

IN THE SUPERIOR COURT FOR THE STATE OF ALASKA  
THIRD JUDICIAL DISTRICT AT ANCHORAGE

CHAD REEL, )  
 )  
 Appellant, )  
 )  
 v. )  
 )  
 BIG GAME COMMERCIAL )  
 SERVICES BOARD, )  
 )  
 Appellee. )

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Appeal No. 3AN-11-10124 CI  
OAH No.: 11-0183-GUI

**ORDER ON ADMINISTRATIVE APPEAL**

Chad Reel is a registered guide-outfitter who operates under the business name "Reel Alaska Trophy Hunts." The underlying facts of this case are based on an August 2010 sheep hunt and a September 2010 moose hunt. The Division of Corporations, Business and Professional Licensing (the "Division") filed an accusation against Reel alleging that he committed numerous violations related to these two hunts. Following a hearing and proposed decision by the administrative law judge (the "ALJ"), the Big Game Commercial Services Board (the "Board") determined that Reel violated game regulations and Alaska statutes. As a result, the Board imposed sanctions, including a three-year revocation of Reel's license. On appeal, Reel argues the Board erred as a matter of both fact and law in determining that he violated any game regulation or statute.

**I. FACTUAL BACKGROUND**

**A. Dan Davis's Sheep Hunt, August 2010**

Dan Davis, an Idaho resident, contracted with Reel to hunt for Dall sheep in the Alaska Range. Because non-resident sheep hunters are required to have a

guide.<sup>1</sup> Reel assigned Randall Piper to guide Davis. Piper testified that he has been a registered assistant guide since 2006. [Tr. 46] Piper also testified that Reel hired him in August 2010 and guiding Davis was Piper's first hunt as an assistant guide. [Tr. 47] In the game management unit where Piper guided Davis, a legal ram is defined as either as having a full horn curl, being at least eight years of age, or being double-broomed (both tips broken).

On August 12, 2010, Davis and Piper spotted a potential legal ram. Davis expressed concern about the small size of the ram's horns. After Piper assured Davis that the ram was legal, Davis shot the ram. Although Davis was upset with the size of the horns, he nevertheless agreed the ram was "legal." Piper tagged the ram for identification.

A day or two later, Reel picked up Davis and Piper. Davis testified that Reel mentioned "you guys better get that sheep sealed." [Tr. 305] Davis also testified that Piper said he would get the horns sealed. [Tr. 305]

Reel flew Davis to Wasilla where he waited for five days until Reel and Piper returned. Davis, Reel, Reel's girlfriend, and Piper then went on an unguided hunt in the Brooks Range. Reel and his girlfriend took sheep and Davis shot a caribou.

When they returned to Wasilla on August 27, Davis transferred possession of the sheep horns to Piper, so Piper could get them sealed.<sup>2</sup> Davis then returned to Idaho, and Piper took the horns to his cabin in Willow, but failed to get them sealed.

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<sup>1</sup> See AS 16.05.407(a) provides that it is unlawful for a nonresident to hunt sheep in Alaska unless personally accompanied by a registered guide-outfitter, master guide-outfitter, class-A assistant guide or an assistant guide employed by a registered guide-outfitter or master guide-outfitter or a resident over 19 years of age who is the nonresident's spouse or is related to the nonresident.

<sup>2</sup> 5 AAC 92.171(a), a person may not alter, possess, transport or export from the state the horns of a Dall sheep ram unless the horns have been permanently sealed by a department representative within 30 days after the taking. For a discussion of sealing sheep horns, see DALL SHEEP HUNTING IN ALASKA, <http://www.adfg.alaska.gov/index.cfm?adfg=sheephunting.plugin> (last visited January 31, 2013).

Shortly thereafter, Reel dropped Piper off in the Alaska Range where Piper hunted alone for sheep for two or three days. When Reel picked up Piper on September 3, Piper indicated he did not get a sheep. Reel then took Piper to a moose camp on September 3 or 4. At this time Reel became aware that Piper had not gotten Davis's horns sealed. Therefore, around September 4, Reel asked Trooper Darrell Hildebrand in Galena to seal the horns. Trooper Hildebrand indicated he needed a sealing kit from Fairbanks. Trooper Hildebrand testified that Reel expressed concern about the 30 day deadline: "He [Reel] was concerned that... they were going to get a citation for not having it turned in within the 30 day time period and I informed him that since I didn't have seals and he did come to me within that 30 day period that I would not pursue that citation." [Tr. 133] Both Trooper Hildebrand and Reel testified that on September 15, Reel inquired whether Trooper Hildebrand had received the sealing kit. [Tr. 135, 350] It took several weeks for the sealing kit to arrive, however, and the 30-day deadline passed. Furthermore, Reel testified that he was reluctant to fly the horns because the transfer of possession form signed by Davis only authorized Piper to transport the horns. Despite this, on September 25, Reel flew the horns to Galena where Trooper Hildebrand determined the horns were legal.

After the horns were sealed they were returned to Davis in Idaho. Davis, still angry when the horns arrived, barely looked at the horns and put them away. Later, law enforcement arrived at his house with a search warrant and seized the horns. Following the seizure, Alaska Fish and Game Wildlife biologist Rebecca Schwanke examined the horns. Schwanke compared the seized horns with the horns in the photographs of Davis's hunt and determined they were not from the same sheep. She concluded the horns depicted in Davis's sheep hunt photographs were not legal, while the seized horns were legal.

All parties agree the horns were switched at some point, but they disagree as to how and who switched the horns. Piper testified that Reel instructed him to take the tag from Davis's sheep, shoot a replacement sheep that was legal, place

the tag on the substitute horns, and present them for sealing. Reel, however, adamantly denied ever directing Piper to remove the tags or substitute the horns.

