ALASKA STATE LEGISLATURE
HOUSE JUDICIARY STANDING COMMITTEE
March 22, 2004
1:10 p.m.

MEMBERS PRESENT

Representative Lesil McGuire, Chair
Representative Tom Anderson, Vice Chair
Representative Jim Holm
Representative Dan Ogg
Representative Ralph Samuels
Representative Les Gara
Representative Max Gruenberg

MEMBERS ABSENT

All members present

COMMITTEE CALENDAR

HOUSE BILL NO. 534
"An Act extending the termination date of the office of victims' rights."

- MOVED HB 534 OUT OF COMMITTEE

HOUSE BILL NO. 472
"An Act relating to claims for personal injury or wrongful death against health care providers; and providing for an effective date."

- MOVED CSHB 472(JUD) OUT OF COMMITTEE

SPONSOR SUBSTITUTE FOR HOUSE BILL NO. 273
"An Act relating to the right of a parent to waive a child's claim of negligence against a provider of sports or recreational activities."

- MOVED CSSSHB 273(JUD) OUT OF COMMITTEE

PREVIOUS COMMITTEE ACTION

BILL: HB 534
SHORT TITLE: EXTEND OFFICE OF VICTIMS RIGHTS
SPONSOR(S): RULES BY REQUEST OF LEG BUDGET & AUDIT

03/08/04	(H)	READ THE FIRST TIME - REFERRALS
03/08/04	(H)	JUD, FIN
03/22/04	(H)	JUD AT 1:00 PM CAPITOL 120

BILL: HB 472
SHORT TITLE: CLAIMS AGAINST HEALTH CARE PROVIDERS
SPONSOR(S): REPRESENTATIVE(S) ANDERSON

02/16/04	(H)	READ THE FIRST TIME - REFERRALS
02/16/04	(H)	JUD
02/25/04	(H)	JUD AT 1:00 PM CAPITOL 120
02/25/04	(H)	Heard & Held
02/25/04	(H)	MINUTE(JUD)
03/03/04	(H)	JUD AT 1:00 PM CAPITOL 120
03/03/04	(H)	Heard & Held
03/03/04	(H)	MINUTE(JUD)
03/05/04	(H)	JUD AT 1:00 PM CAPITOL 120
03/05/04	(H)	-- Meeting Postponed to 3/16/04 --
03/16/04	(H)	JUD AT 1:00 PM CAPITOL 120
03/16/04	(H)	Heard & Held
03/16/04	(H)	MINUTE(JUD)
03/19/04	(H)	JUD AT 1:00 PM CAPITOL 120
03/19/04	(H)	Heard & Held
03/19/04	(H)	MINUTE(JUD)
03/22/04	(H)	JUD AT 1:00 PM CAPITOL 120

BILL: HB 273
SHORT TITLE: PARENTS' WAIVER OF CHILD'S SPORTS CLAIM
SPONSOR(S): REPRESENTATIVE(S) MCGUIRE

04/16/03	(H)	READ THE FIRST TIME - REFERRALS
04/16/03	(H)	TRA, JUD
05/07/03	(H)	TRA REFERRAL WAIVED
02/16/04	(H)	SPONSOR SUBSTITUTE INTRODUCED
02/16/04	(H)	READ THE FIRST TIME - REFERRALS
02/16/04	(H)	JUD
03/22/04	(H)	JUD AT 1:00 PM CAPITOL 120

WITNESS REGISTER

STEPHEN BRANCHFLOWER, Director
Office of Victims' Rights (OVR)
Alaska State Legislature
Anchorage, Alaska
POSITION STATEMENT: Urged the committee to report HB 534 from committee.

KARLA SCHOFIELD, Deputy Director
Accounting
Legislative Administrative Services
Legislative Affairs Agency
Juneau, Alaska
POSITION STATEMENT: During discussion of HB 534, answered questions.

ROGER F. HOLMES, Attorney at Law
Biss & Holmes
Anchorage, Alaska
POSITION STATEMENT: During discussion of HB 472, answered questions.

VANESSA TONDINI, Staff
to Representative Lesil McGuire
House Judiciary Standing Committee
Alaska State Legislature
Juneau, Alaska
POSITION STATEMENT: Presented SSHB 273 on behalf of the sponsor, Representative McGuire.

TRACEY L. KNUTSON, Attorney at Law
Sisson & Knutson, PC
Anchorage, Alaska
POSITION STATEMENT: During discussion of SSHB 273, answered questions.

MYRA CASEY, Field Administrator
Central Office
Office of Children's Services (OCS)
Department of Health and Social Services (DHSS)
Juneau, Alaska
POSITION STATEMENT: During discussion of SSHB 273, explained the term "surrogate parent."

ACTION NARRATIVE

TAPE 04-44, SIDE A
Number 0001

CHAIR LESIL McGUIRE called the House Judiciary Standing Committee meeting to order at 1:10 p.m. Representatives McGuire, Holm, Ogg, Samuels, Gara, and Gruenberg were present at the call to order. Representative Anderson arrived as the meeting was in progress.

HB 534 - EXTEND OFFICE OF VICTIMS RIGHTS

Number 0052

CHAIR McGUIRE announced that the first order of business would be HOUSE BILL NO. 534, "An Act extending the termination date of the office of victims' rights."

Number 0093

REPRESENTATIVE SAMUELS, as chair of the Joint Committee on Legislative Budget and Audit, sponsor of HB 534, explained that this legislation is a simple sunset extension of the Office of Victims' Rights (OVR). Representative Samuels pointed out that this is being [addressed] a bit early because sometimes the OVR is taking cases that can last several years. Therefore, the desire is to ensure that the OVR can, in good conscience, still take the case without the sunset [becoming a problem]. This legislation was based on the statute pertaining to the Office of the Ombudsman. Although the Office of the Ombudsman doesn't have a sunset date, Representative Samuels opined that the OVR is new enough that he wanted to [maintain some oversight] with regard to the office's effectiveness and work. He pointed out that the committee packet should contain the annual report of the OVR.

Number 0167

STEPHEN BRANCHFLOWER, Director, Office of Victims' Rights (OVR), Alaska State Legislature, offered his belief that since the creation of the OVR, it has implemented [its purpose] to the substantial benefit of crime victims in Alaska. He informed the committee that the OVR has been staffed with experienced attorneys and support staff. Furthermore, the things necessary to create a viable agency, such as negotiating a long-term lease and establishing office and case management systems, have been done. As of today, 376 victims have been served. Mr. Branchflower turned to the OVR's annual report, and highlighted that the OVR has performed extensive community training and outreach. He also highlighted that the OVR has created an informational brochure of which approximately 15,000 copies have been distributed. Mr. Branchflower pointed out that if HB 348 becomes law, it includes money to print another 100,000 informational brochures for distribution.

