ALASKA LEGISLATURE COMMITTEE FILES 1987-1988 8672
5326 SJUD SB 413 - SB 461

time of making an original application or application for renewal. In addition, the following annual fees shall be paid by a holder of a wholesale malt beverage and wine license:

Business Transacted During Year	Fee
over $20,000 and not over $50,000	$ 300
over $50,000 and not over $100,000 . . .	$ 1,000
over $100,000 and not over $150,000 . . .	$ 1,500
over $150,000 and not over $200,000 . . .	$ 2,000
over $200,000 and not over $400,000 . . .	$ 4,000
over $400,000 and not over $600,000 . . .	$ 6,000
over $600,000 and not over $800,000 . . .	$ 8,000
over $800,000	$10,000

* Sec. 5. AS 04.11.200(b) is amended to read:

(b) A sale by a holder of a retail stock sale license may only be in quantities of five [WINE] gallons or more per sale and may only be to persons licensed under this chapter.

* Sec. 6. AS 04.16.130(b) is amended to read:

(b) This section does not apply to stocks of beer carried on a delivery truck by a licensed wholesaler if carried for the purpose of sale and delivery to persons licensed under this title in quantities of not less than 10 [WINE] gallons for each sale.

* Sec. 7. AS 08.01.010 is amended by adding a new paragraph to read:

(28) regulation of electrical administrators under AS 08.40.

* Sec. 8. AS 08.01.035 is amended to read:

Sec. 08.01.035. APPOINTMENTS AND TERMS. Members of boards subject to this chapter [AND MEMBERS OF THE REAL ESTATE COMMISSION UNDER AS 08.88] are appointed for staggered terms of four years. A member of a board serves until a successor is appointed. An appointment to fill a vacancy on a board is for the remainder of the

unexpired term. A member who has served all or part of two successive terms on a board may not be reappointed to that board unless four years have elapsed since the person has last served on the board.

* Sec. 9. AS 08.01.065(c) is amended to read:

(c) A fee established under this section should reflect, but should not exceed, the actual costs to the department of the activity for which the fee is charged except that the department may establish a fee that is less than the cost of the activity for which the fee is charged if the department determines that it is not reasonable to impose the full cost of the activity on the applicant or licensee. [THE ACTUAL OR ANTICIPATED COSTS TO THE DEPARTMENT OF SERVICES PROVIDED TO OR ON BEHALF OF A BOARD MUST REFLECT, TO THE EXTENT POSSIBLE, THE AMOUNT OF FEES THE DEPARTMENT COLLECTS FROM PERSONS IN OCCUPATIONS REGULATED BY THE BOARD.]

* Sec. 10. AS 08.40.190(c) is amended to read:

(c) Work within the exclusionary provisions of this section is nevertheless subject to the inspection provisions of AS 08.40.070 and must follow the regulations regarding workmanship adopted by the <u>department</u> [BOARD].

* Sec. 11. AS 09.45.730 is amended to read:

Sec. 09.45.730 TRESPASS BY CUTTING OR INJURING TREES OR SHRUBS. A person who cuts down, girdles, or otherwise injures or carries off a tree, timber, or shrub on the land of another person or on the street or highway in front of a person's house, or of a village, town, or city lot, or cultivated grounds, or on the commons or public grounds of a village, town, or city, or on the street or highway in front of them, without lawful authority, is liable to the owner of that land, or to the village, town, or city for treble the amount of damages which may be assessed in a civil action. However, if the trespass was

unintentional [CASUAL] or involuntary, or the defendant had probable cause to believe that the land on which the trespass was committed was the defendant's own or that of the person in whose service or by whose direction the act was done, or where the timber was taken from unenclosed woodland for the purpose of repairing a public highway or bridge upon the land or adjoining it, only actual damages may be recovered.

* Sec. 12. AS 12.55.035(b) is amended to read:

(b) Upon conviction of an offense, a defendant who is not an organization may be sentenced to pay, unless otherwise specified in the provision of law defining the offense, a fine of no more than

(1) $75,000 for murder in the first or second degree, sexual assault in the first degree, sexual abuse of a minor in the first degree, kidnapping, or misconduct involving a controlled substance in the first degree;

(2) $50,000 for a class A, B, or C felony;

(3) $5,000 for a class A misdemeanor;

(4) $1,000 for a class B misdemeanor;

(5) $300 for a violation.

* Sec. 13. AS 14.03.070 is amended to read:

Sec. 14.03.070. SCHOOL AGE. A child who is six years of age [OR WHO WILL BECOME SIX YEARS OF AGE] before August 15 following [PRECEDING] the beginning of the school year, and who is under the age of 20 and has not completed the 12th grade, is of school age.

* Sec. 14. AS 14.03.080(d) is amended to read:

(d) A child who is five years of age before August 15 following [PRECEDING] the beginning of the school year, and who is under school age, may enter a public school kindergarten.

* Sec. 15. AS 14.11.115(c)(1) is amended to read:

(1) "debt" means the principal amount of the direct and general obligation indebtedness of the municipality for which all taxable property is subject to taxation to pay the bond, note or other evidence of the debt, determined annually by the Department of Community and Regional Affairs in consultation with each municipality that is a school district and reported to the municipality and the commissioner of education; the determination shall be made by October 1 and report the outstanding debt as of July 1 of that year [IN ACCORDANCE WITH AS 14.17.140(c)];

* Sec. 16. AS 14.25.110(g) is amended to read:

(g) A member who is eligible for a service retirement salary under this chapter or under the Retirement Act of 1945 is entitled to a benefit of at least $25 per month for each year of credited service, excluding adjustments made under AS 14.25.142 or 14.25.143. If the member elected option two under former AS 14.25.063(b)(2) for payment of any indebtedness when the member initially applied for a retirement benefit, or if the member elected to receive an early retirement benefit under (b) of this section, the resulting benefit reduction continues in effect.

* Sec. 17. AS 14.30.030 is amended to read:

Sec. 14.30.030. REPORT OF VIOLATIONS AND PROCEDURES. The chief administrative officer of a district school or regional educational attendance area shall report all apparent violations of AS 14.30.010 to the governing body of the district. The governing body shall, on receiving the report or on the complaint of any person, provide for a full and impartial investigation of all charges of violation. In private or federal schools, the chief administrative officer shall make a full and impartial investigation of all apparent violations. If it reasonably appears upon investigation that a person has violated

AS 14.30.010, the governing body of a district school or regional educational attendance area, or the chief administrative officer of a private or federal school, shall make and file with the district court a complaint against the person, charging the violation. [THE JUDGE OR MAGISTRATE MAY ISSUE A WARRANT FOR THE ARREST OF THE PERSON AND MAY ACT UPON THE COMPLAINT.]

* Sec. 18. AS 14.43.120(d)(4) is amended to read:

(4) to attend an institution, other than a nonprofit institution, if the total amount of scholarship loans made to students to attend that institution exceeds $100,000 and the default rate on those loans exceeds 150 percent of the program default rate [BY MORE THAN 150 PERCENT] as defined by regulation.

* Sec. 19. AS 15.13.020(d) is repealed and reenacted to read:

(d) Members of the commission serve staggered terms of five years, or until a successor is appointed and qualifies. The terms of no two members who are members of the same political party may expire in consecutive years. A member may not serve more than one term. However, a person appointed to fill the unexpired term of a predecessor may be appointed to a successive full five-year term.

* Sec. 20. AS 15.25.040(a) is amended to read:

(a) The declaration is filed by either

(1) the actual physical delivery of the declaration in person or by mail at or before 5:00 p.m., prevailing time, June 1 of the year in which a general election is held for the office, or

(2) the actual physical delivery by telegram of a copy in substance of the statements made in paragraphs (1) - (5) of the declaration as required by AS 15.25.030 at or before 5:00 p.m., prevailing time, June 1 of the year in which a general election is held for the office and also the actual physical delivery of the declaration

containing paragraphs (1) - (16) [(1) - (15)] as required by AS 15.25.030 by registered mail which is received not more than 15 days after that time.

* Sec. 21. AS 24.60.030(c) is amended to read:

(c) Conflicts of interest are prohibited but there is not a conflict of interest if, as to a specific matter, there is no substantial impropriety or appearance of impropriety because

(1) the person's interest is relatively insignificant; or

(2) the person's authority is relatively far removed from any official action that could reasonably be affected by the potential conflict of interest, provided that no attempt has been made to remove the appearance of impropriety by delegating responsibility for official action.

* Sec. 22. AS 28.10.441(8) is amended to read:

(8) special permit for vehicle used for transport of disabled or handicapped person issued under AS 28.10.495 [AS PROVIDED IN AS 28.10.215] ..... none.

* Sec. 23. AS 39.20.180 is amended to read:

Sec. 39.20.180. TRANSPORTATION AND PER DIEM EXPENSES FOR MEMBERS OF BOARDS, COMMISSIONS, ETC. Except as otherwise provided by law, [FROM AND AFTER MARCH 27, 1962,] the provisions in this section relating to per diem and transportation govern exclusively [AND SUPERSEDE ALL OTHER PROVISIONS OF LAW] with respect to a member of a state board, commission, committee, judicial council, or other similar body of persons of the state organized or established under the authority of law, but excluding any other state employee other than a legislator, who is otherwise entitled by law to receive from the state payments for expenses of transportation, and for reimbursement or for per diem in lieu of reimbursement for other expenses incident to

duties as such member:

(1) for [FOR] transportation, the member is entitled either to the use of state transportation requests, or to be reimbursed for expenses of transportation to the same extent, in the same manner, and under the same conditions as provided for state officials and employees by the provisions of AS 39.20.110 - 39.20.170; [.]

(2) for [FOR] reimbursement for other expenses, the member is entitled to a per diem allowance prescribed by the commissioner of administration under the regulatory authority set out in AS 39.20.160 for each day or portion of a day spent in actual meeting or on authorized official business incident to duties as a member.

* Sec. 24. AS 44.21.160(f) is amended to read:

(f) The department [DIVISION OF DATA PROCESSING] shall provide [COORDINATE WITH THE DIVISION OF TELECOMMUNICATIONS IN PROVIDING] for the effective transfer of information by telecommunications through the establishment of compatible systems and common standards.

* Sec. 25. AS 44.81.270(a) is amended to read:

(a) At the direction of the Legislative Budget and Audit Committee under AS 24.20.271, the [THE] legislative auditor may conduct an audit of [CAUSE] the bank [TO BE AUDITED IN THE MANNER AND UNDER THE CONDITIONS PRESCRIBED BY AS 24.20.271 FOR AUDITS PERFORMED BY THE LEGISLATIVE AUDIT DIVISION]. The legislative audit division has free access to all books and papers of the bank that relate to its business and books and papers kept by a director, officer, or employee relating to or upon which a record of its business is kept, and may summon witnesses and administer oaths or affirmations in the examination of the directors, officers, or employees of the bank or any other person in relation to its affairs, transactions, and conditions, and may require and compel the production of records, books, papers,

contracts, or other documents by court order if not voluntarily produced.

* Sec. 26. AS 44.81.270(b) is amended to read:

(b) The bank shall be audited annually by independent outside auditors. The legislative auditor may confer with the outside auditors and review the workpapers of the audit. [AT THE DIRECTION OF THE LEGISLATIVE BUDGET AND AUDIT COMMITTEE UNDER AS 24.20.271, THE LEGISLATIVE AUDITOR MAY CONDUCT AN AUDIT OF THE BANK.]