### **B. Ryan Huitt's Moose Hunt, September 2010**

The Huitt family contracted with Reel for a moose hunt in September 2010. The family was split between several different assistant guides and spike camps. Reel assigned assistant guide Brett Reigle with client Ryan Huitt to a spike camp. Daniel Pepin, a packer, was also at that camp. Shortly after arriving at camp, assistant guide Reigle had to leave to attend to another guide from a different camp who seriously injured himself when he stabbed his leg while salvaging meat. Reel sought Reigle's assistance because Reigle had advanced first aid training.

Huitt, therefore, was left without a licensed guide at his spike camp. Consequently, Reel asked Pepin to stay with Huitt. A licensed guide was not required to hunt moose in that area. Reel continued to check on them for a few days until Reigle returned. Shortly after Reigle returned, Huitt harvested a moose.

## **II. PROCEDURAL HISTORY**

### **A. The Division's Allegations**

The Division filed an accusation alleging Reel committed numerous violations, either directly or vicariously through his employees. With respect to the ram shot by Davis (referred to as a "sub-legal ram"), the Division asserted the following:

1. Piper and Davis knowingly took a sub-legal ram;
2. Reel, Piper and Davis knowingly failed to timely report the harvesting of a sub-legal ram;
3. Reel knowingly attempted to conceal the harvest by removing the metal locking tag from the horns of the sub-legal ram and attach it [sic] to the horns of the substitute ram;

4. Reel knowingly failed to properly and timely seal the horns<sup>3</sup>;
5. Reel knowingly transported a sub-legal ram knowing that it was taken in violation of applicable statutes and regulations;
6. Reel failed to cooperate with law enforcement officers by attempting to conceal the sub-legal ram and switch horns, and
7. to the extent these acts were performed by Piper, Reel is vicariously liable under AS 08.54.710.

In regards to the September 2010 moose hunt, the Division alleged that Pepin was knowingly guiding without a license when Reel left him with Huitt and that Reel, by putting Pepin in that position, knowingly aided Pepin in violating AS 08.54.720(a)(6); and then knowingly failed to report the violation.

#### **B. The Board's Decision**

The matter was heard before an administrative law judge (the "ALJ"). In a written proposed decision dated July 20, 2011, the ALJ made the following findings of fact pertaining to the sheep hunt:

It is undisputed that assistant guide Randall Piper, while in the employ of Mr. Reel, was guiding Mr. Reel's client, Dan J. Davis, on a sheep hunt. It is also undisputed that Mr. Piper saw a ram, and believing it was legal, instructed Mr. Davis to shoot. Upon closer inspection it became apparent that it was questionable as to whether the ram was legal. It does not appear that anyone associated with the hunt made any effort to ascertain if the ram was sub-legal even though they all thought it would be "close." With the benefit of hindsight, the following facts have been established by a preponderance of the evidence.

- Mr. Piper and Mr. Davis took a sub-legal ram.

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<sup>3</sup> Count V of the Division's accusation alleges that Reel "failed to properly seal the horns of the Dall sheep harvested by Davis." [Exc. 21.] Count VI alleges that Reel "failed to seal the horns to the Dall sheep, harvested by Davis, within 30 days of the taking of that animal in violation of 5 AAC 92.171." [Exc. 22.]

- Mr. Piper was Mr. Reel's employee and Mr. Davis was Mr. Reel's client.
- Mr. Piper removed the tags from Mr. Davis' ram and placed them on a legal ram.
- The legal ram was taken to Trooper Hildebrand for sealing by Mr. Reel who did not have a transfer of possession.
- Mr. Davis' ram was not timely sealed.
- The taking of the sub-legal ram was never reported.
- When all of this transpired, Mr. Reel was on probation under the terms of his Consent Agreement.

At the time Mr. Piper and Mr. Davis took the ram they believed it to be legal. There is no convincing evidence that when Mr. Piper told Mr. Davis to pull the trigger and that when Mr. Davis did pull the trigger that either knew Mr. Davis was shooting a sub-legal ram. Nor has the division presented convincing evidence that the taking of the ram was a failure to fulfill the supervision and participation requirements of a licensed guide.

Although not expressly argued as such, it appears the conclusion the division would like the finder of fact to draw is that the taking of the sub-legal ram must be due to a failure to properly supervise or participate in the hunt. Had the division presented testimony establishing what is the industry standard for properly supervising and participating in a hunt or otherwise establish that the way the hunt was conducted was unethical or improper, the result might be different. However, the evidence presented is insufficient to permit the conclusion that the taking of a sub-legal ram without more is conclusive evidence of a failure to properly supervise.

However, contrary to Mr. Reel's belief that he had no responsibility for ensuring the horns were properly tagged and sealed, it is a guide's responsibility to "ensure that the appropriate tags are attached to any game taken by a client and all game is sealed or marked as required by 5 AAC 92.

[Citing 12 AAC 75.340(c)(5)]. Applicable regulation 5 AAC 92.171 requires that Dall sheep horns be sealed within 30 days of taking. Mr. Piper failed to ensure “the appropriate tags were attached” when he removed them from Mr. Davis’ sheep. Both Mr. Piper and Mr. Reel failed to ensure that the horns were timely sealed.

Mr. Piper admitted that his actions related to hiding the taking of the sub-legal ram were improper and a violation of wildlife, game, guiding or transportation statutes or regulations. He also testified that he believed he was substituting legal horns for sub-legal horns. Therefore, he knowingly failed to report a violation, he knowingly committed or aided in the commission of a violation, he attempted to hide a violation, and he knowingly committed or aided in the commission of a violation.

What is less clear is whether Mr. Reel knew or was substantially aware of what was going on. The division has presented evidence sufficient to establish that it is a [sic] probable that Mr. Reel could have deduced that something was amiss, in that the horns were not sealed in Willow and that Mr. Piper was packing the sheep horns on a hunt and to moose camp. Also, Mr. Reel could not say with certainty that the horns were legal. As he testified, it would be up to the sealer to determine.

