ALASKA STATE LEGISLATURE
HOUSE JUDICIARY STANDING COMMITTEE
March 31, 2003
3:05 p.m.

MEMBERS PRESENT

Representative Lesil McGuire, Chair
Representative Jim Holm
Representative Dan Ogg
Representative Ralph Samuels
Representative Les Gara

MEMBERS ABSENT

Representative Tom Anderson, Vice Chair
Representative Max Gruenberg

COMMITTEE CALENDAR

HOUSE BILL NO. 25
"An Act relating to health care decisions, including do not resuscitate orders and the donation of body parts, and to powers of attorney relating to health care, including the donation of body parts; and providing for an effective date."

- MOVED CSHB 25(JUD) OUT OF COMMITTEE

HOUSE BILL NO. 18
"An Act relating to the liability of parents and legal guardians of minors who destroy property."

- MOVED CSHB 18(JUD) OUT OF COMMITTEE

HOUSE BILL NO. 214
"An Act relating to the recovery of punitive damages against an employer who is determined to be vicariously liable for the act or omission of an employee; and providing for an effective date."

- HEARD AND HELD

PREVIOUS ACTION

BILL: HB 25
SHORT TITLE:HEALTH CARE SERVICES DIRECTIVES
SPONSOR(S): REPRESENTATIVE(S)WEYHRAUCH, Ogg

Jrn-Date	Jrn-Page		Action
01/21/03	0038	(H)	PREFILE RELEASED (1/10/03)
01/21/03	0038	(H)	READ THE FIRST TIME - REFERRALS
01/21/03	0038	(H)	HES, JUD, FIN
02/13/03		(H)	HES AT 3:00 PM CAPITOL 106
02/13/03		(H)	Heard & Held
02/13/03		(H)	MINUTE(HES)
02/27/03		(H)	HES AT 3:00 PM CAPITOL 106
02/27/03		(H)	Heard & Held
02/27/03		(H)	MINUTE(HES)
03/06/03		(H)	HES AT 3:00 PM CAPITOL 106
03/06/03		(H)	Moved CSHB 25(HES) Out of Committee
03/06/03		(H)	MINUTE(HES)
03/10/03	0488	(H)	HES RPT CS(HES) NT 7DP
03/10/03	0488	(H)	DP: GATTO, WOLF, HEINZE, SEATON,
03/10/03	0488	(H)	CISSNA, KAPSNER, WILSON
03/10/03	0488	(H)	FN1: ZERO(HSS)
03/26/03		(H)	JUD AT 1:00 PM CAPITOL 120
03/26/03		(H)	<Bill Hearing Postponed to 3/28> -- Meeting Canceled --
03/28/03		(H)	JUD AT 1:00 PM CAPITOL 120
03/28/03		(H)	Heard & Held MINUTE(JUD)
03/31/03		(H)	JUD AT 1:00 PM CAPITOL 120

BILL: HB 18
SHORT TITLE:PARENTAL LIABILITY FOR CHILD'S DAMAGE
SPONSOR(S): REPRESENTATIVE(S)MEYER

Jrn-Date	Jrn-Page		Action
01/21/03	0036	(H)	PREFILE RELEASED (1/10/03)
01/21/03	0036	(H)	READ THE FIRST TIME - REFERRALS
01/21/03	0036	(H)	STA, JUD
02/07/03	0153	(H)	COSPONSOR(S): ANDERSON
02/20/03		(H)	STA AT 8:00 AM CAPITOL 102
02/20/03		(H)	Heard & Held MINUTE(STA)
03/06/03		(H)	STA AT 8:00 AM CAPITOL 102
03/06/03		(H)	Moved CSHB 18(STA) Out of Committee MINUTE(STA)
03/10/03	0486	(H)	STA RPT CS(STA) 2DP 4NR 1AM

03/10/03	0486	(H)	DP: LYNN, DAHLSTROM; NR: SEATON, HOLM,
03/10/03	0486	(H)	BERKOWITZ, WEYHRAUCH; AM: GRUENBERG
03/10/03	0487	(H)	FN1: ZERO(CRT)
03/26/03		(H)	JUD AT 1:00 PM CAPITOL 120
03/26/03		(H)	-- Meeting Canceled --
03/28/03		(H)	JUD AT 1:00 PM CAPITOL 120
03/28/03		(H)	Scheduled But Not Heard
03/31/03		(H)	JUD AT 1:00 PM CAPITOL 120

BILL: HB 214
SHORT TITLE:PUNITIVE DAMAGES AGAINST EMPLOYERS
SPONSOR(S): REPRESENTATIVE(S)SAMUELS

Jrn-Date	Jrn-Page		Action
03/26/03	0640	(H)	READ THE FIRST TIME - REFERRALS
03/26/03	0640	(H)	JUD
03/28/03	0689	(H)	COSPONSOR(S): ROKEBERG, MEYER
03/31/03		(H)	JUD AT 1:00 PM CAPITOL 120

WITNESS REGISTER

REPRESENTATIVE BRUCE WEYHRAUCH
Alaska State Legislature
Juneau, Alaska
POSITION STATEMENT: Spoke as the sponsor of HB 25.

LINDA SYLVESTER, Staff
to Representative Bruce Weyhrauch
Alaska State Legislature
Juneau, Alaska
POSITION STATEMENT: Explained proposed amendments to CSHB 25(HES).

REPRESENTATIVE KEVIN MEYER
Alaska State Legislature
Juneau, Alaska
POSITION STATEMENT: Spoke as the sponsor of HB 18.

MICHAEL LESSMEIER, Attorney at Law
Lessmeier & Winters;
Lobbyist for State Farm Insurance
Juneau, Alaska
POSITION STATEMENT: Testified in support of [CSHB 18(STA)].

PAMELA LaBOLLE, President
Alaska State Chamber of Commerce (ASCC)
Juneau, Alaska
POSITION STATEMENT: Testified in support of HB 214.

MARCIA R. DAVIS, Vice President and General Counsel
ERA Aviation, Inc.
Anchorage, Alaska
POSITION STATEMENT: Testified in support of HB 214.

MICHAEL J. SCHNEIDER, Attorney
Law Offices of Michael J. Schneider, PC
Anchorage, Alaska
POSITION STATEMENT: Testified that HB 214 does not meet the goals of the sponsor statement.

