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SENATE COMMITTEE REPORT
JUST COMMITTEE OF REFERENCE

DATE: 5/10/91

FURTHER:

Date of 5-Day Notice: 2/20/92
(in accordance with Uniform Rule 23)

DATE TURNED INTO OFFICE: 2/26/92

Judiciary Committee considered SB 285

Civil liability of a hospital for nonemployees; efd.

and recommended:

- replace with _____ CS SB 285 (Jud) same title
- attached amendment(s) new title
- _____ letter of intent adopted

- do pass
- do not pass
- no recommendation
- individual recommendations
- further referral to _____

ATTACHES NEW FISCAL NOTE(S):

Department(s)/Date:

Department(s)/Date:

fiscal note(s) LAU

zero fiscal note(s)

appropriation-no fiscal note

Governor's bill w/fiscal note

SIGNING DO PASS:

[Signature]
[Signature]

OTHER RECOMMENDATIONS:

Do not Pass
Walter Bodley, MA Rec.

Rick Holford do pass

Chair: Signature and Recommendation

FISCAL NOTE

STATE OF ALASKA
1992 LEGISLATIVE SESSION

BILL NO. SB 285

Revision Date: February 13, 1992
Title: "An Act relating to civil liability of a hospital for nonemployees ..."
Sponsor: Senator Halford
Requestor: Senate Judiciary Committee

Department Affected: Department of Law
BRU: Legal Services
Component: Operations

COMPONENT SERIAL

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Expenditures/Revenues: (Thousands of Dollars)

OPERATING	FY 93	FY 34	FY 95	FY 96	FY 97	FY 98
PERSONAL SERVICES						
TRAVEL						
CONTRACTUAL						
SUPPLIES						
EQUIPMENT						
LAND & STRUCTURES						
GRANTS, CLAIMS						
MISCELLANEOUS						
TOTAL OPERATING	-0-	-0-	-0-	-0-	-0-	-0-

CAPITAL						
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REVENUE FUND SOURCE:						
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FUNDING: (Thousands of Dollars)

GENERAL FUND	-0-	-0-	-0-	-0-	-0-	-0-
FEDERAL FUNDS						
OTHER FUND SOURCE:						
TOTAL						

POSITIONS:

FULL-TIME	-0-	-0-	-0-	-0-	-0-	-0-
PART-TIME						
TEMPORARY						

Estimate of current year impact: _____

ANALYSIS: (Attach a separate page if necessary.) Please see the attached analysis.

Prepared by: Richard I. Pegues, Director
Division: Administrative Services
Approved by Commissioner: Charles E. Cole, Attorney General
Agency: Department of Law

Phone: 465-3672
Date: February 13, 1992

Date: February 13, 1992

Distribution (by preparer): Leg. Fin., Legislative Sponsor, Requestor, OMB/DBR, Gov. Legis. Ofc., & Impacted Agency(ies).

FISCAL NOTE

STATE OF ALASKA
1992 LEGISLATIVE SESSION

BILL NO. SB 285

ANALYSIS: (continued)

This bill adds a new section to AS 09.65 that shields hospitals from civil liability for the acts and omissions of those providing health care in a hospital who are not employees of the hospital. A hospital would be required to provide ample notice of this provision when services are provided by a health care provider who is an independent contractor. Because this bill deals with the civil liability of hospitals, it will not have a fiscal impact on the Department of Law.

Alaska State Legislature

Senate

Office of The Majority Leader


Official Business

Rick Halford
P.O. Box V
State Capitol
Juneau, Alaska 99811
Phone (907) 465-4958

P. O. Box 190
Chugiak, Alaska 99567
(907) 694-4958

MEMORANDUM

TO: Senate Judiciary Committee

FROM: Senator Rick Halford 

DATE: February 24, 1992

SUBJECT: Sponsor Statement -- SB 285 "Relating to civil liability of a hospital for nonemployees"

In 1987, the Alaska Supreme Court ruled in Jackson v. Power (no. 3237), that a general acute care hospital has a nondelegable duty to provide emergency room services, and therefore, the hospital is vicariously liable for the negligence of an emergency room physician. However, the implications of the Jackson decision extend far beyond the emergency room. Even though the Jackson case dealt only with the relationship between the hospital and non-employee emergency room physicians, the rationale of the case logically extends to other non-employee physicians and health care providers.

Hospitals, as health care providers, should be accountable for their own liability. Senate Bill 285 removes the hospital from the role of "deep pockets" in patient vs. doctor malpractice cases, but does not preclude the hospital's liability for civil damages that are the proximate result of its own negligence or intentional misconduct.

Thank you for consideration of the bill, and I urge its expedient passage from committee.