MR. BRANCHFLOWER noted that in cooperation with the Legislative Information Office, a very user-friendly web site has been

created. This web site includes an extensive explanation about the OVR and victims' rights, a glossary of frequently used terms, an outline of a typical criminal case, and an on-line complaint form. The aforementioned complaint form is very beneficial, especially to victims in the Bush. Furthermore, the OVR has drafted regulations and those are on the verge of being sent to the Office of the Governor for approval.

MR. BRANCHFLOWER concluded by requesting that the sunset date be extended because he believes the OVR has demonstrated its value to victims in Alaska. Moreover, the OVR has developed a cooperative relationship with a number of victims' support organizations, including police and prosecutors. He, too, noted that there are some cases that will likely extend beyond the July 2006 [sunset date], adding that one of the cases will almost certainly go to the Alaska Supreme Court. Page 16 of the annual report discusses the aforementioned case. Mr. Branchflower urged the committee to report HB 534 from committee.

Number 0469

REPRESENTATIVE GRUENBERG inquired as to why a four-year extension was chosen.

REPRESENTATIVE SAMUELS answered, "Short enough where you can still have a little bit of a leash on it, and long enough where you're not doing this again in another two years." He indicated that [the length of a sunset] is a rather arbitrary number.

REPRESENTATIVE GRUENBERG relayed that many boards and commissions seem to [sunset] about every four years. He recalled that the sunset concept became popular during the 1970s. However, many of these boards and commissions are fairly well established. Representative Gruenberg opined that a lot of legislative time is spent reviewing various boards and commissions. Although he said he didn't have a problem with the aforementioned, he suggested that this may be a point at which the legislature may need to determine how to spend its time. Therefore, he suggested a bit longer length for the sunset of these organizations.

REPRESENTATIVE SAMUELS characterized Representative Gruenberg's comments as a "good point." He informed the committee that currently, the auditor is trying to stagger the [sunset of] all boards and commissions, but many are coming due at once and overwhelming the audit staff. The aforementioned results in the

legislative audits requested by members of the legislature being pushed to the bottom. Representative Samuels clarified that there is no audit due for the OVR, and therefore won't take up the auditor's time. He noted that one option is to repeal the sunset; however, he said he believes that the OVR is a new office that should be on a "shorter leash."

REPRESENTATIVE GRUENBERG inquired as to the possibility of having an audit for the OVR, just like every other board.

REPRESENTATIVE SAMUELS noted that an [audit] request could be made. However, he expressed the need to wait a couple years and let the OVR be in existence and "get its feet wet."

REPRESENTATIVE GRUENBERG asked if other legislative boards have a statutory requirement for a legislative audit.

Number 0710

KARLA SCHOFIELD, Deputy Director, Accounting, Legislative Administrative Services, Legislative Affairs Agency, relayed that the OVR is part of the legislative branch, which has an annual financial audit. Usually, the Legislative Audit Division doesn't audit [entities] in the legislative branch.

REPRESENTATIVE GRUENBERG pointed out that the other audits are more programmatic, although they do deal with financial aspects. He said that he finds the audits for the other boards and commissions extremely helpful. Therefore, he expressed the desire to have an audit for the OVR. He asked if there is a reason not to do so.

REPRESENTATIVE SAMUELS reiterated his desire to wait a year.

REPRESENTATIVE GRUENBERG specified that he would [want] an audit to occur in 2010 when the OVR sunsets. He indicated that [boards and commissions] usually have an audit when they expire.

REPRESENTATIVE SAMUELS pointed out that the Office of the Ombudsman doesn't have "one at all." He noted that the choice to him was in regard to putting a [sunset] date on the OVR or not.

REPRESENTATIVE GRUENBERG opined that it's [appropriate] to have a sunset.

REPRESENTATIVE OGG raised a point of order, relating that he would be happy to hear an amendment [if that is desired].

REPRESENTATIVE GRUENBERG clarified that this is a discussion to determine whether he wanted to offer an amendment, and whether it requires a statutory amendment.

REPRESENTATIVE SAMUELS reiterated that if an audit is desired later, it can be requested through the Joint Committee on Legislative Budget and Audit.

REPRESENTATIVE GRUENBERG asked if the audits for all the other boards and commissions occur upon request of the Joint Committee on Legislative Budget and Audit or is it due to a statutory requirement.

REPRESENTATIVE SAMUELS answered that the audits occur automatically upon the sunset date of the entity. He said he assumes that the audit occurs due to a statutory requirement. If, upon sunset, a [board or commission] doesn't have the audit for renewal, the board [or commission] goes away.

Number 0905

REPRESENTATIVE GRUENBERG moved that the committee adopt a conceptual amendment such that the same statutory requirement for [the other boards and commissions] be implemented for the OVR.

REPRESENTATIVE SAMUELS objected. He explained that if the financial audit is already occurring, he didn't want to place the burden [on the Legislative Audit Division] to perform something that's already being done. He reiterated that if someone wants an audit, that can be requested and the auditor and the Legislative Affairs Agency can be contacted with regard to what is being sought in the audit. He highlighted that the financial audit is already being done, as is the report.

REPRESENTATIVE GRUENBERG explained that he wanted the same type of programmatic audit that is in place for all the other [boards or commissions].

REPRESENTATIVE SAMUELS pointed out that the other boards don't provide an annual report. He reiterated that the OVR is more closely aligned with the Office of the Ombudsman.

REPRESENTATIVE GRUENBERG commented that he views a self-report as a bit different than an audit, which is performed by an independent agency. Representative Gruenberg said he is willing to withdraw the amendment, although he believes an independent audit is helpful.

REPRESENTATIVE SAMUELS stated that if Representative Gruenberg requests an audit, "we'll push it forward."

REPRESENTATIVE GRUENBERG withdrew the conceptual amendment.

Number 1027

REPRESENTATIVE SAMUELS moved to report HB 534 out of committee with individual recommendations and the accompanying zero fiscal note. There being no objection, it was so ordered.

HB 472 - CLAIMS AGAINST HEALTH CARE PROVIDERS

Number 1038

CHAIR McGUIRE announced that the next order of business would be HOUSE BILL NO. 472, "An Act relating to claims for personal injury or wrongful death against health care providers; and providing for an effective date."

CHAIR McGUIRE noted that [the committee packet] includes a proposed committee substitute as well as two amendments. Chair McGuire opined that the committee has had a lot of good language on the record with regard to the intent of HB 472 and the amendments made to it thus far.

Number 1194

REPRESENTATIVE GRUENBERG moved to adopt the proposed committee substitute (CS) for HB 472, Version 23-LS1743\D, Bullock, 3/22/04, as the work draft. There being no objection, Version D was before the committee.

Number 1215

REPRESENTATIVE HOLM moved that the committee adopt Amendment 1, which read [original punctuation provided]:

Page 2, Line 22, following "death.":

Insert "The limits on damages in this subsection do not apply if the personal injury or wrongful death was the result of reckless or intentional misconduct."

