committed the crime; a member of the social unit comprised of those living together in the same dwelling as the person who committed the crime; or another person who is not a spouse or former spouse of the person who committed the crime but who previously lived in a spousal relationship with the person who committed the crime.

The statute is ambiguous when read in the context of constitutional limitations on the law of arrest and the common law background for arrest powers. Alaska case law does not resolve these ambiguities and thus this instruction must be used with caution.

Subsection (a) of the statute purports to authorize arrests without warrants by both peace officers and private citizens in three circumstances. Subparagraph (1) applies to both felony and misdemeanor offenses committed in the presence of the arresting party. Although the statute on its face does not specify a probable cause test, the Alaska Supreme Court has read into arrests under subparagraph (1) a provision of probable or reasonable cause. Howes v. State, 503 P.2d 1055 (Alaska 1972); Miller v. State, 462 P.2d 421 (Alaska 1969). In Miller, the court held that an arrest is lawful without a warrant:

where the peace officer has perceived facts which would lead a reasonable man to believe that the arrestee has committed or attempted to commit an offense in his presence. 462 P.2d at 42526.

And in Howes, the court held that whether an offense is committed in the "presence" of the arresting party involves two elements:

> (1) The officer must observe acts which are indicative of the commission of an offense; (2) The officer must be aware that he is in fact seeing an offense being committed. 503 P.2d at 1058.

All of these elements are captured in the first bracketed paragraph of the instruction.

Subparagraphs (a)(2) and (a)(3) of the statute when read together are difficult to interpret. Both provisions apply to felony arrests for crimes committed outside the presence of the arresting party. It appears that (2) governs the case where the arrested person was guilty of the felony and an arrest occurs even though the arresting party does not have reasonable cause. Provision (3) then appears to govern those cases where the person is innocent but the arresting party has reasonable cause. This provision also appears to make the legality of the arrest depend on whether a felony was "in fact" committed regardless of whether or not the arresting party reasonably thought so. This interpretation of provision (3) is supported by the history of the statute and the common law tradition of arrest.

For offenses committed outside the presence of the arresting party, the common law distinguished between the authority of a peace officer and that of a private citizen. The peace officer could arrest for felonies if the officer had reasonable cause to believe both that an offense had been committed and that the person arrested committed it. A private citizen, on the other hand, was liable for false arrest if it subsequently turned out that no felony was in fact committed even though the private citizen reasonably thought otherwise. It appears that the Alaska Legislature, in applying the same rules to both peace officers and private citizens, may have adopted the more restrictive rule formerly applied only to citizen arrests. The Alaska statute is identical to an early California statute, Calf. Penal Code § 836, that was specifically amended in 1957 to apply the more liberal reasonable cause test to both existence of a felony and the identity of the felon.

Alaska case law, however, suggests that at least in a criminal law context, the Alaska court may be unwilling to apply this interpretation of subparagraphs (2) and (3). An interpretation of (2) that authorized an arrest without probable cause when it subsequently was shown the arrested person was guilty would be unconstitutional – at least to the

extent that evidence acquired incident to such an arrest would be suppressed. Beck v.

Ohio, 379 U.W. 89 (1964). It is also likely that since the Alaska court has read a probable cause test into subparagraph (1), it would read a similar standard into subparagraph (2). To do so, however, would make provision (2) inconsistent and in conflict with provision (3).

The Alaska court, on the other hand, apparently has applied a reasonable cause standard to both the commission of the offense and the identity of the offenders under provision (3) of the statute notwithstanding the language requiring the felony to have been committed "in fact." McCoy v. State, 491 P.2d 127 (Alaska 1971). It is not clear in McCoy that the point was specifically argued, and the issue in McCoy was not whether some offense had been committed, but whether the offense committed had in fact amounted to a felony. In that context the court concluded:

> we hold that under AS 12.25.030(3) a peace officer without a warrant, may arrest a person for a felony when the officer has probable cause to believe that a felony has been committed and probable cause to believe that the person committed it. 491 P.2d at 130.

In light of these uncertainties, no instruction is proposed responding to provision (2). The proposed instruction responds to the language in McCoy, supra, applying the reasonable cause standard to both the commission of the offense and the identity of the offenser. If the "in fact" language of the statute is thought to apply to whether the offense occurred, the instruction could be modified by substituting the following language: "a felony was in fact committed by someone and the defendant had reasonable cause to believe the plaintiff had committed it."

15.05 REASONABLE CAUSE DEFINED – WITHDRAWN

Use Note

This instruction has been incorporated as a part of Instruction 15.04, and is therefore withdrawn as a separate instruction.

15.06 FALSE IMPRISONMENT – PRIVILEGE OF PEACE OFFICER TO DETAIN SHORT OF ARREST

In some circumstances, the law allows the defendant to confine the plaintiff without arresting him or her. In order for the defendant to be allowed to confine without arrest, the plaintiff in this case, you must decide it is more likely true than not true that the following things happened:

(Insert evidence of facts which, if true, would establish reasonable suspicion as a matter of law.)

If you decide it is more likely true than not true that these things happened, you must return a verdict for the defendant.