RAY R. BROWN, Attorney at Law
Dillon & Findley, PC
Anchorage, Alaska
POSITION STATEMENT: Expressed concerns with HB 214.

KAREN CASANOVAS, Executive Director
Alaska Air Carrier's Association
Anchorage, Alaska
POSITION STATEMENT: Urged the committee's support [of HB 214].

MICHAEL R. WIRSCHEM, Attorney at Law
Anchorage, Alaska
POSITION STATEMENT: Testified on HB 214.

ACTION NARRATIVE

TAPE 03-26, SIDE A
Number 0001

CHAIR LESIL McGUIRE called the House Judiciary Standing Committee meeting to order at 3:05 p.m. Representatives McGuire, Holm, Ogg, Samuels, and Gara were present at the call to order.

HB 25 - HEALTH CARE SERVICES DIRECTIVES

Number 0087

CHAIR McGUIRE announced that the first order of business would be HOUSE BILL NO. 25, "An Act relating to health care decisions, including do not resuscitate orders and the donation of body

parts, and to powers of attorney relating to health care, including the donation of body parts; and providing for an effective date." [Before the committee was CSHB 25(HES), which had been amended on 3/28/03.]

Number 0150

REPRESENTATIVE BRUCE WEYHRAUCH, Alaska State Legislature, sponsor, said that in response to some of the comments at the last hearing, he has some amendments for the committee's consideration.

The committee took a brief at-ease.

LINDA SYLVESTER, Staff to Representative Bruce Weyhrauch, Alaska State Legislature, turned to [Amendment 5], which read [original punctuation provided]:

Page 2, line 13, after "execute a"
Insert "**durable**"

Page 16, line 22, after "form is a"
Insert "**durable**"

Page 26, line 21,
Insert "**durable**" before "power of attorney"

MS. SYLVESTER explained that Amendment 5 makes it very clear that the reference is to durable power of attorney. Once an individual lacks capacity, the power of attorney [goes into effect].

Number 0368

REPRESENTATIVE SAMUELS moved to adopt Amendment 5. There being no objection, Amendment 5 was adopted.

MS. SYLVESTER turned to Amendment 6, which read [original punctuation provided]:

Page 17, line 11, after "disapprove
Insert "**proposed**"

Page 28, line 13, after "disapproval of"
Insert "**proposed**"

MS. SYLVESTER explained that Amendment 6 arose from the discussion revolving around subsection (c) on page 17, line 11, regarding do-not-resuscitate [DNR] orders and the limitations of an agent to approve or disapprove diagnostic tests, surgical procedures, programs of medication, and DNR orders. She offered that everyone in the [health care] profession agreed that the language [in subsection (c) on page 17] refer to things that would occur in the future, and that this language doesn't address an individual wearing a DNR band.

Number 0527

REPRESENTATIVE SAMUELS moved to adopt Amendment 6 [text provided previously]. There being no objection, Amendment 6 was adopted.

MS. SYLVESTER addressed Amendment 7, which read [original punctuation provided]:

> Page 25, line 26, after "facility"
> Strike lines 26b, 27, 28, 29

MS. SYLVESTER informed the committee that Amendment 7 corrects an inconsistency with the implementation of the durable power of attorney, which was pointed out by a public health nurse from Fairbanks. At least one of the witnesses cannot be related by blood to the principal, but the witness statements for both witnesses specifies that the witness is not related by blood. Therefore, Amendment 7 eliminates the language requiring that the witness not be related by blood to the principal in the witness statement for the second witness.

Number 0611

REPRESENTATIVE HOLM moved to adopt Amendment 7. There being no objection, Amendment 7 was adopted.

CHAIR McGUIRE closed public testimony on HB 25.

Number 0678

REPRESENTATIVE SAMUELS moved to report CSHB 25(HES), as amended, out of committee with individual recommendations and the accompanying fiscal notes. There being no objection, CSHB 25(JUD) was reported from the House Judiciary Standing Committee.

HB 18 - PARENTAL LIABILITY FOR CHILD'S DAMAGE

Number 0697

CHAIR McGUIRE announced that the next order of business would be HOUSE BILL NO. 18, "An Act relating to the liability of parents and legal guardians of minors who destroy property."

Number 0740

REPRESENTATIVE KEVIN MEYER, Alaska State Legislature, spoke as the sponsor of HB 18, which he noted he was bringing forth on behalf of the Anchorage School District. He explained that HB 18 establishes the limit for the recovery of property damaged by a minor at $20,000. The original legislation specified no cap, but that was changed in the House State Affairs Standing Committee after hearing testimony expressing concerns. A woman who adopts high-risk children testified that with an unlimited liability she would be reluctant to adopt high-risk children. Insurance companies expressed concern that an unlimited liability could have an impact on homeowner's insurance, which could result in an increase in the premium for homeowners insurance.

REPRESENTATIVE MEYER informed the committee that the [Anchorage School District] has testified that 90 percent of vandalism to the school district's property is minor, such as graffiti and breaking locks and windows. Therefore, the $20,000 cap should cover 90 percent or more of the incidents. However, there have been some isolated incidents in which there has been serious damage and, thus, the school district doesn't want a cap because the money that isn't recovered comes out of the classroom funds.

REPRESENTATIVE MEYER also informed the committee that almost all states have a cap varying from $1,000 to $25,000, that only five states didn't have a cap, and that no difference in vandalism was seen in relation to not having a cap. In response to Chair McGuire, Representative Meyer estimated that of those states with a cap, Alaska would be in the group with the higher cap. He noted that the cap hasn't been changed since 1995 and with a $20,000 cap he hoped there won't be a need to address this for some time.

Number 1000

MICHAEL J. LESSMEIER, Attorney at Law, Lessmeier & Winters; Lobbyist for State Farm Insurance, began by saying that Representative Meyer accurately expressed [State Farm's]

concerns with not having a cap. Mr. Lessmeier highlighted that this is an area of law where there is liability without fault and, thus, it doesn't seem to make good sense to have the liability be unlimited. He commented that [CSHB 18(STA)] is a fair balance and thus [State Farm Insurance] would support the legislation as amended [in the House State Affairs Standing Committee].

REPRESENTATIVE GARA opined that insurance companies are willing to write off a child's conduct that relates to things outside of schools without a cap. Therefore, he inquired as to why there is a cap on an insurance company's liability when a child's conduct damages a school.