Page 2, Line 25, following "judgment":

Insert "unless the personal injury or wrongful death was the result of reckless or intentional misconduct"

REPRESENTATIVE HOLM said that he didn't want this legislation to be a vehicle that would allow reckless conduct. He offered his understanding that the standard should be clear and convincing evidence, not just negligence, because it "only takes 51 percent" to make negligence the charge.

Number 1233

REPRESENTATIVE ANDERSON objected. He requested that Roger Holmes comment on Amendment 1.

Number 1277

ROGER F. HOLMES, Attorney at Law, Biss & Holmes, said:

If the amendment read that ... the limits on damages do not apply in instances where the jury has made a finding by clear and convincing evidence that the conduct was outrageous, including acts done with malice or bad motives or evidenced reckless indifference to the interest of another person, then it would follow that the punitive damage statute would be compatible and would be easy for the judge and the jury to ... apply the same standard in the same case.

REPRESENTATIVE HOLM stated that the above is his intention.

CHAIR McGUIRE asked if Representative Holm wanted to conceptually amend Amendment 1 to that effect.

REPRESENTATIVE HOLM replied yes.

CHAIR McGUIRE clarified, "So, ... it's clear and convincing evidence and it's acts that are outrageous, or done with malice or bad motive, evidenced reckless indifference to another person."

REPRESENTATIVE ANDERSON surmised, then, that the punitive damage standard would be in place.

CHAIR McGUIRE further clarified that the standard will be applied to punitive damages as well as noneconomic damages.

[Amendment 1 was treated as amended.]

REPRESENTATIVE ANDERSON withdrew his objection.

Number 1392

REPRESENTATIVE GARA objected and suggested [a second] amendment to Amendment 1 [as amended] such that the term "gross negligence" is included.

REPRESENTATIVE GARA explained that if the only way to recover more than $250,000 in damages from loss of enjoyment of life is by clear and convincing evidence of recklessness or malice, then the committee would be adopting a standard that has never been met before in a medical malpractice case in this state. He opined that there has never been a finding of the punitive damages standard in Alaska, and he further opined that there has never been a finding of punitive damages in a medical malpractice case in this state. Therefore, [with the adoption of this amendment], the only serious injuries that will be granted more than $250,000 in noneconomic damages are ones in which a physician has engaged in malice, or a condition in which a physician recklessly disregards his or her duties. The aforementioned will result in the $250,000 cap being imposed in a case in which someone is brain injured, severely handicapped, severely paralyzed, or totally paralyzed. Such situations would occur when the physician has violated the duty to act with reasonable care.

REPRESENTATIVE GARA explained that [a medical professional] isn't found negligent in a medical malpractice case in Alaska unless a physician has failed to adhere to the standard of care exercised by other physicians in the community. In those cases in which a physician has performed negligently, injured the patient, and hasn't adhered to the standard of care adhered to by other physicians in the community, [the legislation] only allows recovery of $250,000 in noneconomic damages. If the aforementioned is to be the case, Representative Gara said that he preferred Representative Ogg's amendment, which specifies that the cap doesn't apply in cases of recklessness or malice. He reiterated his desire to remove the cap in cases of gross

negligence, which is a high standard itself. Representative Gara said that he didn't want a physician performing work on members of the community when the physician doesn't adhere to the standard of care of other physicians, which is the negligence standard.

Number 1548

REPRESENTATIVE GARA moved that the committee adopt [a second] amendment to Amendment 1 [as amended], such that the language "grossly negligent" would be added.

REPRESENTATIVE OGG objected. Representative Ogg asked Mr. Holmes if the difference between negligence and gross negligence is easily defined. He asked if the clear and convincing standard for gross negligence is enough "to clarify the difference or clarify that you really have to get into this higher category; that's what we're trying to do here, I believe."

MR. HOLMES answered that the difference between negligence and gross negligence is difficult to define, which is why the 1997 legislature adopted the language it did for punitive damages. He explained that the problem is that there would be three separate standards: one for negligence; one for punitive damages; and one for when the cap doesn't apply. The aforementioned, he further explained, builds in the chance of error in every case that goes to the jury. The reason to make the exception to the cap match the punitive damage standard is that then there would clearly be two standards that would be given to the jury. Conceptually, Mr. Holmes said he had no problem with Representative Gara's comments with regard to gross negligence as opposed to the punitive damage standard. However, in order to accomplish what Representative Gara wants, the legislation would require the jury to apply three separate standards. He noted that it's already difficult for the jury to apply two.

REPRESENTATIVE OGG inquired as to defining the difference between reckless disregard, reckless indifference, and gross negligence.

MR. HOLMES opined that most jurors that would find something that was grossly negligent would also find something that was reckless. He offered his opinion that a physician who operates while intoxicated would be grossly negligent and he opined that most jurors wouldn't have a problem with the [finding] that this

is reckless indifference to the interests of the patient. Mr. Holmes said he believes the definition of gross negligence is so close to reckless indifference that having three different standards in each case invites error and confusion. He remarked that although he did believe there is a slight difference between gross negligence and reckless [indifference], the difference is probably less than there is between gross negligence and ordinary negligence.

REPRESENTATIVE OGG said that that was his intent, to separate [gross negligence and reckless indifference], in having made his amendment at a previous meeting. Representative Ogg indicated that [gross negligence and reckless indifference] is the type of action [this legislation] wants to avoid, although the language "reckless indifference" is used. "Because we have to have only two standards to clarify it, then I'm comfortable with that as long ... [as] somebody can come and look at this and say, 'We're not going after just the negligent person; we're going after that higher [standard] and we don't want those people protected,'" he explained.

Number 1759

CHAIR McGUIRE informed the committee that in Alaska, reckless [indifference] has been interpreted as "a conscious disregard of a known risk" while Black's Law dictionary defines gross negligence as "the intentional failure to perform a manifest duty in reckless disregard of the consequences." Therefore, she opined, the two are almost identical [definitions].

REPRESENTATIVE ANDERSON offered his understanding that Mr. Holmes is acknowledging that there is a difference [between reckless indifference and gross negligence].

MR. HOLMES reiterated that if the gross negligence standard is added, then the juror is being asked to apply three separate standards. However, he opined, the difference between reckless [indifference] and gross [negligence] is so small that the benefit [of listing both] doesn't outweigh the risk of confusion.

REPRESENTATIVE GARA said he isn't convinced that the jury would be so confused. In many cases, especially in criminal cases, the jury receives instructions on 10-15 different counts. The courts maintain clarity by providing a separate instruction on each issue. Normally, a packet of jury instructions could contain 20-50 instructions or even more. Representative Gara

offered his understanding that there is already a patterned jury instruction for gross negligence, and asked if that is true.

MR. HOLMES replied, "Not since '97 when ... the punitive damage statute was amended."

REPRESENTATIVE GARA recalled seeing jury instructions for gross negligence. Therefore, he asked if that is because gross negligence is defined in the criminal statutes.