At that point perhaps Mr. Reel should have made an effort to ascertain the legal status of the horns, but his explanations for his actions—that he thought they had enough time to still get them sealed and that it was Mr. Piper’s responsibility since he had the transfer of possession—were not challenged by testimony or other evidence establishing that Mr. Reel’s or Mr. Piper’s actions were unusual for a registered guide or his assistant guides. Had the division presented evidence in the form of expert testimony as to just what about Mr. Reel’s or Mr. Piper’s action were not reasonable guiding practices, perhaps it could be found that Mr. Piper’s actions should have placed Mr. Reel on notice that he was committing violations. It did not, and therefore the division has not established that, other than Mr. Reel knowing that the sealing was not timely and he transported

horns without having a transfer of possession, that he knowingly committed any violation associated with the sheep hunt.<sup>4</sup>

As to Mr. Reel's supposed involvement in the plan to substitute legal horns for Mr. Davis', Mr. Piper's manner was evasive, as was his body language, and his testimony was fraught with inconsistencies. Also detracting from the credibility of his testimony was Mr. Piper's claim that he could not recall conversations with investigators that took place less than a week prior to the hearing. A second interview with an investigator about the subject of a hearing to take place within a week is a significant event in someone's life and it is not unreasonable to expect the interviewee would remember with some specificity what he understood he was being asked and his answers.

Finally, the division offered that Mr. Reel had motive to conceal the taking of a sub-legal ream because of the terms of his Consent Agreement. Under the terms of the Consent Agreement, any violation could result in suspension of Mr. Reel's license. While this is true, it is also true that Mr. Piper had strong motives of his own to conceal. He had only been licensed as an assistant guide for four years and did not have long history of guiding in Alaska. If it became known that a client he was in charge of took a sub-legal ram, there could be negative ramifications to his reputation and his employment prospects. If it had been known that Mr. Piper took a sub-legal ram, it is possible that he would not be kept on by Mr. Reel and that he would miss out on moose season and its income. Thus, Mr. Piper also had motive to ensure the horns that were sealed were legal. Moreover, Mr. Piper had a powerful motive to shift blame to Mr. Reel in his testimony, regardless of what truly occurred. By doing so, he avoided felony prosecution and almost certain loss of his license. Instead of these consequences, he obtained a result that included a small fine, not a single day in jail, and not a single day of lost licensure.

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<sup>4</sup> Here the ALJ's decision notes that "Mr. Reel was in possession and transporting the horns at Troope Hildebrand's request."



Regardless, Mr. Reel is liable for the acts of his employees committed while in the course of their employment under AS 08.54.740(a)(1). Therefore, if Mr. Piper committed a knowing violation in the course of employment, Mr. Reel cannot escape responsibility by claiming he did not know what was going on.

Guiding is a unique profession where the licensed activity takes place without observers. For the wildlife, game, and guiding statutes and regulations to have any meaning it is up to those in the field to self-police and self-report violations. As stated above, Mr. Reel, as a registered guide-outfitter, represents to the public that he is the one in charge of a hunt. By holding a registered guide-outfitter license, Mr. Reel is holding himself out to the public as having more experience, knowledge and responsibility than his employees. The legislature, by providing Mr. Reel be statutorily vicariously liable for the acts of his employees has indicted [sic] that a registered guide cannot be shielded by lack of knowledge of what his employees are doing when they are not with him. Rather, a registered guide-outfitter who opts not to ask the question no one wants asked or make an unpopular decision does so at his own peril. In short, the legislature saw fit to remove plausible deniability as a defense to an employee's actions.

[Exc. 64-67] In a footnote, the ALJ observed, "Mr. Reel did not argue that the violations committed by Mr. Piper were outside the course of his employment."

The ALJ found the preponderance of the evidence established that Reel directly or through vicarious liability violated state statutes and regulations regarding guide-outfitting and committed unethical acts. In particular, the ALJ found the Division showed that:

1. Reel failed to properly supervise his employees, amounting to a failure to meet ethical responsibilities;
2. Reel knowingly transported big game without a transfer of ownership;
3. Sheep horns were not timely sealed;
4. Reel knowingly permitted an employee, Pepin, to guide without a license on the moose hunt; and

5. Reel's actions were a violation of his December 2009 Consent Agreement.

Regarding the sheep hunt, the ALJ specifically found that Piper and Davis took a sub-legal ram; Piper was Reel's employee and Davis was Reel's client; Piper removed the tags from Davis's ram and placed them on a legal ram; Piper switched the sub-legal ram for a legal ram; the legal ram was taken to Trooper Hildebrand for sealing by Reel who did not have a transfer of possession; Davis's ram was not timely sealed; the taking of the sub-legal ram was never reported; and when all of this transpired, Reel was on probation under the terms of his Consent Agreement. Based on these findings, the ALJ found that Reel committed two "knowing" violations associated with the sheep hunt: (1) failing to timely seal the horns and (2) transporting the horns without having a transfer of possession. Additionally, the ALJ found Reel was equally liable under AS 08.54.740(a)(1) for Piper's knowingly committed violations.<sup>5</sup>

The ALJ rejected Reel's argument that he had no responsibility for ensuring that the horns were properly tagged and sealed. 12 AAC 75.340(c)(5) provides that it is a guide's responsibility to "ensure that the appropriate tags are attached to any game taken by a client and all game is sealed or marked as required by 5 AAC 92." Furthermore, 5 AAC 92.171 requires that Dall sheep horns be sealed within thirty days of taking.

Regarding the moose hunt, the ALJ found Pepin knowingly guided without a license and Reel knowingly permitted Pepin to guide without a license and aided Pepin in the commission of his violation. AS 08.54.720(a)(6) provides that it is unlawful for a "person to knowingly guide without having a current registered guide-outfitter, class-A assistant guide, or assistant guide license and a valid Alaska hunting license in actual possession . . ."

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<sup>5</sup> Piper admitted that he substituted legal horns for sub-legal horns. The ALJ found Piper knowingly failed to report a violation and knowingly committed or aided in the commission of a violation.