* Sec. 27. AS 44.85.270(i) is amended to read:

(i) All references to the "reserve fund" in this section include special accounts within the reserve fund which may be created by the authority to secure the payment of particular bonds [, INCLUDING, WITHOUT LIMITATION, BONDS ISSUED BY THE CAPITAL CITY ESTABLISHED UNDER AS 29.14.010]. The commissioner of revenue may lend surplus money in the general fund to the authority for deposit to any account in the reserve fund in an amount equal to the required debt service reserve. The loans shall be made on such terms and conditions as may be agreed upon by the commissioner of revenue and the authority, including, without limitation, terms and conditions providing that the loans need not be repaid until the obligations of the corporation secured and to be secured by the account in the reserve fund are no longer outstanding.

* Sec. 28. AS 08.40.080; AS 15.05.016; AS 15.15.213; AS 19.10.220; AS 19.25.110, 19.25.120; AS 44.33.020(11); and AS 44.81.010(c) are repealed.

* Sec. 29. Sections 13 and 14 of this Act take effect July 1, 1988.

* Sec. 30. Except for secs. 13 and 14, this Act takes effect immediately under AS 01.10.070(c).

SB

419

STATE OF ALASKA
1988 LEGISLATIVE SESSION

BILL VERSION: CSSB 419 (Jud)
PUBLISH DATE: _____

FISCAL NOTE

REQUEST:

Revision Date: 4/14/88
Title: "An Act relating to the theft of timber products"
Sponsor: Senator Coghill
Requestor: Senate Judiciary

Agency Affected: Public Safety
BRU: Alaska State Troopers
Components: _____

EXPENDITURES/REVENUES: (Thousands of Dollars)

OPERATING	FY 88	FY 89	FY 90	FY 91	FY 92	FY 93
PERSONAL SERVICES						
TRAVEL						
CONTRACTUAL						
SUPPLIES						
EQUIPMENT						
LAND & STRUCTURES						
GRANTS, CLAIMS						
MISCELLANEOUS						
TOTAL OPERATING		-0-	-0-	-0-	-0-	-0-
CAPITAL		-0-	-0-	-0-	-0-	-0-
REVENUE		-0-	-0-	-0-	-0-	-0-

FUNDING: (Thousands of Dollars)

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

POSITIONS:

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

ANALYSIS: (Attach a separate page if necessary)

No fiscal impact is anticipated as a result of this legislation.

Prepared by: Diana Page, Administrative Assistant I
Phone: 465-4322
Division: Commissioner's Office
Date: 4/14/88

Approved by Commissioner: Arthur English
Date: 4/14/88
Agency: Public Safety

Distribution (by preparer):
Legislative Finance
Legislative Sponsor
Requestor
Office of Management and Budget
Impacted Agency(ies)

Original sponsor: Coghill

IN THE SENATE BY THE JUDICIARY COMMITTEE

CS FOR SENATE BILL NO. 419 (Judiciary)

IN THE LEGISLATURE OF THE STATE OF ALASKA

FIFTEENTH LEGISLATURE - SECOND SESSION

A BILL

For an Act entitled: "An Act relating to timber, defining the crime of trespass by cutting or injuring timber, regulating commercial sales of firewood, and authorizing disposition of state-owned unbranded and abandoned timber to persons for personal, noncommercial use."

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

* Section 1. AS 09.45.730 is repealed and reenacted to read:

Sec. 09.45.730. TRESPASS BY CUTTING OR INJURING TIMBER. (a) A person who cuts down, injures, or carries off timber without lawful authority is liable for treble the amount of damages that may be assessed in a civil action

(1) to the owner of the land for destruction or removal of the timber from the owner's land;

(2) to the state for destruction or removal of the timber from state land;

(3) to a municipality or village for destruction or removal of the timber from the land of the municipality or village.

(b) Notwithstanding (a) of this section, the person who cuts down, injures, or carries off timber without lawful authority is liable for actual damages to the owner of the land specified in (a) of this section if

(1) the trespass was unintentional or involuntary;

(2) the defendant had probable cause to believe that the land on which the trespass was committed was the defendant's own or

that of the person in whose service or by whose direction the act was done; or

(3) the timber was taken from unenclosed woodland for the purpose of repairing a public highway or bridge that is constructed on the land or adjoining it.

(c) In this section, "timber" means

(1) live trees and shrubs; and

(2) trees and shrubs grown on the land that are dead from any cause and remain on the land.

* Sec. 2. AS 41.15 is amended by adding new sections to article 5 to read:

Sec. 41.15.910. COMMERCIAL FIREWOOD SALES. (a) A person may not sell firewood without first obtaining a commercial firewood sales permit from the commissioner.

(b) The commissioner shall issue a permit to a person who provides the commissioner with adequate proof of ownership of the firewood to be sold. The commissioner may accept as proof of ownership

(1) a harvest permit, contract, or other legal instrument issued by the owner of the land from which the firewood was harvested or, if the firewood was harvested from public land, issued by a municipality or a state or federal agency that specifies the

(A) date of execution of the legal instrument and the date of its termination, if any;

(B) name and address of the permittee or contractor who harvested the firewood;

(C) location, by legal description or legal address, where the firewood was harvested; and

(D) estimated amount, volume, and species of the firewood harvested from each location;

(2) a bill of sale showing title to the firewood that specifies the

(A) date of execution of the bill of sale;

(B) name and address of the person who sold the firewood to the permit applicant;

(C) name and address of the permit applicant;

(D) amount, volume, and species of the firewood transferred by the bill of sale; and

(E) location, by legal description or legal address, from which the firewood was harvested; or

(3) a certificate of registration issued as evidence of compliance with AS 45.50.210 - 45.50.325.

(c) The commissioner may include in the permit the terms and conditions that the commissioner believes to be necessary to carry out this section.

(d) A permit is valid for one year.

(e) The commissioner may adopt regulations to implement and enforce this section.

Sec. 41.15.915. CIVIL PENALTY FOR SALES WITHOUT PERMIT. In addition to damages under AS 09.45.730, a person who sells firewood in violation of AS 41.15.910, who violates a term or condition of the permit issued under AS 41.15.910, or who violates a regulation adopted under AS 41.15.910 is liable to the state in a civil action for

(1) the reasonable costs incurred by the state in the detection, investigation, and attempted correction of the violation, including reasonable court costs and attorney's fees; and

(2) three times the retail value of the firewood that is sold in violation of AS 41.15.910, the permit, or the regulations.

Sec. 41.15.920. SALES WITHOUT PERMIT MADE A VIOLATION. (a) A

person who knowingly sells firewood in violation of AS 41.15.910 or who knowingly violates a term or condition of the permit issued under AS 41.15.910 or a regulation adopted under AS 41.15.910 is guilty of a violation.

(b) If, in a proceeding under this section, the defendant shows, by a preponderance of the evidence, that the commercial firewood was harvested from the property of the defendant or from the property of another with the permission of the property owner, the court may not impose a fine.

Sec. 41.15.925. INJUNCTIONS. (a) The superior court has jurisdiction to enjoin a violation of AS 41.15.910 - 41.15.930, a regulation adopted under AS 41.15.910 - 41.15.930, or a permit, or a term or condition of a permit issued under AS 41.15.910 - 41.15.930.

(b) In an action brought under this section, temporary or preliminary relief may be obtained upon a showing of an imminent threat of continued violation and probable success on the merits, without the necessity of demonstrating irreparable physical harm.

Sec. 41.15.930. DEFINITIONS. In AS 41.15.910 - 41.15.930

(1) "commissioner" means the commissioner of natural resources;

(2) "firewood" means natural logs or portions of natural logs suitable for use as a solid fuel, with processing of the logs limited to cutting to length and splitting;

(3) "permit" means a commercial firewood sales permit authorized by AS 41.15.910.

* Sec. 3. AS 45.50.235(b) is amended to read:

(b) Timber property <u>that</u> [WHICH] becomes state property under the provisions of <u>(a) of</u> this section may be

<u>(1)</u> sold under terms and conditions established by the

director of the division of lands; or

(2) recovered, without a permit, by any person for personal, noncommercial use.

Senator John B. (Jack) Coghill

Alaska State Legislature

Box V
Juneau, Alaska 99811
(907) 465-4797

Box 55028
North Pole, Alaska 99705
(907) 488-0869

MEMORANDUM

TO: Senate Judiciary Committee Members

FROM: Senator Jack Coghill

DATE: April 14, 1988

RE: SB 419 Theft of Timber
CS SB 419 (Resources) Timber Theft and Trespass

Theft of timber and firewood and timber trespass, with subsequent sale of the wood to consumers, is a serious problem in timber producing areas of the state. Persons entering public or private land without a permit for cutting timber frequently take logs or firewood for their own use or sale. This theft of timber or trespass often includes cutting logs or firewood from storage areas of high value timber that has been cut, graded and stored while waiting transportation to a processing facility by the legal owner. On a state timber sale, for example, the state gets paid for the volume of wood hauled to the mill. If the wood is stolen in the woods and not delivered to the mill, the state receives no revenue.

The downturn in the state's economy has dramatically increased the theft of timber and trespass. However, statutes have not been enforceable by the DNR, Div. of Forestry, or the State Troopers. The late Senator Don Bennett and a Task Force started to address this serious problem several years ago. Current legal revisions with enforceable penalty clauses are now in this bill, so that illegal operations will first be discouraged, and persistent illegal operations can be heavily penalized.

Your support of CS SB419 (Resources) will greatly benefit the legal timber industry, private land owners, and the state-owned timber in Alaska.

RECD 3/1/88

STATE OF ALASKA
1988 LEGISLATIVE SESSION

BILL VERSION: SB 419
PUBLISH DATE: _____

FISCAL NOTE

REQUEST:

Revision Date: _____
Title: "An Act relating to the theft of timber products."
Sponsor: Senator Coghill
Requestor: Senate Judiciary

Agency Affected: Public Safety
RU: Alaska State Troopers
Components: _____

EXPENDITURES/REVENUES: (Thousands of Dollars)

OPERATING	FY 88	FY 89	FY 90	FY 91	FY 92	FY 93
PERSONAL SERVICES						
TRAVEL						
CONTRACTUAL						
SUPPLIES						
EQUIPMENT						
LAND & STRUCTURES						
GRANTS, CLAIMS						
MISCELLANEOUS						
TOTAL OPERATING	-0-	-0-	-0-	-0-	-0-	-0-
CAPITAL	-0-	-0-	-0-	-0-	-0-	-0-
REVENUE	-0-	-0-	-0-	-0-	-0-	-0-

FUNDING: (Thousands of Dollars)

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

POSITIONS:

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

ANALYSIS: (Attach a separate page if necessary)

No fiscal impact is anticipated as a result of this legislation.

Prepared by: Diana Page, Administrative Assistant
Phone: 2/29/88
Division: Commissioner's Office
Date: _____

Approved by Commissioner: L. Hartig Dep. Comm
Date: 2-29-88
Agency: D. Scott - Bill / D. Wilson Admin

Distribution (by preparer):
Legislative Finance
Legislative Sponsor
Requestor
Office of Management and Budget
Impacted Agency(ies)

STATE OF ALASKA

STEVE COWPER, GOVERNOR

DEPARTMENT OF NATURAL RESOURCES

OFFICE OF THE COMMISSIONER

400 WILLOUGHBY AVE.
JUNEAU, ALASKA 99801-1796
PHONE: (907) 465-2400

March 7, 1988

The Honorable Jay Kerttula
Chairman, Senate Judiciary Committee
P.O. Box V
Juneau, Alaska 99811

MAR 1 [illegible] 1988

Dear Senator Kerttula:

Subject: SB 419, an act relating to theft of timber products.

