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SENATE CS FOR CS FOR SS FOR HOUSE BILL NO. 58(RLS) am S

IN THE LEGISLATURE OF THE STATE OF ALASKA

TWENTIETH LEGISLATURE - FIRST SESSION

BY THE SENATE RULES COMMITTEE

Amended: 4/16/97

Offered: 4/16/97

Sponsor(s): REPRESENTATIVES PORTER, Cowdery, Bunde

SENATORS Pearce, Sharp, Kelly, Miller

A BILL

FOR AN ACT ENTITLED

1 "An Act relating to civil actions; relating to independent counsel provided under
2 an insurance policy; relating to attorney fees; amending Rules 16.1, 26, 41, 49,
3 58, 68, 72.1, 82, and 95, Alaska Rules of Civil Procedure; amending Rules 1 and
4 4, District Court Rules of Civil Procedure; amending Rule 702, Alaska Rules of
5 Evidence; and amending Rule 511, Alaska Rules of Appellate Procedure."

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

7 * **Section 1. LEGISLATIVE INTENT.** In enacting this bill, it is the intent of this
8 legislature as a matter of public policy to

9 (1) encourage the efficiency of the civil justice system by discouraging
10 frivolous litigation and by decreasing the amount, cost, and complexity of litigation without
11 diminishing the protection of innocent Alaskans' rights to reasonable, but not excessive,
12 compensation for tortious injuries caused by others;

13 (2) provide for reasonable, but not excessive, punitive damage awards against

1 tortfeasors sufficient to deter conduct and practices that harm innocent Alaskans while not
2 hampering a positive business environment by allowing excessive penalties;

3 (3) encourage individual savings and economic growth by fostering an
4 environment likely to control the increase of liability insurance rates to individuals and
5 businesses resulting in a savings to the state, municipalities, and private businesses that are
6 self-insured;

7 (4) encourage the traditionally recognized Alaska values of self-reliance and
8 independence by underscoring the need for personal responsibility in making choices and
9 personal accountability for the consequences of those choices;

10 (5) alleviate the high cost of malpractice insurance premiums that discourage
11 physicians, architects, engineers, attorneys, and other professionals from rendering needed
12 services to the public;

13 (6) ensure that hospitals that comply with the disclosure requirements set out
14 in this Act are not liable for the negligence of emergency room physicians who are acting as
15 independent contractors; to this extent, this Act is intended to overrule Jackson v. Powers, 743
16 P.2d 1376 (Alaska 1987);

17 (7) ensure that one of several tortfeasors is not held responsible for the
18 negligence of an employer; to this extent, this Act is intended to overrule Lake v. Construction
19 Machinery, Inc., 787 P.2d 1027 (Alaska 1990);

20 (8) enact a statute of repose that meets the tests set out in Turner Construction
21 Co., Inc. v. Scales, 752 P.2d 467 (Alaska 1988);

22 (9) ensure that in actions involving the fault of more than one person, the fault
23 of each claimant, defendant, third-party defendant, person who has been released from
24 liability, or other person responsible for the damages and available as a litigant be determined
25 and awards be allocated in accordance with the fault of each, thereby modifying Benner v.
26 Wichman, 874 P.2d 949 (Alaska 1994);

27 (10) reduce the amount of litigation proceeding to trial by modifying the
28 allocation of attorney fees and court costs based on the offer of judgment and the final court
29 award, thereby providing a financial incentive to both parties to settle the dispute; and

30 (11) ensure that this Act does not apply to or in any way have an effect on
31 existing litigation or a civil cause of action that accrues before the effective date of this Act;

1 it is the specific intent of the legislature that this Act not apply to or in any way have an
2 effect on In Re Exxon Valdez, A89-0095 Civ. (D.Alaska) or any other federal admiralty action
3 now or in the future.

4 * Sec. 2. AS 06.05.473(h) is amended to read:

5 (h) After the payment of all other claims, including interest at the rate of 10.5
6 percent a year [ESTABLISHED UNDER AS 09.30.070], the department shall pay
7 claims that are otherwise valid but that were not filed within the time prescribed.

8 * Sec. 3. AS 09.10.050 is repealed and reenacted to read:

9 Sec. 09.10.050. **Certain property actions to be brought in six years.** Unless
10 the action is commenced within six years, a person may not bring an action for waste
11 or trespass upon real property.

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

13 Sec. 09.10.053. **Contract actions to be brought in three years.** Unless the
14 action is commenced within three years, a person may not bring an action upon a
15 contract or liability, express or implied, except as provided in AS 09.10.040, the
16 provisions of this section may be waived by contract, or as otherwise provided by law.

17 * Sec. 5. AS 09.10.055 is repealed and reenacted to read:

18 Sec. 09.10.055. **Statute of repose of 10 years.** (a) Notwithstanding the
19 disability of minority described under AS 09.10.140(a), a person may not bring an
20 action for personal injury death, or property damage unless commenced within 10
21 years of the earlier of the date of

22 (1) substantial completion of the construction alleged to have caused
23 the personal injury, death, or property damage; however, the limitation of this
24 paragraph does not apply to a claim resulting from an intentional or reckless disregard
25 of specific project design plans and specifications or building codes; in this paragraph,
26 "substantial completion" means the date when construction is sufficiently completed
27 to allow the owner or a person authorized by the owner to occupy the improvement
28 or to use the improvement in the manner for which it was intended; or

29 (2) the last act alleged to have caused the personal injury, death, or
30 property damage.

31 (b) This section does not apply if

- 1 (1) the personal injury, death, or property damage resulted from
- 2 (A) prolonged exposure to hazardous waste;
- 3 (B) an intentional act or gross negligence;
- 4 (C) fraud or misrepresentation;
- 5 (D) breach of an express warranty or guarantee;
- 6 (E) a defective product; in this subparagraph, "product" means
- 7 an object that has intrinsic value, is capable of delivery as an assembled whole
- 8 or as a component part, and is introduced into trade or commerce; or
- 9 (F) breach of trust or fiduciary duty;

10 (2) the facts that would give notice of a potential cause of action are

11 intentionally concealed;

12 (3) a shorter period of time for bringing the action is imposed under

13 another provision of law;

14 (4) the provisions of this section are waived by contract; or

15 (5) the facts that would constitute accrual of a cause of action of a

16 minor are not discoverable in the exercise of reasonable care by the minor's parent or

17 guardian.

18 (c) The limitation imposed under (a) of this section is tolled during any period

19 in which there exists the undiscovered presence of a foreign body that has no

20 therapeutic or diagnostic purpose or effect in the body of the injured person and the

21 action is based on the presence of the foreign body.

22 * Sec. 6. AS 09.10.070(a) is amended to read:

23 (a) Except as otherwise provided by law, a [A] person may not bring an

24 action (1) for libel, slander, assault, battery, seduction, or false imprisonment, (2)

25 [OR] for personal [ANY] injury or death, [TO THE PERSON] or injury to the rights

26 of another not arising on contract and not specifically provided otherwise; (3) for

27 taking, detaining, or injuring personal property, including an action for its

28 specific recovery; (4) [(2)] upon a statute for a forfeiture or penalty to the state; or

29 (5) [(3)] upon a liability created by statute, other than a penalty or forfeiture; unless

30 the action is commenced within two years of the accrual of the cause of action.

31 * Sec. 7. AS 09.10.140(a) is amended to read:

(a) Except as provided under (c) of this section, if [IF] a person entitled to bring an action mentioned in this chapter is at the time the cause of action accrues either (1) under the age of majority, or (2) incompetent by reason of mental illness or mental disability, the time of a disability identified in (1) or (2) of this subsection is not a part of the time limit for the commencement of the action. Except as provided in (b) of this section, the period within which the action may be brought is not extended in any case longer than two years after the disability ceases.

* Sec. 8. AS 09.10.140 is amended by adding a new subsection to read:

(c) In an action for personal injury of a person who was under the age of eight years at the time of the injury, the time period before the person's eighth birthday is not a part of the time limit imposed under AS 09.10.070(a) for commencing the civil action.

* Sec. 9. AS 09.17.010 is repealed and reenacted to read:

Sec. 09.17.010. Noneconomic damages. (a) In an action to recover damages for personal injury or wrongful death, all damage claims for noneconomic losses shall be limited to compensation for pain, suffering, inconvenience, physical impairment, disfigurement, loss of enjoyment of life, loss of consortium, and other nonpecuniary damage.

(b) Except as provided under (c) of this section, the damages awarded by a court or a jury under (a) of this section for all claims, including a loss of consortium claim, arising out of a single injury or death may not exceed \$400,000 or the injured person's life expectancy in years multiplied by \$8,000, whichever is greater.

(c) In an action for personal injury, the damages awarded by a court or jury that are described under (b) of this section may not exceed \$1,000,000 or the person's life expectancy in years multiplied by \$25,000, whichever is greater, when the damages are awarded for severe permanent physical impairment or severe disfigurement.

(d) Multiple injuries sustained by one person as a result of a single incident shall be treated as a single injury for purposes of this section.

* Sec. 10. AS 09.17.020 is repealed and reenacted to read:

Sec. 09.17.020. Punitive damages. (a) In an action in which a claim of punitive damages is presented to the fact finder, the fact finder shall determine,

1 concurrently with all other issues presented, whether punitive damages shall be allowed
2 by using the standards set out in (b) of this section. If punitive damages are allowed,
3 a separate proceeding under (c) of this section shall be conducted before the same fact
4 finder to determine the amount of punitive damages to be awarded.