Consequently, Reel argued that Pepin was not guiding Huitt because Huitt was hunting moose in an area that did not require a hunter to have a guide. The ALJ rejected this argument, however, reasoning that the statute that defines the duties of a guide does not require that to “guide” the activities must only take place where a guide is required to hunt. Instead, to guide is to perform services for pay and to accept certain responsibilities by a person who accompanies or is present with the big game hunter in the field. AS 08.54.790(8). Services include, among other things, stalking, pursuing, tracking, killing, or attempting to kill big game. *Id.* The ALJ found that Pepin helped Huitt stalk a moose and that Pepin was performing the same duties of any other assistant guide and he was paid to perform those services.

As a result of these findings, the ALJ proposed the following discipline:

1. Reel’s license shall be suspended for one year with 6 months suspended;
2. Reel shall be on probation for three years;
3. Reel is to pay \$3,000. This figure represents the portion of his suspended \$4,000 civil fine imposed from previous, separate violations;
4. Reel shall pay an additional \$10,000 with \$8,000 suspended;
5. Reel shall receive public written reprimand from the Board;
6. Reel shall take a class on a guide’s legal and ethical obligations.

The Board adopted the ALJ’s decision, but revised her proposed disciplinary measures. The Board found it appropriate: to revoke Reel’s license for a period of three years; require him to pay a \$3,000 unsuspended civil fine incurred as a result of a previous violation; pay an additional \$5,000 civil fine in this matter with \$3,000 suspended; and receive public reprimand.

### **C. The Parties’ Arguments on Appeal**

Reel presents four main arguments on appeal. First, Reel argues the “knowing” violations – transporting big game without a transfer of ownership and

untimely sealing of horns – have been either “unproven” or are “excused.” Reel reasons it was not his responsibility to timely seal the horns, but even if it was, Trooper Hildebrand “authorized” an untimely sealing and the Division is estopped from claiming that he violated the sealing requirement.

Second, Reel broadly argues he cannot be held vicariously liable for his employees’ violations. AS 08.54.740(a) provides that a registered guide-outfitter is “equally responsible” for violations committed by a person while in the course of the person’s employment for the registered guide-outfitter. Reel, however, contends .740(a) has never been utilized to hold a guide responsible for misconduct committed by his employees of which the guide was unaware. Because the underlying violations require knowing misconduct, Reel argues it is unconstitutional to interpret .740(a) as permitting him to be held liable for violations committed by Piper where there was no proof that Reel himself knowingly committed or participated in the misconduct.

Third, Reel argues that Piper’s misconduct with respect to the Davis sheep hunt and substitution of horns did not occur within the course of Piper’s employment. Therefore, Reel claims he cannot be liable under AS 08.54.740(a) regardless of its constitutionality.

Fourth, regarding the moose hunt, Reel argues he did not knowingly permit Pepin to guide without a license. In support, Reel argues Pepin was merely a packer during the moose hunt, not an assistant guide. Reel maintains it was Reigel who provided guide services and was “in the field” during the moose hunt.

The Division contends there was substantial evidence to support the Board’s finding of Reel’s direct violations – that he did not seal the horns within 30 days, he transported the horns without a transfer of possession, he knowingly aided Pepin to guide without a license and he failed to report Pepin’s misconduct.

### III. STANDARD OF REVIEW

Review of the Board's factual findings is limited to whether there was substantial evidence in the record to support those findings. *Halter v. State, Dep't of Commerce & Econ. Dev., Med. Bd.*, 990 P.2d 1035, 1037 (Alaska 1999). Substantial evidence is relevant evidence that a reasonable mind might accept as adequate to support the Board's conclusion. *Id.* The reviewing court does not reweigh the evidence or choose between competing inferences; it only determines whether such evidence exists. *Storrs v. State Med Bd.*, 664 P.2d 547, 554 (Alaska 1983).

With regard to questions of law involving agency expertise, courts apply the reasonable basis standard and will defer to the Board's interpretation of its own regulations. *State, Bd. of Marine Pilots v. Renwick*, 936 P.2d 526, 530 (Alaska 1997). Administrative agencies are also given wide latitude when they are interpreting statutes that they have been charged to administer. *Id.* at 531. With regard to questions of law not involving agency expertise, courts apply the substitution of judgment test. *Boyd v. State, Dep't of Commerce & Econ. Dev., Div. of Occupational Licensing*, 977 P.2d 113, 115 (Alaska 1999)(whether a \$2,500 payment constituted a fine); *State, Div. of Ins. v. Schnell*, 8 P.3d 351, 355 (Alaska 2000)(whether equitable estoppel should be applied).

### IV. ANALYSIS

#### A. Sheep Hunt Violations

The Board found that Reel's sheep hunt violations fell into two categories: (1) Those which Reel participated in directly and (2) those which were committed by Piper, without Reel's knowledge. The first category consists of the failure to seal the Davis horns within 30 days and the transportation of the horns without a

transfer of possession.<sup>6</sup> The second category consists of Piper's failure to report the taking of a sub-legal ram (Davis's), Piper's removal of the tags from Davis's sub-legal ram, and his substitution of legal horns for sub-legal horns. The Board disciplined Reel for these violations even though Reel himself did not knowingly commit them. The Court will organize its analysis of the sheep hunt violations into these two categories of violations—direct and vicarious liability.

**1. Whether there was substantial evidence for the Board to conclude that Reel “knowingly” failed to timely seal the sheep’s horns.**

As the Division argues in its brief, 44 days passed between the taking of Davis' ram on August 12, 2010 and the sealing of the horns by Trooper Hildebrand on September 25, 2010, whereas 5 AAC 92.171 required they be sealed within thirty days.<sup>7</sup> On this basis, the ALJ found that “Mr. Davis’s ram was not timely sealed.” [Exc. 64]

Reel does not dispute that Davis's sheep horns were not sealed within thirty days. Rather, Reel denies responsibility and argues that only Davis and Piper were responsible for timely sealing Davis's horns. *See* Appellant's Brief at 25; *see also* Appellant's Reply Brief at 4. Reel argues that to the extent he is responsible for sealing Davis's horns, Trooper Hildebrand excused the untimely sealing.