MR. HOLMES explained that gross negligence has been the punitive damage standard for years. He noted that there are several supreme court opinions that discuss what it took to reach gross negligence and what it meant, although those are no longer in effect. Mr. Holmes recalled that many of those decisions were authored by Justice Robert L. Eastaugh of the Alaska Supreme Court, and the term "gross negligence" was defined as reckless indifference. In the supreme court opinions, the term "recklessness" was used in defining gross negligence.

REPRESENTATIVE GARA offered his belief that the term "gross negligence" is defined in the statutes because that standard is used in many criminal cases. He inquired as to Mr. Holmes' understanding.

MR. HOLMES said he can't answer that question.

REPRESENTATIVE GARA returned to the [second] amendment to Amendment 1 [as amended]. He remarked that if the reckless standard is adopted, the standard will almost never result in someone getting more than the $250,000 damages cap. Therefore, he said the [committee] might as well just adopt the $250,000 damages cap. Representative Gara highlighted his belief in the importance of preserving the rights of people who have been terribly injured by conduct that simply falls to the standard of not exercising the same care that other physician's in the community exercise.

CHAIR McGUIRE noted that the objection to the [second] amendment to Amendment 1 [as amended] is maintained.

Number 1964

A roll call vote was taken. Representatives Gara and Gruenberg voted in favor of the [second] amendment to Amendment 1 [as amended]. Representatives Ogg, Samuels, Holm, Anderson, and

McGuire voted against it. Therefore, the second amendment to Amendment 1 [as amended] failed by a vote of 2-5.

CHAIR McGUIRE announced that Amendment 1 [as amended] was before the committee. Chair McGuire, upon determining there were no further objections, announced that Amendment 1 [as amended] was adopted.

Number 1989

REPRESENTATIVE GARA moved that the committee adopt Amendment 2, labeled 23-LS1743\A.6, Bullock, 3/22/04,which read:

> Page 2, line 19, following $250,000:
> Insert ", except that the limit on damages is $1,000,000 if it is shown, by clear and convincing evidence, that the injury is a serious debilitating physical injury or disfigurement. Each limit applies"
>
> Page 2, line 25:
> Delete "$250,000"
> Insert "the limit in (d) of this section"

Number 1992

REPRESENTATIVE ANDERSON objected.

REPRESENTATIVE GARA recalled that there was a concern with regard to the dual cap, that is a higher cap for those with serious debilitating injuries and a lower cap for those who don't have serious debilitating injuries or disfigurement. He recalled that Representative Holm inquired as to what can be done to ensure that those with marginal claims of serious disfigurement or serious debilitating injury proceed with their claims. The aforementioned has been accomplished in the law by specifying that in those circumstances, the evidence is required to be proven by clear and convincing evidence, which will weed out the marginal claims.

REPRESENTATIVE GARA offered his understanding that clear and convincing evidence is defined in case law as follows: "clear and convincing evidence means and is that amount of evidence which produces in the trier of fact a firm belief or conviction about the existence of a fact to be proved." Representative Gara noted that sometimes the court will tell jurors that the evidence has to be much higher than a preponderance of the evidence but not as high as proof beyond a reasonable doubt.

"It's a high level of evidence, it's used in the punitive damages statute ... and that's why punitive damages are so rarely granted," he said. Furthermore, [clear and convincing evidence] is a good bar to [avoid] marginal claims.

REPRESENTATIVE GARA pointed out that although the committee at a prior meeting adopted the $1 million cap, the term "clear and convincing evidence" wasn't included. He explained that he has been convinced that in order to make the system more predictable so that we know the higher cap is only to be applied to those with valid claims, the term "clear and convincing evidence" should be included in the dual cap structure. He reminded the committee that the $250,000 cap works out to about $13.59 a day for the value of one's enjoyment of life and pain and suffering, which Representative Gara opined isn't right.

REPRESENTATIVE GARA recalled that Representative Anderson has said that it wouldn't really be $13.59 a day because that money can be placed in an annuity. However, he opined, the truth is that one-third of a $250,000 award would go to pay taxes, one-third would pay for attorney fees, and anyone other than a rich person wouldn't be able to place the remaining funds into an 30-year annuity. Representative Gara emphasized that $13.59 a day for someone suffering from a brain injury due to medical care that falls below the standard of care of other physicians in the community is too low. He remarked that although physicians don't agree with Amendment 2, it provides two levels of certainty that physicians have requested. That certainty is in the form of the $1 million hard cap with a lower cap of $250,000. Currently, there is a soft cap of [$400,000] and $1 million, which might turn out to be [$800,000] and $2 million. "So we're coming down to hard caps: $250,000 and [$1] million, and we're only extending it to very limited cases of serious injury that is validly provable with clear and convincing evidence," he explained. Representative Gara requested the committee's support of Amendment 2.

Number 2133

REPRESENTATIVE GRUENBERG moved that the committee adopt an amendment to Amendment 2 adding the following language: "or if the defendant acts with criminal negligence as defined in [AS 04.21.080(a)(1)]", after the word "disfigurement" in Amendment 2. He informed the committee that [the language he is suggesting adding to Amendment 2] is a long-standing definition in the alcoholic beverages title that reads:

> a person acts with "criminal negligence" with respect to a result or to a circumstance described by a provision of law defining an offense when the person fails to perceive a substantial and unjustifiable risk that the result will occur or that the circumstance exists; the risk must be of such a nature and degree that the failure to perceive it constitutes a gross deviation from the standard of care that a reasonable person would observe in the situation;

REPRESENTATIVE GARA said that he accepts the amendment to Amendment 2. However, he pointed out that physicians benefit from a much stricter standard of negligence than do others. Therefore, in order to be fair to the medical community, he suggested inserting the language "to [a] reasonable medical practitioner in the area".

REPRESENTATIVE GRUENBERG suggested also inserting the language ", except that the term 'reasonable person' shall be reasonable medical practitioner in the field".

REPRESENTATIVE GARA said that he accepted the [second] amendment to Amendment 2.

CHAIR McGUIRE announced that the [amendments] to Amendment 2 are adopted, adding that Amendment 2, as amended, is now before the committee.

Number 2257

REPRESENTATIVE ANDERSON maintained his objection. He recalled Representative Holm's concern that if someone is reckless or intentionally does something, then that [medical professional] should be liable and there shouldn't be a cap. Representative Anderson surmised that Representative Holm saw the caps as the only way to correct it.

REPRESENTATIVE ANDERSON offered the following analogy: "When you go out on the street and you ask a senior ... is it more important for you to have medical care and treatment or to ensure that out of 10,000 times, the one time when you ... think there was an egregious act by a doctor, you can get over $250,000 pain and suffering, ... that senior ... would say, 'I want medical coverage.'" Representative Anderson said that [this legislation] brings predictability with the $250,000 cap and emulates California, which Alaska's courts as well as federal courts constantly reference. California is a state with

a cap that has been successful and brought in physicians and recruited physicians, he opined, and said he wants the same for Alaska, which is why he sponsored HB 472. Increasing the cap changes that and removes the predictability.