5 (b) The fact finder may make an award of punitive damages only if the
6 plaintiff proves by clear and convincing evidence that the defendant's conduct

7 (1) was outrageous, including acts done with malice or bad motives;

8 or

9 (2) evidenced reckless indifference to the interest of another person.

10 (c) At the separate proceeding to determine the amount of punitive damages
11 to be awarded, the fact finder may consider

12 (1) the likelihood at the time of the conduct that serious harm would
13 arise from the defendant's conduct;

14 (2) the degree of the defendant's awareness of the likelihood described
15 in (1) of this subsection;

16 (3) the amount of financial gain the defendant gained or expected to
17 gain as a result of the defendant's conduct;

18 (4) the duration of the conduct and any intentional concealment of the
19 conduct;

20 (5) the attitude and conduct of the defendant upon discovery of the
21 conduct;

22 (6) the financial condition of the defendant; and

23 (7) the total deterrence of other damages and punishment imposed on
24 the defendant as a result of the conduct, including compensatory and punitive damages
25 awards to persons in situations similar to those of the plaintiff and the severity of the
26 criminal penalties to which the defendant has been or may be subjected.

27 (d) At the conclusion of the separate proceeding under (c) of this section, the
28 fact finder shall determine the amount of punitive damages to be awarded, and the
29 court shall enter judgment for that amount.

30 (e) Unless that evidence is relevant to another issue in the case, discovery of
31 evidence that is relevant to the amount of punitive damages to be determined under

1 (c)(3) or (6) of this section may not be conducted until after the fact finder has
2 determined that an award of punitive damages is allowed under (a) and (b) of this
3 section. The court may issue orders as necessary, including directing the parties to
4 have the information relevant to the amount of punitive damages to be determined
5 under (c)(3) or (6) of this section available for production immediately at the close of
6 the initial trial in order to minimize the delay between the initial trial and the separate
7 proceeding to determine the amount of punitive damages.

8 (f) Except as provided in (g) and (h) of this section, an award of punitive
9 damages may not exceed the greater of

10 (1) three times the amount of compensatory damages awarded to the
11 plaintiff in the action; or

12 (2) the sum of \$500,000.

13 (g) Except as provided in (h) of this section, if the fact finder determines that
14 the conduct proven under (b) of this section was motivated by financial gain and the
15 adverse consequences of the conduct were actually known by the defendant or the
16 person responsible for making policy decisions on behalf of the defendant, it may
17 award an amount of punitive damages not to exceed the greatest of

18 (1) four times the amount of compensatory damages awarded to the
19 plaintiff in the action;

20 (2) four times the aggregate amount of financial gain that the defendant
21 received as a result of the defendant's misconduct; or

22 (3) the sum of \$7,000,000.

23 (h) Notwithstanding any other provision of law, in an action against an
24 employer to recover damages for an unlawful employment practice prohibited by
25 AS 18.80.220, the amount of punitive damages awarded by the court or jury may not
26 exceed

27 (1) \$200,000 if the employer has less than 100 employees in this state;

28 (2) \$300,000 if the employer has 100 or more but less than 200
29 employees in this state;

30 (3) \$400,000 if the employer has 200 or more but less than 500
31 employees in this state; and

(4) \$500,000 if the employer has 500 or more employees in this state.

(i) Subsection (h) of this section may not be construed to allow an award of punitive damages against the state or a person immune under another provision of law. In (h) of this section, "employees" means persons employed in each of 20 or more calendar weeks in the current or preceding calendar year.

(j) If a person receives an award of punitive damages, the court shall require that 50 percent of the award be deposited into the general fund of the state. This subsection does not grant the state the right to file or join a civil action to recover punitive damages.

* Sec. 11. AS 09.17.080(a) is amended to read:

(a) In all actions involving fault of more than one person [PARTY TO THE ACTION], including third-party defendants and persons who have settled or otherwise been released [UNDER AS 09.16.040], the court, unless otherwise agreed by all parties, shall instruct the jury to answer special interrogatories or, if there is no jury, shall make findings, indicating

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

(2) the percentage of the total fault [OF ALL OF THE PARTIES TO EACH CLAIM] that is allocated to each claimant, defendant, third-party defendant, [AND] person who has been released from liability, or other person responsible for the damages unless the person was identified as a potentially responsible person, the person is not a person protected from a civil action under AS 09.10.055, and the parties had a sufficient opportunity to join that person in the action but chose not to; in this paragraph, "sufficient opportunity to join" means the person is

(A) within the jurisdiction of the court;

(B) not precluded from being joined by law or court rule;

and

(C) reasonably locatable [UNDER AS 09.16.040].

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

(b) In determining the percentages of fault, the trier of fact shall consider both the nature of the conduct of each person [PARTY] at fault, and the extent of the

1 causal relation between the conduct and the damages claimed. [THE TRIER OF
2 FACT MAY DETERMINE THAT TWO OR MORE PERSONS ARE TO BE
3 TREATED AS A SINGLE PARTY IF THEIR CONDUCT WAS A CAUSE OF THE
4 DAMAGES CLAIMED AND THE SEPARATE ACT OR OMISSION OF EACH
5 PERSON CANNOT BE DISTINGUISHED.]

6 * Sec. 13. AS 09.17.080(c) is amended to read:

7 (c) The court shall determine the award of damages to each claimant in
8 accordance with the findings [, SUBJECT TO A REDUCTION UNDER
9 AS 09.16.040,] and enter judgment against each party liable. The court also shall
10 determine and state in the judgment each party's equitable share of the obligation to
11 each claimant in accordance with the respective percentages of fault as determined
12 under (a) of this section. Except as provided under AS 23.30.015(g), an
13 assessment of a percentage of fault against a person who is not a party may only
14 be used as a measure for accurately determining the percentages of fault of a
15 named party. Assessment of a percentage of fault against a person who is not a
16 party does not subject that person to civil liability in that action and may not be
17 used as evidence of civil liability in another action.

18 * Sec. 14. AS 09.17.900 is amended to read:

19 **Sec. 09.17.900. Definition.** In this chapter, "fault" includes acts or omissions
20 that are in any measure negligent, [OR] reckless, or intentional toward the person or
21 property of the actor or others, or that subject a person to strict tort liability. The term
22 also includes breach of warranty, unreasonable assumption of risk not constituting an
23 enforceable express consent, misuse of a product for which the defendant otherwise
24 would be liable, and unreasonable failure to avoid an injury or to mitigate damages.
25 Legal requirements of causal relation apply both to fault as the basis for liability and
26 to contributory fault.

27 * Sec. 15. AS 09.20 is amended by adding a new section to read:

28 **Sec. 09.20.185. Expert witness qualification.** (a) In an action based on
29 professional negligence, a person may not testify as an expert witness on the issue of
30 the appropriate standard of care unless the witness is

31 (1) a professional who is licensed in this state or in another state or

country;

(2) trained and experienced in the same discipline or school of practice as the defendant or in an area directly related to a matter at issue; and

(3) certified by a board recognized by the state as having acknowledged expertise and training directly related to the particular field or matter at issue.

(b) The provisions of (a) of this section do not apply if the state has not recognized a board that has certified the witness in the particular field or matter at issue.

* Sec. 16. AS 09.30.065 is amended to read:

Sec. 09.30.065. Offers of judgment. At any time more than 10 days before the trial begins, either the party making a claim or the party defending against a claim may serve upon the adverse party an offer to allow judgment to be entered in complete satisfaction of the claim for the money or property or to the effect specified in the offer, with costs then accrued. If within 10 days after the service of the offer the adverse party serves written notice that the offer is accepted, either party may then file the offer and notice of acceptance together with proof of service, and the clerk shall enter judgment. An offer not accepted within 10 days is considered withdrawn, and evidence of that offer is not admissible except in a proceeding to determine the form of judgment after verdict. If the judgment finally entered on the claim as to which an offer has been made under this section is at least five percent less [NOT MORE] favorable to the offeree than the offer, or if there are multiple defendants at least 10 percent less favorable to the offeree than the offer, the offeree, whether the party making the claim or defending against the claim, shall pay all costs as allowed under the Alaska Rules of Civil Procedure and shall pay reasonable actual attorney fees incurred by the offeror from the date the offer was made, [THE INTEREST AWARDED UNDER AS 09.30.070 AND ACCRUED UP TO THE DATE JUDGMENT IS ENTERED SHALL BE ADJUSTED] as follows:

(1) if the offer was served no later than 60 days after both parties made the disclosures required by the Alaska Rules of Civil Procedure the offeree shall pay 75 percent of the offeror's reasonable actual attorney fees [OFFEREE IS THE PARTY MAKING THE CLAIM, THE INTEREST RATE SHALL BE

1 REDUCED BY FIVE PERCENT A YEAR];

2 (2) if the offer was served more than 60 days after both parties
 3 made the disclosures required by the Alaska Rules of Civil Procedure but more
 4 than 90 days before the trial began, the offeree shall pay 50 percent of the
 5 offeror's reasonable actual attorney fees;

6 (3) if the offer was served 90 days or less but more than 10 days
 7 before the trial began, the offeree shall pay 30 percent of the offeror's reasonable
 8 actual attorney fees [OFFEREE IS THE PARTY DEFENDING AGAINST THE
 9 CLAIM, THE INTEREST RATE SHALL BE INCREASED BY FIVE PERCENT A
 10 YEAR].