MR. LESSMEIER said that Representative Gara is talking about apples and oranges. He explained that this legislation makes a parent liable without regard to whether the parent was negligent. He said that in every other area of the law of which he is aware, for there to be the aforementioned liability, the parents themselves would have to be negligent. He pointed out that most insurance policies don't cover intentional actions or knowing actions. He informed the committee that when there is legislation such as HB 18 and there is a parent who can't afford to pay a judgment, there is an effort to find a deep pocket. Although these claims aren't all covered, even under this statute, there may be a question regarding whether the claim is covered and, thus, the insurance company may pay some of the claims. Mr. Lessmeier reiterated that the statute proposed in CSHB 18(STA) is different because it imposes liability without fault and doesn't impact those cases in which there is liability with fault.

REPRESENTATIVE GARA relayed his belief that if a child did a negligent act, the parent would automatically be liable. However, he understood Mr. Lessmeier to mean that the parent has to be negligent also.

MR. LESSMEIER answered that he didn't know that there is any automatic liability on behalf of the parent. Furthermore, he said he didn't know of any automatic liability on behalf of an insurer. He said he believes it depends upon the circumstances for which the insurer would be responsible.

Number 1233

REPRESENTATIVE GARA asked whether, under Alaska law, the parent is automatically liable for the child's negligent conduct or whether, instead, the parent has to be negligent.

MR. LESSMEIER offered his understanding that a parent wouldn't automatically be liable for the negligence of a child. He posed a situation in which a child who drives is in an automobile accident. If the parent submits that the child has met financial responsibility, then the parent isn't liable. However, if the child hasn't met financial liability, the parent would be liable. There are certain laws, such as those dealing with driving, where there is liability; that liability is created through statute. Furthermore, there are cases in which the [insurance company] deals with "issues of negligent entrustment of vehicles" for which it's purely a question of negligence as to whether the parent is responsible. Mr. Lessmeier said that he didn't think parents are strictly liable for the actions of their child.

REPRESENTATIVE GARA expressed concern that numbers are being picked out of the air. The original legislation specified that parents would be liable for what their children do to schools. Under [CSHB 18(STA)], the cap has been placed at $20,000 due to the perception that without [the cap], homeowner's insurance rates will be raised. He asked if there is an actuarial analysis that supports the aforementioned notion.

MR. LESSMEIER said that the issue posed by CSHB 18(STA) is more complicated because it has to do with the issue of insurance coverage, which he urged the committee to set aside. It's bad public policy, he said, to pass legislation such as this because it may or may not be covered by insurance. The [committee] should review this issue in terms of whether it sinks or swims on its own merits. He relayed his belief that the intent of CSHB 18(STA) is to create financial responsibility and perhaps avoid the damage to begin with. With regard to how the cap landed at $20,000, Mr. Lessmeier said that he didn't know that he had input into that, although he viewed it as a reasonable balance. Mr. Lessmeier suggested that this should be done because it's right to do so regardless of whether it's covered by insurance. He noted that in many instances, this responsibility isn't going to be covered by insurance anyway; coverage depends upon how the [homeowner's] policy is drafted. In every instance where there is this kind of intentional, knowing conduct, it is typically not covered by insurance.

MR. LESSMEIER highlighted the importance of realizing that when one discusses insurance, it's not just the insurance company. To the extent possible, most insurers in Alaska try to base premiums on frequency and severity of loss. Ultimately, those premiums get paid by individual policyholders. Therefore, Mr. Lessmeier encouraged the committee to set the insurance issue aside and determine whether having parents liable in an unlimited way for the actions of their children is good public policy, even when the parents aren't at fault. Mr. Lessmeier said that he doesn't believe that to be a good idea; rather, it makes better sense to impose some balance on that liability.

Number 1586

REPRESENTATIVE GARA agreed that this legislation shouldn't be crafted based on whether an insurance company can be held liable. However, he said he understood the sponsor's explanation that the school district wanted unlimited liability while some insurance company representatives expressed concerns, which ultimately created the $20,000 cap. Although Representative Gara agreed that there should be a liability amount that's justified as a matter of public policy rather than based on whether someone has insurance, he said he understood that the $20,000 cap was driven by the concerns of the insurance industry.

CHAIR McGUIRE recalled Representative Meyer's testimony in which he relayed that a woman who [adopted] high-risk youth had expressed concern that if she had a homeowner's policy and was liable, her insurance costs might go up. She said she understood such to be the reason the $20,000 cap was included. She noted that she would be proposing an amendment to reduce the cap to $15,000. She said she didn't know how many people would be able to argue that their homeowner's policy would cover the destruction of property by a minor due to the "intentional element." Furthermore, she remarked, many people don't have a homeowner's policy.

REPRESENTATIVE GARA asked if one of the reasons CSHB 18(STA) was reduced from unlimited liability to a specified amount was because some folks in the insurance industry thought doing so would be necessary for actuarial reasons.

REPRESENTATIVE SAMUELS interjected to say that the school's insurance company will pay and thus he couldn't imagine why the industry would take a position on it. He further commented that

he couldn't imagine having one penalty for those who are insured and one penalty for those who aren't insured.

REPRESENTATIVE GARA then inquired as to why the school district is interested in this if it already has insurance.

REPRESENTATIVE MEYER answered that the school district has $1 million deductible, and therefore the district has to pay all the damages until the deductible is reached. He said that the main testimony was in the House State Affairs Standing Committee, that the committee itself wanted a cap, and that he opted for the $20,000 cap because of testimony from the woman who adopts high-risk children.

Number 1691

REPRESENTATIVE HOLM questioned whether there is any interest in solving the issue of the civil liability of the parents. He related his understanding that this caps the amount of money that can be guaranteed by state law. He asked if there is a tort liability beyond this.

MR. LESSMEIER answered, "This would be the limit to the tort liability with respect to how this statute applies for the parents." Therefore, if the parents aren't negligent, then [CSHB 18(STA)] would limit the liability of the parents to $20,000 but it wouldn't limit the liability of the minor, or the parents, if the parents were somehow at fault.

REPRESENTATIVE HOLM remarked that this is good legislation.

REPRESENTATIVE OGG asked if there is a correlation between the higher cap and the insurance factor.

REPRESENTATIVE MEYER answered that there didn't seem to be any correlation. For example, the five states without a cap didn't illustrate any reduction in vandalism.

REPRESENTATIVE GARA remarked that there may be a need for a clause specifying that this legislation shouldn't be interpreted to interfere with existing causes of action.