TAPE 04-44, SIDE B
Number 2378

REPRESENTATIVE ANDERSON emphasized that he defers to all the associations, hospitals, and physicians that have endorsed HB 472, but who [oppose] this amendment and want the legislation to move from committee to the House floor.

REPRESENTATIVE OGG specified that he is supportive of [Amendment 2] without the amendments. He characterized [the amendments to Amendment 2] as redundant. Through the discussion, the committee has decided that those who act intentionally or with reckless disregard aren't subject to this cap. Therefore, [amending Amendment 2] is confusing because it has already been addressed. Representative Ogg opined that he likes the differentiation in the caps, which he believes provides predictability. Therefore, Representative Ogg said that he would have to oppose Amendment 2, as amended.

REPRESENTATIVE GARA recalled that when the amendments to Amendment 2 were offered, there didn't seem to be any objection. However, if there is an objection to the [amendments] to Amendment 2, then he would also withdraw his support. Therefore, he requested that Representative Gruenberg withdraw his amendments to Amendment 2.

Number 2235

REPRESENTATIVE GRUENBERG moved that the committee withdraw the language of the amendments to Amendment 2 such that it would read as follows [which is identical to the original, unamended Amendment 2]:

> Page 2, line 19, following $250,000:
> Insert ", except that the limit on damages is $1,000,000 if it is shown, by clear and convincing evidence, that the injury is a serious debilitating physical injury or disfigurement. Each limit applies"
>
> Page 2, line 25:
> Delete "$250,000"
> Insert "the limit in (d) of this section"

REPRESENTATIVE HOLM objected.

REPRESENTATIVE ANDERSON asked Chair McGuire not to allow further amendments to change the limits should this amendment fail, otherwise, he said, he felt that the chair would be dilatory.

REPRESENTATIVE GARA stated, "If we're going to pass this bill out of this committee, it should be done without gamesmanship. Certainly, I understand the Representative's view that if we kill the amendment with the amendment to the amendment, then we'll never have to vote on the amendment." Therefore, if the amendments to Amendment 2 are left in just to kill it, he announced that he would offer a clean amendment. Representative Gara opined that it would fair for that to be heard. However, he suggested that it would be quicker to delete the language inserted by Representative Gruenberg.

Number 2165

REPRESENTATIVE HOLM withdrew his objection to removing the language inserted by the [amendments] to Amendment 2.

CHAIR McGUIRE, upon determining that there were no further objections, announced that the [amendments] to Amendment 2 had been removed. Therefore, the question of whether to adopt an unamended Amendment 2, was before the committee.

Number 2147

A roll call vote was taken. Representatives Ogg, Gara, and Gruenberg voted in favor of Amendment 2. Representatives Samuels, Holm, Anderson, and McGuire voted against it. Therefore, Amendment 2 failed by a vote of 3-4.

Number 2106

REPRESENTATIVE GRUENBERG moved that the committee adopt Amendment 3 [labeled 23-LS1743\A.5, Bullock, 3/16/04, which was formerly failed Amendment 6 to the original version on 3/19/04], which read as follows:

> Page 2, following line 27:
> Insert a new subsection to read:
> "(g) The limitation on damages under (d) of this section shall be adjusted by the administrative director of the Alaska Court System on October 1 of

each year, calculated to the nearest whole percentage point between the index for January of that year and January of the prior year according to the Consumer Price Index for all urban consumers for the Anchorage metropolitan area compiled by the Bureau of Labor Statistics, United States Department of Labor. The administrative director of the Alaska Court System shall provide notification of a change in the limitation of damages to the clerks of court in each judicial district of the state. The court shall adjust the award for noneconomic damages under this subsection and (e) of this section, if necessary, before the entry of judgment."

The committee took an at-ease from 2:13 p.m. to 2:14 p.m.

Number 2079

REPRESENTATIVE ANDERSON objected.

CHAIR McGUIRE pointed out that these Consumer Price Index (CPI) amendments are frequently offered. If there could be this type of certainty with all of the things that each person cares about in the budget, it would be great. However, that's not the case. Chair McGuire explained that the legislature, as an appropriating body, needs the ability to have some sense of predictability. When a CPI index clause is added into something that a private individual or a public entity has to pay, a level of uncertainty is created. Therefore, she suggested that the appropriate course would be to revisit this in a specified amount of time. Chair McGuire turned to the issue of a certificate of need. She noted that the $1 million limit put into effect in the 1970s is no longer applicable because the CPI would place it closer to $2 million. She indicated that she didn't support Amendment 3.

REPRESENTATIVE GRUENBERG specified that he has reoffered this amendment because two of the members of the committee weren't present when it was initially offered, and more importantly, the legislation now includes caps again. He turned to Chair McGuire's comments, and remarked that there is a difference between putting this into a budget or a public-funding type of thing because those are the kinds of legislation that the legislature is involved with on an annual basis. However, medical malpractice is not [reviewed by the legislature every year].

REPRESENTATIVE GRUENBERG stated that medical malpractice is a very divisive issue, albeit not a common issue. If limits in this area have to be changed, the arguments are in regard to the impacts of raising the limits on the availability of health insurance and the number of physicians and other health care professionals to practice in the state. On the other hand, an automatic adjustment for cost of living is something that insurance companies deal with frequently. Furthermore, it's a measure of certainty because actuaries and economists are accustomed to dealing with it. "It does not require that we re-open the entire issue of medical malpractice and get the legislature embroiled in this," he explained. This amendment attempts to provide an area of certainty so that [the legislature] doesn't have to go through the "medical malpractice trauma" every few years.

Number 1850

REPRESENTATIVE OGG agreed that there is a difference between the annual budget and funding and including the CPI. He recalled that the [CPI] was put "into labor" with regard to those who [pay] minimum wage. Very shortly, the argument was that the unforeseen cost [of the CPI] was putting some folks out of business. Representative Ogg turned to criminal fines, and pointed out that those are set and then revisited at some point when the pressure rises. He recalled recent [legislation] in which the limit for small claims court was decided and the CPI wasn't put in place for it. Representative Ogg acknowledged that insurance companies want certainty, and highlighted that currently, the legislature is wrestling with a change in an actuarial status on mortality such that the Public Employees' Retirement System (PERS) and Teachers' Retirement System (TRS) programs have become one of the larger difficulties in the state's fiscal problems.

REPRESENTATIVE OGG indicated that he would prefer to leave [the legislation] as it is and when times and the economy have changed, the legislature at the time could address it. He acknowledged that the arguments [made by Representative Gruenberg] will come up and he indicated that those are the proper arguments to be visited each time this comes up rather than being addressed by a standard that's out of the legislature's hands. Representative Ogg expressed his desire for the legislature to not foreclose its ability to deal with these issues on behalf of the public. Therefore, Representative Ogg announced that he wouldn't support Amendment 3.