Position: The Department of Natural Resources supports SB 419 with changes as proposed by the Attorney General's Office.

Background: SB 419 attempts to address a problem faced by the Division of Forestry and many commercial firewood dealers in Northern Alaska. This problem involves the unauthorized harvest of timber from state lands. The existing statutes provide inadequate authority to deal with this problem. At present, the Division of Forestry must prove that the firewood seller unlawfully obtained timber from state land, which is difficult to do once timber has been removed from the harvest site. The department, the sponsor of the house version of this bill (which is identical to the senate version), and private timber operators have recently worked with the office of the Attorney General in Fairbanks to craft language that will more effectively get at the problem. This language has been provided to the sponsors and committee staff, as well as an analysis by John McDonagh, Assistant Attorney General.

Recommendation: The department supports the concept of the bill as originally written but prefers the changes drafted by the office of the Attorney General as a more effective way to address the problem.

We look forward to working with the committee and staff through the progress of this legislation.

Sincerely,

Judith M. Brady
for Commissioner

cc: Committee Members
Bill Sponsors
Bob Evans
Rod Swope

10-J9LH

STATE OF ALASKA
1988 LEGISLATIVE SESSION

BILL VERSION: SB 419
PUBLISH DATE: 2-12-88

FISCAL NOTE

REQUEST:

Revision Da :: _____
Title: An Act relating to theft of timber products
Sponsor: Coghill
Requestor: _____

Agency Affected: Natural Resources
BRU: Forest Management

Components: Forest Management

EXPENDITURES/REVENUES: (Thousands of Dollars)

OPERATING	FY 88	FY 89	FY 90	FY 91	FY 92	FY 93
PERSONAL SERVICES						
TRAVEL						
CONTRACTUAL						
SUPPLIES						
EQUIPMENT						
LAND & STRUCTURES						
GRANTS, CLAIMS						
MISCELLANEOUS						
TOTAL OPERATING	0	0	0	0	0	0
CAPITAL						
REVENUE						

FUNDING: (Thousands of Dollars)

GENERAL FUND						
FEDERAL FUNDS						
OTHER						
TOTAL	0	0	0	0	0	0

POSITIONS:

FULL-TIME						
PART-TIME						
TEMPORARY						

ANALYSIS : (Attach a separate page if necessary)

Prepared by: George K. Hollett — Phone: 465-2491
Division: Forestry — Date: 2-29-88

Approved by Commissioner: [signature] — Date: 2-9-88
Agency: Natural Resources

Distribution (by preparer):
Legislative Finance
Legislative Sponsor
Requestor
Office of Management and Budget
Impacted Agency(ies)

STATE OF ALASKA
THE LEGISLATURE
LEGISLATIVE AFFAIRS AGENCY

POUCH Y STATE CAPITOL
JUNEAU, ALASKA 99811
907 465 3800

M E M O R A N D U M February 29, 1988

SUBJECT: Draft CSSB 419 (Judiciary)

TO: Senator Jay Kerttula
Chairman
Senator Judiciary Committee

FROM: Jack Chenoweth
Legislative Counsel

Enclosed is a draft Committee Substitute for Senate Bill 419, based on notes and suggestions provided by Beth Kerttula.

The bill draft shifts the focus from "theft of timber" to the narrower topic of unauthorized harvest of timber and commercial sale of it as firewood, and reflects the recommendation that "[t]he commercial sale phase offers the best opportunity for effective curative legislation."

Please note the following changes from the notes and suggestions that were provided.

The notes suggested locating the new provision in article 1 of AS 41.15, a subdivision that emphasizes protection of forested lands chiefly against forest fires. Since this matter is somewhat unrelated to that, but does address a serious problem, I have chosen to locate the new material in that portion of AS 41.15 that collects "miscellaneous provisions."

In the suggested AS 41.15.025(a), the notes excepted "a federal, state, or local government entity" from the definition of "a person." These terms are already excluded. See AS 01.10.060(8). It is not necessary to do so again.

I have "loosened" the proof of ownership requirement slightly. In the notes provided by Ms. Kerttula, proof of ownership could be shown by provision of either the "legal instrument" or the "bill of sale." I have used

substantially the same language, but suggest that the commissioner could, by authority of regulation, accept other documentation that the commissioner reasonably believes would reflect a legal acquisition of the firewood.

I have deleted the material in the proposed AS 41.15.025(b)(1)(E) and (b)(2)(F) of the notes. Again, the commissioner may establish other "proofs of ownership" under authority to adopt regulations. What I thought was unnecessary in this suggestion was the giving of permission to the commissioner to require "any other information . . . necessary to establish adequate proof of ownership" in the context of a "legal instrument" or "bill of sale." Since most wood sellers will likely try to fulfill one of those two requirements, those two approaches should be specific as to their requirements as a matter of statute; the commissioner should not be allowed to add to them on a case-by-case basis.

The second part of proposed AS 41.15.025(c) is unnecessary. The statute cited [AS 41.15.950] specifies persons who may enforce the provision of AS 41.15.

The second part of proposed AS 41.15.025(d) is, to my mind, unnecessary. The statutory provisions will take effect. The statute does not require the commissioner to adopt regulations to give the statute effect, but permits the commissioner to do so to carry out its provisions.

I have separated out the civil and criminal penalties into their own respective sections.

If this memorandum or the bill draft prompt questions, please contact me.

Enclosure

JBC:bb
wkb3/049

5-1886B
Chenoweth
2/29/88

Original sponsor: Coghill

IN THE SENATE BY THE JUDICIARY COMMITTEE

CS FOR SENATE BILL NO. 419 (Judiciary)

IN THE LEGISLATURE OF THE STATE OF ALASKA

FIFTEENTH LEGISLATURE - SECOND SESSION

A BILL

For an Act entitled: "An Act regulating commercial sales of firewood."

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

* Section 1. AS 41.15 is amended by adding new sections to article 5 to read:

Sec. 41.15.910. COMMERCIAL FIREWOOD SALES. (a) A person may not sell firewood without first obtaining a commercial firewood sales permit from the commissioner.

(b) The commissioner shall issue a permit to a person who provides the commissioner with adequate proof of ownership of the firewood to be sold. The commissioner may accept as proof of ownership

(1) a harvest permit, contract, or other legal instrument issued by the owner of the land from which the firewood was harvested or, if the firewood was harvested from public land, issued by a municipality or a state or federal agency that specifies the

(A) date of execution of the legal instrument and the date of its termination, if any;

(B) name and address of the permittee or contractor who harvested the firewood;

(C) location, by legal description or legal address, where the firewood was harvested; and

(D) estimated amount, volume, and species of the firewood harvested from each location; or

(2) a bill of sale showing title to the firewood that specifies the

(A) date of execution of the bill of sale;

(B) name and address of the person who sold the firewood to the permit applicant;

(C) name and address of the permit applicant;

(D) amount, volume, and species of the firewood transferred by the bill of sale; and

(E) location, by legal description or legal address, from which the firewood was harvested.

(c) The commissioner may include in the permit the terms and conditions that the commissioner believes to be necessary to carry out this section.

(d) A permit is valid for one year.

(e) The commissioner may adopt regulations to implement and enforce this section.

Sec. 41.15.915. CIVIL PENALTY FOR SALES WITHOUT PERMIT. A person who sells firewood without a valid commercial firewood sales permit under AS 41.15.910 who fails to comply with a term or condition of the permit or who fails to comply with a regulation adopted under AS 41.15.910 is liable to the state in a civil action for

(1) the reasonable costs incurred by the state in the detection, investigation, and attempted correction of the violation, including reasonable court costs and attorney's fees; and

(2) the gross profits realized by the person from the sale of firewood made in violation of AS 41.15.910, the permit, or the regulations.

Sec. 41.15.920. CRIMINAL PENALTY. A person who knowingly sells firewood without a valid commercial firewood sales permit or who knowingly violates a term or condition of the permit or a regulation adopted under AS 41.15.910 is guilty of a class B misdemeanor.

Sec. 41.15.925. INJUNCTIONS. (a) The superior court has jurisdiction to enjoin a violation of AS 41.15.910 - 41.15.930, a regulation adopted under AS 41.15.910 - 41.15.930, or a permit, or a term or condition of a permit issued under AS 41.15.910 - 41.15.930.

(b) In an action brought under this section, temporary or preliminary relief may be obtained upon a showing of an imminent threat of continued violation and probable success on the merits, without the necessity of demonstrating irreparable physical harm.

Sec. 41.15.930. DEFINITIONS. In AS 41.15.910 - 41.15.930

(1) "commissioner" means the commissioner of natural resources;

(2) "firewood" means natural logs or portions of natural logs suitable for use as a solid fuel, with processing of the logs limited to cutting to length and splitting;

(3) "permit" means a commercial firewood sales permit authorized by AS 41.15.910.

Rec'd 2/29/88 EJK

MEMORANDUM

State of Alaska

Department of Law

TO: The Honorable Judith M. Brady
Commissioner
Department of Natural Resources

DATE: February 12, 1988

FILE NO:

TELEPHONE NO: 452-1568

THRU:

SUBJECT: HB 339

DEPARTMENT OF NATURAL RESOURCES
FEB 16 1988
COMMISSIONER'S JUNEAU

FROM: John A. McDonagh
Assistant Attorney General

Your February 5, 1988 memorandum requests the Department of Law to review HB 339 entitled "An act relating to theft of timber products." We have discussed the bill with your office staff, the Division of Forestry, the District Attorney's Office, and Representative Davis' office. Based upon those discussions and upon our own reading of HB 339, we offer the following comments.

Background.

HB 339 attempts to address a serious problem faced by the Division of Forestry and many commercial firewood sellers in northern Alaska. The problem involves the unauthorized harvest of timber from state, borough, and private lands, and the commercial sale of that timber as firewood. Commercial firewood sellers who purchase timber from the state, the borough, and private landowners complain that they are being driven out of business by sellers who harvest firewood timber without the permission of, or payment to, the rightful landowner. The Division of Forestry informs us that it has received numerous such complaints from legitimate commercial firewood sellers.

The existing statutes and regulations provide inadequate authority to deal with this problem. At present, the Division of Forestry must prove that the firewood seller unlawfully obtained the timber from state land. Generally, this requires a division employee to catch the seller "in the act" of unlawfully harvesting the timber. The present laws do not regulate the sale of unlawfully harvested firewood, nor do the laws give the division authority to address the problems posed by unauthorized firewood harvests from non-state lands. All of the persons with whom we have discussed this problem believe it is serious and requires corrective legislation.

Analysis.

The present version of HB 339 presents several problems. Section 2 of the bill creates a new crime called "theft of timber products." This crime occurs when a person "with intent to deprive another person of property . . . transports on a public highway or water of the state timber products . . . without proof of ownership of the timber products." Section 1 of the bill amends the theft definition statute, AS 11.46.100, to include "theft of timber products" within the theft definition.