REPRESENTATIVE HOLM agreed.

REPRESENTATIVE GARA pointed out that the courts are always faced with the question of whether a particular legal remedy was meant to eliminate all other legal remedies in the area. Sometimes

the courts aren't sure what was exactly intended. Therefore, he reiterated his suggestion to include language to allow the other two areas of law to continue.

REPRESENTATIVE OGG said he didn't believe the [such language] was necessary because CSHB 18(STA) merely adjusts the monetary amount [of an existing cap].

Number 1929

REPRESENTATIVE MEYER agreed. He mentioned that perhaps some review should be given to the inflation clause, although he didn't believe such would be necessary if the $20,000 cap is maintained. Representative Meyer pointed out that under criminal law, a juvenile can be held directly responsible and monies can be levied against the juvenile and his/her permanent fund dividend. He noted that such doesn't apply to civil law, which is what this legislation addresses.

CHAIR McGUIRE asked if Representative Meyer had reviewed the fact that Alaska has criminal statutes that allow for a youth offender to be tried as an adult at the age of 16 in certain egregious cases. If so, she inquired as to how he compared the philosophical argument to this situation, where the parent is held strictly liable for their child's acts up to the age of majority.

REPRESENTATIVE MEYER responded that he hadn't reviewed that, adding that CSHB 18(STA) addresses the civil side in existing statute.

CHAIR McGUIRE announced that she is considering offering an amendment to lower the age to 16 in order to make [CSHB 18(STA)] consistent with other statutes [regarding emancipated minors]. She inquired as to the sponsor's opinion on such an amendment.

REPRESENTATIVE MEYER said that changing the age makes sense.

REPRESENTATIVE HOLM pointed out that an emancipated minor wouldn't have causation.

CHAIR McGUIRE agreed.

REPRESENTATIVE MEYER reminded the committee that in civil matters, a minor can't be sued. He said that although the chair makes a very valid point, the school district couldn't take action against a 17-year-old because he/she is underage.

REPRESENTATIVE SAMUELS surmised, then, that in a case against a 17-year-old, the school district wouldn't be able to obtain $10,000 - the current cap.

REPRESENTATIVE MEYER answered that the school district would go after the parents until the child is age 18.

CHAIR McGUIRE pointed out that there is a two-year statute of limitations.

Number 2106

REPRESENTATIVE GARA returned to Representative Holm's earlier point. Although Representative Gara said that [CSHB 18(STA)] is fine with him, he wanted to ensure that Representative Holm understood that the current language of the legislation would still be interpreted to allow a separate action against the child. With regard to the remaining question of whether the $20,000 cap would apply in the circumstance where the parent is negligent, he opined that it probably should.

REPRESENTATIVE OGG turned to the suggestion of changing the age to 16 and pointed out that this [legislation] wouldn't apply to someone between 16 and 18 years of age.

CHAIR McGUIRE acknowledged that.

REPRESENTATIVE GARA inquired as to the school district's opinion of CSHB 18(STA).

REPRESENTATIVE MEYER said that the school district would still prefer no cap. He informed the committee that Senator Dyson is carrying this same legislation and it has no cap. However, if it did come to the House, he predicted that the House State Affairs Standing Committee would place a cap on it as well. Representative Meyer said that he was convinced that a cap is necessary, although he recognized that the amount of the cap is a policy call.

Number 2269

CHAIR McGUIRE made a motion to adopt Amendment 1, which reads as follows:

> Page 1, line 7
> Delete "$20,000"

Replace with "$15,000"

CHAIR McGUIRE remarked that everyone probably knows of a child who doesn't turn out to be "a good egg" no matter what is done. Chair McGuire said that she has concern for those children with head injuries or behavioral problems. She recognized the need to address the school district's concern, but suggested it be done in a cautious manner. She reiterated that many people don't have a homeowner's insurance policy to fall back on, much less a policy that includes intentional acts. Although she agreed that children and parents should be held responsible, she expressed the need to take care with regard to the following: The family that has done everything it can and the child has still turned out poorly, and the family that has no financial recourse.

TAPE 03-26, SIDE B
Number 2380

CHAIR McGUIRE directed attention to a document from the Legislative Research Agency dated February 16, 1995. This document lists the states with caps and without caps for parental responsibility for delinquent acts of children. The list shows a graduated scale. Of those states with caps, Alaska [with the proposed cap of $20,000] would be the second highest in the nation. Doubling the cap is simply too much, she said.

REPRESENTATIVE MEYER pointed out that the 1995 document uses data that is current as of the end of 1993. Therefore, he surmised that these cap amounts have increased. With regard to a low-income family that couldn't come up with $20,000, Representative Meyer questioned whether these low-income families would even have $15,000. Therefore, one must keep in mind the need for balance, he said. When the school district can't sue for recoverable damages, the money comes out of the classroom. The goal, he maintained, is to keep as much money in the educational system - in the classroom - and not paying for graffiti, broken windows, et cetera. Although he acknowledged that the amount of the cap is a policy call, he related his belief that $20,000 is appropriate. He also reiterated that this amount hasn't been touched since 1995.

CHAIR McGUIRE remarked that she doesn't view a $20,000 cap as a compromise. She said that she is trying to review the policy as a whole while keeping in mind the balance between the school district and the parent of a high-risk youth. She asked if the

sponsor had any updated figures with regard to the cap and where Alaska stands nationwide were this $20,000 cap enacted.

The committee took an at-ease from 4:02 p.m. to 4:03 p.m.

REPRESENTATIVE MEYER confirmed that of the western states, Alaska [would] be the second highest with the $20,000 cap.

Number 2240

CHAIR McGUIRE noted that the committee packet also includes a chart entitled, "Table 1: Limits of Parental Liability for Property Damage by Minors," which also shows Alaska would become the second highest of the states and provinces listed.

REPRESENTATIVE OGG pointed out that in 2001, the cap was at $10,000 for school property and $25,000 for other properties. He said he was inclined to go with Chair McGuire's amendment because the $10,000 cap didn't have much of an impact and, as the sponsor stated earlier, having an unlimited cap wasn't a deterrent. Furthermore, Representative Ogg expressed concern that this $20,000 could deplete the income of an average family.

REPRESENTATIVE MEYER remarked that he didn't believe the amount would act as a deterrent.