Reel also argues that Piper's misconduct made it legally and physically impossible to seal Davis's horns. *See* Appellant's Reply Brief at 5. Piper testified that he left the horns in his shed in Willow and they have since been “misplaced.”

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<sup>6</sup> The ALJ found, “[T]he division has not established that, other than Mr. Reel knowing that the sealing was not timely and he transported horns without having a transfer of possession, that he knowingly committed any violation associated with the sheep hunt.” [Exc. 65-66]

<sup>7</sup> 5 AAC 92.171(a) provides:

A person may not alter, possess, transport, or export from the state, the horns of a Dall sheep ram taken in any hunt where there is a horn configuration bag limit, or the horns of a Dall sheep ram taken in Units 6 - 11 and Units 13 - 17, unless the horns have been permanently sealed by a department representative within 30 days after the taking, or a lesser time if designated by the department.

[Tr. 67] The Davis horns are missing. They have not been produced and there is no evidence they were ever sealed. The horns that were sealed by Trooper Hildebrand in September 2010 were the substitute horns obtained by Piper on a personal hunt in the Brooks Range. Although Piper knew them to be substitutes for the Davis horns, the Division failed to prove Reel was aware of the substitution. Nonetheless, the Division's brief proceeds on the theory that Reel is liable for knowingly failing to seal the Davis horns within 30 days because the horns Reel presented for sealing in September 2010 were represented to the trooper as being the Davis horns. *See Appellee's Brief at 28.*

The Board appears not to have considered the fact that it would have been impossible for Reel to seal the Davis horns after they were substituted and "misplaced" by Piper. In the absence of a finding that Reel knew about the illegal substitution by Piper, it is unclear how he could be held liable for knowingly failing to seal horns that were no longer in existence. The issue of impossibility need not be probed further, however, because the doctrine of equitable estoppel obviates Reel's liability for failing to seal the horns in a timely fashion.

The undisputed evidence showed that Reel timely contacted the nearest law enforcement officer authorized to seal the horns, Trooper Hildebrand in Galena, but the trooper lacked the necessary sealing kit, which would have taken several weeks to arrive from Fairbanks. The uncontradicted evidence also established that Trooper Hildebrand assured Reel that the 30-day deadline would not be an issue because Reel had attempted to timely seal the horns. The question presented is whether the trooper's representations create an equitable estoppel that precludes finding that Reel knowingly violated the sealing requirement.

To invoke equitable estoppel against a state entity, a party must show that: (1) the governmental body asserted a position by conduct or words; (2) the private party acted in reasonable reliance thereon; (3) the private party suffered resulting prejudice; and (4) the estoppel serves the interest of justice so as to limit public

injury.” *Boyd v. State, Dep’t of Commerce and Economic Development*, 977 P.2d 113, 116-17 (Alaska 1999).

In the present case the uncontradicted evidence establishes these elements. The first element is fulfilled by Trooper Hildebrand’s assurance to Reel, in response to his attempt to timely seal the horns, that the 30-day deadline was not an issue. The second element—reasonable reliance—is also met. Trooper Hildebrand’s assurances were “not isolated misstatements of law; rather, they were made in direct response to request from [Reel].” Furthermore, the state clothed Trooper Hildebrand with the jurisdiction and authority to perform the function of sealing the horns. It was reasonable, therefore, for Reel to rely upon the trooper’s representations. There is also no dispute that after receiving Trooper Hildebrand’s assurances, Reel did not attempt to find another way of having the horns sealed. Thus, Reel suffered prejudice as a result of relying on the trooper’s representations. The fourth element exists as well. The greater public interest is served when citizens uncertain as to what they must do to conform to the law are able to inquire of state law enforcement officials rather than to keep silent for fear of being found in violation.

Based on the undisputed and uncontradicted facts presented to the Board, the Court concludes that, as a matter of law, Reel cannot be found to have committed a knowing violation of the 30-day sealing requirement.

**2. Whether there was substantial evidence for the Board to conclude that Reel “knowingly” transported horns without a transfer of possession.**

The Board’s decision is somewhat vague regarding Reel’s wrongful possession of horns. The undisputed evidence shows that Reel possessed a set of horns without a transfer of possession form. However, there seems to be confusion over whether the ALJ’s decision was based on Reel possessing Davis’s horns or Piper’s horns. The Division’s accusation does not appear to allege that Reel



possessed either Davis's or Piper's horns without a transfer of possession.<sup>8</sup> Much of the parties' testimony regarding the transfer of possession form focused on Reel possessing Davis's horns. Reel's testimony indicates that at the time he transported the horns, he believed the horns were from Davis's sheep. As the Division's case developed at the hearing, however, it became apparent that Reel did not transport Davis's horns. Instead, Reel transported the substitute horns provided by Piper. On appeal, Reel contends the Board erred in finding that he possessed horns without a transfer of possession because there is no evidence that he ever possessed Davis's horns.

Reel correctly maintains that there was not substantial evidence that he possessed Davis's horns. In fact, the evidence tends to show that Reel did *not* possess Davis' horns. Therefore, a finding that Reel possessed Davis's horns without a transfer of possession would have been error. However, the ALJ's finding indicates that the transfer of possession violation was based on Reel possessing the substitute horns, not Davis's horns. In her findings, the ALJ distinguishes between the "legal" ram (Piper's substitute ram) and the "sub-legal" ram (Davis's ram). The ALJ found that "[t]he *legal ram* was taken to Trooper Hildebrand for sealing by Mr. Reel who did not have a transfer of possession." (Emphasis added). The Court, therefore, interprets the ALJ's finding that Reel possessed horns without a transfer of possession as referring only to Reel possessing Piper's substitute horns. The evidence substantially supports this finding.