11 * Sec. 17. AS 09.30.065 is amended by adding a new subsection to read:

12 (b) If an offeror receives costs and reasonable actual attorney fees under (a)
 13 of this section, that offeror shall be considered the prevailing party for purposes of an
 14 award of attorney fees under the Alaska Rules of Civil Procedure. Notwithstanding
 15 (a) of this section, if the amount awarded an offeror for attorney fees under the Alaska
 16 Rules of Civil Procedure is greater than a party would receive under (a) of this section,
 17 the offeree shall pay to the offeror attorney fees specified under the Alaska Rules of
 18 Civil Procedure and is not required to pay reasonable actual attorney fees under (a) of
 19 this section. A party who receives attorney fees under this section may not also
 20 receive attorney fees under the Alaska Rules of Civil Procedure.

21 * Sec. 18. AS 09.30.070(a) is amended to read:

22 (a) Notwithstanding AS 45.45.010, the [THE] rate of interest on judgments
 23 and decrees for the payment of money, including prejudgment interest, is three
 24 percentage points above the 12th Federal Reserve District discount rate in effect
 25 on January 2 of the year in which the judgment or decree is entered [10.5
 26 PERCENT A YEAR], except that a judgment or decree founded on a contract in
 27 writing, providing for the payment of interest until paid at a specified rate not
 28 exceeding the legal rate of interest for that type of contract, bears interest at the rate
 29 specified in the contract if the interest rate is set out in the judgment or decree.

30 * Sec. 19. AS 09.30.070 is amended by adding a new subsection to read:

31 (c) Prejudgment interest may not be awarded for future economic damages,

1 future noneconomic damages, or punitive damages.

2 * Sec. 20. AS 09.50.280 is amended to read:

3 **Sec. 09.50.280. Judgment for plaintiff; punitive damages.** If judgment is
4 rendered for the plaintiff, it shall be for the legal amount found due from the state with
5 [LEGAL] interest as provided under AS 09.30.070 [FROM THE DATE IT BECAME
6 DUE] and without punitive damages.

7 * Sec. 21. AS 09.55.440(a) is amended to read:

8 (a) Upon the filing of the declaration of taking and the deposit with the court
9 of the amount of the estimated compensation stated in the declaration, title to the estate
10 as specified in the declaration vests in the plaintiff, and that property is condemned
11 and taken for the use of the plaintiff, and the right to just compensation for it vests in
12 the persons entitled to it. The compensation shall be ascertained and awarded in the
13 proceeding and established by judgment. The judgment must include interest at the
14 rate of 10.5 percent a year [SET OUT IN AS 09.30.070] on the amount finally
15 awarded that [WHICH] exceeds the amount paid into court under the declaration of
16 taking. The interest runs from the date title vests to the date of payment of the
17 judgment.

18 * Sec. 22. AS 09.55.536(a) is amended to read:

19 (a) In an action for damages due to personal injury or death based upon the
20 provision of professional services by a health care provider, including a person
21 providing services on behalf of a governmental entity, when the parties have not
22 agreed to arbitration of the claim under AS 09.55.535, the court shall appoint within
23 20 days after filing of answer to a summons and complaint a three-person expert
24 advisory panel unless the court decides that an expert advisory opinion is not necessary
25 for a decision in the case. When the action is filed, the court shall, by order,
26 determine the professions or specialties to be represented on the expert advisory panel,
27 giving the parties the opportunity to object or make suggestions.

28 * Sec. 23. AS 09.55.536(c) is amended to read:

29 (c) Not more than 30 days after selection of the panel, the panel [IT] shall
30 make a written report to the parties and to the court, answering the following questions
31 and other questions submitted to the panel by the court in sufficient detail to explain

1 the case and the reasons for the panel's answers:

2 (1) Why did the claimant seek [WHAT WAS THE DISORDER FOR
3 WHICH THE PLAINTIFF CAME TO] medical care?

4 (2) Was a correct diagnosis made? If not, what was incorrect
5 about the diagnosis [WHAT WOULD HAVE BEEN THE PROBABLE OUTCOME
6 WITHOUT MEDICAL CARE]?

7 (3) Was the treatment or lack of treatment [SELECTED] appropriate?
8 If not, what was inappropriate about the treatment or lack of treatment [FOR
9 THE CASE]?

10 (4) Was the claimant injured during the course of evaluation or
11 treatment or by failure to diagnose or treat [DID AN INJURY ARISE FROM THE
12 MEDICAL CARE]?

13 (5) If the answer to question 4 is "yes," what [WHAT] is the nature
14 and extent of the medical injury?

15 (6) What specifically caused the medical injury?

16 (7) Was the medical injury caused by unskillful care? Explain.

17 (8) If a medical injury had not occurred, what would have been the
18 likely outcome of the medical case [HOW WOULD THE PLAINTIFF'S
19 CONDITION DIFFER FROM THE PLAINTIFF'S PRESENT CONDITION]?

20 * Sec. 24. AS 09.55.536(f) is amended to read:

21 (f) Discovery may not be undertaken in a case until the report of the expert
22 advisory panel is received or 60 days after selection of the panel, whichever occurs
23 first. However, the court may relax this prohibition upon a showing of good cause by
24 any party. If the panel has not completed its report within the 30-day period
25 prescribed in (c) of this section, the court may, upon application, grant the panel [IT]
26 an additional 30 days.

27 * Sec. 25. AS 09.55.536 is amended by adding a new subsection to read:

28 (i) This section applies regardless of whether a party in the action or the health
29 care provider whose professional services are the subject of the action is a
30 governmental entity or in the public or private sector.

31 * Sec. 26. AS 09.55.560(1) is amended to read:

(1) "health care provider" means an acupuncturist licensed under AS 08.06; an audiologist licensed under AS 08.11; a chiropractor licensed under AS 08.20; a dental hygienist licensed under AS 08.32; a dentist licensed under AS 08.36; a nurse licensed under AS 08.68; a dispensing optician licensed under AS 08.71; a naturopath licensed under AS 08.45; an optometrist licensed under AS 08.72; a pharmacist licensed under AS 08.80; a physical therapist or occupational therapist licensed under AS 08.84; a physician licensed under AS 08.64; a podiatrist; a psychologist and a psychological associate licensed under AS 08.86; [AND] a hospital as defined in AS 18.20.130, including a governmentally owned or operated hospital; [AND] an employee of a health care provider acting within the course and scope of employment; an ambulatory surgical facility and other organizations whose primary purpose is the delivery of health care, including a health maintenance organization, individual practice association, integrated delivery system, preferred provider organization or arrangement, and a physical hospital organization.

* Sec. 27. AS 09.55.560 is amended by adding new paragraphs to read:

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

(5) "professional services" means service provided by a health care provider that is within the scope of services for which the health care provider is licensed and that is not prohibited under the health care provider's license or by a facility in which the health care provider practices.

* Sec. 28. AS 09.60 is amended by adding a new section to read:

Sec. 09.60.080. Contingent fee agreements. If an attorney contracts for or collects a contingency fee in connection with an action for personal injury, death, or property damage and the damages awarded by a court or jury include an award of punitive damages, the contingent fee due the attorney shall be calculated before that portion of punitive damages due the state under AS 09.17.020(j) has been deducted from the total award of damages.

* Sec. 29. AS 09.65 is amended by adding a new section to read:

Sec. 09.65.085. Civil liability of electric utility. (a) A utility offering

1 electrical service to the public for compensation under a certificate of public
 2 convenience and necessity issued by the Alaska Public Utilities Commission under
 3 AS 42.05.221 may not be held strictly liable for property damage, death, or personal
 4 injury resulting from an act or omission of the utility relating to the production,
 5 delivery, or sale of electricity.

6 (b) This section does not preclude liability for civil damages that are the result
 7 of an intentional, reckless, or negligent act or omission.

8 * Sec. 30. AS 09.65 is amended by adding a new section to read:

9 **Sec. 09.65.096. Civil liability of hospitals for certain physicians.** (a) A
 10 hospital is not liable for civil damages as a result of an act or omission by an
 11 emergency room physician who is not an employee or actual agent of the hospital if
 12 the hospital provides notice that the emergency room physician is an independent
 13 contractor and the emergency room physician is insured as described under (c) of this
 14 section. The hospital is responsible for exercising reasonable care in granting
 15 privileges to practice in the hospital, for reviewing those privileges on a regular basis,
 16 and for taking appropriate steps to revoke or restrict privileges in appropriate
 17 circumstances. The hospital is not otherwise liable for the acts or omissions of an
 18 emergency room physician who is an independent contractor. The notice required by
 19 this subsection must (1) be posted conspicuously in all admitting areas of the hospital;
 20 (2) consist of a sign at least two feet high and two feet wide, with print at least two
 21 inches high; (3) be published at least annually in a newspaper of general circulation
 22 in the area; and (4) be in substantially the following form:

23 Notice to Hospital Users and

24 Notice of Limited Liability

25 (Name of hospital) may not be responsible for the actions of
 26 emergency room physicians in (name of hospital's emergency
 27 room). The following emergency room physicians are
 28 independent contractors and are not employees of the hospital:
 29 (List specific emergency room physicians)

30 (b) This section does not preclude liability for civil damages that are the
 31 proximate result of the hospital's negligence or intentional misconduct.

