

SCOMM

101A:6

To: Roger Holmes and Mike Lessmeier

Fm: Jim Sourant

Re: Jeff Bush letter (attached)

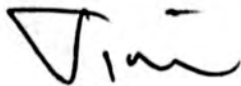
March 8, 1997

Brian just had time to review the first few pages of the attached letter. He agrees with some of it, and wants to think about the rest of it after he has read and analyzed it.

In the meantime, he wants both of you to read the criticisms and proposed substantive changes. If we can make any changes without undermining our own objectives, Brian wants you to propose some specific language.

Let's talk about it. House Finance Committee hears testimony Thursday, and will vote on amendments on Friday.

Thanks for your help.

A handwritten signature in dark ink, appearing to be "Jim" followed by a stylized flourish.

STATE OF ALASKA

DEPARTMENT OF COMMERCE AND ECONOMIC DEVELOPMENT

OFFICE OF THE COMMISSIONER

TONY KNOWLES, GOVERNOR

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March 7, 1997

The Honorable Brian Porter
Alaska State House of Representatives
Capital Room 216
Juneau, Alaska

Re: CS SSHB 58 (Judiciary) (Tort Reform)

Dear Representative Porter:

You requested my comments on various items in the current version of the tort reform bill, CSSSHB 58 (Jud) ("HB 58"), which I believe represent drafting errors and are not necessarily consistent with your intent, as expressed in your testimony and comments in the House Judiciary Committee.

In addition, I would like to take this opportunity to set out several of the significant policy concerns raised by this bill. As I testified before the Judiciary Committee, I firmly believe that the bill developed by the Task Force and introduced by the Governor represents an effective, comprehensive, and meaningful approach to tort reform. That bill was arrived at after several comprehensive meetings, a great deal of debate, and with the input and research of experts in the field. It is the product of significant compromise on the part of representatives of all competing interests in this debate, and it is, quite frankly, disheartening to have this product cast off without appropriate legislative consideration. To the extent HB 58 differs from that approach, these differences generally tend to be poorly conceived and represent extreme views, contrary to public policy and the interests of most Alaskans.

Technical Issues:

Section 5: Statute of Repose. In previous versions of the tort reform legislation, the statute of repose proposal has included a provision permitting a contractual override of the time limit, an exemption that I understand the state and several municipalities routinely rely upon. At the hearing, you indicated that this was intended here. However, it is not included in the language currently in the bill, and there is some concern that without it a contractual override is impermissible.

Section 6: Special Statute of Repose for Minors. You stated that the intention of this change is to impact the statute of limitations for minors, not the statute of repose. But as drafted, it is a limiting statute of repose, more restrictive than the general one for adults contained in section 5. It is, in short, anti-children, and the Department of Law believes that it is very likely unconstitutional on that ground.

I think that this change is unnecessary and that your concerns are already addressed in the bill. The general statute of repose of eight years would be applied to children as well as adults irrespective of the statute of limitations, meaning that a child's cause of action for birth injuries would be extinguished at age eight. To make sure that this would be the court's interpretation, you could even make an amendment to AS 09.10.140 to clarify that the tolling of the statute of limitations for minority does not extend the statute of repose.

Section 9: Standard for Punitive Damages. The phrase being inserted should say "deliberate disregard of another person's rights" instead of "deliberate disregard of another person." This is consistent with the case law, as most recently expressed in the *Chizmar* case.

*or Acc future
Med
taxi*
Section 11: Taxes on Award. I believe this section, allowing a defendant a deduction for taxes that would otherwise be payable were the award taxable, should only apply to damages for traditionally taxable compensatory damages, such as damages for lost wages. It should not apply to compensation for medical costs incurred. As written, a verdict for medical reimbursement only could have a deduction applied, leaving the victim without full compensation for his medical expenses. *??*

??
Section 15: Collateral Benefits. The last sentence in proposed AS 09.17.070(b), which allows a plaintiff to submit evidence of payments made for the purchase of the collateral source, is apparently meaningless and probably should be removed. Under (a) and the first part of (b), the amount paid by the collateral source is automatically deducted from the judgment, irrespective of the amount paid by the plaintiff for the benefit. *Call*

Sections 20: Expert Witness Qualifications. This section is unclear and needs substantial work. Is this section targeting medical malpractice, or all professional malpractice? And who is a "professional"; is the term linked to licensure (e.g., barbers and hairdressers, architects, marine pilots); does it include attorneys? And since Alaska does not have any such thing as "board certification" (in most profession, that is done by private associations), what is meant by "recognized by the state"? If this contemplates that the Division of Occupational Licensing will be required to evaluate and "recognize" various professional associations' certification programs, it will require expertise and analysis far beyond that which the division currently has, and there will be a substantial fiscal note attached to this bill.

This section is also troubling in its application. When the Task Force reviewed these concepts, Dr. Wilson noted the problems associated with its implementation in a state as small as Alaska. For example, he stated that there are only three neurosurgeons in Alaska, and two are partners. Thus, if any one of the three is involved in a lawsuit, the pool of available experts is either one or two, they will certainly have a conflict of interest, and they may be unwilling or unable to testify. Under current law, the other party could hire an internist or other surgeon to testify. But if this provision is adopted, the only option would be to find a "hired gun" from Outside, which even you have admitted is not a desirable situation.

The solution is really quite simple: remove proposed AS 09.20.185(a)(1) and (3), but leave in (2), thereby requiring that the expert be trained and experienced in the relevant discipline, but not necessarily "licensed" or "board certified."

Significant Policy Concerns:

Even if we charge the state of repose, they'll attack it as state of other state of repose, absent after state

Sections 5 & 6: Statutes of Repose. As you know, Governor Knowles vetoed last year's tort reform legislation, stating that although he supports meaningful tort reform, it must preserve the ability of Alaskan victims to be compensated for injuries caused by others. Nothing flies in the face of this goal more than statutes of repose, which can cut off a person's right to compensation even before they are injured. Such statutes are likely unconstitutional and certainly bad public policy. As discussed above, the special, shorter statute of repose for children is particularly troubling. In addition, the exceptions for "fraud or collusion" of parents or guardians will likely lead to litigation between parents and their children, and against the state in cases where the state has (or had) custody of the injured child.

the women's comp law to sample

Section 8: New Cap on Noneconomic Damages. These proposed caps on non-economic damages are irresponsibly low, designed to penalize not the victim of a minor injury (who will be fully compensated in any event), but only those severely injured by another's wrongdoing. Furthermore, the exceptions for spinal injuries are irrational; why should someone have a higher cap if one loses the use of a limb due to a spinal injury, but not if the limb is cut off? Why is the use of one arm deemed more serious than the loss of one's sight? I believe that if the legislature is going to impose a graduated scale of caps, either the application of the scale to individual cases should be left with the jury, as under current law, or the scale has to bear some rational relationship to the severity of the injury, as is done under the workers' compensation system. Finally, it must be noted that empirical studies have demonstrated no connection

Sec. 6. of damage caps and the amount paid for liability insurance rates.

