

SENATE BILL NO. 204**IN THE LEGISLATURE OF THE STATE OF ALASKA****EIGHTEENTH LEGISLATURE - FIRST SESSION****BY THE SENATE HEALTH, EDUCATION AND SOCIAL SERVICES COMMITTEE BY REQUEST****Introduced: 4/24/93**
Referred: HES, JUD, FIN**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. INTENT OF SECTION 16. It is the intent of the legislature in enacting
6 AS 09.65.096 in sec. 16 of this Act to overrule the decision of the Alaska Supreme Court in
7 Jackson v. Power, 743 P.2d 1376 (Alaska 1987), but not to otherwise change existing law.

8 * Sec. 2. AS 08.64.326 is amended to read:

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

12 (1) secured a license through deceit, fraud, or intentional
13 misrepresentation;

14 (2) engaged in deceit, fraud, or intentional misrepresentation while

- 1 providing professional services or engaging in professional activities;
- 2 (3) advertised professional services in a false or misleading manner;
- 3 (4) has been convicted, including conviction based on a guilty plea or
- 4 plea of nolo contendere, of
- 5 (A) a felony or other crime if the felony or other crime
- 6 is substantially related to the qualifications, functions, or duties of the
- 7 licensee; or
- 8 (B) a crime involving the unlawful procurement, sale,
- 9 prescription, or dispensing of drugs;
- 10 (5) has procured, sold, prescribed, or dispensed drugs in violation of
- 11 a law, regardless of whether there has been a criminal action;
- 12 (6) intentionally or negligently permitted the performance of patient
- 13 care by persons under the licensee's supervision that does not conform to minimum
- 14 professional standards even if the patient was not injured;
- 15 (7) failed to comply with this chapter, a regulation adopted under this
- 16 chapter, or an order of the board;
- 17 (8) has demonstrated
- 18 (A) professional incompetence, gross negligence, or
- 19 repeated negligent conduct; the board may not base a finding of
- 20 professional incompetence solely on the basis that a licensee's practice
- 21 is unconventional or experimental in the absence of demonstrable
- 22 physical harm to a patient;
- 23 (B) addiction to, severe dependency on, or habitual
- 24 overuse of alcohol or other drugs that impairs the licensee's
- 25 ability to practice safely;
- 26 (C) unfitness because of physical or mental disability;
- 27 (9) engaged in unprofessional conduct or in lewd or immoral conduct
- 28 in connection with the delivery of professional services to patients;
- 29 (10) has violated AS 18.16.010;
- 30 (11) has violated any code of ethics adopted by regulation by the board;
- 31 or

1 (12) [HAS DENIED CARE OR TREATMENT TO A PATIENT OR
2 PERSON SEEKING ASSISTANCE FROM THE PHYSICIAN IF THE ONLY
3 REASON FOR THE DENIAL IS THE FAILURE OR REFUSAL OF THE PATIENT
4 TO AGREE TO ARBITRATE AS PROVIDED IN AS 09.55.535(a); OR

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

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

13 * Sec. 3. AS 08.68.270 is amended to read:

14 Sec. 08.68.270. GROUNDS FOR DENIAL, SUSPENSION, OR
15 REVOCATION. The board may deny, suspend, or revoke the license of a person who

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

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

20 (3) habitually abuses alcoholic beverages, or illegally uses controlled
21 substances;

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

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

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

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

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

1 (9) is professionally incompetent [;
2 (10) DENIES CARE OR TREATMENT TO A PATIENT OR PERSON
3 SEEKING ASSISTANCE IF THE SOLE REASON FOR THE DENIAL IS THE
4 FAILURE OR REFUSAL OF THE PATIENT OR PERSON SEEKING ASSISTANCE
5 TO AGREE TO ARBITRATE AS PROVIDED IN AS 09.55.535(a)].

6 * Sec. 4. AS 09.10 is amended by adding a new section to read:

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

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

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

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

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

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

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

25 (c) In this section,

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

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

29 (3) "professional services" means services provided by a health care
30 provider that are within the scope of services for which the health care provider is
31 licensed, and that are not prohibited under the health care provider's license or by a

1 hospital in which the health care provider practices.