DIVISION OF LEGAL SERVICES

**LEGISLATIVE AFFAIRS AGENCY
STATE OF ALASKA**

(907) 465-3867 or 465-2450
FAX (907) 465-2029
Mail Stop 3101

240 Main Street, Suite 500
Juneau, Alaska 99801-2101

MEMORANDUM

February 25, 1992

SUBJECT: Civil liability of hospitals - (SB 285)
TO: Senator Rick Halford
FROM: Michael F. Ford *M.F.*
Legislative Counsel

The following is a section by section analysis of SB 285:

Section 1 - Limits the liability of a hospital for civil damages resulting from an act or omission of a health care provider who is not an employee of the hospital, if the basis for liability is the fact that the hospital provides services required under AS 18.20 or is subject to regulation with respect to the provision of health care services. Provides that compliance with licensing or accreditation standards may not be construed as an assumption of civil liability by the hospital for an act or omission of a health care provider who is not an employee. Requires that the hospital provide a conspicuous notice of those health care providers who are not employees. Excludes limited liability if damages are caused by the hospital's own negligence or intentional misconduct.

Section 2 - Applicability section.

Section 3 - Effective date.

MFF:gc
92-164.glc

SENATE BILL NO. 285
IN THE LEGISLATURE OF THE STATE OF ALASKA
SEVENTEENTH LEGISLATURE - FIRST SESSION

BY SENATOR HALFORD

Introduced: 5/10/91
Referred: Judiciary

A BILL
FOR AN ACT ENTITLED

1 "An Act relating to civil liability of a hospital for nonemployees; and providing for an
2 effective date."

3 BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF ALASKA:

4 * Section 1. AS 09.65 is amended by adding a new section to read:

5 Sec. 09.65.096. CIVIL LIABILITY OF HOSPITALS FOR NONEMPLOYEES. (a) A
6 hospital that is required to provide services by AS 18.20 or regulations implementing that
7 chapter, or that is subject to regulation with respect to the provision of services, is not, solely for
8 that reason, liable for civil damages as a result of an act or omission in administering those
9 services by a health care provider who is not an employee of the hospital.

10 (b) Compliance with the standards of a public or private licensing or accreditation agency
11 with respect to provision of services, or adoption by the hospital of bylaws or regulations
12 governing provision of services, may not be construed as an assumption of civil liability by the
13 hospital for the acts or omissions of a health care provider who is not an employee of the
14 hospital.

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

8 Notice of Limited Liability

9 The following health care providers are independent
10 contractors and are not employees of the hospital:

11 (List specific health care providers)

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

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

20 (e) In this section,

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

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

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

27 * Sec. 3. This Act takes effect immediately under AS 01.10.070(c).

*Rural
Contract*

SENATE BILL NO. 285

IN THE LEGISLATURE OF THE STATE OF ALASKA

SEVENTEENTH LEGISLATURE - FIRST SESSION

BY SENATOR HALFORD

Introduced: 5/10/91
Referred: Judiciary

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9 services by a health care provider who is not an employee of the hospital.

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12 governing provision of services, may not be construed as an assumption of civil liability by the
13 hospital for the acts or omissions of a health care provider who is not an employee of the
14 hospital.

1 (c) A hospital is not, solely for ^{the} reason that a health care provider was the actual,
2 apparent, ~~or implied~~ agent of the hospital, liable for civil damages caused by the acts or
3 omissions of a health care provider who is not the hospital's employee, if the hospital provides
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Alaska Action Trust

P.O. Box 102323 • Anchorage, Alaska 99510

Office: 540 L Street, Suite 104 • Anchorage

(907) 258-1010

SB 285: IMMUNITY OF HOSPITALS

This bill is a giant step backwards. A decision by the Alaska Supreme Court several years ago found that hospitals may be liable for the negligence of the physicians who work in the hospital's emergency room. That was a decision very much in line with the legal trend in most states in the country. When persons are traumatically injured and rushed to the emergency room of a hospital, they are relying on the care provided by that hospital in obtaining treatment for their injuries. Most individuals do not arrive at a hospital emergency room and individually select the emergency room physician. Quite to the contrary, hospital emergency rooms are almost always staffed with physicians who are on rotation and have a contract with the hospital to provide that care. This is the reason that our Supreme Court has found it appropriate to hold the hospital liable for the negligence of any emergency room physician. Since the hospitals select the emergency room physicians, it is appropriate for the hospital to be responsible for the physician's negligence. If the hospitals are liable for the emergency room physicians' negligence, then the hospitals will be more careful in selecting which physicians they use in those emergency rooms.

The same reasoning holds true for any other "contract" personnel whom the hospital hires. For example, a nurse may be earning an hourly contract amount for providing services to the hospital. Who would argue with the concept that a hospital should be liable for the negligence of any nurse who is administering to a patient? Yet the hospital would not be responsible for the nurse's negligence under a "contract" employment arrangement if this legislation becomes law in Alaska.