Need to put in tort reform

38

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 amount of damages awarded by a court or a jury under (a) of this section for all claims of a party to the action, including a loss of consortium claim, arising out of a single injury or death may not exceed \$300,000.

(c) In an action for personal injury, the damages awarded by a court or jury that are described under (a) of this section may not exceed \$500,000 when the claimant, as a result of the injury;

(1) is a hemiplegic, paraplegic, or quadriplegic and has permanent functional loss of one or more limbs resulting from injury to the spine or spinal cord;

(2) has lost both arms or both legs or an arm and a leg;

(3) has permanently impaired cognitive capacity, is incapable of making independent, responsible decisions, and is permanently incapable of independently performing the activities of normal, daily living;

(4) is both deaf and blind; or

(5) has third degree burns over one half or more of the claimant's body.

(d) The limit under (b) or (c) of this section does not apply to noneconomic damages awarded by a court or jury against a person who, as proven by a preponderance of the evidence, was attempting to commit or committing a felony, if the person bringing the action was a victim of that offense and the offense substantially contributed to the injury or death. In this subsection, "victim" has the meaning given in AS 12.55.185.

(e) Multiple injuries sustained as a result of a single incident shall be treated as a single injury

compensation. As Representative Croft pointed out, this section invites abuse by defense lawyers, making false accusations about any number of non-parties in order to reduce their own client's responsibility.

These provisions are especially onerous in light of the proposed changes to the offers of judgment rules. This best can be demonstrated by example. Assume P sues D for injuries sustained when D struck P with his automobile. D then claims that the state should be liable because the road was not properly maintained, or alternatively that the responsibility lies with the Seattle used car salesman or the Japanese automaker because the steering mechanism was defective (a good defense lawyer could come up with any number of possibilities). To the extent that the people D accuses are beyond the reach of the court, such as the salesman and possibly the automaker, D has a free rein to claim anything. As for the condition of the road, P is left little choice but to sue the state. The state's attorney, however, will then immediately serve an offer of judgment in the amount of \$100. P's dilemma is this: if he accepts the offer and dismisses the state (because he actually agrees that the state is not responsible), D will continue to assert the state's fault, and P will have to try to defend against that position without the state's help. On the other hand, if P rejects the offer in order to keep the state in the case, even though he thinks there is no state responsibility, he risks having to pay the state's full attorney fees and costs. As the Task Force rightly concluded, this is unfair.

Section 21: Offers of Judgment. Although the goal of encouraging early settlements is laudable, this section goes too far. It is not uncommon for defense attorneys to expend far in excess of a case's value, simply to "prove a point" (plaintiffs' attorneys do not have the same incentives, so the same cannot generally be said of them). Our current system, with definite awards under Rule 82 in most cases, acts as a reasonable but not unfair disincentive to so-called "frivolous" lawsuits. To create a situation where a party is at risk for fees far in excess of the potential value of the case makes it virtually impossible for the small guy to bring even valid claims, and grants the large insurance carriers a tool to coerce beneficial but unjustified settlements. No.

Section 36: ER Doctors. This provision, overruling *Jackson v. Powers*, was also rejected by the Task Force, because when people go to an emergency ward, they expect to receive treatment from the hospital, not a particular doctor. But even more disturbing is the very low insurance requirement contained in the bill. In the emergency room, we are likely dealing with serious injuries, and the medical expenses of an injury incurred there could easily use up \$500,000 before any consideration is made for other compensatory damages. The Task Force, in considering this provision, learned that the hospitals in Anchorage already require their ER doctors to carry \$1 million/\$2 million in E&O coverage, and we were told by the medical community that insurance in those amounts was readily available to any ER doctor in Alaska. Requiring anything less, especially where the hospital will not be able to be held liable, is unconscionable and can only be designed to hurt victims in serious cases. }

Section 62: ADR. I must also make a pitch for inclusion of an ADR pilot program in the bill. I understand that the Court System has threatened a significant fiscal note if the provisions contained in the Task Force bill are adopted. Suffice it to say that their threats are unfounded. You have indicated to me that you support ADR; if so, why not include it here, in a bill that has a reasonably good chance of passage? In crafting the proposal for the Task Force, the Procedures Subcommittee was very much aware of the Court System's threats, and we worked very hard to minimize the financial impact of the pilot program. If a pilot program is included in this bill, I would be very happy to work with you in

reviewing and analyzing any fiscal notes relating to this section, in order to minimize any impact on the state treasury.

I must also respectfully disagree with some comments you made at the conclusion of the Judiciary hearing (and which I have since heard you repeat on *Gavel-to-Gavel* and before the AARP board), in which you stated that the reason the Task Force did not come up with more recommendations was because of the requirement of approval by a super-majority before a recommendation could go forward. It was unfortunate that you were unable to attend the final Task Force meetings, when the votes on these important issues were taken. I have, in my file, the voting results for each item on the Task Force agenda. Only once was a recommendation rejected where the recommendation received more than half of the votes. That recommendation related to the statute of repose, where the vote was 10-7 in favor; but that was a far less onerous proposal than the one in this bill: it was for a 10-year statute of repose that tolled for minors and incompetents. Provisions relating to allocation of fault were rejected 8-9, and the section to overrule *Jackson v. Powers* was withdrawn by unanimous consent. No other recommendations even made it out of committee, nor were any that were rejected in committee offered to the full Task Force. The proposal relating to expert witness qualifications was rejected *unanimously* by the Procedures Committee, and proposals relating to collateral benefits and periodic payments were rejected *unanimously* by the Damages Committee.

