

HOUSE BILL NO. 274

IN THE LEGISLATURE OF THE STATE OF ALASKA

EIGHTEENTH LEGISLATURE - FIRST SESSION

BY THE HOUSE HEALTH, EDUCATION AND SOCIAL SERVICES COMMITTEE BY REQUEST

Introduced: 4/2/93

Referred: Health, Education & Social Services, Judiciary, Finance

A BILL

FOR AN ACT ENTITLED

1 "An Act relating to civil actions; amending Alaska Rule of Civil Procedure 68;
2 repealing Alaska Rule of Civil Procedure 72.1; and providing for an effective
3 date."

4 **BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF ALASKA:**

5 * **Section 1.** AS 08.64.326 is amended to read:

6 Sec. 08.64.326. **GROUND**S FOR IMPOSITION OF DISCIPLINARY
7 **SANCTIONS.** (a) The board may impose a sanction if the board finds after a hearing
8 that a licensee

9 (1) secured a license through deceit, fraud, or intentional
10 misrepresentation;

11 (2) engaged in deceit, fraud, or intentional misrepresentation while
12 providing professional services or engaging in professional activities;

13 (3) advertised professional services in a false or misleading manner;

14 (4) has been convicted, including conviction based on a guilty plea or

1 plea of nolo contendere, of

2 (A) a felony or other crime if the felony or other crime
3 is substantially related to the qualifications, functions, or duties of the
4 licensee; or

5 (B) a crime involving the unlawful procurement, sale,
6 prescription, or dispensing of drugs;

7 (5) has procured, sold, prescribed, or dispensed drugs in violation of
8 a law, regardless of whether there has been a criminal action;

9 (6) intentionally or negligently permitted the performance of patient
10 care by persons under the licensee's supervision that does not conform to minimum
11 professional standards even if the patient was not injured;

12 (7) failed to comply with this chapter, a regulation adopted under this
13 chapter, or an order of the board;

14 (8) has demonstrated

15 (A) professional incompetence, gross negligence, or
16 repeated negligent conduct; the board may not base a finding of
17 professional incompetence solely on the basis that a licensee's practice
18 is unconventional or experimental in the absence of demonstrable
19 physical harm to a patient;

20 (B) addiction to, severe dependency on, or habitual
21 overuse of alcohol or other drugs that impairs the licensee's
22 ability to practice safely;

23 (C) unfitness because of physical or mental disability;

24 (9) engaged in unprofessional conduct or in lewd or immoral conduct
25 in connection with the delivery of professional services to patients;

26 (10) has violated AS 18.16.010;

27 (11) has violated any code of ethics adopted by regulation by the board;

28 or

29 (12) [HAS DENIED CARE OR TREATMENT TO A PATIENT OR
30 PERSON SEEKING ASSISTANCE FROM THE PHYSICIAN IF THE ONLY
31 REASON FOR THE DENIAL IS THE FAILURE OR REFUSAL OF THE PATIENT

1 TO AGREE TO ARBITRATE AS PROVIDED IN AS 09.55.535(a); OR

2 (13)] has had a license or certificate to practice medicine in another
3 state or territory of the United States, or a province or territory of Canada suspended
4 or revoked unless the suspension or revocation was caused by the failure of the
5 licensee to pay fees to that state, territory, or province.

6 (b) In a case involving (a)(12) [(a)(13)] of this section, the final findings of
7 fact, conclusions of law, and order of the authority that suspended or revoked a license
8 or certificate constitutes a prima facie case that the license or certificate was suspended
9 or revoked and the grounds under which the suspension or revocation was granted.