Number 1663

REPRESENTATIVE GARA commented that in the context of those debates, the legislature has never done anything as severe as what is being done today. In the case of fines, the minimum wage, and other limits, the legislature has developed numbers that are within a broad range of something that is fair. However, [this legislation] values a human life at $250,000. He said he didn't believe anyone on the committee believes that $250,000 is a fair value of someone's ability to hold a child, kiss a spouse, walk, hike, and fish. "I think what we're doing is, the policy judgment on this committee has been that the insurance industry needs this -- the insurance industry needs us to take these rights away from human beings.

REPRESENTATIVE GARA opined that because nobody says that this is a fair amount of money to give to people, not adopting the CPI adds insult to injury because it means that today the aforementioned life attributes are worth $13.69 a day, and those will be worth less each year thereafter. "So, I think the CPI argument becomes much more forceful in a case where we're already inadequately compensating somebody," he remarked. He concluded by announcing that he would vote for Amendment 3.

CHAIR McGUIRE thanked Representative Ogg for his comments. She highlighted that it's important to consider that sometimes something could be used as a method of achieving a goal that wasn't achieved through the regular process, which is similar to what happened with the minimum wage. Chair McGuire encouraged the committee to look at the [addition of the CPI] on its merits versus using it to reach another policy goal. She pointed out that business license fees were $25 for almost 20 years without the CPI, which certainly would've been a benefit for the state and a potential hardship to businesses. Finally, there was debate on that last year and the successful argument was that the business license fee hadn't been altered in some time. She noted her expectation that such arguments will be made about this legislation some time in the future.

REPRESENTATIVE ANDERSON maintained his objection.

Number 1553

A roll call vote was taken. Representatives Gara and Gruenberg voted in favor of Amendment 3 [labeled 23-LS1743\A.5, Bullock, 3/16/04]. Representatives Ogg, Samuels, Holm, Anderson, and

McGuire voted against it. Therefore, Amendment 3 failed by a vote of 2-5.

Number 1520

REPRESENTATIVE ANDERSON moved to report the proposed CS for HB 472, Version 23-LS1743\D, Bullock, 3/22/04, as amended, out of committee with individual recommendations and the accompanying zero fiscal notes.

Number 1509

REPRESENTATIVE GARA objected.

REPRESENTATIVE GRUENBERG noted that he can't support the legislation, but reminded the committee that he'd agreed at a prior meeting that he wouldn't object to moving it.

Number 1455

A roll call vote was taken. Representatives Ogg, Samuels, Holm, Anderson, and McGuire voted in favor of reporting the proposed CS for HB 472, Version 23-LS1743\D, Bullock, 3/22/04, as amended. Representative Gara voted against it. Representative Gruenberg abstained from voting but wished his presence to be noted for the record. Therefore, CSHB 472(JUD) was reported out of the House Judiciary Standing Committee by a vote of 5-1-1.

HB 273 - PARENTS' WAIVER OF CHILD'S SPORTS CLAIM

Number 1424

CHAIR McGUIRE announced that the final order of business would be SPONSOR SUBSTITUTE FOR HOUSE BILL NO. 273, "An Act relating to the right of a parent to waive a child's claim of negligence against a provider of sports or recreational activities."

The committee took an at-ease from 2:24 p.m. to 2:25 p.m.

Number 1402

VANESSA TONDINI, Staff to Representative Lesil McGuire, House Judiciary Standing Committee, Alaska State Legislature, explained, on behalf of the sponsor, Representative McGuire, that SSHB 273 gives legal effect to release waivers and permission slips, such as those giving a child the ability to participate in some activity.

Number 1351

REPRESENTATIVE HOLM moved to adopt the proposed committee substitute (CS) for SSHB 273, Version 23-LS0966\I, Bullock, 3/19/04, as the work draft.

REPRESENTATIVE GRUENBERG objected, but ultimately removed his objection once it was clarified that Ms. Tondini was going to explain [Version I].

CHAIR McGUIRE announced that Version I was before the committee.

MS. TONDINI paraphrased from the sponsor statement, which read [original punctuation provided]:

> Children in the State of Alaska should enjoy the maximum opportunity to participate in sports or recreational activities, despite the presence of risk in such activities. Public, private, and nonprofit entities that provide sports or recreational activities to children need and deserve a measure of protection against lawsuits, and without that measure of protection, may be unwilling or unable to provide such activities. Parents have a fundamental right and responsibility to make decisions concerning the care, custody, and control of their children. The law has long presumed that parents are in the best position to determine what is in the best interests of their children. Parents are accustomed to making conscious choices on behalf of their children every day regarding the benefits and risks of various activities available to their children. Such parental choices, when made voluntarily upon consideration of appropriate information, should not be ignored, but rather should be afforded the same dignity and legal effect as other parental choices, including choices regarding education and medical treatment. SSHB 273 furthers these truisms and encourages the availability and affordability of sports and recreational activities to children by recognizing the right of a parent to choose to release, on behalf of his or her child, prospective negligence based claims that the child may accrue against the provider of such activities.

As a result of a recent Colorado Supreme Court case, Cooper v. Aspen Skiing Co., wherein the Court refused to uphold or recognize the mother of a seventeen year old skier's signature on a release document used in a juvenile race camp program, the outdoor industry has been trying to respond to the myriad problems and potentially severe ramifications created by this holding. The faulty rationale behind Colorado and other western states' decisions has been the legal premise that, since a minor is not capable of releasing his or her own rights to sue because a minor is not legally competent to contract and release documents that are contractual in nature, that a parent should not be capable of releasing on behalf of the minor child.

This erroneous rationale is contrary to a body of authority derived from Midwestern and Eastern states, which find that parents do specifically have the legally binding right to sign release documents on behalf of their minor children. In these states, the courts have articulately stated that prohibiting a parent's right to release or waive on behalf of a minor child would detrimentally chill school, scouting, athletic, and similar type programs from being able to offer athletic, recreational, and other extra-curricular programs. There exists a well-settled legal history of recognizing parental rights regarding making decisions on behalf of minor children regarding education and medical treatment. To not extend the same logic to recreational activities in Alaska would be legally illogical and unfair.

The practical consequences of not recognizing this parental authority are profound. If an outdoor recreation company is found to have been operating without a valid release/waiver document, either insurance coverage will not be offered or will be voided. Very few programs will stay in business without proper insurance in place. As an outdoor recreation-oriented and supported state, Alaska simply cannot stand by and watch this type of result. The Alaska Supreme Court has gone in the direction of requiring pre recreational release/waiver documents to be clearly and unambiguously drafted and has expressed concerns over the specificity of the language used in those documents. Given the Court's careful focus on

this subject, along with the developing line of authority in the western states, it is important that the legislature address this matter before the court system is called upon to rule on whether it is legal for a parent or legal guardian to sign a release document on behalf of a minor child.