2 * Sec. 5. AS 09.17.010(b) is amended to read:

3 (b) The amount of damages awarded by a court or a jury under (a) of this
4 section may not exceed \$250,000 [\$500,000] for each claim based on a separate
5 incident or injury, except as adjusted under (d) of this section.

6 * Sec. 6. AS 09.17.010 is amended by adding a new subsection to read:

7 (d) The limit under (b) of this section shall be adjusted July 1 of each year by
8 the Department of Labor to reflect changes in the Anchorage consumer price index.
9 The base year for the index is 1992. The Department of Labor shall adopt regulations
10 that provide for public notice of the adjusted consumer price index required under this
11 subsection.

12 * Sec. 7. AS 09.17.080(a) is amended to read:

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

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

19 (2) the percentage of the total fault of all of the parties to each claim
20 that is allocated to each claimant, defendant, third-party defendant, [AND] person who
21 has been released from liability under AS 09.17.091, or other person responsible for
22 the damages to each claimant regardless of whether the other person is subject
23 to an action by the claimant [AS 09.16.040], except as adjusted under (d) of this
24 section.

25 * Sec. 8. AS 09.17.080(c) is amended to read:

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

31 * Sec. 9. AS 09.17 is amended by adding a new section to read:

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

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

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

10 * Sec. 10. AS 09.30.070(a) is amended to read:

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

18 * Sec. 11. AS 09.30.070 is amended by adding a new subsection to read:

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

21 * Sec. 12. AS 09.55.535 is repealed and reenacted to read:

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

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

30 (c) An arbitrator appointed under this section shall conduct a prehearing
31 settlement conference within 30 days after the appointment. The arbitrator shall

1 establish a period for discovery and a date for a hearing. The hearing date may not
2 be more than 120 days after the settlement conference.

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

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

9 (f) The provisions of AS 09.43.010 - 09.43.180 (Uniform Arbitration Act)
10 apply to an arbitration under this section to the extent the provisions do not conflict
11 with the provisions of this section.

12 * Sec. 13. AS 09.55.536 is amended to read:

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

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

30 (c) Not more than 30 days after selection of the advisor, the advisor [PANEL,
31 IT] shall make a written report to the parties and to the court, answering the following

1 questions and other questions submitted to the advisor [PANEL] by the court:

2 (1) What was the disorder for which the plaintiff came to medical care?

3 (2) What would have been the probable outcome without medical care?

4 (3) Was the treatment selected appropriate for the case?

5 (4) Did an injury arise from the medical care?

6 (5) What is the nature and extent of the medical injury?

7 (6) What specifically caused the medical injury?

8 (7) Was the medical injury caused by unskillful care?

9 (8) If a medical injury had not occurred, how would the plaintiff's
10 condition differ from the plaintiff's present condition?

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

27 (e) The report of the advisor [PANEL WITH ANY DISSENTING OR
28 CONCURRING OPINION] is admissible in evidence to the same extent as though its
29 contents were orally testified to by the person [OR PERSONS] preparing it. The court
30 shall delete any portion that would not be admissible because of lack of foundation for
31 opinion testimony, or otherwise. Either party may submit testimony to support or refute

1 the report. The jury shall be instructed in general terms that the report shall be
2 considered and evaluated in the same manner as any other expert testimony. The
3 expert advisor [ANY MEMBER OF THE PANEL] may be called by any party and
4 may be cross-examined as to the contents of the report [OR OF THAT MEMBER'S
5 DISSENTING OR CONCURRING OPINION].

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

11 (g) The expert advisor is [MEMBERS OF A PANEL ARE] entitled to travel
12 expenses and per diem in accordance with state law pertaining to members of boards
13 and commissions for all time spent in preparing its report. If an advisor [A PANEL
14 MEMBER] is called upon as a witness at trial or upon deposition, the advisor
15 [MEMBER] is entitled to payment of an expert witness fee, which may not exceed
16 \$150 per day. All expenses incurred by the advisor [PANEL] shall be paid by the
17 court. However, in any case in which the court determines that a party has made a
18 patently frivolous claim or a patently frivolous denial of liability, it shall order that all
19 costs of the expert advisor [ADVISORY PANEL] be borne by the party making that
20 claim or denial.