REPRESENTATIVE HOLM relayed that testimony in the House State Affairs Standing Committee indicated that parents of adopted children from foster care take on a tremendous responsibility. Furthermore, the state has taken away many of the parental rights with regard to discipline and other things. Since parents aren't allowed to easily demonstrate control, Representative Holm indicated that money is about the only thing left as a deterrent. Although he said he wasn't sure [any amount] would make an impact, he thought that as a policy matter, [the intent] is to effect a [financial] solution for the problem. Still, Representative Holm expressed reservations with regard to taking away parental capabilities to discipline while at the same time making the parents financially responsible.

REPRESENTATIVE SAMUELS inquired as to how often the $10,000 is collected. Have there been any problems with driving families to bankruptcy, and "how often do we go after the parents," he asked.

REPRESENTATIVE MEYER said he could obtain that information. He reiterated that the school district approached him saying that

$10,000 isn't enough. This came about due to some instances of extensive vandalism in Anchorage. Those instances are the exception, he noted; most of the incidents are minor.

Number 1979

REPRESENTATIVE GARA said that he didn't think the approach presented in CSHB 18(STA) is going to work; the premise behind the bill is that parents should help school districts pay for damage to schools, adding that he believes everyone would agree with that premise. However, he remarked, the committee can't, in good conscious, impose a $20,000 liability on a low-income family. Furthermore, he said he questions whether higher penalties would deter children.

REPRESENTATIVE GARA surmised that the intent is twofold: to develop a figure that fairly compensates the school district without destroying a family by imposing that amount. The only way to accommodate both, he remarked, would be to develop a fair amount that would serve the school district's purposes and stipulate that it wouldn't be imposed when it would destroy a family. Therefore, he suggested a $30,000 cap with the caveat that a family shall not be charged an amount more than 25 percent of its net federal taxable income. The aforementioned would protect the families that would be hurt by the current legislation and allow the school districts to recover money related to damages. Without the aforementioned caveat, Representative Gara said that he is uncomfortable with the potential of destroying a family.

REPRESENTATIVE SAMUELS disagreed. He indicated that [this legislation is about] personal responsibility. Whether the parent is a bad parent is the crux, he said, rather than the [parent's] income. He stressed that there is a difference between a parent that did his/her best and the [child] still didn't turn out [well], and a bad parent. "We'll wale on the bad parent whether they have money or not," he said. The [caveat suggested by Representative Gara] isn't fair, he opined, because everyone ends up paying for some of the people, and the wealthy families end up paying for their children.

REPRESENTATIVE OGG posited that Representative Gara's suggestion might run up against the equal protection clause and, thus, there may be problems. Therefore, he said he preferred sticking with [the current language].

CHAIR McGUIRE announced that Amendment 1 [text provided previously] is before the committee. She pointed out that even with a cap of $15,000, Alaska would still be the highest because California's $10,000 cap specifically addresses damage to school property.

CHAIR McGUIRE asked if there were any objections to Amendment 1. There being no objection, Amendment 1 was adopted.

Number 1730

REPRESENTATIVE GARA moved that the committee adopt Amendment 2, which reads as follows:

> p.2., after line 1, insert:
> *__Section 2.__ AS 34.50.020 is amended by adding a new subsection (d):
>
> **(d) Liability for the conduct described in this section shall not attach to the legal guardian of any child who has been adopted after being in state custody, including foster care.**

REPRESENTATIVE GARA informed the committee that he has received comments for those who work in the child protection and adoption field. Those comments have indicated that if word gets out that there is liability for parents of difficult-to-handle children, then a bad message will be sent to those very few parents who adopt children out of foster care. He said he didn't believe those parents who take in foster children will be subject to this provision because these people aren't the legal guardian - the state is the legal guardian.

REPRESENTATIVE GARA pointed out that children are staying in foster care far too long, although the Division of Family & Youth Services (DFYS) is working very hard to place children in adoptive families. The troublesome children and children with the greatest problems are the most difficult to place in adoptive homes. Therefore, Amendment 2 specifies that a parent of an adoptive child formerly in state custody isn't subject to this liability provision. Representative Gara noted that Amendment 2 is a bit overbroad because it would also protect adoptive parents when the foster child isn't a problem child.

CHAIR McGUIRE objected for discussion purposes. She inquired as to the definition of state custody and asked whether it refers

to custody only in the State of Alaska, anywhere in the U.S., or other countries.

REPRESENTATIVE GARA said that he had wanted to include foster parents in order to ensure that foster parents wouldn't be held liable for the active and unruly child. He relayed that it was explained to him that foster parents are exempt from the statute because foster children are in state custody. However, he said he didn't know that all foster parents are parents of children in state custody.

CHAIR McGUIRE returned to the definition of state custody and asked if it should be defined.

REPRESENTATIVE GARA remarked that it would be a good idea. He relayed that state custody might have to be defined as the custody of any governmental state - any jurisdiction.

Number 1565

REPRESENTATIVE MEYER noted that he is the parent of an adopted child. He questioned whether [Amendment 2] would exclude children adopted through private adoptions. He said he didn't think it was fair to exempt only those who adopt from state-run foster care programs. If one adopts an infant from a state-run foster care program, then that person has modeled and raised that child and should take full responsibility for the child's actions.

REPRESENTATIVE OGG said that he was persuaded by Representative Meyer's comments. Furthermore, Representative Ogg said that he didn't believe that one type of parents should be excluded. He relayed his belief that people should be encouraged to be good parents, which is the aim of CSHB 18(JUD). He noted his opposition to Amendment 2.

REPRESENTATIVE HOLM questioned whether [the intent] is to limit vicarious liability or to initiate a system whereby more children are adopted. If the testimony from the House State Affairs Standing Committee is true, by requiring such stringent vicarious liability on adoptive parents, folks will choose not to adopt. He acknowledged that Representative Gara is attempting to have the best of both worlds. However, Representative Holm said he wasn't sure whether CSHB 18(STA) is the vehicle to accomplish that.

CHAIR McGUIRE relayed that one of her constituents has six high-risk youth in her home and has chosen to adopt two. Despite this constituent's best efforts, [this parent has faced difficulties with these children]. Chair McGuire said that although Representative Gara's point is important, she didn't know the answer.

REPRESENTATIVE SAMUELS opined that if the desire is to overhaul the entire system, that [would require] a different vehicle. He asked if there is any statistical data with regard to foster children and property damage as compared to the general population.