The first problem concerns the bill's application of the "theft" concept. The act of transporting timber products on a highway without proof of ownership does not constitute theft under traditional common law and statutory principles. The District Attorney's Office has questioned the wisdom of broadening the AS 11.46.100 theft definition beyond its traditional scope through the addition of this new offense. Stated more simply, the Department of Law is somewhat concerned that "theft of timber products", as defined in the bill, is not really "theft" as understood by courts, juries, law enforcement officers, and the public.

A second problem concerns the bill's broad coverage. The bill criminalizes transportation of "timber products" on a highway or waterway without proof of ownership. The bill does not separately define "timber products", but states that these products include "deciduous or coniferous trees, sawlogs, poles, cedar products, pulp logs, fuelwood, or other timber products."[1] An extremely wide variety of wood products could be construed as "timber products" under the bill. It therefore appears that the bill's prohibition goes far beyond what is reasonably necessary to address the problem of commercial sales of unlawfully harvested firewood.

Finally, the bill presents potential problems with enforcement and public perception. The Division of Forestry informs us that the bill would be enforced primarily through highway stops and spot checks of persons transporting "timber products." Once stopped, the person would have to produce "proof of ownership" of the timber products. Given the traditional Alaska notions of personal liberty, such an enforcement scheme may well prove unpopular and difficult to implement.

---

[1]Subsection (b) sets forth defenses to prosecution that somewhat limit the bill's application. However, these defenses
(Footnote Continued)

Recommendation.

All of the persons with whom we have discussed this bill agree that legislation is needed to address the problems posed by the commercial sale of unlawfully harvested firewood. In theory, curative legislation could be directed at any of three distinct phases of the problem: the harvest phase; the transportation phase; or the commercial sale phase.

Because firewood may be unlawfully harvested from a variety of state, borough, and private lands, and because it is often impossible to catch a person "in the act" of harvesting firewood from these lands, we suggest that legislation should not focus on the harvest phase. Because of the potential enforcement and public perception problems discussed above, legislation directed at the transportation phase seems unacceptable. Also, it may be difficult to determine whether wood products in transit are intended for resale as commercial firewood.

The commercial sale phase offers the best opportunity for effective curative legislation. The sale phase is easily identifiable: Most commercial firewood sellers advertise in a prominent manner. The sale phase is also the convergence point for firewood unlawfully harvested from the various land categories. Finally, if legislation is directed at the sale phase, one can tailor the legislation to focus solely upon the sellers of commercial firewood. Properly tailored legislation can avoid the overbreadth problems, the enforcement problems, and the public perception problems discussed above.

At your office's request, we have prepared a suggested outline of legislation directed at the sale phase. A copy is attached. At Larry Ostrosky's suggestion, we have sent copies of this memorandum and the outline to legislative drafter Jack Chenoweth and to Representative Davis' office. If you have any questions or if we may be of further assistance, please do not hesitate to contact me.

JAM/mjf
Attachment
cc: Jack Chenoweth
Representative Mike Davis

(Footnote Continued)
are narrow in scope and, as defenses, must be raised by the accused after he is charged with the crime.

DRAFT ⊗

IN THE HOUSE BY: _____

HOUSE BILL NO. _____

IN THE LEGISLATURE FOR THE STATE OF ALASKA

FIFTEENTH LEGISLATURE - SECOND SESSION

A BILL

For an Act entitled: "An Act relating to the regulation of commercial firewood sales."

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

* Section 1. AS 41.15 is amended by adding a new section to read:

Sec. 41.15.025. COMMERCIAL FIREWOOD SALES.

(a) A person, other than a federal, state, or local government entity, who intends to sell firewood must first obtain a commercial firewood sales permit from the Commissioner.

(b) Upon request, the Commissioner may issue a commercial firewood sales permit to a person who provides the Commissioner with adequate proof of ownership of the firewood to be sold. As used in this section, "proof of ownership" includes one or more of the following:

(1) A permit, contract, or other legal instrument issued by the owner of the land from which the firewood was harvested that specifies

(A) the date of execution of the legal instrument and the date of its termination, if any;

(B) the name and address of the permittee or contractor who harvested the firewood;

⊗ DRAFT

(C) each location, by legal description or legal address, from which the firewood was harvested;

(D) the estimated amount, volume, and species of the firewood harvested from each location; and

(E) any other information the Commissioner deems necessary to establish adequate proof of ownership.

(2) A bill of sale showing ownership of the firewood that specifies

(A) the date of execution of the bill of sale;

(B) the name and address of the person who sold the firewood to the commercial firewood sale permit applicant;

(C) the name and address of the commercial firewood sale permit applicant;

(D) the amount, volume, and species of the firewood transferred by the bill of sale;

(E) the location, by legal description or legal address, of the property from which the firewood was harvested.

(F) any other information the Commissioner deems necessary to establish adequate proof of ownership.

(c) Sales of firewood without a commercial firewood sales permit are prohibited. The Commissioner and the

persons designated in AS 41.15.950(a) shall have authority to enforce this section.

(d) The Commissioner may adopt regulations to implement and enforce this section. However, adoption of regulations is not a prerequisite to implementation and enforcement of the requirements set forth in this section.

(e) The Commissioner may include in a commercial firewood sales permit the terms and conditions the Commissioner deems necessary to carry out this section. The duration of a commercial firewood sales permit shall not exceed one year.

(f) A person who sells firewood without a valid commercial firewood sales permit, or who fails to comply with the permit's terms, or who fails to comply with a regulation adopted under this section, shall be liable to the state in a civil action for

(1) the reasonable costs incurred by the state in the detection, investigation, and attempted correction of the violation, including but not limited to reasonable court costs and attorney's fees; and

(2) the gross profits realized by the violator from the sale of firewood made in violation of this section, the permit, or the regulations;

(g) The superior court has jurisdiction to enjoin a violation of this section, a permit issued under this section, or a regulation adopted under this section. In actions brought under this section, temporary or preliminary relief may be obtained upon a showing of imminent threat of continued violation and probable success on the merits, without the necessity of demonstrating physical irreparable harm.

(h) A person who knowingly sells firewood without a valid commercial firewood sales permit, or who knowingly violates a permit term or a regulation adopted under this section, is guilty of a class B misdemeanor.

*Section 2. AS 41.15.170 is amended by adding a new paragraph to read:

(5) "firewood" means natural logs or portions thereof suitable for use as a solid fuel with processing limited to cutting to length and splitting.

SB

445

REPRESENTATIVE
C.E. "SWACK" SWACKHAMMER

Alaska State Legislature

SOLDOTNA
P.O. BOX 417
SOLDOTNA, ALASKA 99669
(907) 262-7663

JUNEAU
BOX V
JUNEAU, ALASKA 99811
(907) 465-2689

House of Representatives

MEMORANDUM

FEB 26 1988

TO: Senator Jay Kerttula, Chair
Alaska State Senate Judiciary Committee

FROM: Rep. C.E. Swackhammer

DATE: February 26, 1988

TOPIC: House Bill 445

On February 22, 1988, the aforementioned House Bill successfully passed the House with a vote of 39 to 0. While in the House it was given one referral, the Judiciary standing committee on February 18, 1988.

This bill merely establishes intent language that the effective date of HB 140, passed last year through your effort, is immediate. House Bill 140 changed the serving of mandatory parole from 181 day sentences to a minimum sentence of two years; this impacts offenders guilty of misdemeanors or non-presumptive sentence felonies.

Upon the effective date, Corrections implemented it and realized an immediate positive impact. Mr. Trivette, Executive Director of the Parole Board, attributed the majority of a 181 case reduction to this enactment. Approximately three months later, an AG's opinion indicated that the new law was applicable solely to persons committing a crime after the effective date. Consequently, the positive effect, to both the state and the offender, halted.

Attached is the bill packet used on the House side for your edification.

I solicit your support for the swift passage of this enabling legislation. It was the implied intent of HB 140 to have its effective date immediate.

CES/cn

HOUSE BILL 445

COVER PACKET INDEX

Introduction Memorandum, Rep. C.E. Swackhammer

Support Letter, Sam Trivette, Exec. Dir. Parole Board

~~AG Opinion Re: House Bill 140~~

Leg. Legal Opinion Re: House Bill 445

→ DELETED IN FINAL PACKET

· REPRESENTATIVE
C.E. "SWACK" SWACKHAMMER

Alaska State Legislature

SOLDOTNA

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(907) 465-2689

House of Representatives

MEMORANDUM

TO: All Interested Parties

FROM: Rep. C.E. Swackhammer

DATE: February 10, 1988

TOPIC: House Bill 445

During the first session of the 15th Legislature, House Bill 140 passed both houses with virtually no opposition. This piece of legislation had an immediate and positive impact.

The bill changed the serving of mandatory parole from 181 day sentences to a minimum sentence of two years. It was demonstrated that this would basically impact those offenders who were guilty of misdemeanors or non-presumptive sentence felony offenses. Offenders routinely receive probation to follow their convictions.

The Alaska Board of Parole conducts approximately 1400 formal hearings a year, utilizing three professional staff and a clerk typist. In 1987, there were 135 final mandatory parole violation hearings. With only isolated exceptions, these violations could have been processed through probation. Parolees and probationers are seen by the same Probation Officers.

As stated in Sam Trivette's letter (attached), the legislation was enacted the effective date of the bill. Mr. Trivette states the positive impact was immediate, he attributes the majority of a 181 case reduction to this enactment. Approximately three months later, a Dept. of Law opinion indicated that the new legislation applied solely to those persons committing a crime after the effective date of the bill. The positive effects "ground to a halt." Consequently, they are also postponed for an extended period of time.

House Bill 445 merely establishes intent language that the effective date of House Bill 140 is immediate.

I solicit your support. The implied intent of House Bill 140 was to have it immediately effective. This bill, as in the case of HB 140, has a zero fiscal note. It simply allows more time for supervising offenders, having more serious offenses.

STATE OF ALASKA

STEVE COWPER, GOVERNOR

DEPARTMENT OF CORRECTIONS

BOARD OF PAROLE

ALASKA BOARD OF PAROLE
P.O. BOX T
JUNEAU, ALASKA 99811-2000
PHONE: (907) 465-3384

February 8, 1988

Representative C. E. Swackhammer
Alaska House of Representatives
Alaska State Legislature
P.O. Box V
Juneau, Alaska 99811

RE: House Bill 140

Dear Representative Swackhammer:

You have asked our opinion on the impact House Bill 140 [Chapter 77, SLA 1987] has had on the number of mandatory parolees. The following information is provided in response.

We met with the Department of Law staff this summer after the Governor signed the bill. Law agreed any prisoner being released on the effective date of the bill, September 13, 1987 or thereafter, would be subject to the 2 year minimum to be on mandatory parole. We notified all institutional parole officers of this, and effective 9/13/87, only prisoners with sentences of 2 years or longer went out on mandatory parole. On December 10, 1987, we received the Department of Law's opinion indicating we could only apply HB 140 to those prisoners whose crimes were committed on September 13, 1987 or thereafter. After discussing this opinion thoroughly with Law, we advised Corrections' employees through memorandum on December 11 to apply HB 140 only to those prisoners whose crimes were committed 9/13/87 or thereafter.

For the first six months of 1987, we set supplemental conditions on 348 mandatory parolees. During the second six months of 1987, we set mandatory parole conditions on 167 cases. I think this drop of 181 cases in the second half of the year can be attributed primarily to HB 140. Again, I have not kept actual figures, but we believe the number of mandatory parole packets has increased significantly in the last 1 1/2 months. We had over 2 feet of files awaiting action this morning.