I think we both agree that tort reform is necessary. However, I firmly believe that the general approach adopted by the Task Force -- to reduce the time and expense of litigation for all parties while continuing to protect the rights of all Alaskans -- is superior to the approach taken in HB 58, which appears designed more to protect insurance companies at the expense of innocent Alaska victims. I encourage you to rethink your approach.

Please feel free to contact me at any time to discuss these or related issues.

Sincerely,


Jeffrey W. Bush
Deputy Commissioner

cc: Representative Mark Hanley, Co-Chair, House Finance Committee
Pat Pourchot, Legislative Director, Governor's Office
Attorney General Bruce Botelho

FAX TRANSMITTAL

TO: Representative Therriault, 465-3884

Pages (including cover) 4

SECTIONAL ANALYSIS
OF
HOUSE BILL 58

Prepared by:

Alaska Action Trust
P.O. Box 102323
Anchorage, Alaska 99510
(907) 258-4040

March 13, 1997

Mary LONG
~~ATL~~
= AL Academy
of
Trial Lawyers

SECTIONAL ANALYSIS OF CSSS H.B. 58

Alaska Academy of Trial Lawyers Alaska Action Trust

The Governor's Advisory Task Force on Civil Justice Reform studied court statistics on cases in Alaska and heard from two nationally recognized experts on civil justice reform. Contrary to the stated need for H.B. 58, the Task Force found that there was no explosion in the number of tort cases filed, no evidence of high jury awards, and no evidence of significant numbers of frivolous lawsuits. The Task Force found no evidence of any crisis in insurance cost or availability, or that tort reform in Alaska would have any effect on insurance rates for Alaskans. The following explains why H.B. 58 neither helps Alaskans nor follows the recommendations of the Governor's Task Force.

Section 5: Reduces the ability of those injured by faulty design or construction to recover for their injury by prohibiting claims after eight years from completion of the construction, even if the negligent work is not discovered until after then. *The Governor's Task Force did not recommend any changes to the statute of repose.* This provision will prevent local governments, school districts and homeowners from recovering damages for faulty construction which is typically not discovered until a fire, roof collapse or other event occurs long after completion of the project.

Section 6: Gives only doctors and other health care professionals special protection when their negligence injures young children. This section requires malpractice actions affecting children under six years of age to be filed by the child's eighth birthday, even if the effect of the doctor's negligence can't be recognized because of the infant's age. No other person or professional is given this special protection. *The Governor's Task Force did not recommend any changes regarding when lawsuits must be filed for injuries to children.*

Section 8: This provision reduces the existing cap on non-economic damages. Section 8 not only limits the non-economic damages which can be recovered for *all* claims to \$300,000 in most situations, but also does not allow non-economic damages to exceed \$500,000, even when someone is quadriplegic and has suffered permanent brain damage. Current law at least allows the cap to be exceeded when injuries are serious. *The Governor's Task Force did not recommend reductions to the cap on non-economic damages because this only harms those who are most severely injured.*

Section 9: This section changes the current legal definition for punitive damages by eliminating reckless conduct as the basis for an award of punitive damages. This means that punitive damages cannot be assessed against a drunk driver and could not have been assessed against Exxon for the oil spill. *The Governor's Task Force did not recommend any changes in the definition of punitive damages.*

Section 10: Section 10 places an absolute cap on punitive damages regardless of the wealth of the wrongdoer or the nature of the wrongdoer's conduct. This section also requires 50% of punitive damages to be deposited to go to the state. This section only benefits large multi-national corporations, like Exxon, against whom a punitive damage award of \$600,000 would have no effect. *The proposal of the Governor's Task Force on punitive damages allowed for consideration of the financial gain of the defendant and did not recommend that punitive damages go to the state.*

Section 11: This section reduces all damages an injured person might receive by a federal income tax rate, even though these damages are not taxed under state or federal law. This unfair provision means that an injured person's recovery is automatically reduced 20%-30%. *No such proposal was made by the Governor's Task Force.*

Sections 12 - 14: Force an injured person to accept any damages which are awarded for past injury as installment payments to be paid over time in the future. This takes away the choice of injured Alaskans to decide for themselves whether periodic payments are fair, or meet their needs. *This proposal was rejected by the Governor's Task Force.*

Section 15: This section requires a jury to reduce the damages an injured person can receive by the amount of insurance payments the person has received for the injury, or might receive in the future. *The Governor's Task Force concluded that such a proposal would increase the cost of insurance and rejected the idea.* This provision in HB 158 will only make trials more time consuming and complicated.

Sections 16 - 19: These sections allow responsibility for injury to be allocated to a person or corporation which is not even brought into the lawsuit or into the courtroom. This means that someone at fault can shift blame to an "empty chair" without the jury ever hearing evidence to the contrary. *The Governor's Task Force rejected this proposal because innocent victims might be denied full recovery.* Section 19 even allows punitive damages to be allocated to someone who is not in the courtroom.

Section 21: This section forces injured persons to guess about the outcome of their case with near certainty at the risk of having to pay all of the defendants' actual attorney's fees. This section and

Section 16 encourage a negligent defendant to delay disclosing actors who may be at fault. *The changes to Section 21 are far harsher to victims than the recommendations about offers of judgment made by the Governor's Task Force.*

Other Sections make it more difficult for those injured to have experts testify on their behalf (Sec. 20); give special protection to hospitals (Sec. 35); limit attorney fee recoveries in punitive damage cases (Sec. 34); and make trials more complicated (Sec. 49). *None of these changes were recommended by the Governor's Task Force.*

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Re Bush H.R.

0-LS0056VK

CS FOR SPONSOR SUBSTITUTE FOR HOUSE BILL NO. 58(JUD)

IN THE LEGISLATURE OF THE STATE OF ALASKA

TWENTIETH LEGISLATURE - FIRST SESSION

BY THE HOUSE JUDICIARY COMMITTEE

Offered: 2/27/97

Referred: Finance

Sponsor(s): REPRESENTATIVES PORTER, Cowdery, Bunde

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, 41, 49, 58,
3 68, 72.1, 82, and 95, Alaska Rules of Civil Procedure; amending Rule 702, Alaska
4 Rules of Evidence; amending Rule 511, Alaska Rules of Appellate Procedure; and
5 providing for an effective date."