One of the main reasons a negligently injured patient sues a hospital is because the physician who negligently injured that patient has no insurance coverage. Many of the physicians who work in hospitals do not carry any kind of malpractice insurance at all. If the hospitals could ensure that every physician would carry adequate malpractice insurance coverage, then it would rarely be necessary to sue the hospital for the negligence of a physician who is working there. However, very few Alaskan hospitals require that all physicians working there carry malpractice insurance coverage.

This legislation is bad public policy. It relieves the hospitals from liability which they should face up to for the negligence of those people who work in the hospital. This state's policy should be to provide recourse to the victims of medical malpractice negligence, not to limit the recourse of innocent victims. This is

the third year that special interests have attempted to pass this special immunity bill. It has been met with little enthusiasm in the legislature because it is bad public policy. It should receive the same treatment this year.

ALASKA STATE HOSPITAL & NURSING HOME ASSOCIATION

LEGISLATIVE SUMMARY -- SB 285

RE Liability of Hospitals for
Nonemployee Physicians and Other Health Personnel

February, 1992

On October 16, 1987, the Alaska Supreme Court ruled in Jackson v. Power (no. 3237), that a general acute care hospital has a nondelegable duty to provide emergency room services, and therefore, the hospital is vicariously liable for the negligence of an emergency room physician.

** The Jackson decision imposes liability on hospitals for the negligence of non-employee emergency room physicians solely because the hospital is required by law to provide emergency room services and is regulated in the provision of those services without requiring the plaintiff to show that the hospital has been negligent or that it has violated any specific regulatory requirement.

** The implications of the Jackson decision extend far beyond the emergency room. Although the Jackson case dealt only with the relationship between the hospital and non-employee emergency room physicians, the rationale of the case logically extends to other non-employee physicians and health care providers. Under the common law prior to the Jackson decision a hospital was not vicariously liable for the negligence of the non-employees if the hospital itself was not negligent and had complied with all applicable statutory and regulatory requirements.

** The Jackson decision runs counter to modern trends of apportioning liability according to fault. Recent tort reforms were designed to provide some relief to public entities, which were often named as "deep pocket" defendants, even though their share of the responsibility for the injury was negligible. The Jackson case insures that municipally owned, and other community owned hospitals, will be named as deep pocket defendants in every case involving physicians negligence, even though the hospital was not negligent and has done everything within its power to comply with statutory and regulatory requirements. In one recent case, for example, the plaintiff dismissed all of the allegedly negligent physician defendants and went to trial solely against the corporate hospital.

** The ruling will not improve hospital and emergency room care because, by definition, the Jackson rule applies where there is no fault on the part of the hospital. Hospitals have always been liable for their own negligence, and would continue to be so liable if Jackson were legislatively repealed.

** The Jackson ruling could decrease hospital and emergency room response time if hospitals react to the ruling by requiring emergency room physicians to practice more "legal" or "defensive medicine" -- more tests, more consultations, etc. Emergency situations are inherently risky. The legislature, for example, has granted immunity to EMT's, paramedics, and ordinary citizens acting in emergency situations. These legislative choices reflect a policy decision that the need for swift action in emergency situations outweighs the policy of compensating injured plaintiffs. The Jackson decision undercuts this legislative policy.

** Hospital and Emergency room operating costs could be increased also if hospitals react to Jackson by imposing more "defensive medicine" requirements.

** Unless hospitals dramatically restructure their relationship to physicians (by requiring them to become hospitals employees, for example) the net result of the Jackson decision probably will be to increase insurance costs as both hospital and doctor insure to cover the same risk.

** There is no showing that medical malpractice plaintiffs have experience difficulty collecting their judgements. Most physicians carry adequate malpractice insurance. The addition of a "deep pocket" corporate hospital to the cast of defendants, however, will probably increase the size of jury verdicts.

** The burden of the Jackson decision will fall on municipally owned, and other community owned hospitals, which are already caught in a cost squeeze from state and federal regulatory and rate requirements.

** The ASHNHA proposal clarifies that hospitals are not liable for acts or omissions of nonemployee physicians or other health professionals, where that liability is premised solely on the fact that the hospital is required to provide certain services by Alaska Statute or regulations.