(c) A hospital is not immune from liability under (a) of this section for an act or omission of an emergency room physician who is an independent contractor unless the emergency room physician has liability insurance coverage in the amount of at least \$500,000 for each incident and \$1,500,000 for all incidents in a year, and the coverage is in effect and applicable to those health care services offered by the emergency room physician that the hospital is required to provide by law or by accreditation requirements.

(d) In this section,

(1) "emergency room physician" means a physician who does not have an ongoing physician-patient relationship with the emergency room patient and who provides emergency health care services in a hospital emergency room;

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

(3) "independent contractor" means an emergency room physician who is not an employee or actual agent of the hospital in connection with the rendition of the health care services.

* Sec. 31. AS 09.65.210 is repealed and reenacted to read:

Sec. 09.65.210. Damages resulting from commission of a felony or while under the influence of alcohol or drugs. A person who suffers personal injury or death or the person's personal representative under AS 09.55.570 or 09.55.580 may not recover damages for the personal injury or death if the injury or death occurred while the person was

(1) engaged in the commission of a felony, the person has been convicted of the felony, including conviction based on a guilty plea or plea of nolo contendere, and the party defending against the claim proves by clear and convincing evidence that the felony substantially contributed to the personal injury or death;

(2) engaged in conduct that would constitute the commission of an unclassified felony, a class A, or a class B felony for which the person was not convicted and the party defending against the claim proves by clear and convincing evidence

(A) the felonious conduct; and

(B) that the felonious conduct substantially contributed to the personal injury or death;

(3) fleeing after the commission, by that person, of conduct that would constitute an unclassified felony, a class A felony, or a class B felony or being apprehended for conduct that would constitute an unclassified felony, a class A felony, or a class B felony if the party defending against the claim proves by clear and convincing evidence

(A) the felonious conduct; and

(B) that the conduct during the flight or apprehension substantially contributed to the injury or death;

(4) operating a vehicle, aircraft, or watercraft while under the influence of intoxicating liquor or any controlled substance in violation of AS 28.35.030, was convicted, including conviction based on a guilty plea or plea of nolo contendere, and the party defending against the claim proves by clear and convincing evidence that the conduct substantially contributed to the personal injury or death; or

(5) engaged in conduct that would constitute a violation of AS 28.35.030 for which the person was not convicted if the party defending against the claim proves by clear and convincing evidence

(A) the violation of AS 28.35.030; and

(B) that the conduct substantially contributed to the personal injury or death.

* Sec. 32. AS 09.68 is amended by adding a new section to read:

Sec. 09.68.130. Collection of settlement information. (a) Except as provided in (c) of this section, the Alaska Judicial Council shall collect and evaluate information relating to the compromise or other resolution of all civil litigation. The information shall be collected on a form developed by the council for that purpose and must include

- (1) the case name and file number;
- (2) a general description of the claims being settled;
- (3) if the case is resolved by way of settlement,
 - (A) the gross dollar amount of the settlement;

1 (B) to whom the settlement was paid;

2 (C) the dollar amount of advanced costs and attorney fees that
3 were deducted from the gross dollar amount of the settlement before
4 disbursement to the claimant;

5 (D) the net amount actually disbursed to the claimant;

6 (E) the total costs and attorney fees paid by or owed by all
7 parties; and

8 (F) any nonmonetary terms, including whether the attorney fees
9 incurred by the claimant were based on a contingent fee agreement or upon an
10 hourly rate; if a contingent fee was paid, the percentage of the total settlement
11 represented by the fee must be included; or, if an hourly rate, the hourly rate
12 paid;

13 (4) if the case is resolved by dismissal, summary judgment, trial, or
14 otherwise,

15 (A) the gross dollar amount of the judgment;

16 (B) the amount of attorney fees awarded and to which party;

17 (C) the amount of costs awarded and to which party;

18 (D) the net amount, after deduction of (B) and (C) of this
19 paragraph, for which the prevailing party has judgment;

20 (E) the dollar amount of advanced costs and attorney fees that
21 were deducted from the gross dollar amount of the judgment before distribution
22 to the claimant;

23 (F) the total costs and attorney fees paid by defending parties;
24 and

25 (G) any nonmonetary terms, including whether the attorney fees
26 incurred by the claimant were based on a contingent fee agreement or upon an
27 hourly rate; if a contingent fee was paid, the percentage of the total settlement
28 represented by the fee must be included; or, if an hourly rate, the hourly rate
29 paid.

30 (b) The information received by the council under (a) of this section is
31 confidential. This restriction does not prevent the disclosure of summaries and

1 statistics in a manner that does not allow the identification of particular cases or
2 parties.

3 (c) The requirements of (a) of this section do not apply to the following types
4 of cases:

5 (1) divorce and dissolution;

6 (2) adoption, custody, support, visitation, and emancipation of children;

7 (3) children-in-need-of-aid cases under AS 47.10 or delinquent minors
8 cases under 47.12;

9 (4) domestic violence protective orders under AS 18.66.100 -
10 18.66.180;

11 (5) estate, guardianship, and trust cases filed under AS 13;

12 (6) small claims under AS 22.15.040.

13 * **Sec. 33.** AS 21.06 is amended by adding a new section to read:

14 **Sec. 21.06.087. Insurance report.** (a) The director shall require reporting of
15 and shall compile information necessary to evaluate the effect of the measures enacted
16 in this Act on the availability and cost of insurance in the state.

17 (b) Information described in (a) of this section shall be provided by all insurers
18 doing business in this state in the format specified by the director and must include
19 factual information stating premiums, claims, losses, expenses, and solvency of the
20 company as a whole. Information shall be compiled by the division in a way that
21 protects the identity of individual insureds.

22 (c) The director shall adopt regulations to implement and interpret this section,
23 including requiring insurers doing business in the state to provide information
24 necessary for the division to carry out its responsibilities under (a) and (b) of this
25 section. If there are indications of market disruption, the director may waive all or
26 part of the reporting requirements in this section.

27 (d) Beginning June 1, 2000, the information compiled under (a) of this section
28 shall be reported annually to the governor and the judiciary committees of both houses
29 of the legislature.

30 (e) The division may consult with the Alaska Judicial Council when
31 determining what information to require to be reported under (a) - (c) of this section

1 and when implementing the compilation required under (a) of this section.

2 * Sec. 34. AS 21.89.100(d) is amended to read:

3 (d) If the insured selects independent counsel at the insurer's expense, the
 4 insurer may require that the independent counsel have at least four years of experience
 5 in civil litigation, including defense experience in the general subject area at issue in
 6 the civil action, and malpractice insurance. Unless otherwise provided in the insurance
 7 policy, the obligation of the insurer to pay the fee charged by the independent counsel
 8 is limited to the rate that is actually paid by the insurer to an attorney in the ordinary
 9 course of business in the defense of a similar civil action in the community in which
 10 the claim arose or is being defended. In providing independent counsel, the insurer
 11 is not responsible for the fees and costs of defending an allegation for which
 12 coverage is properly denied and shall be responsible only for the fees and costs
 13 to defend those allegations for which the insurer either reserves its position as to
 14 coverage or accepts coverage. The independent counsel shall keep detailed
 15 records allocating fees and costs accordingly. A dispute between the insurer and
 16 insured regarding attorney fees that is not resolved by the insurance policy or this
 17 section shall be resolved by arbitration under AS 09.43.

18 * Sec. 35. AS 21.89.100 is amended by adding a new subsection to read:

19 (h) When an insured is represented by independent counsel, the insurer may
 20 settle directly with the plaintiff if the settlement includes all claims based upon the
 21 allegations for which the insurer previously reserved its position as to coverage or
 22 accepted coverage, regardless of whether the settlement extinguishes all claims against
 23 the insured.

24 * Sec. 36. AS 23.30.015(g) is amended to read:

25 (g) If the employee or the employee's representative recovers damages from
 26 the third person, the employee or representative shall promptly pay to the employer the
 27 total amounts paid by the employer under (e)(1)(A) - (C) [(e)(1)(A), (B), AND (C)]
 28 of this section [,] insofar as the recovery is sufficient after deducting all litigation costs
 29 and expenses. Any excess recovery by the employee or representative shall be
 30 credited against any amount payable by the employer thereafter. If the employer is
 31 allocated a percentage of fault under AS 09.17.080, the amount due the employer

under this subsection shall be reduced by an amount equal to the employer's equitable share of damages assessed under AS 09.17.080(c).

* Sec. 37. AS 44.77.015(a) is amended to read:

(a) For the purposes of filing claims for medical services provided under AS 47.07 or AS 47.25.120 - 47.25.300, "promptly," in AS 44.77.010(a), means (1) within six months after the date of service, or as provided in (b) of this section, if there is no third-party claim, or (2) within 12 months after the date of service if there is a third-party claim. Except as provided in (c) of this section, a claim may not be paid if it is not filed promptly; an inference to the contrary may not be drawn from AS 09.10.053 [AS 09.10.050], AS 09.50.250 - 09.50.300, or AS 37.25.010.