REPRESENTATIVE MEYER reiterated that the main reason for the cap is due to the testimony from an individual with adopted high-risk children who was uncomfortable with unlimited liability. Although this person was specifically asked about a cap other than the $10,000, he said he assumed that this parent would be amenable to a cap of $15,000 or $20,000, and would continue to adopt high-risk children. He said there is no data showing that high-risk children are causing problems.

Number 1275

REPRESENTATIVE GARA emphasized that people don't tend to read statutes; thus changing a few words in the criminal law doesn't deter people any more than before the language is changed. He surmised that once this legislation receives media publicity, the impression will be that the legislature is increasing the liability of parents of children who do damage to school property. And although this impression will eventually reach those who are thinking of adopting high-risk children, they won't have read the statutes. Furthermore, the foster care system in Alaska is failing, like in many other states, he noted, because social workers are given far too large caseloads and, hence, the system fails.

REPRESENTATIVE GARA explained that the federal and state government came together a number of years ago and said that the best thing is to get children out of foster care and place them in adoptive homes. The most attractive children for adoption were shuttled to adoptive homes and now there are a high proportion of children in foster care for which it's difficult to find adoptive parents. Representative Gara said that he didn't want to do anything that would prevent even one of those children from being adopted. Therefore, he indicated that there is a need to craft this legislation such that it doesn't deter

anyone from taking in these [high-risk] children. With regard to the idea that parents should be responsible for their children, Representative Gara suggested that those taking in troubled children are probably fairly responsible. Therefore, he didn't worry that adoption of Amendment 2 would foster irresponsibility among parents. He noted that he did agree that state custody does include custody of children from any other state or jurisdiction.

REPRESENTATIVE SAMUELS agreed that most people don't read the statutes. With regard to this coming out in the press, Representative Samuels said that the exemption won't be in the press either and the exemption won't be read either.

CHAIR McGUIRE withdrew her objection to Amendment 2.

REPRESENTATIVE SAMUELS objected.

A roll call vote was taken. Representatives Gara and McGuire voted in favor of Amendment 2. Representatives Ogg, Holm, and Samuels voted against it. Therefore, Amendment 2 failed by a vote of 2-3.

Number 1056

REPRESENTATIVE SAMUELS moved to report CSHB 18(STA), as amended, out of committee with individual recommendations and the accompanying fiscal notes. There being no objection, CSHB 18(JUD) was reported from the House Judiciary Standing Committee.

HB 214 - PUNITIVE DAMAGES AGAINST EMPLOYERS

Number 1006

CHAIR McGUIRE announced that the final order of business would be HOUSE BILL NO. 214, "An Act relating to the recovery of punitive damages against an employer who is determined to be vicariously liable for the act or omission of an employee; and providing for an effective date."

Number 0964

REPRESENTATIVE SAMUELS, speaking as the sponsor, explained that HB 214 adds a section to the punitive damage statutes in order to create new guidelines for damages against the employer under vicarious liability. The legislation stipulates that the

employer shall not be responsible for paying damages unless the employer [authorized] the act, knew of the act later and approved of it, or the employer knew that the employee was unfit and employed the individual anyway. He highlighted that the legislation doesn't apply unless the employer has been determined to be vicariously liable anyway. Furthermore, the legislation strictly involves punitive damages. Punitive damages are meant to punish an entity, usually a company, for bad behavior. Under HB 214, if no bad behavior occurred, the company shouldn't be liable for punishment. He clarified that the bill doesn't pertain to compensatory damages; only punitive damages are addressed.

REPRESENTATIVE SAMUELS posed an example in which an owner of a construction company with training programs, drug testing programs, and hiring standards informs an employee that he can't drive a truck because the employee hasn't been "checked out in the truck." If the employee gets in the truck and breaks the rules of the company, the company shouldn't be liable for punitive damages because the employee went against the company's policies.

CHAIR McGUIRE announced that she didn't intend to report HB 214 from committee today.

Number 0785

PAMELA LaBOLLE, President, Alaska State Chamber of Commerce (ASCC), informed the committee that ASCC is in support of HB 214. She said it's unfair to hold employers [liable for punitive damages] when the employers had no control in the situation. She echoed Representative Samuels's point that [the employers] would remain responsible under civil law for compensatory damages.

CHAIR McGUIRE pointed out that [with passage of HB 214] businesses would be placed in parity with the State of Alaska, which, as an employer, is immune from punitive damages.

Number 0663

MARCIA R. DAVIS, Vice President and General Counsel, ERA Aviation, Inc. ("ERA"), announced strong support HB 214, which it views as a measured, limited correction to an earlier position taken by the Alaska Supreme Court. She relayed the belief that HB 214 impacts a broad range of constituents and, thus, she characterized HB 214 as an employer's bill, adding,

however, that the bill isn't anti-employee legislation. She stated that HB 214 will make a difference to ERA.

MS. DAVIS noted that ERA is closely regulated by the Federal Aviation Administration (FAA), and performs extensive criminal background checks and pre-employment drug and alcohol tests on all employees. Furthermore, mandatory random drug and alcohol tests are performed on all of the emergency medical technician employees. Moreover, the company has a zero-tolerance policy regarding drugs and alcohol at work, and reserves the right to conduct, for cause, drug and alcohol testing. All of ERA's supervisors undergo annual, mandatory drug-and-alcohol-detection training. Still, several summers ago a seasonal summer-hire, driving the company van between two "air locations," struck a motorcycle. After the investigation it was determined that he had consumed alcohol.

MS. DAVIS said she couldn't think of anything else, as a responsible employer, that the company could've done to avoid the situation. The plaintiff's attorney raised the specter of the company facing many punitive damages and there was nothing the company could do. Because the Alaska Supreme Court had taken a strict liability [position] for punitive damages assessed against an employee, the company had no recourse. Ms. Davis concluded by noting that ERA doesn't object to paying compensatory damages. She opined that punitive damages should function as punishment of the wrongdoer, but added that this isn't how the law is currently working. She strongly encouraged the committee to pass HB 214.

Number 0451

MICHAEL J. SCHNEIDER, Attorney, Law Offices of Michael J. Schneider, PC, began by saying that in his 28 years in practice he has never obtained a punitive damage recovery by the way of jury trial. He emphasized that punitive damages are rarely awarded by Alaskan jurors. However, when that occurs, the [Alaska Supreme Court] almost universally reverses those awards; there are few exceptions. Under current law, at least half of the benefit of the struggles to obtain those damages goes directly to the State of Alaska. Therefore, he characterized HB 214 as a solution in search of a problem.