#

FOR MORE INFORMATION CONTACT:

Harlan Knudson
President/CEO
Alaska Hospital & Nursing Home Association
319 Seward; #11
Juneau, AK 99801
(907) 586-1790



**Kodiak Island Hospital
& Care Center**

1515 E. Rezanof Drive
Kodiak, AK 99615
(907) 486-3281 FAX (907) 486-2335

February 21, 1992

**Senator Rick Halford
Chairman, Senate Judiciary Committee
Alaska State Legislature
P.O. Box V
Juneau, AK 99801**

Dear Senator Halford:

I am writing to strongly encourage you to support SB 285 correcting the 1987 Supreme Court decision in Jackson v. Power. This decision has been extremely damaging to hospitals and is contrary to tort reform efforts across the country. It essentially makes the hospital the "deep pocket" for liability claims, even in cases where the hospital is found not to be at fault.

Please consider the following facts about how Jackson v. Power impacts this small community hospital:

1. In 1991, Kodiak Island Hospital & Care Center and Kodiak Island Borough settled a case out of court for \$1.2 million based primarily upon a Summary Judgment that the hospital was negligent as a matter of law under the Jackson v. Power decision. In this particular case, the court asserted that a physician bringing their patient to the hospital emergency room essentially had to be removed from the case and required the hospital to substitute its emergency room physician to care for the patient. It was determined inconsequential that the physician was a credentialed member of the active Medical Staff and that the family requested their family physician to provide care in this case. Other than this actions around this issue, there was no other asserted negligence by the hospital.
2. This hospital currently has two cases pending in which the Jackson/Power decision may be the only link to the hospital. One of these cases will certainly assert Jackson v. Power. In this case, an independent contractor practitioner is involved who provided services on a locum tenens basis. There are no specific allegations of hospital negligence in this case and defense counsel has advised that our primary exposure is under the Jackson v. Power decision, under which we may assume the vicarious liability of the practitioner.

Senator Rick Halford
February 21, 1992
Page Two

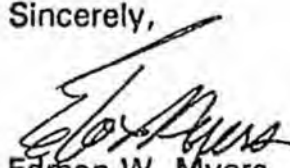
3. In 1991, this small hospital paid out nearly \$1 million in legal fees and insurance premiums, which equates to nearly \$200 per adjusted day, and more than 11% of total expenses.
4. Cases currently in process could have the potential of bankrupting this hospital's self-insured liability trust in legal fees alone. This hospital became self-insured in January of 1990 because liability insurance premiums for this 25-bed acute care hospital and 19-bed intermediate care facility approached \$400,000 per year.

It is not the contention of hospitals that they should not be responsible for their own liability. However, hospitals should not be expected to assume all of the liability for the actions of professional staff members and become the "deep pocket" for virtually every claim filed against a practitioner. It should be noted that physicians are lowering their malpractice coverages, in many cases, to the lowest level insurable (generally in our community that level is around \$200,000). This lower level of coverage encourages plaintiff attorneys to quickly settle with the physician and go after the hospital where linkage can be established by the Jackson v. Power decision. This occurred in the case outlined in #1 above.

It should also be noted that the Jackson v. Power decision, while revolving around an emergency room case, extends well beyond emergency room situations. Even if hospitals require higher levels of malpractice insurance for their medical staffs, it is likely that the size of judgments would only increase.

Hospitals of this size cannot afford the impact of this decision, which has the potential to bankrupt a facility either through insurance premiums or legal expenses, particularly in the case of those who are self-insured. As a result of these experiences, this hospital is looking at elimination of its self-insured program, reverting back to an indemnity insurance program. However, this may not be easy and will certainly be very expensive.

Sincerely,



Edmon W. Myers
Administrator

EWM/dpr

Woods
Anderson
Company

ALASKA STATE

HOSPITAL & NURSING HOME

ASSOCIATION

February 6, 1992

Senator Rick Halford, Chair
Senate Judiciary Committee
Capitol Building; Rm. #103
Juneau, AK 99801

Dear Senator Halford:

We have two requests.

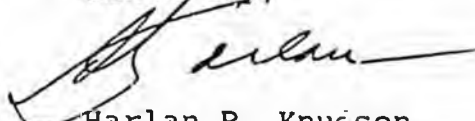
The first is to schedule SB 285, correcting a State Supreme Court decision (Jackson v Power) holding a hospital liable for all actions of emergency room physicians, regardless of fault for public hearing.

SB 285 was introduced late in the 1991 session. It would be very helpful to have this hearing teleconferenced to Kodiak, Fairbanks and Anchorage, as hospitals in those communities have been severely impacted. They are now named in all lawsuits against physicians, even though the hospitals can show there was no negligence on its part.

The second request is to get your advice and guidance on health care reform. As you know the Health Resource & Access Task Force is preparing recommendations (March 15 deadline); Senator Duncan has SB 83 that providers and the insurance industry does not like, and now physicians/hospitals are working on a proposal. *(Enclosed)*

I will call your office and get on your appointment calendar.

Sincerely,



Harlan R. Knudson
President/CEO