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

25 * Sec. 14. AS 09.55.548 is repealed and reenacted to read:

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

31 (b) Notwithstanding AS 09.17.040(d), the court shall, at the request of either

1 party, enter a judgment that future damages in a medical malpractice action be paid
2 in whole or in part by periodic payments rather than by a lump-sum payment if the
3 award equals or exceeds \$100,000 in future damages. When the court enters a
4 judgment ordering the payment of future damages by periodic payments, the judgment
5 must include, if necessary, other provisions to assure that funds are available as
6 periodic payments become due. Insurance from an insurer is sufficient assurance that
7 funds will be available. If periodic payments for future damages are awarded, the
8 present value of the periodic payments shall be used in computing the total award. In
9 this subsection,

10 (1) "future damages" includes damages for future medical treatment,
11 care or custody, loss of future earnings, or loss of bodily function of the claimant; and

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

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

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

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

10 (f) A source of collateral benefits may not recover an amount against the
11 plaintiff and may not be subrogated to the rights of the plaintiff against a defendant.

12 * Sec. 15. AS 09.55.560 is repealed and reenacted to read:

13 Sec. 09.55.560. DEFINITION. In AS 09.55.530 - 09.55.560, "health care
14 provider" means an acupuncturist licensed under AS 08.06; an audiologist licensed
15 under AS 08.11; a chiropractor licensed under AS 08.20; a dental hygienist licensed
16 under AS 08.32; a dentist licensed under AS 08.36; a nurse licensed under AS 08.68;
17 a dispensing optician licensed under AS 08.71; a naturopath licensed under AS 08.45;
18 an optometrist licensed under AS 08.72; a pharmacist licensed under AS 08.80; a
19 physical therapist or occupational therapist licensed under AS 08.84; a physician
20 licensed under AS 08.64; a podiatrist licensed under AS 08.64; a psychologist and a
21 psychological associate licensed under AS 08.86; and a hospital as defined in
22 AS 18.20.130, including a governmentally owned or operated hospital; and an
23 employee of a health care provider acting within the course and scope of employment.

24 * Sec. 16. AS 09.65 is amended by adding a new section to read:

25 Sec. 09.65.096. CIVIL LIABILITY OF HOSPITALS FOR NONEMPLOYEES.

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

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

31 (2) is required to comply or has voluntarily complied with the standards

1 of a public or private licensing or accreditation agency with respect to provision of
2 services; or

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

5 (b) A hospital is not, solely for the reason that a health care provider was the
6 apparent or implied agent of the hospital, liable for civil damages caused by the acts
7 or omissions of a health care provider who is not the hospital's employee, if the
8 hospital provides notice that the health care provider is an independent contractor. The
9 notice required by this subsection must be posted conspicuously in all admitting areas
10 of the hospital, published at least annually in a newspaper of general circulation in the
11 area, and must be in substantially the following form:

12 Notice of Limited Liability

13 The following health care providers are independent contractors
14 and are not employees of the hospital:

15 (List specific health care providers)

16 The hospital is responsible for exercising reasonable care in granting staff privileges
17 to practice in the hospital, for reviewing those privileges on a regular basis, and for
18 taking appropriate steps to revoke or restrict privileges in appropriate circumstances.
19 The hospital is not otherwise liable for the acts or omissions of a health care provider
20 who is an independent contractor.

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

23 (d) In this section,

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

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

28 * Sec. 17. Alaska Rule of Civil Procedure 72.1 is repealed.

29 * Sec. 18. AS 09.30.070(c), added by sec. 11 of this Act, has the effect of amending
30 Alaska Rule of Civil Procedure 68 by providing that prejudgment interest may not be awarded
31 for future economic or noneconomic damages.

1 * **Sec. 19. APPLICABILITY.** This Act applies to all causes of action accruing on or after
2 the effective date of this Act.

3 * **Sec. 20. (a)** This Act takes effect only if an Act establishing the Alaska Health
4 Insurance Corporation, relating to hospitals, insurers, and duties of the Department of Health
5 and Social Services that are related to health care is passed by the Eighteenth Alaska State
6 Legislature and becomes law.

7 (b) If the condition described in (a) of this section is fulfilled, this Act takes effect on
8 the effective date of the Act described in (a) of this section.