* Sec. 38. Rule 16.1(c), Alaska Rules of Civil Procedure, is amended to read:

(c) **Motion to Set Trial and Certificate.** Unless otherwise ordered by the court, a [A] motion to set trial may not be filed until after the meeting of parties under (n) of this rule has occurred and the scheduling order under Rule 16(b) has been issued [105 DAYS AFTER SERVICE OF THE SUMMONS AND COMPLAINT]. A party seeking to obtain a trial date must serve and file a motion to set trial together with a certificate, signed by counsel, stating:

(1) That the issues in the case have actually been joined;

(2) That all parties have completed discovery or have a reasonable opportunity to do so within the next 60 days;

(3) That the procedure for listing witnesses and exhibits and providing exhibit copies, as set forth in [PARAGRAPH] (d) of this rule has been completed;

(4) Whether trial by jury has been timely demanded;

(5) The estimated number of days for the trial, including estimates for each party's case and for jury selection;

(6) The names, addresses and telephone numbers of all attorneys and pro se parties who are responsible for the conduct of the litigation;

(7) Which, if any, statute or rule entitles the case to preference on the trial calendar;

(8) That the parties have complied with [PARAGRAPH] (k) of this rule.

1 * **Sec. 39.** Rule 16.1(n), Alaska Rules of Civil Procedure, is repealed and reenacted to read:

2 (n) **Meeting of Parties.** Except when otherwise ordered, the parties shall, as
3 soon as practicable after the exchange of initial disclosures required under Rule
4 26(a)(1) and in any event at least 14 days before a scheduling conference is held or
5 a scheduling order is due under Rule 16(b), meet to discuss the nature and basis of
6 their claims and defenses and the possibilities for a prompt settlement of the case and
7 to develop a proposed discovery plan. The attorneys of record and all unrepresented
8 parties that have appeared in the case are jointly responsible for arranging and being
9 present or represented at the meeting, for attempting in good faith to agree on the
10 proposed discovery plan, and for submitting to the court within 10 days after the
11 meeting a written report outlining the proposed discovery plan. The proposed
12 discovery plan shall indicate the parties' views and proposals concerning

13 (1) what changes should be made in the timing or forms of subsequent
14 disclosures under the rules, including a statement as to when the disclosures required
15 under Rule 26(a) were made;

16 (2) the subjects on which discovery may be needed, when discovery
17 should be completed, and whether discovery should be conducted in phases or be
18 limited to or focused upon particular issues;

19 (3) what changes should be made in the limitations on discovery
20 imposed under these rules and what other limitations should be imposed;

21 (4) whether a scheduling conference is unnecessary;

22 (5) whether there will be dispositive or partially dispositive motions
23 filed in the case and whether other deadlines should be set aside pending resolution of
24 the dispositive or partially dispositive motions by the court; and

25 (6) any other orders that should be entered by the court under Civil
26 Rule 16(b) and (c).

27 * **Sec. 40.** Rule 26, Alaska Rules of Civil Procedure, is amended by adding a new
28 subsection to read:

29 (g) **Limited Discovery; Expedited Calendaring.** In a civil action for personal
30 injury or property damage involving less than \$100,000 in claims the parties shall limit
31 discovery to that allowed under Rule 1(a)(1), District Court Rules, and shall avail

1 themselves of the expedited calendaring procedures allowed under Rule 4, District
2 Court Rules.

3 * **Sec. 41.** Rule 41(a), Alaska Rules of Civil Procedure, is amended by adding a new
4 paragraph to read:

5 (3) **Settlement Information.** If a voluntary dismissal under this rule
6 is the result of compromise or other settlement of the parties, the parties shall submit
7 to the Alaska Judicial Council the information required under AS 09.68.130. A notice
8 of dismissal made under (1)[a] of this subsection must be accompanied by a
9 certification signed by or on behalf of the plaintiff that the information required under
10 AS 09.68.130 has been submitted to the Alaska Judicial Council. A stipulation of
11 dismissal made under (1)[b] of this subsection must be accompanied by a certification
12 signed by or on behalf of all parties who have appeared in the action. The
13 requirements of this paragraph do not apply to the types of cases listed in
14 AS 09.68.130(c).

15 * **Sec. 42.** Rule 72.1(g), Alaska Rules of Civil Procedure, is amended to read:

16 (g) **Discovery.** Except by leave of court, no discovery may be conducted until
17 the report of the Panel has been filed or until 60 [80] days after selection of the Panel
18 [HAVE ELAPSED FROM THE DATE THE CASE IS AT ISSUE], whichever is first
19 to occur, unless discovery is further stayed for good cause by order of the court.

20 * **Sec. 43.** Rule 95(b), Alaska Rules of Civil Procedure, is amended to read:

21 (b) In addition to its authority under (a) of this rule and its power to punish
22 for contempt, a court may, after reasonable notice and an opportunity to show cause
23 to the contrary, and after hearing by the court, if requested, impose a fine not to
24 exceed \$50,000.00 [\$1,000.00] against any attorney who practices before it for failure
25 to comply with these rules or any rules promulgated by the supreme court.

26 * **Sec. 44.** Rule 1(a)(1), District Court Rules of Civil Procedure, is amended to read:

27 (1) The procedure in civil actions and proceedings before district judges
28 and magistrates shall be governed by the rules governing the procedure in the superior
29 court to the extent that such rules are applicable. However, in a civil action for
30 personal injury or property damage, unless otherwise agreed by all parties or
31 permitted by order of the court in exceptional cases and for good cause shown,

1 discovery shall be limited to the disclosures required under Civil Rule 26(a) and
2 to the taking by each party of the deposition of one or more opposing parties and
3 of one additional person who is not a party.

4 * Sec. 45. Rule 4, District Court Rules of Civil Procedure, is amended by adding a new
5 subsection to read:

6 (b) In a civil action for personal injury or property damage, unless otherwise
7 permitted by order of the court in exceptional cases and for good cause shown, all
8 parties shall file a memorandum to set the case for trial, as set out in Civil Rule 40(b),
9 no later than 180 days after service of the complaint on all parties to the case. The
10 memorandum shall contain a certification that each party has exchanged the
11 information described in Rule 26(a), Alaska Rules of Civil Procedure, and may state
12 their separate positions if they do not agree concerning information or estimates to be
13 provided in the memorandum. After the court satisfies itself that the information
14 described in Rule 26(a), Alaska Rules of Civil Procedure, has been disclosed, the court
15 shall set the case for trial as soon as practicable, but no sooner than 30 days after the
16 court makes the determination regarding disclosure.

17 * Sec. 46. Rule 511, Alaska Rules of Appellate Procedure, is amended by adding a new
18 subsection to read:

19 (e) **Settlement Information.** If a dismissal under (a) or (b) of this rule is the
20 result of compromise or other settlement between the parties, the parties shall submit
21 to the Alaska Judicial Council the information required under AS 09.68.130. A
22 dismissal by agreement under (a) of this rule must be accompanied by a certification
23 signed by the attorneys of record for all parties that the information required under
24 AS 09.68.130 has been submitted to the Alaska Judicial Council. A dismissal by the
25 appellant or petitioner made under (b) of this rule must be accompanied by a
26 certification signed by the appellant's or petitioner's attorney of record. The
27 requirements of this subsection do not apply to the types of cases listed in
28 AS 09.68.130(c).

29 * Sec. 47. Rule 16.1(k)(4), Alaska Rules of Civil Procedure, is repealed.

30 * Sec. 48. AS 09.17.020(e), as enacted in sec. 10 of this Act, has the effect of amending
31 Rule 26, Alaska Rules of Civil Procedure, by limiting discovery in certain actions.

1 * **Sec. 49.** AS 09.17.020(j), as enacted by sec. 10 of this Act, has the effect of amending
2 Rule 58, Alaska Rules of Civil Procedure, by requiring the court to require that a certain
3 percentage of an award of punitive damages be deposited into the general fund.

4 * **Sec. 50.** AS 09.17.080(a), as amended by sec. 11 of this Act, has the effect of amending
5 Rule 49, Alaska Rules of Civil Procedure, by requiring the jury to answer the special
6 interrogatory listed in AS 09.17.080(a)(2) regarding the percentages of fault to be allocated
7 among the claimants, defendants, third-party defendants, persons who have been released from
8 liability, or other person who is potentially responsible for the damages.

9 * **Sec. 51.** AS 09.20.185, enacted by sec. 15 of this Act, has the effect of amending
10 Rule 702, Alaska Rules of Evidence, by requiring certain qualifications from a person
11 testifying as an expert witness.

12 * **Sec. 52.** AS 09.30.065, as amended by secs. 16 and 17 of this Act, has the effect of
13 amending Rules 68 and 82, Alaska Rules of Civil Procedure, by requiring the offeree to pay
14 costs and reasonable actual attorney fees on a sliding scale of percentages in certain cases, b
15 eliminating provisions relating to interest and by changing provisions related to attorney fee
16 awards.

17 * **Sec. 53.** AS 09.30.070(c), added by sec. 19 of this Act, has the effect of amending
18 Rule 58, Alaska Rules of Civil Procedure, by providing that prejudgment interest may not be
19 awarded for future economic or noneconomic damages or punitive damages.

20 * **Sec. 54. ALTERNATIVE DISPUTE RESOLUTION.** (a) It is the intent of this
21 legislation to create an alternative dispute resolution procedure within the existing civil
22 litigation system in order to promote the timely, inexpensive, and efficient resolution of civil
23 disputes. It is also the intent of this legislation that the Alaska Supreme Court implement the
24 alternative dispute resolution procedure not later than July 1, 1998.