10 * Sec. 2. AS 08.68.270 is amended to read:

11 Sec. 08.68.270. GROUND S FOR DENIAL, SUSPENSION, OR
12 REVOCATION. The board may deny, suspend, or revoke the license of a person who

13 (1) has obtained or attempted to obtain a license to practice nursing by
14 fraud or deceit;

15 (2) has been convicted of a felony or other crime if the felony or other
16 crime is substantially related to the qualifications, functions or duties of the licensee;

17 (3) habitually abuses alcoholic beverages, or illegally uses controlled
18 substances;

19 (4) has impersonated a registered or practical nurse;

20 (5) has intentionally or negligently engaged in conduct that has resulted
21 in a significant risk to the health or safety of a client or in injury to a client;

22 (6) practices or attempts to practice nursing while afflicted with
23 physical or mental illness, deterioration, or disability that interferes with the
24 individual's performance of nursing functions;

25 (7) is guilty of unprofessional conduct as defined by regulations
26 adopted by the board;

27 (8) has wilfully or repeatedly violated a provision of this chapter or
28 regulations adopted under it;

29 (9) is professionally incompetent [;

30 (10) DENIES CARE OR TREATMENT TO A PATIENT OR PERSON
31 SEEKING ASSISTANCE IF THE SOLE REASON FOR THE DENIAL IS THE

1 **FAILURE OR REFUSAL OF THE PATIENT OR PERSON SEEKING ASSISTANCE**
2 **TO AGREE TO ARBITRATE AS PROVIDED IN AS 09.55.535(a)].**

3 * **Sec. 3. AS 09.10 is amended by adding a new section to read:**

4 **Sec. 09.10.065. LIMITATION ON ACTIONS AGAINST HEALTH CARE**
5 **PROVIDERS. (a) Notwithstanding AS 09.10.140, an action based on professional**
6 **negligence may not be brought against a health care provider unless**

7 (1) the action is brought within two years from the date of the alleged
8 negligent act or omission; or

9 (2) if the injured person is, on the date of the alleged negligent act or
10 omission less than six years of age, the action is brought before the person's eighth
11 birthday.

12 (b) The limitation imposed under (a) of this section is tolled during any period
13 in which there exists

14 (1) fraud, including fraud or collusion by a parent, guardian, insurer,
15 or health care provider, resulting in the failure to bring an action on behalf of an
16 injured minor;

17 (2) intentional concealment of facts that would give notice of a
18 potential action; or

19 (3) the undiscovered presence of a foreign body, that has no therapeutic
20 or diagnostic purpose or effect, in the body of the injured person and the action is
21 based on the presence of the foreign body.

22 (c) In this section,

23 (1) "health care provider" has the meaning given in AS 09.55.560;

24 (2) "professional negligence" means a negligent act or omission by a
25 health care provider in rendering professional services;

26 (3) "professional services" means services provided by a health care
27 provider that are within the scope of services for which the health care provider is
28 licensed, and that are not prohibited under the health care provider's license or by a
29 hospital in which the health care provider practices.

30 * **Sec. 4. AS 09.17.010(b) is amended to read:**

31 (b) The amount of damages awarded by a court or a jury under (a) of this

1 section may not exceed \$250,000 [\$500,000] for each claim based on a separate
2 incident or injury.

3 * Sec. 5. AS 09.17.080(a) is amended to read:

4 (a) In all actions involving fault of more than one party to the action, including
5 third-party defendants and persons who have been released under AS 09.17.091
6 [AS 09.16.040], the court, unless otherwise agreed by all parties, shall instruct the jury
7 to answer special interrogatories or, if there is no jury, shall make findings, indicating

8 (1) the amount of damages each claimant would be entitled to recover
9 if contributory fault is disregarded; and

10 (2) the percentage of the total fault of all of the parties to each claim
11 that is allocated to each claimant, defendant, third-party defendant, [AND] person who
12 has been released from liability under AS 09.17.091, or other person responsible for
13 the damages to each claimant regardless of whether the other person is subject
14 to an action by the claimant [AS 09.16.040].