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 independent contractors; to this extent, this Act
15 is intended to overrule Jackson v. Powers, 743 P.2d 1376 (Alaska 1987);

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

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

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

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

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

30 (h) After the payment of all other claims, including interest at the rate of 10.5
31 percent a year [ESTABLISHED UNDER AS 09.30.070], the department shall pay

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

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

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

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

25 (b) This section does not apply if

26 (1) the personal injury, death, or property damage resulted from

- 27 (A) prolonged exposure to hazardous waste;
28 (B) an intentional act or gross negligence;
29 (C) fraud or fraudulent misrepresentation;
30 (D) breach of an express warranty or guarantee; or
31 (E) a defective product; in this subparagraph, "prod

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resulted from

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of this statute
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antee; or

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h, "product" means

CSSSHB 58(JUD)

an object that has intrinsic value, is capable of delivery as an assembled whole or as a component part, and is introduced into trade or commerce;

(2) the facts that would give notice of a potential cause of action are intentionally concealed;

(3) a shorter period of time for bringing the action is imposed under another provision of law.

(c) The limitation imposed under (a) of this section is tolled during any period in which there exists the undiscovered presence of a foreign body that has no therapeutic or diagnostic purpose or effect in the body of the injured person and the action is based on the presence of the foreign body.

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

Sec. 09.10.065. Limitation of actions against health care providers. (a)

Notwithstanding the disability of minority described under AS 09.10.140(a), an action based on professional negligence may not be brought against a health care provider if the injured person is, on the date of the alleged negligent act or omission, less than six years of age unless the action is commenced before the person's eighth birthday.

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

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

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

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

(c) In this section,

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

(2) "professional negligence" has the meaning given in AS 09.55.560;

(3) "professional services" has the meaning given in AS 09.55.560.

* Sec. 7. AS 09.10.070(a) is amended to read:

of a person -- on

Building
of a child
of a child

9/1/01
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(a) Except as otherwise provided by law, a [A] person may not bring an action (1) for libel, slander, assault, battery, seduction, or false imprisonment, (2) [OR] for personal [ANY] injury or death, [TO THE PERSON] or injury to the rights of another not arising on contract and not specifically provided otherwise; (3) for taking, detaining, or injuring personal property, including an action for its specific recovery; (4) [(2)] upon a statute for a forfeiture or penalty to the state; or (5) [(3)] upon a liability created by statute, other than a penalty or forfeiture; unless the action is commenced within two years of the accrual of the cause of action.

* Sec. 8. 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 \$300,000.

(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 \$500,000 when the claimant, as a result of the injury,

(1) is a hemiplegic, paraplegic, or quadriplegic and has permanent functional ~~limbs resulting from injury to the spine or spinal cord,~~ or ~~is incapable of making~~ ~~of a single incident~~ shall be

* Sec. 9. /

ay not be awarded in reported by clear and liberate disregard of

Right
 1 another person by the person from whom the punitive damages are sought.

2 * Sec. 10. AS 09.17.020 is amended by adding new subsections to read:

3 (b) Except as provided under (c) of this section, the amount of punitive
 4 damages awarded by a court or jury under (a) of this section may not exceed three
 5 times the amount of compensatory damages awarded or \$300,000, whichever amount
 6 is greater.

7 (c) The amount of punitive damages awarded by a court or jury under (a) of
 8 this section may not exceed four times the amount of compensatory damages awarded
 9 or \$600,000, whichever amount is greater, if

10 (1) the wrongful conduct or omission arose in connection with a
 11 commercial activity motivated by financial gain; and

12 (2) the likelihood of death or serious bodily injury from the commercial
 13 activity was previously known by the person responsible for making policy decisions
 14 relating to the commercial activity and the knowledge was gained from previous
 15 instances of death or serious bodily injury arising from the same wrongful conduct or
 16 omission, regardless of where the previous wrongful conduct or omission occurred.

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

21 * Sec. 11. AS 09.17.040(a) is amended to read:

22 (a) In every case where damages for personal injury or death are awarded by
 23 the court or jury,

24 (1) the verdict shall be itemized between economic loss and
 25 noneconomic loss, if any, as follows:

26 (A) [(1)] past economic loss;

27 (B) [(2)] past noneconomic loss;

28 (C) [(3)] future economic loss;

29 (D) [(4)] future noneconomic loss; [AND]

30 (E) [(5)] punitive damages; and

31 (2) the amount of damages awarded shall be reduced by the

1 amount of federal and state income tax that would have been paid on damages
 2 contained in the verdict under tax rates in effect on the date of the injury or
 3 death; this paragraph does not apply to an award of damages if the damages are
 4 taxable under federal or state law.

5 * Sec. 12. AS 09.17.040(d) is amended to read:

6 (d) In an action to recover damages, the court shall, at the request of a [AN
 7 INJURED] party, enter judgment ordering that amounts awarded a judgment creditor
 8 for future damages that exceed \$100,000 be paid to the maximum extent feasible by
 9 periodic payments rather than by a lump-sum payment. If a portion of the judgment
 10 awarded is owed to an attorney under a contingent fee agreement, that portion
 11 of the judgment shall be reduced to present value, if necessary, and paid in a
 12 lump sum, and the remaining portion of the judgment shall be paid as provided
 13 under this subsection.

14 * Sec. 13. AS 09.17.040(e) is amended to read:

15 (e) Except as provided in this subsection, if a judgment is paid by
 16 structured settlement type periodic payments, the [THE] court shall [MAY] require
 17 security be posted in the form of United States government obligations [,] in order
 18 to ensure that funds are available as periodic payments become due. The court may
 19 not require security to be posted if the state, a self-insured municipality, or an
 20 authorized insurer, as defined in AS 21.90.900, acknowledges to the court its
 21 obligation to discharge the judgment, provided that an authorized insurer must be
 22 rated by two nationally recognized independent rating agencies to be in the two
 23 highest categories of quality and financial soundness. If a judgment is paid by
 24 annuity type period payments, the court shall require the annuity be purchased
 25 from an authorized insurer that is rated by two nationally recognized independent
 26 rating agencies to be in the two highest categories of quality and financial
 27 soundness. The injured party shall determine whether a structured settlement or
 28 an annuity is the source of the periodic payments. The injured party may not be
 29 required to accept a structured settlement or annuity from the defendant's or
 30 other party's insurer or from any affiliated companies of the insurer.