In addition, it is important to note that HB 273 would not defeat in any way a parent or guardian's right to sue an operator that is not providing a safe service or program. An ordinary release/waiver document provides only a release to causes of action sounding in negligence. Claims of gross negligence, reckless, or intentional misconduct are never released in a release/waiver document. It is also crucial to remember that, with respect to pre-recreation releases, these documents regard activities that are totally voluntary in nature; they are activities that regard personal choice for the participant. As such, participants and parents of participants should have the freedom to decide which sports or recreational activities they want to participate in or that they want to have their children participate in and should have the freedom to contract regarding these activities. That fundamental right to make choices regarding a child's activities is what is being protected here; the bill does not negate a parent's rights, it in fact strengthens them.

Number 1011

MS. TONDINI concluded by requesting the committee's support of this legislation. In response to Chair McGuire, Ms. Tondini informed the committee that Version I incorporates some changes suggested by the Office of Children's Services (OCS) in the Department of Health and Social Services (DHSS). On page 3, lines 1 and 7-8, subparagraph (B) was changed and subparagraph (E) was added so that a representative of the DHSS will be the representative of a child in the state's legal custody.

REPRESENTATIVE SAMUELS asked if a young person under the age of 18 needs a parent to be present in order to rent skis.

Number 0825

TRACEY L. KNUTSON, Attorney at Law, Sisson & Knutson, PC, answered that it depends upon the particular operator's habits,

policies, and procedures. For instance, the Alyeska Resort requires that a child or someone underage have a parent sign the [waiver] document. However, she noted, a less well-prepared recreational provider might not require [the above]. Ms. Knutson opined that very few recreational providers, whether those offering rentals or services and programs, allow children to sign their own release. Ms. Knutson highlighted that children don't have the legal capacity under the law to sign a [waiver] contract and policy documents are contractual in nature.

REPRESENTATIVE GRUENBERG turned attention to page 3, lines 9-10, which refers to AS 09.65.290, and pointed out that subsection (e)(2) specifies: "(2) 'provider' means a person or a federal, state, or municipal agency that promotes, offers, or conducts a sports or recreational activity, whether for pay or otherwise;". However, he remarked, AS 09.65.290(e)(3)(B)(iii) says that it doesn't include "skiing or sliding activities at a ski area that are subject to the requirements of AS 05.45". He inquired as to the types of skiing or sliding activities that would be excluded.

MS. KNUTSON reminded the committee that the legislature passed the "Ski Area Safety Act of 1994" a number of years ago. As a result of that Act, ski areas don't use written release documents; rather, an individual purchases a ticket which specifies the inherent risks [or the activity]. Therefore, the issue of a release doesn't really apply to a ski area. However, the smaller groups that operate around a ski area, such as the Mighty Mites, do use written release documents. The aforementioned is the reason why ski areas weren't included in the inherent-risk legislation that came before the legislature last year.

REPRESENTATIVE GRUENBERG then turned attention to page 3, line 6, which refers to AS 14.30.325. The aforementioned statute allows the Department of Education and Early Development to appoint a surrogate parent to represent disabled children in matters relating to "an appropriate public education". This doesn't seem to fall within that type of activity, and therefore he questioned whether a surrogate parent would be involved with this unless the [recreational] activity is done through the school. Representative Gruenberg said he foresees a potential conflict between the child's natural parent and the surrogate parent and the person, under a power of attorney, with whom the child may be living. He inquired as to how to resolve such a conflict.

MS. KNUTSON noted that the aforementioned was of concern when the legislation was drafted. She explained that the intent is to create a reasonably complete list of those who would have the ability to sign release/waiver documents. Although she agreed that there may be situations in which there is a natural parent and someone operating under a power of attorney for the same child, it wouldn't be up to the operator to determine who is capable of signing [the release/waiver documents].

CHAIR McGUIRE suggested that the language in question be removed, noting that the representative from the OCS agrees that it presents a conflict.

Number 0257

REPRESENTATIVE GRUENBERG moved that the committee adopt Amendment 1, which would, on page 3, delete lines 5-6.

REPRESENTATIVE OGG surmised that the legislation provides a list [of who is a parent] and it seems that these individuals have different jobs concerning a child. Therefore, if [Amendment 1 is adopted] and a child wants to engage in school activities, there is no one to sign for that child in the case in which the child has been assigned a surrogate parent.

REPRESENTATIVE GRUENBERG commented that this is just one possible factual situation. He requested that Amendment 1 be tabled. There being no objection, it was so ordered.

REPRESENTATIVE GRUENBERG highlighted that it needs to be clear that this [legislation] only applies to unemancipated minors.

Number 0158

REPRESENTATIVE GRUENBERG moved that the committee adopt Amendment 2, as follows:

Page 2, line 22, after "parent's";
Insert "unemancipated"

Page 2, line 26;
Delete "a"
Insert "an unemancipated"

REPRESENTATIVE OGG asked if a parent has the right to act on behalf of an emancipated child.

REPRESENTATIVE GRUENBERG replied no, and stated that [Amendment 2] would make it clear.

Number 0008

CHAIR McGUIRE, upon determining that there were no objections, announced that Amendment 2 was adopted.

REPRESENTATIVE GRUENBERG remarked that he could see parents warring over this. He noted that such a conflict wouldn't arise before the child engages in football and breaks his or her neck, but would arise afterwards.

TAPE 04-45, SIDE A
Number 0001

REPRESENTATIVE GRUENBERG restated his concern with regard to the possibility of a situation in which there is a conflict when [a child has two individuals classified as a parent under the definitions of this legislation]. He remarked that perhaps he is making a mountain out of a molehill.

REPRESENTATIVE SAMUELS said that subparagraph (C) on page 3, lines 2-4, seems to be a bit of a catchall, which he didn't see as necessarily a bad thing. He offered his understanding that under subparagraph (C), he, as the person responsible for a group of children going rafting, could sign the waiver for [all the children].

MS. KNUTSON informed the committee that she practices almost exclusively in recreation law. What [the language in the bill] attempts to get at is anyone who is legally responsible for a child. Although Ms. Knutson agreed that [subparagraph (C)] is sort of a catchall, she clarified that it isn't meant to include a situation in which a neighbor signs a waiver for the child next door. The neighbor wouldn't have the legal right to do the aforementioned because he or she wouldn't have legal responsibility for that child. In such a case, the operator would need [the waiver/release document to be signed] by a person who has a legal responsibility for the child.

REPRESENTATIVE GRUENBERG suggested, then, that [those points] should be clearly stated in the bill, otherwise there will be some legal problems.

MS. KNUTSON suggested that perhaps the language in subparagraph (C) should read: "a person who has the legal capacity to act in the place of the child or adoptive parent".