Use Note

This instruction should be used where a peace officer temporarily detains a person for investigative purposes but no arrest occurs and therefore, there is no issue of false arrest. If a claim of false arrest is also made, the jury must be instructed that the above defined privilege does not apply to the claim of false arrest. It should be used following Instruction 15.02C.

Comment

The Alaska Supreme Court has authorized detention short of arrest by peace officers on reasonable suspicion. Coleman v. State, 553 P.2d 40 (Alaska 1976) (reasonable suspicion that imminent public danger exists or serious harm to persons or property); Goss v. State, 390 P.2d 220 (Alaska 1964); Maze v. State, 425 P.2d 235 (Alaska 1967). See also, Terry v. Ohio, 392 U.S. 1 (1968). In City of Nome v. Ailak, 570 P.2d 162, 172, such detentions would also serve as a defense to a cause of action for false imprisonment.

It is not clear the extent to which the question of reasonable suspicion is for the jury. Presumable, it would be treated the same as probable cause in arrest cases. See Use Note to Instruction 15.04.

15.07 GOOD FAITH DEFENSE – PEACE OFFICERS

No instruction.

Comment

The Alaska Supreme Court has noted that some jurisdictions provide police officers with a defense to a false arrest action if they acted with reasonable good faith even though they did not have probable cause. City of Nome v. Ailak, 570 P.2d 162, 171 n.24 (Alaska 1977). The court avoided deciding whether such a defense is applicable under Alaska law.

No instruction is provided due to the difficulty of projecting if Alaska law provides a good faith defense and, if so, the nature of the defense. The court suggested that such defense is in part subjective, i.e., what the officer actually thought, but that it must be based on objective evidence. City of Nome, 570 P.2d at 172.

The issue is also confused because false arrest cases also can be brought as a federal civil rights action under 42 U.S.C. § 1983 which has its own good faith defense. Pierseon v. Ray, 386 U.S. 547 (1967). But good faith

is not a defense when a municipality itself is named as a defendant. Owen v. City of Independence, 444 U.S. 822 (1980).

15.08 False Imprisonment – Privilege to Detain by Property Owner

The law allows the defendant to detain the plaintiff for purposes of protecting the defendant's property and conducting an investigation. In order for the defendant to be entitled to this privilege, you must decide it is more likely true than not true that the following things happened:

1. (insert evidence of fact which, if more likely true than not true, would give the defendant reasonable cause as a matter of law to believe that the plaintiff was committing or attempting to commit concealment of merchandise; e.g., the defendant knew the plaintiff had hidden on the plaintiff's person, unpurchased property of the defendant); and

2. the detention occurred in or in the immediate vicinity of a commercial establishment for the purpose of investigation or questioning as to the ownership of merchandise; and

3. the detention of the plaintiff was done in a reasonable manner; and

4. the detention of the plaintiff was only for a reasonable time, which is the length of the time necessary for the plaintiff to make a statement or refuse to make a statement and for [the defendant] [the defendant's employees] to examine the defendant's own records relating to the ownership of the merchandise.

If you decide that each of these things happened, you must return your verdict for the defendant. Otherwise, the defendant was not privileged to detain the plaintiff.

Use Note

This instruction should follow Instruction 15.02C and applies when a property owner asserts a privilege to reasonably detain a person to protect the defendant's property.

When the issue of "reasonable grounds to believe " is raised on complex facts, the preferred procedure is to use special interrogatories. See Malvo v. J.C. Penny Co., Inc., 512 P.2d 575 (Alaska 1973).

The scope of the applicability of the privilege to detain is not established. See Comment below.

Comment

The Alaska Supreme court has recognized a common law privilege for property owners to temporarily and reasonably detain persons in order to protect their property. Malvo v. J.C. Penney Co., Inc., 512 P.2d 575 (Alaska 1973). The Alaska Legislature has enacted a privilege for shopkeepers to detain suspected shoplifters. AS 11.46.230 (1983). The court has held that the predecessor statute was consistent with the common law privilege. 512 P.2d at 586 n.16. The statute, as revised, serves as the basis for this instruction. There is no law in Alaska as to what extent the privilege extends beyond the shopkeeper situation since the Malvo case involved a shopkeeper.

The statute requires four elements: (1) reasonable cause to believe the detained person was concealing merchandise; (2) detention "on or in the immediate vicinity of the premises of the mercantile establishment"; (3) detention in a reasonable manner and (4) detention for a reasonable time.

The statute provides that reasonable cause "includes" knowledge that a person has concealed property of the shopkeeper. The use of the word "includes" strongly suggests that other facts would also support a finding

of reasonable grounds. The court in Malvo, 512 P.2d at 585, suggests the issue of reasonable grounds in one of law with the jury responsible for resolving factual disputes. The court notes there is "strong authority that the best method of instructing the jury in this situation is to submit special interrogatories asking them to determine if the facts constituting reasonable cause exist. . ." 512 P.2d at 585.

The statute uses the word "means" in defining reasonable time for the detention. This suggests an exclusive standard which is incorporated into the instruction.

For adoption of a special privilege to detain for shopkeepers, see Restatement (Second) of Torts § 120A (1965). See generally Note, The Merchant, the Shoplifter, and the Law, 55 Minn. L. Rev. 825 (1971).