15 * Sec. 6. AS 09.17.080(c) is amended to read:

16 (c) The court shall determine the award of damages to each claimant in
17 accordance with the findings, subject to a reduction under AS 09.17.091
18 [AS 09.16.040], and enter judgment against each party liable. The court also shall
19 determine and state in the judgment each party's equitable share of the obligation to
20 each claimant in accordance with the respective percentages of fault.

21 * Sec. 7. AS 09.17 is amended by adding a new section to read:

22 Sec. 09.17.091. EFFECT OF RELEASE. When a release or covenant not to
23 sue or not to enforce judgment is given in good faith to one of two or more persons
24 civilly liable for the same injury or the same wrongful death

25 (1) it does not discharge any of the other persons from liability for the
26 injury or wrongful death unless its terms so provide; but it reduces the claim against
27 the others to the extent of any amount stipulated by the release or the covenant, or in
28 the amount of the consideration paid for it, whichever is the greater; and

29 (2) it discharges the person to whom it is given from all liability for
30 contribution to any other person.

31 * Sec. 8. AS 09.30.070(a) is amended to read:

1 (a) The rate of interest on judgments and decrees for the payment of money
2 is equal to the 2nd Federal Reserve District discount rate in effect on January 2
3 of the year in which the judgment or decree is entered [10.5 PERCENT A YEAR],
4 except that a judgment or decree founded on a contract in writing, providing for the
5 payment of interest until paid at a specified rate not exceeding the legal rate of interest
6 for that type of contract, bears interest at the rate specified in the contract if the
7 interest rate is set out in the judgment or decree.

8 * Sec. 9. AS 09.30.070 is amended by adding a new subsection to read:

9 (c) Prejudgment interest may not be awarded for future economic damages,
10 future noneconomic damages, or for punitive damages.

11 * Sec. 10. AS 09.55.535 is repealed and reenacted to read:

12 Sec. 09.55.535. MANDATORY ARBITRATION. (a) A person who files an
13 action for damages against a health care provider resulting from medical malpractice,
14 shall also submit the claim to the court for arbitration.

15 (b) When a claim is submitted as required by (a) of this section, the court shall
16 appoint an arbitrator to review the claim. The arbitrator appointed to review the claim
17 shall interview the parties and examine all records or materials relating to the claim
18 and may compel the attendance of witnesses, interview the parties, or consult with
19 medical specialists.

20 (c) An arbitrator appointed under this section shall conduct a prehearing
21 settlement conference within 30 days after the appointment. The arbitrator shall
22 establish a period for discovery and a date for a hearing. The hearing date may not
23 be more than 120 days after the settlement conference.

24 (d) An arbitrator shall render a decision within 30 days after hearing a claim
25 under (c) of this section. The decision must contain findings of fact and conclusions
26 of law. The decision of the arbitrator may be rejected by a party.

27 (e) If the decision of the arbitrator is rejected by a party, the action may
28 proceed in the appropriate court. The arbitrator's decision is admissible evidence in
29 that action and may be used by a party to support or oppose a claim of damages.

30 (f) The provisions of AS 09.43.010 - 09.43.180 (Uniform Arbitration Act)
31 apply to an arbitration under this section to the extent the provisions do not conflict

1 with the provisions of this section.

2 * **Sec. 11.** AS 09.55.536 is amended to read:

3 **Sec. 09.55.536. EXPERT ADVISOR [ADVISORY PANEL].** (a) In an action
4 for damages due to personal injury or death based upon the provision of professional
5 services by a health care provider [WHEN THE PARTIES HAVE NOT AGREED TO
6 ARBITRATION OF THE CLAIM UNDER AS 09.55.535,] the court shall appoint
7 within 20 days after filing of answer to a summons and complaint **an expert medical**
8 **advisor** [A THREE-PERSON EXPERT ADVISORY PANEL] unless the court decides
9 that an expert advisory opinion is not necessary for a decision in the case. When the
10 action is filed the court shall, by order, determine the professions or specialties to be
11 represented **by the medical expert** [ON THE EXPERT ADVISORY PANEL], giving
12 the parties the opportunity to object or make suggestions.