On the other hand, the ALJ also found "Mr. Reel was in possession and transporting the horns at Trooper Hildebrand's request." [Exc. 66] This finding,

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<sup>8</sup> Count VII of the state's accusation alleges that Reel "possessed or transported client Davis' sublegal Dall sheep...knowing that it was [sublegal.]" [Exc 22.] Count VIII alleges that Reel "concealed Davis' sublegal Dall sheep...by attempting to deceive Trooper Hildebrand by providing a different set of horns..." [Exc. 23.] It does not appear that the accusation explicitly alleges that Reel possessed any horns *without a transfer of possession form*.

which is supported by substantial evidence,<sup>9</sup> gives rise to equitable estoppel under *Boyd*, 977 P.2d at 116-17 in the same manner as the trooper's comments relaxing the sealing requirement. Accordingly, the Court concludes that as a matter of law Reel cannot be found to have committed a knowing violation by transporting the horns without a transfer of possession form.

**3. Whether there was substantial evidence to hold Reel vicariously liable for Piper's violations with respect to the sheep hunt.**

After determining that Piper knowingly committed a host of violations--failure to report the taking of a sub-legal ram, removing the tags from Davis's sub-legal ram, and substitution of legal horns for the sub-legal horns—the Board then decided that Reel should be held vicariously liable for those violations even though Reel himself did not knowingly commit them. The Board relied on AS 08.54.740, which provides as follows:

**Responsibility of guide or transporter for violations.** (a) A registered guide-outfitter who contracts to guide or outfit a big game hunt is equally responsible under AS 08.54.710 for a violation of a state or federal wildlife or game or guiding statute or regulation committed by a person while in the course of the person's employment for the registered guide-outfitter.

Reel challenges the validity of the decision to hold him vicariously liable. He argues that the statute should not be interpreted to discipline Reel for violations that he had no knowledge of at the time, and that AS 08.54.740(a) is unconstitutional. He also argues that the statute, even as interpreted by the Board, does not apply to Piper's conduct because Piper was not acting in the course of his employment for Reel. Because the Court can decide the present case on non-

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<sup>9</sup> For example, Reel testified that he was "real direct" in speaking with Trooper Hildebrand about his concern over transporting the horns to the trooper in Galena without a transfer of possession and Trooper Hildebrand "did say that [Reel] could fly them once he [Trooper Hildebrand] got the sealing certificate." [Tr. 349-50]

constitutional grounds, it is not necessary to address the constitutional issues raised in Reel's brief.<sup>10</sup>

The starting point in analyzing this issue is to determine which party had the burden of persuasion<sup>11</sup> under AS 08.54.740. The statute itself does not allocate the burden of persuasion. The U.S. Supreme Court has held that where "[t]he plain text [of a statute] is silent on the allocation of the burden of persuasion . . . we therefore begin with the ordinary default rule that plaintiffs bear the risk of failing to prove their claims."<sup>12</sup> The Supreme Court observed, "Perhaps the broadest and most accepted idea is that the person who seeks court action should justify the request, which means that the plaintiffs bear the burdens on the elements in their claims." *Id.* "Course of the person's employment" constitutes an essential element to vicarious liability under AS 08.54.740(a). It follows, therefore, that the Division had the burden of persuasion on the issue as well as the burden of production, which generally tracks the allocation of the burden of persuasion.<sup>13</sup>

It was thus incumbent upon the Division to produce evidence that Piper's misconduct occurred within the course of his employment and to prove that proposition by a preponderance of the evidence. Contrary to the Division's argument, however, the Board did not make an express finding that Piper's

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<sup>10</sup> "The canon of constitutional avoidance recommends that when the validity of an act of the [legislature] is drawn in question, and even if a serious doubt of constitutionality is raised, it is a cardinal principle . . . [to] first ascertain whether a construction of the statute is fairly possible by which the question may be avoided." *Bigley v. Alaska Psychiatric Institute*, 208 P.3d 168, 184 (Alaska 2009).

<sup>11</sup> The burden of persuasion is another term for "burden of proof." The burden of persuasion is to be distinguished from the burden of production, *i.e.*, the obligation to come forward with evidence of the facts necessary to support a finding in support of a claim or defense.

<sup>12</sup> *Schaffer ex rel. Schaffer v. Weast*, 546 U.S. 49, 56 (2005).

<sup>13</sup> This is consistent with AS 44.62.460(e)(1): "Unless a different standard of proof is stated in applicable law, the petitioner has the burden of proof by a preponderance of the evidence . . . if the renewal of a right, authority, license, or privilege has been denied."

violations occurred in the course of employment, nor does the decision discuss the evidence that would support such a conclusion.<sup>14</sup> Furthermore, apart from the undisputed fact that Reel employed Piper, the decision does not cite any evidence that would support a finding that Piper acted within the course of employment. The decision merely states, in a footnote, “Mr. Reel did not argue that the violations committed by Mr. Piper were outside the course of his employment.” [Exc. 67]

As Reel observes, it appears that for the Board “it was enough that Piper was employed by Reel for purposes of the Dan Davis sheep hunt.” See Appellant’s Reply Brief at 11. It was not enough. Course of employment was an essential element of the Division’s case of vicarious liability. Proof of employment alone was not sufficient; the Division was required to prove Piper’s misconduct occurred within the “course of employment.” And whether Reel argued the point is immaterial since the burden of persuasion and production fell on the Division. Silence is a sufficient response when the opposing party fails to meet its burden. The Division’s reliance on Reel’s failure to argue course of employment was misplaced.