As you know, it take a significant amount of time to process and supervise mandatory parole cases. Even if every mandatory parolee followed all conditions, handling this additional workload of about 181 case would take a tremendous amount of time. Unfortunately, many of these mandatory parolees appear before us at violation hearings. We held about 135 final mandatory parole violation hearings in 1987. This does not include preliminary hearings. Corrections gives the parole officer credit for 12 hours for each parole violation processed. Handling these 135 cases is the equivalent to the work of

more than one full-time parole officer spread out over a years time.

As you can see, not being allowed to apply the bill to all prisoners released on September 13, 1987, is having a significant impact on the workload of the Parole Board and on the Department of Corrections. We strongly support an amendment that would allow the immediate application of HB 140 to everyone released September 13, 1987 or thereafter.

I will be glad to supply any additional information we have.

Cordially,

Samuel H. Trivette
Executive Director

cc: Susan Humphrey-Barnett, Commissioner
Department of Corrections

Bill Parker, Special Assistant
Department of Corrections

STATE OF ALASKA
THE LEGISLATURE

LEGISLATIVE AFFAIRS AGENCY

POUCH Y · STATE CAPITOL
JUNEAU, ALASKA 99811
907-465-3800

MEMORANDUM February 8, 1988

SUBJECT: Applicability of Ch. 77, SLA 1987
(Work Order 5-1842)

TO: Representative C.E. Swackhammer

FROM: Jack Chenoweth
Legislative Counsel

The December 8, 1987, Opinion of the Attorney General guides the Department of Corrections and the Parole Board in the administration of those provisions of AS 33.16 and AS 33.20 that were amended by ch. 77, SLA 1987. I am of the view that the opinion reaches a defensible conclusion and contains no obvious error that might prompt a request for its reconsideration.

While the testimony before one or more legislative committees probably supports the contention that the provisions of the bill were to apply to all prisoners, there is simply nothing in the record of the drafting file maintained by this office to confirm your assertion that the Legislature intended HB 140 to apply to persons incarcerated on the effective date of the Act.

As your request states, the Legislature may set aside the effect of the opinion by clarifying legislative intent in passing the 1987 legislation. Please do not assume that a committee report or letter of intent will do that. A draft of a bill to accomplish the effect you intended accompanies this memorandum.

If this memorandum and the accompanying legislation prompt questions, please contact me.

Enclosure

JC:gc
WKG1:072

STATE OF ALASKA
1988 LEGISLATIVE SESSION

No. 1

BILL VERSION: CSHB 445
PUBLISH DATE: HOUSE 2/19/88

FISCAL NOTE

REQUEST:

Revision Date: _____
Title: "An Act relating to the applicability of ch77, SLA 1987."
Sponsor: Rep. Swackhammer, Gruenberg & Rieger
Requestor: _____

Agency Affected: Department of Corrections
BRU: Parole Board
Components: _____

(144)

EXPENDITURES/REVENUES: (Thousands of Dollars)

OPERATING	FY 88	FY 89	FY 90	FY 91	FY 92	FY 93
PERSONAL SERVICES						
TRAVEL						
CONTRACTUAL						
SUPPLIES						
EQUIPMENT						
LAND & STRUCTURES						
GRANTS, CLAIMS						
MISCELLANEOUS						
TOTAL OPERATING	0	0	0	0	0	0
CAPITAL	0	0	0	0	0	0
REVENUE	0	0	0	0	0	0

FUNDING: (Thousands of Dollars)

GENERAL FUND						
FEDERAL FUNDS						
OTHER						
TOTAL	0	0	0	0	0	0

POSITIONS:

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

ANALYSIS: (Attach a separate page if necessary)

Susan E. Knighton

Prepared by: Susan Knighton, Director of Admin. Services
Phone: 465-3376
Division: Administration
Date: 2/18/88

Susan Humphrey-Barnett
Approved by Commissioner: Susan Humphrey-Barnett
Date: 2/18/88
Agency: Department of Corrections

Distribution (by preparer):
Legislative Finance
Legislative Sponsor
Requestor
Office of Management and Budget
Impacted Agency(ies)

SB

447

STATE OF ALASKA
1988 LEGISLATIVE SESSION

Bill Version: CS SB 447 (C+RA)
Publish Date: Senate 3/2/88

FISCAL NOTE

REQUEST:

Revision Date:
Agency Affected: Department of Administration
Title: An act relating to liability for damage or injury from hazardous recreational activities
BRU: Risk Management
Components:
Sponsor: Duncan
Requestor:

EXPENDITURES/REVENUES: (Thousands of Dollars)

OPERATING	FY 88	FY 89	FY 90	FY 91	FY 92	FY 93
PERSONAL SERVICES	0	0	0	0	0	0
TRAVEL	0	0	0	0	0	0
CONTRACTUAL	0	0	0	0	0	0
SUPPLIES	0	0	0	0	0	0
EQUIPMENT	0	0	0	0	0	0
LAND & STRUCTURES	0	0	0	0	0	0
GRANTS, CLAIMS	0	0	0	0	0	0
MISCELLANEOUS	0	0	0	0	0	0
TOTAL OPERATING	0	0	0	0	0	0
CAPITAL	0	0	0	0	0	0
REVENUE	0	0	0	0	0	0

FUNDING: (Thousands of Dollars)

GENERAL FUND	0	0	0	0	0	0
FEDERAL FUNDS	0	0	0	0	0	0
OTHER	0	0	0	0	0	0
TOTAL	0	0	0	0	0	0

POSITIONS:

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

ANALYSIS: (Attach a separate page if necessary)

While no immediate fiscal relief is shown, this legislation would help control possible future liabilities; thereby generating considerable claims savings (including defense costs) for the State in the future.

Prepared By: Donald J. Hitchcock, Director Phone: 465-2180
Division: Risk Management Date: 03-01-88

Approved by Commissioner: John M. Andrews Date: 3/4/88
Agency: Department of Administration

Distribution (by preparer):
Legislative Finance
Legislative Sponsor
Requestor
Office of Management and Budget
Impacted Agency(ies)

Rev: 1/11/88

15/9K1/0229-09

SB

448

ALASKA ACADEMY OF TRIAL LAWYERS
604 WEST SECOND AVENUE
ANCHORAGE, ALASKA 99501
(907) 276-1130

April 15, 1988

Representative John Sund
Chairman
House Judiciary Committee
P. O. Box V
Juneau, AK 99811

Re: HB 517

Dear Representative Sund:

House Bill 517, pending before your Committee, grants immunity to certain volunteers in connection with their volunteer functions and duties. The bill, however, makes certain exceptions. First, persons guilty of gross negligence, recklessness or intentional misconduct are not immune. Second, persons who have insurance which covers their activities as a volunteer are liable, but only to the extent of such insurance coverage. It is the second of these exceptions that I would like to address.

The exception is founded on sound public policy. First, public policy favors compensating people who have been injured through the fault of others, and immunity from this liability is generally disfavored. Secondly, if insurance has been purchased to cover the risk and the risk is declared immune, the result is a windfall to the insurance carrier. The exception contained in (b)(2), as written, satisfies public policy respecting both of these issues; while extending immuntiy to the volunteer to the extent that his liability exceeds his insurance coverage.

I am advised that the constitutionality of subsection (b)(2) has been questioned by someone during the course of pendency of this bill. Specifically, someone has suggested there is an "equal protection" question raised by subsection (b)(2). I respectfully submit that there is no serious constitutional question introduced by the concept embodied in subsection (b)(2).

Historically, a very close parallel to the provisions of subsection (b)(2) developed with regard to charitable immunity. Several decades ago, charitable immunity was still alive and well in many states. Since then, of course, many states have abolished charitable immunity. However, when that immunity

doctrine was still broadly recognized, a great many states carved out an exception to immunity for those charitable institutions which had liability insurance. The exception was justified on the basis of implied waiver of immunity, and the fact that to hold otherwise would simply grant a windfall to insurance companies. At least two states, Arkansas and Maryland, made the same exception to charitable immunity by the statutory process. Whether created by statute or court ruling, this exception to the immunity rule has never been challenged on a constitutional basis.

Given the history of judicial treatment of this closely similar concept, it is extremely unlikely that the provisions of subsection (b)(2) would be held to be constitutionally flawed.

If you desire further information, do not hesitate to contact me.

Respectfully and sincerely,

ALASKA ACADEMY OF TRIAL LAWYERS

Robert M. Libbey, President

STATE OF ALASKA
THE LEGISLATURE

LEGISLATIVE AFFAIRS AGENCY

POUCH Y STATE CAPITOL
JUNEAU, ALASKA 99811
907 465 3600

M E M O R A N D U M April 21, 1988

SUBJECT: Constitutionality of CSSB 448(Judiciary) (4/20/88 draft)

TO: Senator Jay Kerttula, Chairman
Senate Judiciary Committee

FROM: Edward H. Hein EHH
Legislative Counsel

Enclosed is a draft committee substitute for SB 448 requested by your assistant, Beth Kerttula.

The bill provides immunity from civil liability for damages resulting from the negligence of volunteers of the state, a municipality, or a nonprofit entity. The immunity does not extend to gross negligence, recklessness, or intentional misconduct, or to simple negligence if and to the extent that the defendant is insured. This last feature makes the bill unconstitutional as a violation of equal protection and due process.

Under Article I, section 1, of the Alaska Constitution, "all persons are equal and entitled to equal rights, opportunities, and protection under the law." The test of constitutionality under this section is whether the means chosen by the legislature substantially furthers a legitimate state interest, which the court then weighs against the interest of the person or group discriminated against. State v. Erickson, 574 P.2d 1, 12 (Alaska 1978).

It is not clear that the provision in proposed Sec. 09.65.098(b)(2) furthers any legitimate state interest. That paragraph discriminates between similarly situated negligent volunteers on the basis of whether they are insured. If the state's interest is to encourage persons to perform volunteer work for state, municipal, or nonprofit entities, by immunizing them from some civil liability, the provision works to defeat, rather than further, that interest. More

important, predicating liability on the existence of insurance is an irrational basis for discrimination. It is not rationally related to a legitimate state interest, and therefore fails even the lowest level of constitutional scrutiny. See also Turner Construction Company, Inc. v. Scales and Clapper, file No. 5-1429. (Alaska, April 1, 1988).

Likewise, because the discrimination would deprive a defendant of property in an arbitrary, irrational manner, the bill also violates Article I, section 7, of the Alaska Constitution, which requires due process.

Finally, it is a long established rule that liability insurance is not to be considered in determining whether anyone is liable in the first instance. See Prosser, Law of Torts (1971), p. 553; McCormick on Evidence, (1972), pp. 479 - 483.

Enclosure

EHH:gc
WKG3:020

5-1484X
Ilein
4/20/88

Original sponsor: Duncan

IN THE SENATE BY THE JUDICIARY COMMITTEE

CS FOR SENATE BILL NO. 448 (Judiciary)

IN THE LEGISLATURE OF THE STATE OF ALASKA

FIFTEENTH LEGISLATURE - SECOND SESSION

A BILL

For an Act entitled: "An Act relating to civil liability of certain volunteers."

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

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

Sec. 09.65.098. CIVIL LIABILITY OF CERTAIN VOLUNTEERS. (a) A person working as a volunteer for the state, for a municipality, or for a nonprofit entity is not liable for civil damages as a result of an act or omission while acting in good faith and within the person's official functions and duties.