13 (b) The expert **advisor** [ADVISORY PANEL] may compel the attendance of
14 witnesses, interview the parties, physically examine the injured person if alive, consult
15 with the specialists or learned works they consider appropriate, and compel the
16 production of and examine all relevant hospital, medical, or other records or materials
17 relating to the health care in issue. The **advisor** [PANEL] may meet in camera, but
18 shall maintain a record of any testimony or oral statements of witnesses, and shall keep
19 copies of all written statements **received** [IT RECEIVES].

20 (c) Not more than 30 days after selection of the **advisor, the advisor** [PANEL,
21 IT] shall make a written report to the parties and to the court, answering the following
22 questions and other questions submitted to the **advisor** [PANEL] by the court:

- 23 (1) What was the disorder for which the plaintiff came to medical care?
24 (2) What would have been the probable outcome without medical care?
25 (3) Was the treatment selected appropriate for the case?
26 (4) Did an injury arise from the medical care?
27 (5) What is the nature and extent of the medical injury?
28 (6) What specifically caused the medical injury?
29 (7) Was the medical injury caused by unskillful care?
30 (8) If a medical injury had not occurred, how would the plaintiff's
31 condition differ from the plaintiff's present condition?

1 (d) In any case in which the answer to one or more of the questions submitted
2 to the advisor [PANEL] depends upon the resolution of factual questions which are
3 not the proper subject of expert opinion, the report shall so state and may answer
4 questions based upon hypothetical facts that are fully set out in the opinion. The
5 report must [SHALL] include copies of all written statements, opinions, or records
6 relied upon by the advisor [PANEL] and either a transcription or other record of any
7 oral statements or opinions; must [SHALL] specify any medical or scientific authority
8 relied upon by the advisor [PANEL]; and must [SHALL] include the results of any
9 physical or mental examination performed on the plaintiff. The advisor [EACH
10 MEMBER] shall sign the report and the signature constitutes the advisor's
11 [MEMBER'S] adoption of all statements and opinions contained in it [; HOWEVER,
12 A MEMBER MAY, INSTEAD OF SIGNING THE REPORT, SUBMIT A
13 CONCURRING OR DISSENTING REPORT WHICH COMPLIES WITH THE
14 REQUIREMENTS OF THIS SUBSECTION]. An advisor [A MEMBER] may not
15 attest to any portion of the report as to which the advisor [MEMBER] is not qualified
16 to give expert testimony.

17 (e) The report of the advisor [PANEL WITH ANY DISSENTING OR
18 CONCURRING OPINION] is admissible in evidence to the same extent as though its
19 contents were orally testified to by the person [OR PERSONS] preparing it. The court
20 shall delete any portion that would not be admissible because of lack of foundation for
21 opinion testimony, or otherwise. Either party may submit testimony to support or refute
22 the report. The jury shall be instructed in general terms that the report shall be
23 considered and evaluated in the same manner as any other expert testimony. The
24 expert advisor [ANY MEMBER OF THE PANEL] may be called by any party and
25 may be cross-examined as to the contents of the report [OR OF THAT MEMBER'S
26 DISSENTING OR CONCURRING OPINION].

27 (f) Discovery [NO DISCOVERY] may not be undertaken in a case until the
28 report of the expert advisor [ADVISORY PANEL] is received. However, the court
29 may relax this prohibition upon a showing of good cause by a [ANY] party. If the
30 advisor [PANEL] has not completed its report within the 30-day period prescribed in
31 (c) of this section, the court may, upon application, grant [IT] an additional 30 days.