25 (b) The Alaska Judicial Council shall consult with the Alaska Dispute Settlement
26 Association, review court sanctioned alternative dispute resolution programs in other states and
27 in the federal court system, and shall confer with and obtain the approval of the Alaska Court
28 System regarding the establishment of a program for alternative dispute resolution within the
29 Alaska Court System. The Alaska Judicial Council shall submit a proposed statute or rule
30 change, or both, and a report to the legislature by December 31, 1997. The proposed statute
31 or rule change and report must include specific types of programs, specific types of cases

1 within each program that are amenable to alternative dispute resolution, the cost to the parties
2 and to the Alaska Court System under these programs, and the qualifications of the neutral
3 parties, including nonlawyers, who will provide dispute resolution services under the program.
4 The work required under this section shall be completed for the amount of money appearing
5 on the fiscal note submitted by the Alaska Judicial Council dated March 17, 1997.

6 (c) In this section, "alternative dispute resolution" is limited to arbitration, mediation,
7 and early neutral evaluation.

8 * Sec. 55. APPLICABILITY. This Act applies to all causes of action accruing on or after
9 the effective date of this Act.

10 * Sec. 56. SEVERABILITY. Under AS 01.10.030, if any provision of this Act or the
11 application of a provision of this Act to any person or circumstance is held invalid, the
12 remainder of this Act and the application to other persons shall not be affected.

Alaska State Legislature

Representative Brian S. Porter

HOUSE MAJORITY LEADER

MEMBER
HOUSE JUDICIARY COMMITTEE
HOUSE RULES COMMITTEE
HEALTH, EDUC. & SOCIAL SERVICES COMMITTEE
LEGISLATIVE COUNCIL JOINT COMMITTEE



DISTRICT 20

April 20, 1997

Sectional Summary
of

SENATE CS FOR CS FOR SS FOR HB 58 (RLS) am S

An Act Relating to Civil Actions

Section 1. Legislative intent. This section generally sets forth the legislative intent of this Act.

Section 2. Minor consistency change. This section clarifies that no change is being made to the Alaska Banking Code by the change in Section 23 of this Act, relating to a floating interest rate on judgments.

Section 3. Certain property actions to be brought in six years. This section is taken verbatim from the report of the Governor's Task Force on Civil Justice Reform ("Governor's Task Force"). It removes the existing six year statute of limitations for recovery of, or damages to, personal property, and reduces it to 2 years in Section 7.

Section 4. Contract actions to be brought in three years. This section is taken verbatim from the Governor's Task Force report. It adds a new section which imposes a three year statute of limitations on contract actions, thereby reducing it from the existing six year statute of limitations.

On the floor of the House, this section was amended to clarify that the the shortened statute of limitations could be waived by contract.

Section 5. Statute of repose of ten years. This section adds a new section which generally imposes a ten year statute of repose.

In this section, the statute of repose in design and construction cases begins to run on the earlier of the date of substantial completion of a construction project or of the last act alleged to have caused the personal injury, death or property damage. This changes existing law by reducing the time to bring an action from 15 years to ten, although the ten years may be waived by contract.

In medical malpractice cases, the statute of repose is tolled until the actual discovery of a foreign object in the body of the injured person.

In medical malpractice cases involving children, the statute of repose does not apply if the facts that would give notice of a potential cause of action

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of a minor are not discoverable in the exercise of reasonable care by the minor's parent or guardian.

This section does not apply if the cause of action resulted from:

- (a) intentional or reckless disregard of plans and specifications or building codes in the design-construction area;
- (b) hazardous waste exposure;
- (c) intentional act or gross negligence;
- (d) fraud or misrepresentation;
- (e) breach of express warranty or guarantee;
- (f) a defective product;
- (g) intentional concealment of facts;
- (h) where a shorter statute of limitations applies.

Section 6. Actions for torts, for certain statutory liabilities, and against peace officers and coroners to be brought in two years. This section amends AS 09.10.070(a) by including in the two year statute of limitations actions for recovery of, or damages to, personal property. Such actions previously were limited to a six year statute of limitations under AS 09.10.050. The report of the Governor's Task Force recommended this reduction.

This section also eliminates the conflict between existing subsections AS 09.10.070(a)(2) - (3) with AS 09.10.090, to make clear the shorter statute of limitations of AS 09.10.090 controls in cases involving penalties and forfeitures to the state.

Language is added indicating that ordinary negligence and other non-intentional actions are covered by the two year statute of limitations.

Section 7. Disabilities of minority and incompetency. This section was amended by the House Finance Committee. The change is a consistency change for the new subsection in Section 8.

Section 8. Disabilities of minority and incompetency. This subsection clarifies that the normal two year statute of limitations for personal injuries or death under AS 09.10.070(a) is tolled, in the case of minors under the age of eight years at the time of the injury, until the minor's eighth birthday. This means the minor may bring an action for birth trauma injuries, or other injuries sustained before the age of eight, anytime before the minor's tenth birthday. This is consistent with the operation of the statute of repose.

Section 9. Noneconomic damages. This new section replaces an earlier version of this statute pertaining to noneconomic damages. This section generally places caps on the amounts which may be awarded for noneconomic damages. It also specifically adds loss of consortium to the list of items for which noneconomic damages may be sought. Under existing law, there are no caps on noneconomic damages for "disfigurement or severe physical impairment."

This section leaves intact the existing recovery cap of \$500,000 for pain, suffering, inconvenience, physical impairment, disfigurement, loss of enjoyment of life, loss of consortium, and other non pecuniary damage. However, it now takes into consideration injuries to children and young adults by allowing the greater of \$400,000 or the injured person's life expectancy in years multiplied by \$8,000. These caps are per occurrence, and not per claimant.

In more serious cases, the recovery cap is substantially raised from previous versions of the bill to \$1,000,000. Again, in the case of injuries to children or young adults, the cap now is the greater of \$1,000,000 or the injured person's life expectancy in years multiplied by \$25,000. These caps are per occurrence, and not per claimant.

Section 10. Punitive damages. This new section replaces an earlier version of this statute, which defines the circumstances in which punitive damages may be awarded. This section essentially restates the language used by the Alaska Supreme Court to sustain a finding of punitive damages: there must be outrageous conduct done with malice or bad motives or a reckless indifference to the interests of another. *Cummings. Sea Lion Corporation*, 924 P. 2d 1011,1022 (Ak. 1996).

Subsections (a) through (e) are substantially identical to the language recommended by the Governor's task force.

Subsection (f) imposes a cap on punitive damages of the greater of three times compensatory damages or \$500,000.

Subsection (g) places a higher cap on punitive damages in cases where, in connection with commercial activities, the wrongful conduct was motivated by financial gain, and the likelihood of injury or damage was known by the persons who made the subsequent policy decisions, but they nonetheless went forward with selling the product, or otherwise engaged in the commercial activities that resulted in the injuries, death or property damages. Under these circumstances, the cap on punitive damages would be the greatest of (1) four times compensatory damages, (2) four times the aggregate amount of financial gain that the defendant received as a result of the defendant's misconduct, or (3) \$7,000,000.

Subsection (h) caps on punitive damages in unlawful employment practice cases vary in four categories, depending upon the number of employees the business has in this state. Where employers have fewer than 100 employees, punitive damages are capped at \$200,000. Where employers have 500 or more employees, the punitive damage cap is \$500,000.

Subsection (d) requires that one half of any punitive damage award be paid into the general fund of the State of Alaska.

Section 11. Apportionment of damages.

Under present law, fault can be allocated only to parties who are present in the lawsuit. This section would allow allocation of fault to a person who is not a party to the action, if the person has been identified as a

potentially responsible person, but (a) the person is outside the jurisdiction of the court; or, (b) the person is precluded from being joined by law or court rule; or (c) is a person who is not reasonably locatable. Under this section, fault cannot be allocated to a person who cannot be joined because of the statute of repose.

The elimination of two references to AS 09.16.040 is done because that statute was repealed by the 1987 Initiative Proposal.

Section 12. Apportionment of damages. This section amends AS 09.17.080(b) by allowing the trier of fact to assign a percentage of fault to two or more persons if their conduct was a cause of the damages claimed and the separate act or omission of each person cannot be distinguished.

This subsection was amended at the House Judiciary Committee by deleting the last sentence as a consistency change which should have been made with the repeal of the Contribution Among Joint Tortfeasors provisions, and to be consistent with AS 09.17.080(d).

Section 13. Apportionment of damages; worker's compensation lien. This section eliminates a reference to AS 09.16.040 since that statute was repealed by the 1987 Initiative Proposal.

This section also anticipates and resolves an issue left open by Section 16, which would otherwise have been resolved in the future by the Alaska Supreme Court. Under existing law the nonparty employer would have been entitled to full reimbursement of its worker's compensation lien under AS 23.30.015(g), which would be unfair in instances where the employer was found in the third-party action to be mostly at fault. This section makes clear that the employer's lien is only recoverable from the injured employee's recovery in the third-party action to the extent that the lien exceeds the dollar amount of fault attributed to the employer in the third-party action.

Section 14. Definition; intentional torts. This section is taken verbatim from the Report of the Governor's Task Force. This section amends AS 09.17.900 to clarify its application to intentional acts.