31 * Sec. 14. AS 09.17.040(f) is amended to read:

(f) A judgment ordering payment of future damages for personal injury or death by periodic payment shall specify the recipient, the dollar amount of the payments, including any increases in future payments for anticipated inflation, the interval between payments, and the number of payments or the period of time over which payments shall be made. Payments may be modified only in the event of the death of the judgment creditor, in which case payments may not be reduced or terminated, but shall be paid to persons to whom the judgment creditor owed a duty of support, as provided by law, immediately before death. In the event the judgment creditor owed no duty of support to dependents at the time of the judgment creditor's death, the money remaining shall be distributed in accordance with a will of the deceased judgment creditor accepted into probate or under the intestate laws of the state if the deceased had no will. In this subsection, "inflation" means the change in the consumer price index for United States city average, all urban consumers, all items indices, compiled by the Bureau of Labor Statistics, United States Department of Labor.

* Sec. 15. AS 09.17.070 is repealed and reenacted to read:

Sec. 09.17.070. Collateral benefits. (a) A claimant in an action for personal injury or death may only recover damages that exceed amounts received by the claimant, or that with reasonable probability will be received in the future by the claimant, as compensation for the injuries from collateral sources, whether private, group, or governmental, and whether contributory or noncontributory, except when

(1) the collateral source is a federally funded program that by law must seek subrogation;

(2) the collateral source has a right of subrogation under federal law;

(3) the collateral source is the payment of a dependent child's medical bills by the injured child's parent that does not result from insurance coverage;

(4) the benefit consists of death benefits paid under life insurance; or

(5) the benefit consists of workers' compensation benefits received under AS 23.30.

(b) A person defending a claim may introduce into evidence at trial an amount paid or payable as a benefit to the claimant as a result of the personal injury or death

1 under 42 U.S.C. 301 - 1397 (Social Security Act); a federal disability act; health,
 2 sickness, disability, accident, or income-disability insurance; insurance that provides
 3 health benefits or income-disability coverage; and a contract or agreement of a group,
 4 organization, partnership, or corporation, or other collateral source, to provide, pay for,
 5 or reimburse the cost of medical, hospital, dental, or other health care services,
 6 disability, or lost wages. However, evidence of a collateral source described under
 7 (a)(1) - (5) of this section may not be introduced into evidence at trial. If a person
 8 defending a claim elects to introduce evidence described in this subsection, the
 9 claimant may introduce evidence of the amount that the claimant has paid or
 10 contributed to secure the claimant's right to the collateral benefit, including the cost
 11 to the claimant resulting from depleted or exhausted coverage.

12 (c) A person who provides a collateral benefit admissible under (b) of this
 13 section may not recover an amount against the claimant as reimbursement for those
 14 benefits and may not be subrogated to the rights of a claimant against a person
 15 defending a claim.

16 * Sec. 16. AS 09.17.080(a) is amended to read:

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

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

24 (2) the percentage of the total fault [OF ALL OF THE PARTIES TO
 25 EACH CLAIM] that is allocated to each claimant, defendant, third-party defendant,
 26 [AND] person who has been released from liability, or other person responsible for
 27 the damages to each claimant regardless of whether the other person, including
 28 an employer, is or could have been named as a party to the action [UNDER
 29 AS 09.16.040].

30 * Sec. 17. AS 09.17.080(b) is amended to read:

31 (b) In determining the percentages of fault, the trier of fact shall consider both

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

7 * Sec. 18. AS 09.17.080(c) is amended to read:

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

19 * Sec. 19. AS 09.17.900 is amended to read:

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

28 * Sec. 20. AS 09.20 is amended by adding a new section to read:

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

(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; however, this paragraph does not apply if a board does not exist that could certify the witness in the particular field or matter at issue.

* Sec. 21. 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, 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 100 percent of the offeror's reasonable actual attorney fees [OFFEREE IS THE PARTY MAKING THE CLAIM, THE INTEREST RATE SHALL BE REDUCED BY FIVE PERCENT A YEAR];

1 (2) if the offer was served more than 60 days after both parties
2 made the disclosures required by the Alaska Rules of Civil Procedure but more
3 than 90 days before the trial began, the offeree shall pay 75 percent of the
4 offeror's reasonable actual attorney fees;

5 (3) if the offer was served 90 days or less but more than 10 days
6 before the trial began, the offeree shall pay 50 percent of the offeror's reasonable
7 actual attorney fees [OFFEREE IS THE PARTY DEFENDING AGAINST THE
8 CLAIM, THE INTEREST RATE SHALL BE INCREASED BY FIVE PERCENT A
9 YEAR].

10 * Sec. 22. AS 09.30.065 is amended by adding new subsections to read:

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

20 (c) If an offeror makes more than one offer of judgment, the last offer served
21 on the adverse party shall be considered to be a revocation of any prior offer of
22 judgment.

23 * Sec. 23. AS 09.30.070(a) is amended to read:

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

1 * Sec. 24. AS 09.30.070 is amended by adding a new subsection to read:

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

4 * Sec. 25. AS 09.50.280 is amended to read:

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

9 * Sec. 26. AS 09.55.440(a) is amended to read:

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

20 * Sec. 27. AS 09.55.535(k) is amended to read:

21 (k) The provisions of AS 09.43.010 - 09.43.180 (Uniform Arbitration Act)
22 apply to arbitrations under this section if they do not conflict with the provisions of
23 this section; arbitrations under this section shall be conducted in accordance with
24 procedures established by any rules of court which may be adopted and according to
25 provisions of AS 09.55.540 - 09.55.547, 09.55.554 - 09.55.560 [AS 09.55.540 -
26 09.55.548 AND AS 09.55.554 - 09.55.560], and AS 09.65.090.

27 * Sec. 28. AS 09.55.536(a) is amended to read:

28 (a) In an action for damages due to personal injury or death based upon
29 the provision of professional services by a health care provider, including a person
30 providing services on behalf of a governmental entity, when the parties have not
31 agreed to arbitration of the claim under AS 09.55.535, the court shall appoint within

20 days after filing of answer to a summons and complaint a three-person expert advisory panel unless the court decides that an expert advisory opinion is not necessary for a decision in the case. When the action is filed, the court shall, by order, determine the professions or specialties to be represented on the expert advisory panel, giving the parties the opportunity to object or make suggestions.