(b) This section does not preclude liability for civil damages as a result of

(1) gross negligence, recklessness, or intentional misconduct; or

(2) negligence, to the extent that the negligent person is insured against liability for the negligence.

(c) This section does not affect

(1) a civil action brought by the state, a municipality, or a nonprofit entity against, respectively, a volunteer of the state, the municipality, or the entity;

(2) the liability of the state, a municipality, or a nonprofit entity with respect to injury caused to a person.

(d) In this section,

(1) "municipality" has the meaning given in AS 01.10.060 and includes a public corporation established by a municipality;

(2) "nonprofit entity" means an entity

(A) incorporated under AS 10.20; or

(B) exempt from taxation under 26 U.S.C. 501(c)(3) (Internal Revenue Code of 1954);

(3) "volunteer" means a person who receives financial consideration of not more than $500 a year, not including reimbursement for expenses actually incurred, for services performed for the state, a municipality, or a nonprofit entity.

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STATE OF ALASKA
1988 LEGISLATIVE SESSION

Bill Version: CSSB 448 (C+RA) (a)
Publish Date: Senate 3/21/88

FISCAL NOTE

REQUEST:

Revision Date:
Title: An act relating to civil liability of certain volunteers
Sponsor: Duncan
Requestor:

Agency Affected: Department of Administration
BRU: Risk Management
Components:

EXPENDITURES/REVENUES: (Thousands of Dollars)

OPERATING	FY 88	FY 89	FY 90	FY 91	FY 92	FY 93
PERSONAL SERVICES	0	0	0	0	0	0
TRAVEL	0	0	0	0	0	0
CONTRACTUAL	0	0	0	0	0	0
SUPPLIES	0	0	0	0	0	0
EQUIPMENT	0	0	0	0	0	0
LAND & STRUCTURES	0	0	0	0	0	0
GRANTS, CLAIMS	0	0	0	0	0	0
MISCELLANEOUS	0	0	0	0	0	0
TOTAL OPERATING	0	0	0	0	0	0
CAPITAL	0	0	0	0	0	0
REVENUE	0	0	0	0	0	0

FUNDING: (Thousands of Dollars)

GENERAL FUND	0	0	0	0	0	0
FEDERAL FUNDS	0	0	0	0	0	0
OTHER	0	0	0	0	0	0
TOTAL	0	0	0	0	0	0

POSITIONS:

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

ANALYSIS: (Attach a separate page if necessary)

While no immediate fiscal relief is shown, this legislation could help control possible future liabilities; thereby generating possible future claims savings (including defense costs) for the State.

Prepared By: Donald J. Hitchcock, Director Phone: 465-2180
Division: Risk Management Date: 03-01-88

Approved by Commissioner: John M. Andrews Date: 3/4/88
Agency: Department of Administration

Distribution (by preparer):
Legislative Finance
Legislative Sponsor
Requestor
Office of Management and Budget
Impacted Agency(ies)

Rev: 1/11/88

15/9K1/0229-10

(b.

223

STATE OF ALASKA
1988 LEGISLATIVE SESSION

BILL VERSION: CSSB 448 (C+RA)
PUBLISH DATE: Senate 3/21/88

FISCAL NOTE

REQUEST:

Revision Date: _____
Title: SB 448 An Act Relating to Civil Liability of Certain Volunteers
Sponsor: Duncan
Requestor: Senate C&RA

Agency Affected: NATURAL RESOURCES
BRU: _____

Components: _____

EXPENDITURES/REVENUES: (Thousands of Dollars)

OPERATING	FY 88	FY 89	FY 90	FY 91	FY 92	FY 93
PERSONAL SERVICES		Ø	Ø	Ø	Ø	Ø
TRAVEL						
CONTRACTUAL						
SUPPLIES						
EQUIPMENT						
LAND & STRUCTURES						
GRANTS, CLAIMS						
MISCELLANEOUS						
TOTAL OPERATING		Ø	Ø	Ø	Ø	Ø
CAPITAL						
REVENUE						

FUNDING: (Thousands of Dollars)

GENERAL FUND						
FEDERAL FUNDS						
OTHER						
TOTAL		Ø	Ø	Ø	Ø	Ø

POSITIONS:

FULL-TIME		Ø	Ø	Ø	Ø	Ø
PART-TIME						
TEMPORARY						

ANALYSIS: (Attach a separate page if necessary)

The Department will not incur cost to implement this bill. There is no way to project the cost of any liability the Department may incur as a result of this bill.

Prepared by: Richard LeFebvre — Phone: 465-2400
Division: Land and Water Management — Date: February 25, 1988

Approved by Commissioner: Tom Hawkins — Date: February 25, 1988
Agency: Department of Natural Resources

Distribution (by preparer):
Legislative Finance
Legislative Sponsor
Requestor
Office of Management and Budget
Impacted Agency(ies)

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(2)

STATE OF ALASKA
1988 LEGISLATIVE SESSION

BILL VERSION: CSSB 448 (C+RA)
PUBLISH DATE: Senate 3/21/88

FISCAL NOTE

REQUEST:

Revision Date: 2/16/88
Title: An Act relating to civil liability of certain . . .
Sponsor: Duncan
Requestor:

Agency Affected: Health & Social Services
BRU: State Health Services
Components: EMS Certification and Licensing

EXPENDITURES/REVENUES: (Thousands of Dollars)

OPERATING	FY 88	FY 89	FY 90	FY 91	FY 92	FY 93
PERSONAL SERVICES						
TRAVEL						
CONTRACTUAL						
SUPPLIES						
EQUIPMENT						
LAND & STRUCTURES						
GRANTS, CLAIMS						
MISCELLANEOUS						
TOTAL OPERATING	-0-	-0-	-0-	-0-	-0-	-0-
CAPITAL						
REVENUE						

FUNDING: (Thousands of Dollars)

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

POSITIONS:

FULL-TIME						
PART-TIME						
TEMPORARY						

ANALYSIS: (Attach a separate page if necessary)

The enactment of SB 448 would have no direct fiscal impact on the Department of Health and Social Services.

Prepared by: Elizabeth Ward, Director — Phone: 465-3090
Division: Public Health — Date: 2-19-88

(1) Approved by Commissioner: Myra M. Munson — Date: 2-23-88
Agency: Department of Health & Social Services

Distribution (by preparer):
Legislative Finance
Legislative Sponsor
Requestor
Office of Management and Budget
Impacted Agency(ies)

SB

461

provided by attorney Dan Hensley MAR 9 1988

SB 461 AND THE ALASKA SUPREME COURT OPINION IN JACKSON V. POWER

INTRODUCTION

In 1981, 16 year old Brett Jackson fell 40 feet from a cliff and suffered severe injuries. He was rushed to Fairbanks Memorial Hospital. When he finally regained consciousness he learned he had lost both kidneys during his stay in the hospital. He also learned that the loss of his kidneys was probably the result of failure of the emergency room physician to order certain kidney function tests.

Brett Jackson was in for another surprise when he decided to file suit against the hospital for that emergency room negligence. He learned that the hospital denied any responsibility for the activities of the emergency room. He was referred to a corporation he had never heard of called Emergency Room, Inc., and was told that if he was to have any recovery it must be against that unknown corporation.

In a unanimous decision, the Alaska Supreme Court, in Jackson, et al., v. Power, et al., 743 P.2d 1376 (Alaska 1987) rectified this gross inequity. The court held that a hospital--required by law to have an emergency room--could not hide behind a corporation like Emergency Room, Inc. when a hospital patient is injured in the emergency department.

SB 461 would reverse that Supreme Court ruling. It would allow hospitals again to attempt to "franchise" their

operations and hide behind those franchises when negligence occurs at the hospital. SB 461 would, in fact, encourage hospitals to create new "franchises" to further insulate the hospital from liability for negligent acts occurring under the hospital's very roof.

THE PUBLIC POLICY OF THE STATE OF ALASKA MUST BE TO PROTECT THE SAFETY OF HOSPITAL PATIENTS

The policy issue presented by SB 461 is whether the Alaska legislature will continue, as it has in previous legislation regarding hospitals, to consider the safety of hospital patients to be of highest priority.

Alaska's earliest hospital licensing laws reflect the legislative policy of "promoting safe and adequate treatment of individuals in hospitals in the interest of public health, safety and welfare." (See AS 18.20.060, enacted in 1949). The legislature has continually reaffirmed that policy. In 1976, the requirement for an internal risk management program was instituted. (AS 18.20.075). Important amendments to the certificate of need program were adopted in 1983. The rule in Jackson v. Power merely reiterates that important commitment to the public health and safety. The rule recognizes that when hospitals are finally held accountable for activities occurring under the hospital's own roof, a hospital will have full incentive to take whatever measures are necessary to ensure that patients are not injured during their hospital stay.

The Alaska legislature, by its certificate of need

program (AS 18.07.031), has given hospitals special protection from competition in order to allow hospitals to devote energy to providing safe medical treatment to patients, rather than engaging in "bidding wars" and other competitive activities. In fact, this statute has been used in legal proceedings to prevent the establishment of an additional hospital in Anchorage.

However, in exchange for this protection from competition, Alaska law has required semi-monopoly hospitals to provide certain basic services to the public, including emergency room treatment, radiology, pathology, anesthesiology and the like. In Jackson v. Power, the Alaska Supreme Court merely reasoned that if a hospital is granted special legislative treatment it must bear full responsibility for the operations carried out under that special protective legislation.

The civil liability rule adopted by the Alaska Supreme Court in its unanimous decision is not revolutionary. The same rule has been applied for decades to numerous types of quasi-public businesses which have received special protections from the government in order to further the public good. In Alaska, airlines which are granted scheduled routes may not insulate themselves from liability for operation of those routes by franchising those operations to other airlines. Common carriers such as trucking lines, bus lines and railroad carriers who are given special route priorities by the government may not delegate their operations to "independent contractors" and hide from liability when those contractors are negligent.

If SB 461 becomes law, the Alaska legislature's commitment to quality hospital care will be reversed. Hospitals will be encouraged to "franchise" even more of their vital public services in an attempt to avoid liability for injuries to hospital patients. The passage of SB 461 and the overruling of Jackson v. Power would send a message to the public, and to hospital administrators, that the safety of hospital patients is no longer a high priority in the State of Alaska.

THERE IS NO EVIDENCE THAT INSURANCE RATES WILL INCREASE AS A RESULT OF THE RULE IN JACKSON V. POWER

Although claims have been made that the Supreme Court ruling will drastically increase hospital insurance premiums, no evidence has been presented to support those claims. The same contention was made before the Alaska Supreme Court, again with no evidence to support that argument. In fact, one commentator who has addressed the issue has suggested that "if the hospital, all its employees, and all physicians admitted to membership on the medical staff" are "insured by the same insurance carrier, . . . the costs and the excessive length of the litigation process" would be greatly reduced. Southwick 4, Journal of Legal Medicine, 1 (1983).

The costs to the consumer of medical treatment should not increase under the Jackson v. Power rule. If, for example, a "franchised" emergency room is presently carrying adequate insurance, then the burden of paying the costs of that insurance will merely shift from the "franchise" to the hospital. However,

the total overall insurance costs for the emergency room operation, and thus the costs to the public, should remain the same. These costs may even be reduced if, in carrying out its obligation under Jackson v. Power, a hospital undertakes a greater role in requiring quality medical treatment in the emergency room, and therefor reduces the risk factor for those operations. The Jackson v. Power rule merely places the primary responsibility for providing that insurance coverage upon the hospital, rather than leaving that important decision to a less regulated franchise.