Section 15. Expert witness qualification. This section requires that certain minimal standards be met by persons who testify in professional malpractice cases, including medical malpractice cases. The legislative purpose of this section is to maintain the integrity of testimony by expert witnesses in professional malpractice cases. Under existing law, it is easier to qualify expert witnesses who are more in the nature of "hired guns" than an expert in the particular profession.

This section does not apply if the state has not recognized a board that has certified the witness in the particular field or matter in issue.

Section 16. Offers of judgment. This section builds upon the approach taken from the Governor's Task Force report to encourage early settlements. This section places significantly more pressure on the parties to settle a case within 60 days after the Rule 26(a)(1) discovery disclosures have been made.

The approach taken in this section is to assess reasonable actual attorney fees against the offeree which are incurred after the date the offer is tendered, if the judgment finally entered is at least 5% less favorable to the offeree than the offer (or at least 10% less favorable if there are multiple defendants), whether the offer is tendered by the party making the claim, or the party defending against the claim.

The phrase "reasonable actual attorney fees" is intended to mean the actual attorney's time expended, as evidenced by time sheets and billing statements. That phrase is not intended to mean Rule 82 fees.

The encouragement to settle early is furnished by the sliding scale percentages of reasonable actual attorney fees imposed, based on how soon after the commencement of the action the offer is made. The maximum amount of settlement pressure will occur within 60 days after the Rule 26(a)(1) disclosures are made, since 75% of the reasonable actual attorney fees should provide a heavy inducement to settle, particularly against frivolous suits.

Section 17. Offers of judgment. This subsection addresses cases where one party is entitled to attorney fees under the offer of judgment rule, but the other party technically prevailed at the trial. In those rare instances, it is the party making the successful offer of judgment under Civil Rule 68 that overrides any claims by the other party to a set off by the amount of Civil Rule 82 attorney fees. Further, no party is ever allowed to claim attorney fees under both Civil Rule 68 and Civil Rule 82, in instances where a party both made a successful offer of judgment and was the prevailing party at trial.

Section 18. Interest on judgments; prejudgment interest. This section provides for a floating or variable interest rate on judgments and prejudgment interest by making it three hundred basis points above the discount rate at the 12th Federal Reserve District as of January 2 of the year in which the judgment or decree is entered. Once set by this section, the interest rate does not change until satisfaction of the judgment or decree. Using the discount rate of the 12th Federal Reserve District is consistent with the way interest rates are determined under the Alaska usury statute, AS 45.45.010(b).

Section 19. Prejudgment interest. This new section is intended to preclude prejudgment interest from being awarded for future economic and future non-economic damages, as well as for punitive damage awards. It is consistent with existing Alaska case law. McConkey v. Hart, Alaska Supreme Court Opinion No. 4441, November 29, 1996; Anderson v. Edwards, 625 P.2d 282, 289 (Alaska 1981).

Section 20. Judgment for plaintiff; punitive damages. This section contains a consistency change that applies the Section 19 interest rate to judgments against the State of Alaska.

Section 21. Interest in condemnation proceedings. This section contains a technical consistency change which leaves the interest rate in condemnation proceedings unchanged at 10.5%, notwithstanding the interest rate change in Section 19.

Section 22. Medical advisory panels. This section is taken verbatim from the report of the Governor's Task Force. This provision amends AS 09.55.536(a) by making expert advisory panels available to state health care providers.

Section 23. Expert advisory panel; panel questions. This section is taken verbatim from the report of the Governor's Task Force. The proposed changes are intended to clarify that omissions as well as commissions are within the purview of the questions to be answered by the medical advisory panel.

Section 24. Expert advisory panel; discovery. This section is taken verbatim from the report of the Governor's Task Force. The change allows discovery to proceed within 60 days after the selection of a panel, irrespective of whether the panel has rendered its report. The change is intended to expedite reporting of answers to improve the usefulness of the medical advisory panel system.

Section 25. Expert advisory panel; public sector provider. This section is taken verbatim from the Governor's Task Force report. It should be read in tandem with AS 09.55.536(a), in that this provision makes clear the access of government healthcare providers to the expert medical advisory panel. The clarification is sought because some trial judges do not refer such cases, usually stemming from healthcare extended to prisoners in correctional facilities, to the expert advisory panel.

Section 26. Definitions; health care provider. This section amends the existing definition of health care providers to include various entities recently formed, and which will be formed, to provide health care services in the wake of the health care reforms which are taking place.

Section 27. Definitions; professional negligence and professional services. This section adds new subsections to define professional negligence and professional services in the health care area.

Section 28. Attorney contingent fee agreements. This section adds a new section AS 09.60.080 which provides that the 50% of punitive damage awards which are payable to the State of Alaska under Section 10 shall be subject to reduction by the percentage of a contingent fee agreement between the attorney and the client.

Section 29. Civil liability of electric utility. This section is intended to provide immunity from strict liability for publicly regulated electric utility companies for the generation, distribution, and sale of electricity. This section makes clear that the provision of electricity, from the time it is generated until the consumer utilizes it, is the provision of a service, which does not change its character from a service to a product.

Section 30. Civil liability of hospitals for certain physicians. This section adds a new section designated AS 09.65.096. This statute grants immunity to hospitals from liability for the acts or omissions of emergency room independent contractor physicians. Current law allows a claimant to sue only the hospital rather than the emergency room physician who may have less ability to satisfy a judgment. This section will provide immunity to the hospital if it posts a notice of limited liability in all admission areas, and publishes a notice annually in a local newspaper. This section is intended to overrule the case of Jackson v. Powers, 743 P.2d 1376 (Alaska 1987).

Subsection (c) imposes, however, an additional condition of immunity to the hospital by requiring the emergency room physician to carry liability insurance in the amount of at least \$500,000 per incident, and \$1,500,000 for all incidents in a year.

Section 31. Damages resulting from commission of a felony, or while under the influence of alcohol or drugs. In general, the Governor's Task Force report recommends that a person who sustains personal injuries or death during the commission, or attempted commission of a felony, should be barred from recovering damages for those injuries.

This section goes further than the Governor's Task Force report, and extends the bar to recovery to those instances where the injured perpetrator is convicted of operating a motor vehicle, aircraft or water craft while under the influence of intoxicating liquor or a controlled substance in violation of AS 28.35.030. This section also extends the bar to recovery to cases where the injured perpetrator was not convicted, but was nonetheless engaged in conduct that would constitute a violation of AS 28.35.030 if shown by clear and convincing evidence.

This section requires clear and convincing evidence that the claimant's conduct substantially contributed to the personal injury or death.

This section applies to survival and wrongful death actions which might otherwise have been brought by the personal representative of the perpetrator.

Section 32. Collection of settlement information. This approach of this section is generally taken from the Governor's Task Force report. It amends AS 09.68 by adding a new section which requires civil litigants who settle, or otherwise dispose of cases, to file information about the settlements or judgments, including the amounts received by the attorneys on both sides. This data will be essential in assessing the efficiency of the civil justice system in the future.

Section 33. Insurance report. This section is intended to require insurance companies to report information necessary to evaluate the impact of tort reform. This statute empowers the division of insurance to require reporting, by insurers doing business in this state, of information relating to premiums, claims, losses, expenses, and solvency of the company as a whole. This section obtains most of the information sought from the report of the Governor's Task Force, while minimizing the regulatory burden on the insurance industry.

The June 1, 2000 commencement date for the reports to the governor and legislature is suggested by the division of insurance as a realistic starting date considering existing regulatory reporting deadlines.

Section 34. Appointment of independent counsel; conflicts of interest.

This section makes an insurer responsible only for the costs and attorney fees incurred by an independent counsel defending against claims for which the insurer has either accepted coverage or reserved its right to deny coverage. The insurer is not responsible for costs and attorney fees incurred in defending against claims for which the insurer has denied coverage.

Section 35. Appointment of independent counsel; conflicts of interest. In the context of an insured represented by independent counsel, this section allows an insurer to settle directly with a plaintiff as to claims for which the insurer has either accepted coverage or reserved its right to deny coverage, even though the claims for which the insurer denied coverage are not settled.

Section 36. Workers' compensation lien. This section is a consistency change to the workers' compensation statutes required by the change in Section 13 of this Act. The employer's workers' compensation lien is reduced by the amount of fault attributed to the employer in the third-party action.

Section 37. Claims against the state for medical claims. This section is amended for purposes of effecting a consistency change in connection with the reduction of the statute of limitations for contract claims from 6 years to 3 years at the time AS 09.10.053 was split off from AS 09.10.050.

Section 38. Motion to set trial and certificate. This section is taken verbatim from the report of the Governor's Task Force. It is intended to improve upon existing Superior Court fast track procedures by providing for a meeting of the parties and a pretrial conference.

Section 39. Alaska Rule of Civil Procedure 16.1(n). This section is a consistency change to the foregoing section 38. It replaces the pretrial order section of the existing fast track rule with a meeting of parties requirement.

Section 40. Limited Discovery; Expedited Calendaring. This section applies the District Court streamlined provisions found in sections 44 and 45 of this bill to Superior Court personal injury and property damage cases involving \$100,000 in claims or less.

Section 41. Settlement information. This section is taken verbatim from the report of the Governor's Task Force. It amends Civil Rule 41(a) by adding a new paragraph to require collection of settlement information as required by the new AS 09.68.130.