* Sec. 29. AS 09.55.536(c) is amended to read:

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

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

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

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

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

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

(6) What specifically caused the medical injury?

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

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

* Sec. 30. AS 09.55.536(f) is amended to read:

(f) Discovery may not be undertaken in a case until the report of the expert advisory panel is received or 60 days after selection of the panel, whichever occurs

1 **first.** However, the court may relax this prohibition upon a showing of good cause by
 2 any party. If the panel has not completed its report within the 30-day period
 3 prescribed in (c) of this section, the court may, upon application, grant **the panel** [IT]
 4 an additional 30 days.

5 * **Sec. 31.** AS 09.55.536 is amended by adding a new subsection to read:

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

9 * **Sec. 32.** AS 09.55.560(1) is amended to read:

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

25 * **Sec. 33.** AS 09.55.560 is amended by adding new paragraphs to read:

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

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

1 * Sec. 34. AS 09.60 is amended by adding a new section to read:

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

8 * Sec. 35. AS 09.65 is amended by adding a new section to read:

9 **Sec. 09.65.085. Civil liability of electric utility.** (a) A utility offering
10 electrical service to the public for compensation under a certificate of public
11 convenience and necessity issued by the Alaska Public Utilities Commission under
12 AS 42.05.221 may not be held strictly liable for property damage, death, or personal
13 injury resulting from an act or omission of the utility relating to the production or
14 delivery of electrical service.

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

17 * Sec. 36. AS 09.65 is amended by adding a new section to read:

18 **Sec. 09.65.096. Civil liability of hospitals for certain physicians.** (a) A
19 hospital is not liable for civil damages as a result of an act or omission by an
20 emergency room physician who is not an employee or actual agent of the hospital if
21 the hospital provides notice that the emergency room physician is an independent
22 contractor and the emergency room physician is insured as described under (c) of this
23 section. The hospital is responsible for exercising reasonable care in granting
24 privileges to practice in the hospital, for reviewing those privileges on a regular basis,
25 and for taking appropriate steps to revoke or restrict privileges in appropriate
26 circumstances. The hospital is not otherwise liable for the acts or omissions of an
27 emergency room physician who is an independent contractor. The notice required by
28 this subsection must be posted conspicuously in all admitting areas of the hospital,
29 published at least annually in a newspaper of general circulation in the area, and must
30 be in substantially the following form:

31 Notice of Limited Liability

1 The following emergency room physicians are independent
2 contractors and are not employees of the hospital:

3 (List specific emergency room physicians)

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

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

12 (d) In this section,

13 (1) "emergency room physician" means a physician who provides health
14 care services in a hospital emergency room;

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

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

20 * Sec. 37. AS 09.65.210 is repealed and reenacted to read:

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

26 (1) engaged in the commission of a felony, the person has been
27 convicted of the felony, including conviction based on a guilty plea or plea of nolo
28 contendere, and the felony substantially contributed to the personal injury or death;

29 (2) engaged in conduct that would constitute the commission of an
30 unclassified felony, a class A, or a class B felony for which the person was not
31 convicted and the conduct

1 (A) substantially contributed to the personal injury or death; and
2 (B) is proven by the defendant in the civil trial by clear and
3 convincing evidence;

4 (3) fleeing after the commission, by that person, of conduct that would
5 constitute an unclassified felony, a class A felony, or a class B felony or being
6 apprehended for conduct that would constitute an unclassified felony, a class A felony,
7 or a class B felony if the conduct

8 (A) during the flight or apprehension substantially contributed
9 to the injury or death; and

10 (B) is proven by the defendant in the civil trial by clear and
11 convincing evidence;

12 (4) operating a vehicle, aircraft, or watercraft while under the influence
13 of intoxicating liquor or any controlled substance in violation of AS 28.35.030, was
14 convicted, including conviction based on a guilty plea or plea of nolo contendere, and
15 the conduct substantially contributed to the personal injury or death; or

16 (5) engaged in conduct that would constitute a violation of
17 AS 28.35.030 for which the person was not convicted if the conduct substantially
18 contributed to the personal injury or death and the conduct is proven by the defendant
19 in the civil trial by clear and convincing evidence.

20 * Sec. 38. AS 09.68 is amended by adding a new section to read:

21 **Sec. 09.68.130. Collection of settlement information.** (a) Except as
22 provided in (c) of this section, the Alaska Judicial Council shall collect and evaluate
23 information relating to the compromise or other settlement of all civil litigation. The
24 information, including the case name and file number, a general description of the
25 claims being settled, the dollar amount of the settlement, to whom the settlement was
26 paid, and any nonmonetary terms, shall be collected on a form developed by the
27 council for that purpose.

28 (b) The information received by the council under (a) of this section is
29 confidential. This restriction does not prevent the disclosure of summaries and
30 statistics in a manner that does not allow the identification of particular cases or
31 parties.

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

- 3 (1) divorce and dissolution;
4 (2) adoption, custody, support, visitation, and emancipation of children;
5 (3) children-in-need-of-aid cases under AS 47.10 or delinquent minors
6 cases under 47.12;
7 (4) domestic violence protective orders under AS 18.66.100 -
8 18.66.180;
9 (5) estate, guardianship, and trust cases filed under AS 13;
10 (6) small claims under AS 22.15.040.

11 * Sec. 39. AS 21.06 is amended by adding a new section to read:

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

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

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

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

28 (e) The division may consult with the Alaska Judicial Council when
29 determining what information to require to be reported under (a) - (c) of this section
30 and when implementing the compilation required under (a) of this section.