1 (g) The expert advisor is [MEMBERS OF A PANEL ARE] entitled to travel
2 expenses and per diem in accordance with state law pertaining to members of boards
3 and commissions for all time spent in preparing its report. If an advisor [A PANEL
4 MEMBER] is called upon as a witness at trial or upon deposition, the advisor
5 [MEMBER] is entitled to payment of an expert witness fee, which may not exceed
6 \$150 per day. All expenses incurred by the advisor [PANEL] shall be paid by the
7 court. However, in any case in which the court determines that a party has made a
8 patently frivolous claim or a patently frivolous denial of liability, it shall order that all
9 costs of the expert advisor [ADVISORY PANEL] be borne by the party making that
10 claim or denial.

11 (h) Parties to the case and their counsel may not initiate communication out
12 of court with an expert advisor [MEMBERS OF THE PANEL] on the subject matter
13 of its inquiry and report or cause or solicit others to do so, except through ordinary
14 discovery proceedings.

15 * Sec. 12. AS 09.55.548 is repealed and reenacted to read:

16 Sec. 09.55.548. AWARDS, PERIODIC PAYMENTS, COLLATERAL
17 SOURCE; SUBROGATION. (a) Damages in a medical malpractice action shall be
18 awarded under principles of the common law, except as otherwise provided by statute.
19 The fact finder in a medical malpractice action shall render an award for damages by
20 category of loss.

21 (b) Notwithstanding AS 09.17.040(d), the court shall, at the request of either
22 party, enter a judgment that future damages in a medical malpractice action be paid
23 in whole or in part by periodic payments rather than by a lump-sum payment if the
24 award equals or exceeds \$100,000 in future damages. When the court enters a
25 judgment ordering the payment of future damages by periodic payments, the judgment
26 must include, if necessary, other provisions to assure that funds are available as
27 periodic payments become due. Insurance from an insurer is sufficient assurance that
28 funds will be available. If periodic payments for future damages are awarded, the
29 present value of the periodic payments shall be used in computing the total award. In
30 this subsection,

31 (1) "future damages" includes damages for future medical treatment,

1 care or custody, loss of future earnings, or loss of bodily function of the claimant; and

2 (2) "insurer" has the meaning given in AS 21.90.900.

3 (c) Except when the collateral source is a federally funded program that is
4 required by law to seek subrogation or are death benefits paid under life insurance, a
5 plaintiff in a medical malpractice action may only recover damages from the defendant
6 that exceed amounts received by the plaintiff, or that with reasonable probability will
7 be received in the future by the plaintiff as compensation for the injuries from
8 collateral sources, whether private, group, or governmental, and whether contributory
9 or noncontributory.

10 (d) If the defendant elects, in an action for personal injury or death against a
11 health care provider based upon claims of medical malpractice, the defendant may
12 introduce into evidence any amount paid or payable as a benefit to the plaintiff as a
13 result of the personal injury under 42 U.S.C. 301-1397 (United States Social Security
14 Act), and state or federal income disability or workers' compensation act, a health,
15 sickness, or income disability insurance, accident insurance that provides health
16 benefits or income disability coverage, a contract or agreement of a group,
17 organization, partnership, or corporation, or other collateral source, to provide, pay for,
18 or reimburse the cost of medical, hospital, dental, or other health care services. If the
19 defendant elects to introduce evidence described in this subsection, the plaintiff may
20 introduce evidence of an amount that the plaintiff has paid or contributed to secure the
21 plaintiff's right to insurance benefits for which the defendant has introduced evidence.

22 (e) Unless evidence of collateral sources has already been introduced under (d)
23 of this section, evidence of collateral sources, other than a federal program that is
24 required by law to seek subrogation and a death benefit paid under life insurance, is
25 admissible after the fact finder has rendered an award. The court may take into
26 account the value of the plaintiff's rights to coverage exhausted or depleted by
27 payment of these collateral benefits by adding back a reasonable estimate of their
28 probable value, or by earmarking and holding for possible periodic payment under (b)
29 of this section that amount of the award that would otherwise have been deducted, to
30 see if the impairment of the plaintiff's rights actually takes place in the future.