Section 42. Medical advisory panel; discovery. This section is taken verbatim from the report of the Governor's Task Force. It amends Civil Rule 72.1(g) by allowing discovery to proceed after 60 days after the selection of the panel in order to expedite obtaining panel reports.

Section 43. Sanctions for rule violations. This section modifies Civil Rule 95 by imposing increased sanctions against attorneys and their clients for any infraction of the rules, including Civil Rule 11. It permits fines of up to \$50,000 against attorneys, increased from \$1,000 under the existing rule.

Section 44. District Court; Deposition limitation. This section requires that in District Court personal injury and property damage cases depositions be limited to two for each side, unless the parties otherwise agree, or the court for good cause otherwise directs.

Section 45. District Court; Expedited Trials. This section requires that in District Court personal injury and property damage cases, all parties must file a memorandum to set the case for trial within six months after service of the complaint, and that the court shall set the case for trial "as soon as practicable" after confirming that all parties have exchanged the discovery materials required by Rule 26(a).

Section 46. Settlement information. This section is taken verbatim from the report of the Governor's Task Force. This section changes Appellate Rule 511 to require the gathering of settlement information at the appellate level.

Section 47. Civil Rule 16.1(k)(4). This rule is repealed as a consistency change to Section 39.

Sections 48-53. Technical changes. These sections denote which civil and evidence rules have to change to be consistent with the statutory changes in this Act.

Section 54. Alternative dispute resolution. This section requires the Alaska Judicial Council to see what alternative dispute resolution programs have been used in other states and the federal courts in order to efficiently and

economically structure such a program in the Alaska Court System. It is further directed to work with the Alaska Supreme Court to prepare proposed rules and statutes to implement such a program, and submit the proposal in time for the second term of this 20th Legislature. The intent is to have and alternative dispute resolution program in effect by July 1, 1998.

Section 55. Applicability. This Act will apply to all causes of action accruing on or after the effective date of this Act.

Section 56. Severability. If any section of this Act is held invalid, the remainder of this Act shall not be affected.

April 20, 1997

0-LS0056\C.a Version [HB0058H] Section Number	0-LS0056\L.a Version [HB0058e] amended in the House 3/18/97	0-LS0056\C Version [HB0058G] amended in the Senate 4/18/97
Section 1. Intent.	Same.	Added paragraph (11) regarding no effect of this bill on Exxon Valdez case, now or in the future.
Section 2. Liquidation of a state bank.	Same.	Same.
Section 3. Statute of limitations for property actions.	Same	Same.
Section 4.. Statute of limitations for property actions.	Same.	Same.
Section 5. Statute of Repose.	8 years.	10 years. Excepts from the statute of repose: breach of trust or fiduciary duty; and the situation where the facts which would constitute accrual of a potential cause of action of a minor are not discoverable in the exercise of reasonable care by the minor's parent or guardian.
Section 6. Statute of limitations for tort and other claims.	Same.	Same.

Section 7. Disability of minority.	Same.	Same.
Section 8. Addition to disability of minority.	6 years.	8 years.
Section 9. Noneconomic damages.	Lower limit of \$300,000. Upper limit of \$500,000.	Lower limit is the greater of \$400,000 or the injured person's life expectancy in years multiplied by \$8,000. Upper limit is the greater of \$1,000,000 or the injured person's life expectancy in years multiplied by \$25,000. The upper limit damages require a threshold determination that the injured person suffered "severe permanent physical impairment or severe disfigurement." The House version's list of specific severe injuries, such as loss of limbs, third degree burns, etc. was deleted.

Section 10.
Punitive damages.

Section 10 & 11
combined into one
section in Senate
versions.

First tier punitive
damages cap set at the
greater of three times
compensatory damages
or \$300,000.

Second tier punitive
damages cap set at the
greater of four times
compensatory damages
or \$600,000.

Except for the above
caps, there is no specific
provision for capping
punitive damages in the
area of unlawful
employment practices.

Adopts the Task Force
recommendations for
subsections a through e.

Clarifies that reckless conduct
is intended to serve as a basis
for punitive damages.

First tier damages cap set at the
greater of three times
compensatory damages or
\$500,000.

Second tier damages require a
threshold determination that
the fact finder conclude that
the wrongful conduct "was
motivated by financial gain
and the adverse consequences
of the conduct were actually
known by the defendant or the
person responsible for making
policy decisions on behalf of
the defendant."

Second tier damages cap is set
at the greater of (1) four times
compensatory damages; (2)
"four times the aggregate
amount of financial gain that
the defendant received as a
result of the defendant's
misconduct" ; or (3) \$7,000,000.

Punitive damages cap for
unlawful employment
practices added. Varies
between \$200,000 if less than
100 employees to \$500,000 if
500 or more employees.

Retains 50% of punitive
damages award going to state.

	Section 12 is deleted. (Income taxes) Sections 13-15 are deleted. (Periodic payments) Section 16 is deleted. (Collateral benefits)	
Section 11. Allocation of fault.	Appears as Section 17 in House version.	Retains provisions of House version that fault cannot be allocated to a person who cannot be joined because of the statute of repose. Requires the person to be joined in order to allocate fault unless (1) the person is not within the jurisdiction of the court, or (2) is precluded from being joined by law or court rules, or (3) cannot be reasonably located.
Section 12. Allocation of fault.	Appears as Section 18 in House version. No change.	No change.
Section 13. Allocation of fault.	Appears as Section 19 in House version. No change.	No change.
Section 14. Intentional conduct.	Appears as Section 20 in House version. No change.	No change.
Section 15. Expert witness qualification.	Appears as Section 21 in House version.	Substantially the same as the House version. The requirements of the section do not apply "if the state has not recognized a board that has certified the witness in the particular field or matter at issue".

Section 16. Offers of Judgment.	Appears as Section 22 in the House version.	Substantially the same as the House version. If there are multiple defendants, the judgment entered has to be at least 10% less favorable to the offeree than the offer for the sanctions to kick in.
Section 17. Offers of judgment.	Appears as Section 23 in the House version.	No substantive change. Subsection (c) removed as unnecessary because under existing law offers of judgment are irrevocable, and good for only 10 days.
Sections 18-19. Prejudgment interest.	Appears as Sections 24-25 in the House version.	No change.
Section 20. Judgment for plaintiff.	Appears as Section 26 in the House version.	No change.
Section 21. Condemnation interest.	Appears as Section 27 in the House version.	No change.
Section 22-27. Miscellaneous noncontroversial sections.	Appear as Sections 28-34 in the House version.	No change.
Section 28. Contingent fee agreements.	Appears as Section 35 in the House version.	Where punitive damages have been awarded, the attorney contingent fees are calculated before the 50% due the state has been deducted, and not after, so that the 50% due the state will be subject to the attorney contingent fees.
Section 29. Civil liability of electric utility.	Appears as Section 36 in the House version.	No change.

Section 30. Civil liability of hospitals.	Appears as Section 37 in the House version.	The amount of insurance was changed from \$500,000 for each incident to "\$500,000 for each incident and \$1,500,000 for all incidents in a year." Definition of emergency room physician was changed from "a physician who provides health care services in a hospital emergency room" to "a physician who does not have an ongoing physician-patient relationship with the emergency room patient and who provides emergency health care services in a hospital emergency room." The admitting area signs that give notice of this section must be at least two feet square, with print at least two inches high, and must disclaim any responsibility for actions of emergency room physicians who are independent contractors.
Section 31. Damages from commission of a felony.	Appears as Section 38 of the House version.	Changed to require clear and convincing evidence both of the violation and that the violation substantially contributed to the personal injury or death in
Section 32. Collection of settlement information.	Appears as Section 39 of the House version.	alcohol/drug cases. Changed to include attorney fee information from both plaintiffs and defendants. Changed to include information from dismissals, summary judgments and trial outcomes, as well as from settlements.

Section 33-39. Miscellaneous noncontroversial sections.	Appears as Sections 40-46 in House version.	No changes.
Section 40 (NEW). Limited discovery and expedited trial calendaring.	NEW	In Superior Court personal injury or property damage cases involving less than \$100,000, it will be mandatory to use the limited discovery and expedited calendaring procedures of certain new District Court Rules.
Sections 41-42. Miscellaneous noncontroversial sections.	Appear as Sections 47-48 in the House version.	No changes.
Section 43. Attorney sanctions.	Appears as Section 49 in the House version.	Discretionary fines against attorneys for failure to follow the rules is raised from \$10,000 to \$50,000.
*****	Section 50 of the House version, dealing with entry of judgment against a party making false statements, was deleted on 4/18/97	Deleted on 4/18/97 in the Senate during reconsideration proceedings.
Sections 44-45. (NEW) District Court procedures.	NEW	Same comments as to Section 40 above, except that it is limited to District Court cases involving up to \$50,000.
Section 46-53. Miscellaneous technical and rule changes.	Appears as Section 51-62 of the House version.	Substantially the same.

Section 54. Alternative Dispute Resolution.	Appears as Section 63 of House version.	Substantially the same. Requires that the Alaska Judicial Council confer with, and obtain the approval of, the Alaska Supreme Court, and bring a proposed statute and rule change to the legislature for consideration by December 31, 1997, with the goal of having a program in place by July 1, 1998.
Section 55-56. Applicability and Severability.	Appears as Sections 64-65 of House version.	No change.