Number 0341

CHAIR McGUIRE announced that Conceptual Amendment 3 would [on page 3, line 2, insert the following language] "a person who has the legal capacity to act in the child's welfare".

REPRESENTATIVE GRUENBERG remarked that he wasn't sure whether the term "capacity" is appropriate because it usually refers to whether the individual is incapacitated or is an infant.

MS. TONDINI asked whether it would be sufficient to insert the following language: "a person who is legally responsible for the child's welfare". She suggested making the language "or another person who is legally responsible for the child" a new subparagraph.

REPRESENTATIVE GRUENBERG suggested having [Ms. Knutson] return with specific language.

MS. TONDINI stated that the amendment could be conceptual and she could talk with the drafters.

CHAIR McGUIRE clarified that the intent is to make it clear that not just anyone can sign a waiver on behalf of a child. She specified that the intent is for the waiver to be signed by the child's natural or adoptive parent or the grandparent or stepparent with whom the child lives.

CHAIR McGUIRE clarified that she had moved the Conceptual Amendment 3, and related her understanding that Representative Gruenberg had objected.

REPRESENTATIVE GRUENBERG withdrew his objection.

Number 0502

CHAIR McGUIRE announced that [Conceptual] Amendment 3 was adopted.

REPRESENTATIVE GRUENBERG returned to the issue of whether to adopt Amendment 1.

REPRESENTATIVE OGG objected.

CHAIR McGUIRE explained that Representative Ogg was concerned that without subparagraph (D) on page 3, the child with only a surrogate parent may not be able to participate in certain activities.

REPRESENTATIVE GRUENBERG inquired as to whether the concern could be resolved by not eliminating [subparagraph (D)] and adding language specifying, "if the activity is within the scope of the surrogate parenting".

Number 0633

MYRA CASEY, Field Administrator, Central Office, Office of Children's Services (OCS), Department of Health and Social Services (DHSS), offered her understanding that the surrogate parent just represents a child's educational interests. She informed the committee that when a child is in the custody of [OCS], OCS "sign" and allow the school to appoint a surrogate parent. Therefore, it seems that for this legislation, the child would either have a parent, a legal guardian, or a child in OCS's custody would allow OCS to sign [a release/waiver document].

REPRESENTATIVE OGG withdrew his objection.

Number 0692

CHAIR McGUIRE, upon determining there were no further objections, announced that Amendment 1 was adopted.

Number 0700

CHAIR McGUIRE moved that the committee adopt [a verbally amended Conceptual] Amendment 4, which then read [original punctuation provided]:

> Page 2, Lines 17-18, following "allege":
>
> Delete "willful, wanton, reckless, or grossly negligent acts or omissions"
>
> Insert "reckless or intentional misconduct"
>
> Page 2, Lines 27-28, following "for":

Delete "willful, wanton, reckless, or grossly negligent acts or omissions"

Insert "reckless or intentional misconduct"

REPRESENTATIVE OGG expressed the need for the language to fit in grammatically.

CHAIR McGUIRE agreed and specified that Amendment 4, as amended, would be a conceptual amendment.

REPRESENTATIVE GRUENBERG asked whether a parent can waive a claim for gross negligence, adding that such would be troubling. He relayed that he would be more comfortable with including gross negligence.

CHAIR McGUIRE reminded members that she had [verbally] amended Conceptual Amendment 4 so as to not include "gross negligence" because of the comments she has heard today. She reminded the committee that after 1997, when the state changed the punitive damages statute, all the jury instructions pertaining to gross negligence became inapplicable. Furthermore, it could be confusing to create multiple jury instructions. The type of conduct being targeted is a known risk that someone should observe and that is being willfully and intentionally disregarded.

REPRESENTATIVE GRUENBERG surmised, then, that gross negligence is now part of recklessness.

CHAIR McGUIRE responded, "I think it is." She noted that Black's Law Dictionary defines gross negligence as follows: "the intentional failure to perform a manifest duty in reckless disregard of the consequences." Under Alaska law, reckless is the standard by which someone consciously disregards a known risk. Therefore, she opined, [gross negligence and reckless] are basically the same.

REPRESENTATIVE GRUENBERG surmised, then, that under [Conceptual Amendment 4] the term "reckless misconduct" includes the concept of gross negligence.

CHAIR McGUIRE replied, "To the extent that someone would allege that, yes."

REPRESENTATIVE GRUENBERG said he was satisfied with that, and withdrew his objection.

Number 0974

CHAIR McGUIRE, upon determining that there were no further objections, announced that Conceptual Amendment 4, as amended, was adopted.

CHAIR McGUIRE requested a motion to report the legislation from committee. She announced that the committee would have an opportunity to review the committee substitute, and would work on any serious concerns.

REPRESENTATIVE OGG remarked that as a whole, the legislation is a "good idea and a good direction to move in." He posed a situation in which a child doesn't have an action against the provider of the sports, although the child is seriously injured. When the child reaches the age of majority, [would the aforementioned] impact the child's ability to have an action against his or her parent for negligence, et cetera, he asked.

MS. KNUTSON noted that she has participated in some of the debate in Colorado on this issue. She relayed that in her research she has only seen a handful of cases in which the children have filed a case of negligence against the parent. In those cases, there was criminal conduct against the children, and so when the children were appointed guardians, [the guardians] looked for insurance policies that might support the children. If a child was hurt while doing a recreational activity and then upon achieving the age of majority decided to [bring a case] against the parent, she said that the question regarding whether it would be supportable would be a question for the court system. In regard to whether this legislation would prevent a child from [bringing an action] against a parent for signing the release, she said it wouldn't. However, she said she could not predict whether a court could support such an action.

REPRESENTATIVE GRUENBERG informed the committee that in order to become emancipated under Title 9, the child must show that he or she can support himself or herself. He said he could foresee a circumstance in which an [unemancipated] 17-year-old wants to pursue a sport, but the parent [doesn't want to sign the waiver/release document]. He said he wasn't aware of any legal mechanism that allows such an issue to be brought before the court. He asked Ms. Knutson whether a provision should be included in order to allow [someone to] execute the release on behalf of the child.

MS. KNUTSON answered that the law specifies that until an individual achieves the age of majority, the individual doesn't have the capacity to contract. Furthermore, case law in Alaska specifies that these waiver/release documents are contractual in nature.

CHAIR McGUIRE, upon determining that no one else wished to testify, closed public testimony on HB 273.

Number 1320

REPRESENTATIVE OGG moved to report the proposed CS for SSHB 273, Version 23-LS0966\I, Bullock, 3/19/04, as amended, out of committee with individual recommendations and the accompanying zero fiscal note. There being no objection, CSSSHB 273(JUD) was reported from the House Judiciary Standing Committee.

ADJOURNMENT

Number 1334

There being no further business before the committee, the House Judiciary Standing Committee meeting was adjourned at 3:15 p.m.