31 (f) A source of collateral benefits may not recover an amount against the

1 plaintiff and may not be subrogated to the rights of the plaintiff against a defendant.

2 * **Sec. 13.** AS 09.55.560 is repealed and reenacted to read:

3 **Sec. 09.55.560. DEFINITION.** In AS 09.55.530 - 09.55.560, "health care
4 provider" means an acupuncturist licensed under AS 08.06; an audiologist licensed
5 under AS 08.11; a chiropractor licensed under AS 08.20; a dental hygienist licensed
6 under AS 08.32; a dentist licensed under AS 08.36; a nurse licensed under AS 08.68;
7 a dispensing optician licensed under AS 08.71; a naturopath licensed under AS 08.45;
8 an optometrist licensed under AS 08.72; a pharmacist licensed under AS 08.80; a
9 physical therapist or occupational therapist licensed under AS 08.84; a physician
10 licensed under AS 08.64; a podiatrist licensed under AS 08.64; a psychologist and a
11 psychological associate licensed under AS 08.86; and a hospital as defined in
12 AS 18.20.130, including a governmentally owned or operated hospital; and an
13 employee of a health care provider acting within the course and scope of employment.

14 * **Sec. 14.** AS 09.65 is amended by adding a new section to read:

15 **Sec. 09.65.096. CIVIL LIABILITY OF HOSPITALS FOR NONEMPLOYEES.**

16 (a) A hospital is not liable for civil damages as a result of an act or omission by a
17 health care provider who is not an employee of the hospital if the claim is based solely
18 on the grounds that the hospital

19 (1) is required to provide services by law or by regulation, or is subject
20 to regulation with respect to the provision of services;

21 (2) is required to comply or has voluntarily complied with the standards
22 of a public or private licensing or accreditation agency with respect to provision of
23 services; or

24 (3) has adopted bylaws, policies, or regulations governing the provision
25 of services.

26 (b) A hospital is not, solely for the reason that a health care provider was the
27 actual, apparent, or implied agent of the hospital, liable for civil damages caused by
28 the acts or omissions of a health care provider who is not the hospital's employee, if
29 the hospital provides notice that the health care provider is an independent contractor.
30 The notice required by this subsection must be posted conspicuously in all admitting
31 areas of the hospital, published at least annually in a newspaper of general circulation

1 in the area, and must be in substantially the following form:

2 **Notice of Limited Liability**

3 **The following health care providers are independent contractors**
4 **and are not employees of the hospital:**

5 **(List specific health care providers)**

6 **The hospital is responsible for exercising reasonable care in granting staff privileges**
7 **to practice in the hospital, for reviewing those privileges on a regular basis, and for**
8 **taking appropriate steps to revoke or restrict privileges in appropriate circumstances.**
9 **The hospital is not otherwise liable for the acts or omissions of a health care provider**
10 **who is an independent contractor.**

11 **(c) This section does not preclude liability for civil damages that are the**
12 **proximate result of the hospital's own negligence or intentional misconduct.**

13 **(d) In this section,**

14 **(1) "health care provider" has the meaning given in AS 18.23.070,**
15 **except that it does not include a hospital or an employee of the hospital;**

16 **(2) "hospital" has the meaning given in AS 18.20.130 and includes a**
17 **governmentally owned or operated hospital.**

18 *** Sec. 15. Alaska Rule of Civil Procedure 72.1 is repealed.**

19 *** Sec. 16. AS 09.30.070(c), added by sec. 9 of this Act, has the effect of amending Alaska**
20 **Rule of Civil Procedure 68 by providing that prejudgment interest may not be awarded for**
21 **future economic or noneconomic damages.**

22 *** Sec. 17. APPLICABILITY. This Act applies to all causes of action accruing on or after**
23 **the effective date of this Act.**

24 *** Sec. 18. This Act takes effect July 1, 1993.**