Reel argues that the Board should have employed an analysis involving the factors set forth in Restatement (Second) of Agency, § 228<sup>15</sup> to determine whether

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<sup>14</sup> The Division argues, “The Board also determined that Piper was acting within the course of his employment with Reel when he committed the above violations, and that Reel did not argue below that Piper’s violations were outside the course of his employment. [Exc. 67]” See Appellee’s Brief at 19. But the portion of the decision cited by the Division merely states that the proposition that “*if* Mr. Piper committed a knowing violation in the course of his employment, Mr. Reel cannot escape responsibility by claiming he did not know what was going on.” (Emphasis added.) Next, the decision observes that Reel did not argue the issue. It appears that the Board interpreted Reel’s failure to argue as being, in essence, an admission.

<sup>15</sup> The Restatement (Second) of Agency §228 provides:

(1) Conduct of a servant is within the scope of employment if, but only if: (a) it is of the kind he is employed to perform; (b) it occurs substantially within the authorized time and space limits; (c) it is actuated, at least in part, by a purpose to serve the master, and (d) if force is intentionally used by the servant against another, the use of force is unexpected by the master. (2) Conduct of a servant is not within the scope of employment if it is

an employer should be held responsible for an employee's acts. Such an analysis would have been an appropriate means of resolving the course of employment issue. Reel further argues that application of the Restatement factors to the facts of this case would compel a finding, as a matter of law that Piper's misconduct did not occur in the course of his employment.<sup>16</sup>

In this appeal, however, the only question the Court must decide is whether substantial evidence supported the Board's determination that Reel is vicariously liable for Piper's misconduct. While it was appropriate for the Division to cite the undisputed fact that Reel employed Piper as assistant guide on the Davis sheep hunt, that alone was not sufficient to meet its burdens of persuasion and production. The Board erred insofar as it relied on Reel's silence as a substitute for evidence meeting the Division's twin burdens and failed to make an explicit finding on course of employment. For the reasons stated above, the Court concludes that there was not substantial evidence to support the Board's imposition of vicarious liability upon Reel.

## **B. Moose Hunt Violations**

The Division alleged that Pepin was knowingly guiding without a license on the Huitt moose hunt, in violation of AS 08.54.720(a)(6).<sup>17</sup> In The Division

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different in kind from that authorized, far beyond the authorized time or space limits, or too little actuated by a purpose to serve the master.

<sup>16</sup> Among other things, Reel points out: (1) There was no dispute that Piper shot the substitute ram on an entirely separate, personal hunt (*i.e.*, when he was not employed by Reel) that occurred after Reel's client, Davis, had left the scene; (2) the Division failed to prove that Reel knew about the illegal conduct; and (3) Piper had independent reasons and motivations for committing the illegal activities, such as protecting his reputation.

<sup>17</sup> Counts X. AS 08.54.720(6) provides that it is unlawful for a "person to knowingly guide without having a current registered guide-outfitter, class-A assistant guide, or assistant guide license and a valid Alaska hunting license in actual possession."

further alleged that Reel knowingly aided Pepin in that violation<sup>18</sup> when Reel left him with Huitt and then knowingly failed to report the violation.<sup>19</sup> The Board found in favor of the Division on all three charges. Reel challenges the Board's findings on the grounds that they are unsupported by the evidence and premised on an erroneous interpretation of the guiding statutes.

**1. Whether there was substantial evidence for the Board to conclude that Daniel Pepin guided without a license.**

AS 08.54.790(9) defines the meaning of the term "guide" as used in that chapter:

"guide" means to provide, for compensation or with the intent or with an agreement to receive compensation, services, equipment, or facilities to a big game hunter in the field by a person who accompanies or is present with the big game hunter in the field either personally or through an assistant; in this paragraph "services" includes

...

(B) stalking, pursuing, tracking, killing, or attempting to kill big game

The Board found that Pepin participated in stalking moose for Huitt. On appeal the question presented is whether there was substantial evidence to support that finding.

At the hearing Pepin was asked about his activities with Huitt and, among other things, he testified as follows:

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<sup>18</sup> AS 08.54.720(a)(8)(A) provides that it is unlawful for a licensed guide to knowingly "commit or aid in the commission of a violation" of a state or federal wildlife or game statute or regulation. Sub-section (B) provides that it is unlawful for a licensed guide to "permit the commission of a violation" of a state or federal wildlife or game statute or regulation.

<sup>19</sup> Count XI. AS 08.54.720(a)(1) provides that it is unlawful for a licensed guide "to knowingly fail to promptly report, unless a reasonable means of communication is not reasonably available, to the Department of Public Safety, and in no event later than 20 days, a violation of a state or federal wildlife or game, guiding, or transportation services statute or regulation that the person reasonably believes was committed by a client or employee of the person."

Well, we were short a guide, one of the guides got injured and me and [Huitt] kind of hunted around and we were walking around to see if we could get a moose while the other guide recovered, I guess. . . . [Tr. 192]

...

We were short a guide and I'm not really sure of the technical definition of guiding, I mean, we were both hiking around, we were looking for moose, we were doing a little bit of calling and, you know, we'd hang out at night, have a fire and then hike around during the day. [Tr. 193]

...

Q. Did anybody ask you to be with Mr. Huitt?

A. Yes, Chad asked me to go with Ryan, told me to kind of fill in until – until somebody else showed up.

Q. Was there any discussion about the fact that you weren't licensed as a guide?

A. I don't – I don't recall. I know I wasn't licensed as a guide at the time, but it seemed like it was kind of a gray area. I mean, I don't really know the definition of guiding technically so I don't know if I was guiding or just showing or just kind of hanging out with him until another guide could come and hunt with him some more, I mean, I'm not really sure of the definition. [Tr. 195]

The evidence cited above provides ample support for the Board's finding that Pepin engaged in "stalking" activities within the meaning of AS 08.54.790(9)(B). Reel maintains, however, that because Pepin was not paid to perform these activities he could not have been acting as a guide. AS 08.54.790(9)(B) defines guiding as the performance of certain specific services "for compensation." "Compensation" is defined as "payment for services including wages or other remuneration but not including reimbursement for actual expenses incurred." AS 08.54.790(5). The evidence showed that Pepin was paid \$200/day to serve as a packer on the Huitt hunt:

Q. Were you getting paid for being with Mr. Huitt?

A. I was getting paid the – the amount that I was getting paid for, you know, that we agreed on when I first came to

moose camp. I wasn't getting paid anything extra or anything.