THE JACKSON V. POWER RULE AND RURAL HOSPITALS

The Jackson v. Power rule applies to those services which a hospital is required to provide to the public by law, by its own national accreditation process and by its own bylaws. If a rural hospital is not required by law, accreditation, or its own bylaws to provide such services, then the reasoning in Jackson v. Power may not apply to that rural hospital. If, on the other hand, a rural hospital is required to provide such services, the sound public policy reasoning behind the rule should apply to that hospital. Safe, quality health care is just as important for the rural residents of this state as it is for urban residents.

CONCLUSION

In mind's dim memory are the days when hospitals served merely as sanitary waysides where individual physicians practiced their professions. The modern day hospital is a fully-integrated

commercial enterprise which provides essential services to the public. In Jackson v. Power the Alaska Supreme Court recognized this modern day fact. The passage of SB 461 would result in a step backward in time, to the detriment of the citizens of our state.

Brett JACKSON and Linda Estrada, Petitioners,

v.

John POWER, M.D.; Fairbanks Memorial Hospital; Lutheran Hospital and Homes Society of America, Inc.; Emergency Room, Inc.; William H. Montano, M.D.; and George Vrablick, M.D., Respondents.

No. S-1677.

Supreme Court of Alaska.

Oct. 16, 1987.

Medical malpractice action was brought against hospital. The Superior Court, Fourth Judicial District, Fairbanks, Gerald J. Van Hoomissen, J., denied patient summary judgment and petition for review was filed. The Supreme Court, Burke, J., held that: (1) hospital could not be held vicariously liable for negligence or malpractice of independent contractor/physician under enterprise liability; (2) genuine issue of material fact as to whether hospital held itself out as providing emergency care services to public precluded summary judgment for patient on apparent authority theory; and (3) general acute care hospital's duty to provide physicians for emergency room care was nondelegable.

Affirmed in part, reversed in part, and remanded.

1. Hospitals ⇐7

Doctrine of corporate negligence holds that hospital owes independent duty to its patients to use reasonable care to insure that physicians granted hospital privileges are competent, and to supervise medical treatment provided by members of its medical staff.

2. Hospitals ⇐7

Generally accepted rule is that where employment relationship exists between physician and hospital, hospital will be liable, under traditional rule of respondeat superior, for any negligence or malpractice which results in injury to hospital patient, and conversely, no liability attaches to hospital when physician is independent contractor.

3. Hospitals ⇐7

Hospital could not be held vicariously liable for negligence or malpractice of independent contractor/physician, committed while treating patient in hospital's emergency room under theory of enterprise liability.

4. Hospitals ⇐7

Two factors are relevant to finding of ostensible agency in hospital context, including whether patient looks to institution, rather than individual physician, for care and whether hospital holds out physician as its employee.

5. Principal and Agent ⇐137(2)

Under theory of agency by estoppel, there must be actual reliance upon representation of principal by person injured.

6. Principal and Agent ⇐99

Traditional rules of apparent authority are applicable to hospital-independent contractor/physician relationship.

7. Judgment ⇐181(33)

Genuine issue of material fact as to whether hospital held itself out as providing emergency care services to public and whether patient reasonably believed that physician was employed by hospital to deliver emergency room service precluded summary judgment for patient in medical malpractice action against hospital on theory of apparent authority.

8. Principal and Agent ⇐159(1)

Application of apparent authority in hospital/emergency room physician situation does not require express representation to patient that treating physician is employee of hospital; nor is direct testimony as to reliance required absent evidence that patient knew or should have known that treating physician was not hospital employee when treatment was rendered.

9. Hospitals ⇐7

Hospital licensed as general acute care hospital had duty to provide emergency

room services and part of duty was to provide physician care in emergency room.

10. Hospitals ⇐7

General acute care hospital's duty to provide physicians for emergency room care was nondelegable, and thus hospital could not shield itself from liability by claiming that it was not responsible for results of negligently performed health care when law imposed duty on hospital to provide that health care.

11. Master and Servant ⇐315

Nondelegable duty is established exception to rule that employer is not liable for negligence of independent contractors.

12. Hospitals ⇐7

Rule that general acute care hospital's duty to provide physicians for emergency room care is nondelegable does not change standard of care with which physician must comply and does not extend to situations where patient is treated by his or her own doctor in emergency room provided for convenience of doctor.

13. Hospitals ⇐7

Acute care hospital was vicariously liable as a matter of law for negligence or malpractice committed by physician on a patient who came to hospital seeking emergency room services; physician was provided by hospital as part of its nondelegable duty to provide nonnegligent physician care in emergency room.

Michael Cohn, Dan A. Hensley, L. Ames Luce, Law Offices of L. Ames Luce, Anchorage, for petitioners.

James J. Delaney, Howard A. Lazar, Delaney, Wiles, Hayes, Reitman & Brubaker, Anchorage, for respondents Fairbanks Memorial Hosp. and Lutheran Hosp. & Homes Soc.

Peter J. Maassen, Burr, Pease & Kurtz, Anchorage, for respondents John Power, M.D. and Emergency Room, Inc.

David C. Crosby, Council & Crosby, Juneau, for Health Ass'n of Alaska, amicus curiae.

Before RABINOWITZ, C.J., and BURKE, MATTHEWS and COMPTON, JJ.

OPINION

BURKE, Justice.

This case presents an issue of first impression in this state, concerning health care delivery in hospital emergency rooms. The question that we must resolve is whether a hospital may be held vicariously liable for negligent health care rendered by an emergency room physician who is not an employee of the hospital, but is, instead, an independent contractor. We hold that the hospital in this case had a non-delegable duty to provide non-negligent physician care in its emergency room and, therefore, may be liable.

I

On the evening of May 22, 1981, sixteen year old Brett Jackson was seriously injured when he fell from a cliff. Jackson was airlifted to Fairbanks Memorial Hospital (FMH). Shortly after midnight, he was received in the hospital's emergency room.

Jackson was examined by respondent John Power, M.D., one of two emergency room physicians on duty at the time. Dr. Power's examination revealed multiple lacerations and abrasions of the patient's face and scalp, multiple contusions and lacerations of the lumbar area, several broken vertebrae and gastric distension, suggesting possible internal injuries. Dr. Power ordered several tests, but did not order certain procedures that could have been used to ascertain whether there had been damage to the patient's kidneys. Jackson had, in fact, suffered damage to the renal arteries and veins which supply blood to and remove blood from the kidneys. This damage, undetected for approximately 9 to 10 hours after Jackson's arrival at FMH, ultimately caused Jackson to lose both of his kidneys.

II

Jackson and his mother, Linda Estrada, (hereinafter referred to collectively as Jack-

son) filed suit. In their complaint they alleged negligence in the diagnosis, care and treatment Jackson received at FMH. Jackson moved for partial summary judgment seeking to hold FMH vicariously liable as a matter of law for the care rendered by Dr. Power. In support of his motion, Jackson advanced three separate theories: (1) enterprise liability; (2) apparent authority; and (3) non-delegable duty.

After briefing and argument, the superior court held, as a matter of law, that FMH could not be held liable under an enterprise liability theory, and that genuine issues of material fact precluded summary judgment on the two remaining theories.[1] We subsequently granted Jackson's petition for review of the court's ruling.

III

[1] Initially, it is important to clarify the exact issue that we have been asked to resolve. Jackson has conceded, for purposes of this appeal, that Dr. Power was not an employee of FMH, but an independent contractor employed by respondent Emergency Room, Inc. (ERI), and that ERI and FMH are separate legal entities. Traditional rules of *respondeat superior* are, therefore, inapposite. Jackson also makes no claim that FMH was itself negligent in its selection, retention, or supervision of Dr. Power. Consequently, we have no occasion to consider the doctrine of corporate negligence.[2] Jackson asks us to resolve only whether a hospital should be vicariously liable, as a matter of public policy, for the negligence or malpractice[3] of an independent contractor/physician, committed while treating a patient in the hospital's emergency room, under theories of (1) enterprise liability; (2) apparent authority; or (3) non-delegable duty.

IV

As previously noted, this case presents this court with an issue of first impression.[4]

[2] The generally accepted rule is that, where an employment relationship exists between the physician and the hospital, the hospital will be liable, under the traditional rule of *respondeat superior*, for any negligence or malpractice which results in injury to a hospital patient. *E.g., Bing v. Thunig*, 2 N.Y.2d 656, 163 N.Y.S.2d 3, 11, 143 N.E.2d 3, 9 (N.Y.1957); *Weldon v. Seminole Municipal Hospital*, 709 P.2d 1058, 1059 (Okla.1985). Conversely, no liability attaches to the hospital when the physician is an independent contractor. *E.g. Greene v. Rogers*, 147 Ill.App.3d 1009, 101 Ill.Dec. 543, 547, 498 N.E.2d 867, 871 (1986); *Hill v. St. Clare's Hosp.*, 67 N.Y.2d 72, 499 N.Y.S.2d 904, 908, 490 N.E.2d 823, 827 (1986). *See generally* Comment, *The Hospital-Physician Relationship: Hospital Responsibility for Malpractice of Phy-*

1. The superior court also rejected three motions for summary judgment by various respondents seeking to have Linda Estrada's claim against them dismissed on the ground that it was time barred by the statute of limitations. None of the respondents cross-petitioned for review of that issue.

2. The doctrine of corporate negligence holds that a hospital owes an independent duty to its patients to use reasonable care to insure that physicians granted hospital privileges are competent, and to supervise the medical treatment provided by members of its medical staff. *See Tucson Medical Center v. Misevch*, 113 Ariz. 34, 545 P.2d 958, 960 (1976); *Darling v. Charleston Community Mem. Hosp.*, 33 Ill.2d 326, 211 N.E.2d 253 (1965); *Pedroza v. Bryant*, 101 Wash.2d 226, 677 P.2d 166, 170 (1984); *Johnson v. Misericordia Community Hosp.*, 99 Wis.2d 708, 301 N.W.2d 156 (1981). *See generally*, Janulis & Hornstein, *Damned If You Do, Damned If You Don't: Hospitals' Liability for Physicians' Malpractice*, 64 Neb.L.Rev. 689, 702–08 (1985); Note, *Hospital Corporate Liability: An Effective Solution to Controlling Private Physician Incompetence*, 32 Rutgers L.J. 342, 360–72 (1979).

3. Jackson has yet to prove that any negligence or malpractice did in fact occur. In order to resolve the issue presented here, however, we must assume negligence. We, of course, express no opinion as to the actual merits of Jackson's claim.

4. In *Baker v. Werner*, 654 P.2d 263, 267 n. 6 (Alaska 1982), Baker appealed the trial court's rejection of his theory of vicarious liability in a wrongful death action against a physician, hospital and attending nurse. Because we upheld the jury's finding that the defendants were not negligent, we did not reach the merits of the issue, "any theory of vicarious liability [being] irrelevant." *Id.*

sicians, 50 Wash.L.Rev. 385 (1975) (hereinafter "Comment, *Hospital Responsibility*").