MR. SCHNEIDER suggested that the goals of the sponsor statement are simply not met by the legislation. He inquired about the employer who gives a wink and a nod to bad conduct - potentially dangerous conduct. Unless the employer knew that the employee

was unfit when hired, the employer will be immune from vicarious liability for punitive damages under HB 214. The employer would be immune if the employer did nothing to train or supervise the employee after the point of hiring. Even if the employer turned a blind eye to information suggesting the very risk visited upon the innocent by the employee, the employer would still enjoy the immunity of HB 214. Therefore, HB 214 is entirely too broad, he suggested. Mr. Schneider said that there are no real examples of punitive damage awards sustained by the [Alaska Supreme Court] that would cause anyone to rush to adopt this measure. Furthermore, under the existing tort reform, proof [for] punitive damages, as to the employee, has to be clear and convincing, and, if the employer is vicariously liable, [the employer] has to have a connection to the activity that brings about the harm.

Number 0239

CHAIR McGUIRE asked Mr. Schneider how many times he has seen settlements occur in response to the mere threat of a punitive damages award by a jury.

MR. SCHNEIDER informed the committee that almost all of his practice focuses on representing injured Alaskans or the families of Alaskans who have been killed. He said he has never obtained monies for punitive damage exposure because juries rarely award those damages and when they do, those awards are reversed. Mr. Schneider relayed that he has asserted punitive damages or the possibility of obtaining punitive damages as part of the settlement process, and specified that he does it every time the conduct seems to support the aforementioned allegation. The practical effect is that those people who have been injured and have "a dime's worth" of compensatory damages have some hope, when the company has legitimate punitive damage exposure, of being fully compensated or getting closer to being fully compensated.

CHAIR McGUIRE surmised, then, that while [punitive damages] began as punishment, they have turned out to be more compensatory in an effort to make the innocent victim whole.

MR. SCHNEIDER agreed. He emphasized, however, that there has to be outrageous conduct and it has to be proven by clear and convincing evidence.

CHAIR McGUIRE acknowledged that, but highlighted that punitive damages were originally created to punish those entities that

willfully disregard information that is known - for example, in the area of consumer protection - and proceed to act with full knowledge and "foreseeability" about the potential harm to victims.

TAPE 03-27, SIDE A
Number 0001

CHAIR McGUIRE highlighted that the legal system has evolved to the point, particularly with regard to settlements, where the philosophical distinction between compensatory damages, which are to make a victim whole, and punitive damages, which are intended to punish the tort feasor who might have known of a foreseeable harm and consciously disregarded it, isn't maintained.

MR. SCHNEIDER said that he couldn't agree with Chair McGuire's assessment. He said that he doesn't see entities paying his clients for punitive damages. He noted that occasionally, when the punitive damage exposure is there and when there is talk of a pre-trial settlement, clients may be compensated. However, he pointed out that the clients are never really paid punitive damages and, furthermore, sums that go beyond the actual losses aren't paid.

CHAIR McGUIRE opined that monies awarded in a settlement simply aren't being called punitive. She recalled Mr. Schneider saying that he did believe that the mere threat or assertion of punitive damages has led to greater compensation of victims.

MR. SCHNEIDER remarked, "I believe it has and I believe it should."

REPRESENTATIVE GARA recalled earlier remarks regarding whether the Alaska Supreme Court has indicated a willingness to adopt the new Restatement (Second) of Agency ("Restatement") rule, which is included in HB 214. In reviewing the Alaskan Village, Inc. v. Smalley, 720 P.2d 945, 948-49 (Alaska 1986), he said that he didn't necessarily agree that the Alaska Supreme Court is stating such a willingness. He requested that Mr. Schneider comment on what the Alaska Supreme Court has said about the Restatement (Second) of Agency. Representative Gara inquired as to whether Mr. Schneider had any sense that the rule Alaska currently follows for punitive damages remains a majority rule.

MR. SCHNEIDER said that he had no information on the latter. However, he offered that he has a strong impression that the

Alaska Supreme Court hasn't abandoned the ruling in the Smalley case, because if such were the case, there have been subsequent opportunities.

MS. DAVIS turned to Representative Gara's first question. She informed the committee that the last case in which the Alaska Supreme Court was presented with this issue was with Laidlaw Transit, Inc. v. Crouse, on August 30, 2002. She directed attention to footnote 9 of the Laidlaw decision, which references that the U.S. Supreme Court [is] cutting back on punitive damages under the due process clause, the Alaska State Legislature's narrowing of circumstances under which punitive damages can be awarded, and the [statutory] caps. The footnote ends with the following statement: "In light of these developments, the Alaskan Village rule may be anachronistic. If and when the point is properly preserved and raised, this court may consider adopting the narrower complicity rule."

MS. DAVIS said that the "narrower complicity rule" essentially is HB 214. Therefore, she said she understood such to be a clear indication from the [Alaska] Supreme Court that it's uncomfortable with the position that it has taken. The problem in the Laidlaw case was that the issue wasn't raised at the trial level, and therefore when it was raised at the supreme court level, the [Alaska] Supreme Court felt that it hadn't been preserved.

REPRESENTATIVE OGG recalled remarks indicating that the language in HB 214 won't cover an employer operating by a wink and nod. He asked what is meant by the phrase, "a wink and nod."

Number 0455

RAY R. BROWN, Attorney at Law, Dillon & Findley, PC, informed the committee that he is a trial lawyer. In response to Representative Ogg, Mr. Brown said he read the statute such that an employer can escape vicarious liability for punitive damage by establishing that the employer didn't authorize the act or omission. No one is going to ratify or approve an act once vicarious liability has been established. Therefore, it would be virtually impossible to get around the "wink and nod" defense, which most of these cases are. He said that this [proposed] statute basically encourages people to put their head in the sand.

MR. BROWN informed the committee that he'd had a case in which punitive damages were awarded, although the case is going to the

supreme court. This case was one in which the employer would've been immunized under HB 214. He explained that the case was one in which a shock-jock radio host in California, who broadcasts nationwide, verbally sexually assaulted a woman in Juneau, Alaska. This radio host gave out this woman's home phone number and fax number and encouraged his listeners, young males under the age of 40, [to contact her]. As a result, this woman was harassed, and consequently experienced a significant amount of stress.