Q. And what was that compensation?

A. I believe it was 200 a day.

[Tr. 194] Pepin also received a tip:

Q. Now did Mr. Huitt or anyone on his behalf pay you anything for your activity?

A. Oh, I got a – tip from I believe his dad.

...

Q. And how much was that?

A. It was \$1,000. . . .

[Tr. 198] The Division did not introduce evidence indicating whether or not a tip of \$1,000 for a packer on a moose hunt such as the one in question was abnormal.

There is a significant degree of ambiguity in the language of the statute, at least as it would apply in this case. Nevertheless, the Board did not err in concluding that the fact that Pepin was being paid to go on the moose hunt. His pay, even if only as a packer, was sufficient to constitute "compensation" within the meaning of AS 08.54.790(9) and trigger the proscription against providing guide services. Reel's interpretation of "compensation" could be extended to allow any of his employees to perform guide services so long as they could plausibly argue they weren't being paid anything "extra." Such a result would conflict with the statutory scheme for licensing and regulation of big game hunting. Accordingly, the Board did not err in finding that Pepin guided without a license on the Huitt moose hunt. As discussed below, however, this finding does not compel the conclusion that he did so knowingly.

**2. Whether there was substantial evidence for the Board to conclude that Pepin "knowingly" guided without a license and that Reel "knowingly" aided Pepin in doing so and "knowingly" failed to report it.**

The Board found that Pepin "knowingly" guided without a license and that Reel knowingly aided Pepin in that violation when Reel left him with Huitt. The



Board further found that Reel then knowingly failed to report the violation. All three of these violations required the Board to find that the conduct occurred “knowingly.” This term is defined in AS 11.81.900(a)(2) as follows:

[A] person acts ‘knowingly’ with respect to conduct or to a circumstance described by a provision of law defining an offense when the person is aware that the conduct is of that nature or that the circumstance exists; when knowledge of the existence of a particular fact is an element of an offense, that knowledge is established if a person is aware of a substantial probability of its existence, unless the person actually believes it does not exist. . . .

As indicated in the statute, the determination of whether an individual acted “knowingly” requires consideration of both the objective facts and the subjective belief of the individual. Having reviewed the testimony in the record, and notwithstanding the deference due in reviewing factual findings on appeal, the Court is unable to affirm the Board’s findings that Pepin “knowingly” guided without a license or that Reel “knowingly” aided him in doing so.

The Board observed that “Pepin knew he did not have a license,”<sup>20</sup> but the relevant question is whether he knew he needed one. The evidence indicated that Pepin did not know whether or not what he did for Huitt constituted guiding, and the Board did not find that he did know. Instead, the Board took Pepin’s testimony that the need for a license was a “gray area” as establishing “by a preponderance of the evidence that [Pepin] was aware there was a *substantial probability* that he was ‘guiding.’”<sup>21</sup> (Emphasis added.) This inference was not supported by substantial evidence. The Board did not consider that Pepin had a reasonable basis for being uncertain as a result of ambiguity in the statutory definition of guiding, nor did it consider the lack of evidence that he was specifically paid to act as a guide as opposed to a packer. The fact that Pepin was

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<sup>20</sup> Exc. 68.

<sup>21</sup> *Id.*

uncertain does not equate to a “substantial probability.” Therefore, the Court is unable to find substantial evidence to support the Board’s conclusion that Pepin knowingly guided without a license in violation of AS 08.54.720(6).<sup>22</sup>

As a result of the determination that Pepin did not commit a violation of AS 08.54.720(6), it is not necessary to consider the parties’ arguments over the evidence concerning Reel’s awareness of a potential violation.<sup>23</sup> In the absence of a violation by Pepin, the remaining claims against Reel must fail as well. Because Pepin did not violate AS 08.54.720(6), Reel cannot be liable under AS 08.54.720(a)(8)(A) or (B) for aiding or permitting “the commission of a violation” of a state or federal wildlife or game statute or regulation. Similarly, Reel cannot be liable under AS 08.54.720(a)(1) for failing to report a violation.

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<sup>22</sup> Ambiguous laws invite the state to discriminate between favored and unfavored individuals for prosecution, thereby undermining public confidence in the equality of every citizen before the law. The legislature, therefore, has the obligation to write laws that are reasonably clear. When they are not the question arises whether the state or the individual citizen should bear the risk of uncertainty. Placing the risk on the individual would result in a chilling effect on otherwise lawful conduct and a contraction of ordered liberty. On the other hand, placing the risk on the state provides an incentive to amend and clarify legislation.

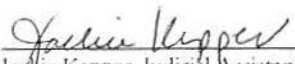
<sup>23</sup> The Court notes, however, that the evidence concerning Reel’s awareness of a potential violation was ambiguous at best. The Board found that “Mr. Pepin was acting for Mr. Reel as his representative at the spike camp.” [Exc. 68] The Division suggests this tends to prove Pepin was in charge of the camp, which the Division equates with the actions of a guide. But having Pepin act as camp representative equally supports the conclusion that Reel retained management and control of the camp *through* Pepin. This conclusion would have been consistent with the substantial evidence presented that Reel maintained daily contact with the camp. [Tr. 192-94, 205-06, 211-13, 281-88, 379-80] The Board itself did not make a finding that Pepin was put in charge of the camp.

**V. CONCLUSION**

For the reasons stated above, the decision of the Board is REVERSED.

**ORDERED** this 31<sup>st</sup> day of January, 2013, at Anchorage, Alaska.

  
ANDREW GUIDI  
Superior Court Judge

I certify that on 2/1/13  
a copy of the above was mailed to  
each of the following at their  
addresses of record:  
Kevin Fitzgerald  
AG - Robert Auth  
  
Jackie Kapper, Judicial Assistant