31 * Sec. 40. AS 21.89.100(d) is amended to read:

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

* Sec. 41. AS 21.89.100 is amended by adding a new subsection to read:

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

* Sec. 42. AS 23.30.015(g) is amended to read:

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

1 * Sec. 43. AS 44.77.015(a) is amended to read:

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

9 * Sec. 44. Rule 16.1(c), Alaska Rules of Civil Procedure, is amended to read:

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

- 16 (1) That the issues in the case have actually been joined;
- 17 (2) That all parties have completed discovery or have a reasonable
18 opportunity to do so within the next 60 days;
- 19 (3) That the procedure for listing witnesses and exhibits and providing
20 exhibit copies, as set forth in [PARAGRAPH] (d) of this rule has been completed;
- 21 (4) Whether trial by jury has been timely demanded;
- 22 (5) The estimated number of days for the trial, including estimates for
23 each party's case and for jury selection;
- 24 (6) The names, addresses and telephone numbers of all attorneys and
25 pro se parties who are responsible for the conduct of the litigation;
- 26 (7) Which, if any, statute or rule entitles the case to preference on the
27 trial calendar;
- 28 (8) That the parties have complied with [PARAGRAPH] (k) of this
29 rule.

30 * Sec. 45. Rule 16.1(n), Alaska Rules of Civil Procedure, is repealed and reenacted to read:

31 (n) **Meeting of Parties.** Except when otherwise ordered, the parties shall, as

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

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

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

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

19 (4) whether a scheduling conference is unnecessary;

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

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

25 * Sec. 46. Rule 41(a), Alaska Rules of Civil Procedure, is amended by adding a new
 26 paragraph to read:

27 (3) **Settlement Information.** If a voluntary dismissal under this rule
 28 is the result of compromise or other settlement of the parties, the parties shall submit
 29 to the Alaska Judicial Council the information required under AS 09.68.130. A notice
 30 of dismissal made under (1)[a] of this subsection must be accompanied by a
 31 certification signed by or on behalf of the plaintiff that the information required under

1 AS 09.68.130 has been submitted to the Alaska Judicial Council. A stipulation of
2 dismissal made under (1)[b] of this subsection must be accompanied by a certification
3 signed by or on behalf of all parties who have appeared in the action. The
4 requirements of this paragraph do not apply to the types of cases listed in
5 AS 09.68.130(c).

6 * **Sec. 47.** Rule 72.1(g), Alaska Rules of Civil Procedure, is amended to read:

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

11 * **Sec. 48.** Rule 95(b), Alaska Rules of Civil Procedure, is amended to read:

12 (b) In addition to its authority under (a) of this rule and its power to punish
13 for contempt, a court may, after reasonable notice and an opportunity to show cause
14 to the contrary, and after hearing by the court, if requested, impose a fine not to
15 exceed \$10,000.00 [\$1,000.00] against any attorney who practices before it for failure
16 to comply with these rules or any rules promulgated by the supreme court.

17 * **Sec. 49.** Rule 95, Alaska Rules of Civil Procedure, is amended by adding a new
18 subsection to read:

19 (c) If the trier of fact determines that a party to a civil action has intentionally
20 made a false statement of a material fact in connection with the prosecution or defense
21 of a civil action, the court shall enter judgment against the party making the false
22 statement on the issue to which the false statement relates. If the civil action involves
23 multiple claims and the false statement does not apply to all claims, the judgment
24 required under this subsection shall apply only to those claims to which the false
25 statement relates.

26 * **Sec. 50.** Rule 511, Alaska Rules of Appellate Procedure, is amended by adding a new
27 subsection to read:

28 (e) **Settlement Information.** If a dismissal under (a) or (b) of this rule is the
29 result of compromise or other settlement between the parties, the parties shall submit
30 to the Alaska Judicial Council the information required under AS 09.68.130. A
31 dismissal by agreement under (a) of this rule must be accompanied by a certification

signed by the attorneys of record for all parties that the information required under AS 09.68.130 has been submitted to the Alaska Judicial Council. A dismissal by the appellant or petitioner made under (b) of this rule must be accompanied by a certification signed by the appellant's or petitioner's attorney of record. The requirements of this subsection do not apply to the types of cases listed in AS 09.68.130(c).

* **Sec. 51.** Rule 16.1(k)(4), Alaska Rules of Civil Procedure, is repealed.

* **Sec. 52.** AS 09.55.548 is repealed.

* **Sec. 53.** AS 09.17.020(d), as enacted by sec. 10 of this Act, has the effect of amending Rule 58, Alaska Rules of Civil Procedure, by requiring the court to require that a certain percentage of an award of punitive damages be deposited into the general fund.

* **Sec. 54.** AS 09.17.040(a), as amended by sec. 11 of this Act, has the effect of amending Rule 58, Alaska Rules of Civil Procedure, by requiring the court to reduce an award of damages by certain tax rates in effect on the date of injury or death if taxable.

* **Sec. 55.** AS 09.17.040(d), as amended by sec. 12 of this Act, has the effect of amending Rule 58, Alaska Rules of Civil Procedure, by requiring that certain judgments be paid periodically if requested by a party, with a lump sum payment for certain attorney fees.

* **Sec. 56.** AS 09.17.040(e), as amended by sec. 13 of this Act, has the effect of amending Rule 58, Alaska Rules of Civil Procedure, by imposing certain requirements when a judgment is paid by periodic payments.

* **Sec. 57.** AS 09.17.040(f), as amended by sec. 14 of this Act, has the effect of amending Rule 58, Alaska Rules of Civil Procedure, by requiring that certain judgments include any increases for future inflation.

* **Sec. 58.** AS 09.17.080(a), as amended by sec. 16 of this Act, has the effect of amending Rule 49, Alaska Rules of Civil Procedure, by requiring the jury to answer the special interrogatory listed in AS 09.17.080(a)(2) regarding the percentages of fault to be allocated among the claimants, defendants, third-party defendants, persons who have been released from liability, or other person who is responsible for the damages.

* **Sec. 59.** AS 09.20.185, enacted by sec. 20 of this Act, has the effect of amending Rule 702, Alaska Rules of Evidence, by requiring certain qualifications from a person testifying as an expert witness.

1 * **Sec. 60.** AS 09.30.065, as amended by secs. ²²~~21~~ and ²³~~22~~ of this Act, has the effect of
2 amending Rule 68, Alaska Rules of Civil Procedure, by requiring the offeree to pay costs and
3 reasonable actual attorney fees on a sliding scale of percentages in certain cases, by
4 eliminating provisions relating to interest and by providing that a subsequent offer revokes
5 prior offers.

6 * **Sec. 61.** AS 09.30.070(c), added by sec. ²⁸~~24~~ of this Act, has the effect of amending
7 Rule 58, Alaska Rules of Civil Procedure, by providing that prejudgment interest may not be
8 awarded for future economic or noneconomic damages.