MR. BROWN said that if this radio host was held liable for intentional misconduct against the woman, the employer would be immune under [HB 214] because the employer could say that it didn't authorize the act or omission and doesn't ratify or approve of the radio host's actions. The case is before the supreme court because [the employer] was held directly liable on a theory of intentional spoliation of evidence. He added that under the theory of the employer acting in misconduct, that issue is before the supreme court on alleged erroneous jury instructions. Therefore, Mr. Brown said he was concerned that one would never be able to establish vicarious liability and [the employer] merely has to "wink and nod" to escape it.

Number 0652

MR. BROWN specified that his main problem with HB 214 is that he didn't know what "unfit" means in Section 1 (k)(2)(A) and (B). Furthermore, requiring the employer to act recklessly in employing the employee is problematic. He proffered an example in which an employer opens a private school and pays lower salaries for teachers and the minimum qualification is a four-year degree. If that [applicant] had a sordid history of sexual harassment and predatory conduct toward women and children and the employer is negligent or grossly negligent in following up on the applicant's employment history, the employer is off the hook. Furthermore, if the employer is deemed not to be reckless in employing the applicant, the employer can turn its back, acting negligent and grossly negligent in supervising and training the employee, and the person can run rampant. The employer would remain off the hook for punitive damages.

MR. BROWN said that if the committee is inclined to pass HB 214, he hoped that the committee would review Section 1 (k)(2)(A) and (B) and at least change the language to refer to "negligent", explain the meaning of "unfit", and expand "employing" to include "supervising and training".

CHAIR McGUIRE pointed out that the language [in Section 1 (k)(2)(A) and (B)] comes from subsection (b) of the Restatement, which reads "(b) the agent was unfit and the principal or a managerial agent was reckless in employing or retaining him".

REPRESENTATIVE OGG inquired as to the language Mr. Brown would recommend to correct the "wink and nod" situation.

MR. BROWN said that he would like to submit suggested language to the committee in writing. With regard to Chair McGuire's point that the language comes from subsection (b) of the Restatement, Mr. Brown commented that sometimes taking language directly from the Restatement is often difficult, especially when the terms aren't defined. He offered to provide proposed language that could satisfy the concerns of Ms. Davis.

Number 1018

KAREN CASANOVAS, Executive Director, Alaska Air Carrier's Association, informed the committee that the Alaska Air Carrier's Association is a member of several national and statewide organizations, many of which work toward economic growth and occasionally propose recommendations for legislative changes. The association's interest is in regard to the punitive damages discussion. She pointed out that in 1994 the National Conference of Commissioners on Uniform State Law (NCCUSL) established a drafting committee on the subject of punitive damages and developed a model act. Punitive damages were thought to be an appropriate candidate for this model.

MS. CASANOVAS said she agreed with Chair McGuire's earlier comment that the direction [of the legal system with regard to punitive damages] has changed over the years. The mounting concern with regard to the role of punitive damage awards in the civil justice system in the U.S. stems from the perceived increase in size and frequency of the awards. Often, it was argued, the size of the awards had no correlation with deterrence, but merely reflected a jury's dissatisfaction with a defendant and a desire to punish the defendant without regard for the actual conduct in the particular situation. She noted that over the years, some of the petitioners have taken cases to the supreme court when some constitutionality limits were in question, for example, in the case of excessive punitive damages under the Eighth Amendment in the 1988 case of Bankers Life & Casualty Company v. Crenshaw, 486 U.S. 71 (1988). She pointed out another example, the 1991 decision of Pacific Mutual Life

Insurance Company v. Haslip, which falls under due process of the Fourteenth Amendment.

MS. CASANOVAS said that the American Law Institute Restatements regarding vicarious responsibility for punitive awards support that an employer is not liable for punitive damages just because an employee was acting within the course and scope of employment. Since punitive damages serve solely to deter or punish, the law requires that there be some wrongdoing and consideration of whether the party would be deterred or punished by the award. She relayed the Alaska Air Carrier's Association's belief that HB 214 would bar an employer from being held vicariously liable for the punitive damages assessed against the employee, except when there was some degree of culpability on the part of the employer.

MS. CASANOVAS said that the association holds the belief that HB 214 won't impact or limit an employer's direct liability for punitive damages due to its own conduct. This legislation would, she said, provide certainty and an appropriate scope of vicarious liability to all employers and industries throughout the state. Based on the [Alaska] Supreme Court's strong suggestion, in the Laidlaw case, that it would change the law in the future, the committee could, with HB 214, solve this problem. Therefore, she added, the Alaska Air Carrier's Association requests the committee's support in this matter.

Number 1215

MICHAEL R. WIRSCHEM, Attorney at Law, began by noting that he has been practicing in Anchorage for about eight years. He, too, mentioned that his experience has been that jurors rarely award punitive damages in this jurisdiction; they [do so] only upon clear and convincing evidence against the offender. He understood the question today to be in regard to the future of vicarious liability - holding employers liable for the offender's misdeeds.

Mr. Wirschem said that there seems to be some disagreement as to the current status of punitive damage awards. He argued that punitive damage awards seem to be few in Alaska, and that this would seem to be a statement in opposition to meddling with the system. The history under common law is that vicarious liability is the rule for employers being held liable for the misdeeds of their employees. Therefore, without a specific problem, he didn't see the need for change. He acknowledged that employers such as ERA probably feel it would be better if

they don't have to pay punitive damage awards. However, as a broad policy decision, Mr. Wirschem requested that the legislature think carefully before making a change in this area of law.

CHAIR McGUIRE returned to the notion that jury's never award punitive damage claims, and emphasized that most cases are settled. Therefore, she asked if the potential exposure to punitive damages is a factor in the settlement negotiations.

MR. WIRSCHEM said that according to his experience, he didn't believe so. Moreover, other aspects such as changes in tort reform have made even bringing such a claim risky.

Number 1409

REPRESENTATIVE GARA asked if someone could review whether the Alaska Judicial Council has produced statistics on average verdicts and on punitive damage verdicts.

MS. DAVIS said that she would try to find that information.

MR. WIRSCHEM agreed to do so as well.

CHAIR McGUIRE announced that public testimony would be left open and that HB 214 would be held over.

ADJOURNMENT

Number 1423

There being no further business before the committee, the House Judiciary Standing Committee meeting was adjourned at 5:10 p.m.