9 * **Sec. 62. ALTERNATIVE DISPUTE RESOLUTION.** (a) It is the intent of this
10 legislation to create a pilot alternative dispute resolution procedure within the existing civil
11 litigation system in order to promote the timely, inexpensive, and efficient resolution of civil
12 disputes.

13 (b) The Alaska Judicial Council shall consult with the Alaska Dispute Settlement
14 Association, review court sanctioned alternative dispute resolution programs in other states and
15 in the federal court system, and make recommendations to assist the legislature and the Alaska
16 Court System in the establishment of a pilot program for alternative dispute resolution within
17 the Alaska Court System. The Alaska Judicial Council shall submit a written report to the
18 legislature and to the Alaska Supreme Court within six months after the effective date of this
19 Act. The report must include specific types of programs, specific types of cases within each
20 program that are amenable to alternative dispute resolution, the cost to the parties and to the
21 Alaska Court System under these programs, and the qualifications of the neutral parties,
22 including nonlawyers, who will provide dispute resolution services under the program.

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

25 * **Sec. 63. APPLICABILITY.** This Act applies to all causes of action accruing on or after
26 the effective date of this Act.

27 * **Sec. 64. SEVERABILITY.** Under AS 01.10.030, if any provision of this Act or the
28 application of a provision of this Act to any person or circumstance is held invalid, the
29 remainder of this Act and the application to other persons shall not be affected.

30 * **Sec. 65.** This Act takes effect July 1, 1997.

FAX TRANSMITTAL

TO: Representative Therriault, 465-3884

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SECTIONAL ANALYSIS
OF
HOUSE BILL 58

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March 13, 1997

Mary Loug
~~ATL~~
= to Academy
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SECTIONAL ANALYSIS OF CSSH H.B. 58**Alaska Academy of Trial Lawyers
Alaska Action Trust**

The Governor's Advisory Task Force on Civil Justice Reform studied court statistics on cases in Alaska and heard from two nationally recognized experts on civil justice reform. Contrary to the stated need for H.B. 58, the Task Force found that there was no explosion in the number of tort cases filed, no evidence of high jury awards, and no evidence of significant numbers of frivolous lawsuits. The Task Force found no evidence of any crisis in insurance cost or availability, or that tort reform in Alaska would have any effect on insurance rates for Alaskans. The following explains why H.B. 58 neither helps Alaskans nor follows the recommendations of the Governor's Task Force.

Section 5: Reduces the ability of those injured by faulty design or construction to recover for their injury by prohibiting claims after eight years from completion of the construction, even if the negligent work is not discovered until after then. *The Governor's Task Force did not recommend any changes to the statute of repose. This provision will prevent local governments, school districts and homeowners from recovering damages for faulty construction which is typically not discovered until a fire, roof collapse or other event occurs long after completion of the project.*

Section 6: Gives only doctors and other health care professionals special protection when their negligence injures young children. This section requires malpractice actions affecting children under six years of age to be filed by the child's eighth birthday, even if the effect of the doctor's negligence can't be recognized because of the infant's age. No other person or professional is given this special protection. *The Governor's Task Force did not recommend any changes regarding when lawsuits must be filed for injuries to children.*

Section 8: This provision reduces the existing cap on non-economic damages. Section 8 not only limits the non-economic damages which can be recovered for all claims to \$300,000 in most situations, but also does not allow non-economic damages to exceed \$500,000, even when someone is quadriplegic and has suffered permanent brain damage. Current law at least allows the cap to be exceeded when injuries are serious. *The Governor's Task Force did not recommend reductions to the cap on non-economic damages because this only harms those who are most severely injured.*

Section 9: This section changes the current legal definition for punitive damages by eliminating reckless conduct as the basis for an award of punitive damages. This means that punitive damages cannot be assessed against a drunk driver and could not have been assessed against Exxon for the oil spill. *The Governor's Task Force did not recommend any changes in the definition of punitive damages.*

Section 10: Section 10 places an absolute cap on punitive damages regardless of the wealth of the wrongdoer or the nature of the wrongdoer's conduct. This section also requires 50% of punitive damages to be deposited to go to the state. This section only benefits large multi-national corporations, like Exxon, against whom a punitive damage award of \$600,000 would have no effect. *The proposal of the Governor's Task Force on punitive damages allowed for consideration of the financial gain of the defendant and did not recommend that punitive damages go to the state.*

Section 11: This section reduces all damages an injured person might receive by a federal income tax rate, even though these damages are not taxed under state or federal law. This unfair provision means that an injured person's recovery is automatically reduced 20%-30%. *No such proposal was made by the Governor's Task Force.*

Sections 12 - 14: Force an injured person to accept any damages which are awarded for past injury as installment payments to be paid over time in the future. This takes away the choice of injured Alaskans to decide for themselves whether periodic payments are fair, or meet their needs. *This proposal was rejected by the Governor's Task Force.*

Section 15: This section requires a jury to reduce the damages an injured person can receive by the amount of insurance payments the person has received for the injury, or might receive in the future. *The Governor's Task Force concluded that such a proposal would increase the cost of insurance and rejected the idea.* This provision in HB 158 will only make trials more time consuming and complicated.

Sections 16 - 19: These sections allow responsibility for injury to be allocated to a person or corporation which is not even brought into the lawsuit or into the courtroom. This means that someone at fault can shift blame to an "empty chair" without the jury ever hearing evidence to the contrary. *The Governor's Task Force rejected this proposal because innocent victims might be denied full recovery.* Section 19 even allows punitive damages to be allocated to someone who is not in the courtroom.

Section 21: This section forces injured persons to guess about the outcome of their case with near certainty at the risk of having to pay all of the defendants' actual attorney's fees. This section and

Section 16 encourage a negligent defendant to delay disclosing actors who may be at fault. *The changes to Section 21 are far harsher to victims than the recommendations about offers of judgment made by the Governor's Task Force.*

Other Sections make it more difficult for those injured to have experts testify on their behalf (Sec. 20); give special protection to hospitals (Sec. 35); limit attorney fee recoveries in punitive damage cases (Sec. 34); and make trials more complicated (Sec. 49). *None of these changes were recommended by the Governor's Task Force.*