Jackson concedes that Dr. Power was an independent contractor; however, he asserts that Alaska's law of *respondeat superior* mandates a result different than that which would be reached under the general rule.[5] Jackson argues that our decision in *Fruit v. Schreiner*, 502 P.2d 133 (Alaska 1972), establishes that the law of "vicarious legal responsibility" in Alaska is "enterprise liability." Thus, he contends, if the enterprise impacts society and the negligent act occurred during an activity performed for the benefit or in the interest of the enterprise, the enterprise is liable.

[3] Jackson's argument proves unpersuasive. First, Jackson's interpretation of *Fruit* is flawed. A close reading of that case shows that we did not view "enterprise liability" as a separate theory of liability or a distinct cause of action. Rather, enterprise liability was seen as one of two widely accepted theories used by courts to justify imposition of vicarious liability in an established employer/employee context. *Id.* at 138–39. As was noted in *Fruit*:

> [T]he "enterprise" theory ... finds liability whenever the enterprise of the employer would have benefited by the context of the act of the *employee* but for the unfortunate injury.
>
> ....
>
> The rule of *respondeat superior* however, ... is *limited* to requiring an enterprise to bear the loss incurred as a result of the *employee's* negligence. The acts of the *employee* need be so connected to his employment as to justify requiring that the employer bear that loss.

Id. at 140–41 (emphasis added) (footnotes omitted). *See generally* Morris, *Enterprise Liability and the Actuarial Process--the Insignificance of Foresight*, 70 Yale L.J. 554 (1961).

Additionally, our decisions since *Fruit* show that we have applied the theory of *respondeat superior* only in an employer/employee context, unless one of the well established exceptions to that rule exists. *See, Parker Drilling v. O'Neill*, 674 P.2d 770, 775 (Alaska 1983); *Williams v. Alyeska Pipeline Service Co.*, 650 P.2d 343, 349 (Alaska 1982); *Hammond v. Bechtel Inc.*, 606 P.2d 1269, 1273 (Alaska 1980); *Barton v. Lund*, 563 P.2d 875, 876 (Alaska 1977); *Luth v. Rogers & Babler Construction*, 507 P.2d 761, 763–64 (Alaska 1973). Jackson's theory presents no such exception.

Finally, the cases from other jurisdictions cited by Jackson provide little support for his theory; those cases deal only with theories of apparent agency or corporate negligence. Moreover, although at least two courts appear to have implicitly indicated a willingness to recognize a theory of enterprise liability, *see Alden v. Providence Hospital*, 382 F.2d 163, 166 (D.C. Cir.1967); *Adamski v. Tacoma General Hospital*, 20 Wash.App. 98, 579 P.2d 970, 977 & n. 5 (1978), to date, no court has explicitly embraced that concept.[6]

In short, Jackson's theory of enterprise liability is not yet the law in Alaska.

V

Jackson next argues that the trial court erred in holding that genuine issues of material fact prevented it from granting summary judgment on his theory of apparent authority.

5. The trial court decided the issue of the applicability of enterprise liability as a matter of law. We scrutinize questions of law under a *de novo* or independent judgment standard of review. *Hicklin v. Orbeck*, 565 P.2d 159, 163 n. 6 (Alaska 1977), *rev'd on other grounds*, 437 U.S. 518, 98 S.Ct. 2482, 57 L.Ed.2d 397 (1978). When reviewing a question of law, it is our "duty to adopt the rule of law that is most persuasive in light of precedent, reason and policy." *Guin v. Ha*, 591 P.2d 1281, 1284 n. 6 (Alaska 1979).

6. Some commentators have suggested an enterprise tort doctrine as a basis for imposing liability for any tort occurring as part of the hospital enterprise. *See* Southwick, *Hospital Liability: Two Theories Have Been Merged*, 4 J. Legal Med. 1, 3–5 (1983); Comment, *Hospital Responsibility*, *supra* at 418–19.

Although we have recognized the doctrine of apparent authority in other contexts, *see City of Delta Junction v. Mack Trucks*, 670 P.2d 1128, 1129–30 (Alaska 1983) (national distributor and local franchise); *Perkins v. Willacy*, 431 P.2d 141, 142 (Alaska 1967) (husband and wife), this is the first time we have been asked to apply this doctrine to a hospital-independent contractor/physician relationship.

Cases from other jurisdictions show a strong trend toward liability against hospitals that permit or encourage patients to believe that independent contractor/physicians are, in fact, authorized agents of the hospitals.[7] These courts have held hospitals vicariously liable under a doctrine labeled either "ostensible" or "apparent" agency or "agency by estoppel." *See Pochubiansky v. Emory University*, 156 Ga. App. 602, 275 S.E.2d 163, 168 (1981); *Paintsville Hospital v. Rose*, 683 S.W.2d 255, 257 (Ky.1985); *Mehlman v. Powell*, 378 A.2d 1121 (Md.1977); *Grewe v. Mt. Clemens General Hospital*, 404 Mich. 240, 273 N.W.2d 429, 432–33 (1978); *Arthur v. St. Peters Hospital*, 169 N.J.Super. 575, 405 A.2d 443 (1979); *Hannola v. City of Lakewood*, 68 Ohio App.2d 61, 426 N.E.2d 1187, 1192 (1980); *Weldon*, 709 P.2d at 1060; *Themins v. Emanuel Lutheran Charity Bd.*, 54 Or.App. 901, 637 P.2d 155, 158–59 (1982); *Adamski v. Tacoma General Hospital*, 20 Wash.App. 98, 579 P.2d 970, 977 (1978); *see generally* Janulis & Hornstein, *supra* at 696–702. Although courts and commentators often use these terms interchangeably, they are not theoretically identical.

[4] The "ostensible" or "apparent" agency theory is based on Section 429 of the Restatement (Second) of Torts (1965), which provides:

> One who employs an independent contractor to perform services for another which are accepted in the reasonable belief that the services are being rendered by the employer or by his servants, is subject to liability for physical harm caused by the negligence of the contractor in supplying such services, to the same extent as though the employer were supplying them himself or by his servants.

Two factors are relevant to a finding of ostensible agency: (1) whether the patient looks to the institution, rather than the individual physician, for care; and (2) whether the hospital "holds out" the physician as its employee. *Simmons v. St. Clair Memorial Hospital*, 332 Pa.Super. 444, 481 A.2d 870, 874 (1984); *see also Irving v. Doctors Hospital of Lake Worth*, 415 So.2d 55, 60–61 (Fla.App.1982); *Smith v. St. Francis Hospital*, 676 P.2d 279, 282 (Okla.App.1984).

[5] "Agency by estoppel," in contrast, is predicated on the arguably stricter standard of the Restatement (Second) of Agency § 267 (1958). Section 267 provides:

> One who represents that another is his servant or agent and thereby causes a third person justifiably to rely upon the care or skill of such apparent agent is subject to liability to the third person for harm caused by the lack of care or skill of the one appearing to be a servant or other agent as if he were such.

Under this theory, there must be actual reliance upon the representations of the principal by the person injured. *Mehlman*, 378 A.2d at 1123.

> Thus, theoretically, there need be no causal relationship between the principal's conduct and the plaintiff's reliance to warrant a conclusion of ostensible agency; such a causal relationship and such a change of position, however, is the essence of estoppel to deny agency.

Janulis & Hornstein, *supra* at 697.

[6] Jackson, in essence, asks us to adopt a rule of ostensible agency. FMH,

7. The only exception to this modern trend of which we are aware is *Greene v. Rogers*, 147 Ill.App.3d 1009, 101 Ill.Dec. 543, 498 N.E.2d 867 (1986). In *Greene*, the court specifically refused to apply apparent agency to a hospital-emergency room doctor relationship because "[t]he absence of the power to control the decision-making of the emergency room physician demands that the independent relationship between hospital and emergency room physician be recognized." *Id.* 101 Ill.Dec. at 547, 498 N.E.2d at 871. We view *Greene* as an aberration dependent upon reasoning which is not particularly persuasive.

on the other hand, requests that we follow *Greene* and refuse to apply this doctrine in the hospital-physician context or, alternatively, that we adopt a rule which is essentially estoppel by agency. Although we find nothing antithetical about applying the doctrine of apparent authority to a hospital-independent contractor/physician relationship, we perceive no reason to adopt a special rule in this area. We believe that traditional rules of apparent authority provide sufficient guidelines.

In *City of Delta Junction*, we defined the doctrine of apparent authority in Alaska as follows:

> Apparent authority to do an act is created as to third persons by written or spoken word or any other conduct of the principal which, reasonably interpreted, causes the third person to believe that the principal consents to have the act done on his behalf by the person purporting to act for him.

670 P.2d at 1130 (quoting Restatement (Second) of Agency § 27, at 103 (1958)). We went on to emphasize that it is the *principal's* conduct that gives rise to his liability and not the conduct of the alleged agent; "one dealing with an alleged agent must prove that the principal was responsible for the appearance of authority, by doing something or permitting the alleged agent to do something that led others, including the plaintiff, to believe that the agent had the authority he purported to have." *Id.* (quoting W. Seavy, *Handbook of The Law of Agency* § 8, at 13 (1964)).

Relying on *City of Delta Junction*, the trial court held that existing factual disputes required Jackson to submit his apparent authority theory to the jury. When reviewing the denial of a motion for summary judgment, we must determine whether genuine issues of material fact exist, and if not, whether the moving party is entitled to judgment as a matter of law. Alaska R.Civ.P. 56(c); *Shatting v. Dillingham City School District*, 617 P.2d 9, 11 (Alaska 1980). In reaching this decision we must draw all reasonable inferences in favor of the non-moving party and against the movant. *Id.*

Drawing all reasonable inferences in the light most favorable to FMH, the record shows the following: at the time of Jackson's accident, FMH was the only civilian hospital north of Anchorage providing emergency room services in Alaska. Two road signs in Fairbanks note the location of the hospital. However, neither of these signs specifically refer to the existence of emergency room services. The signs were not constructed or situated by FMH. In fact, FMH does no advertising at all.

From the time of its establishment in 1972, FMH has never staffed its emergency room with its own physician employees, but has always relied upon local physicians to provide that service. Prior to the formation of ERI in 1977, FMH's emergency room was serviced by three local clinics, each providing one physician on a nightly basis. After 1977, ERI provided one physician on a nightly basis who worked a 14-hour graveyard shift (6:00 p.m. to 8:00 a.m.).[8] While on duty in the emergency room, the ERI physician was "in charge" and no FMH personnel were responsible for either scheduling or monitoring the emergency room physicians. No contractual arrangement existed between FMH and ERI for the provision of emergency room physicians.

In apparent non-life threatening situations the first person an incoming patient sees at the emergency room is the admissions clerk. Immediately adjacent to the clerk's desk is a sign which indicated that physicians from ERI were working in the emergency room. Although the exact state of Jackson's awareness is not entirely clear, there is evidence suggesting that he was admitted in a conscious state.[9] Nei-

8. The clinics continued to provide an additional physician for the graveyard shift on a rotation basis.

9. Jackson testified at his deposition that he recalled being placed in the helicopter but had no recollection of being removed from it, being taken to FMH, or of meeting the doctor who treated him. On the other hand, the medical records indicate that Jackson appeared to be neurologically stable, completely oriented and gave no indication that he was unconscious or in distress. Moreover, at his deposition, Dr.

ther Jackson nor his mother selected FMH as the place of treatment nor Dr. Power as Jackson's physician.

[7, 8] From the above, a jury could conclude that FMH held itself out as providing emergency care services to the public. A jury could also find that Jackson reasonably believed that Dr. Power was employed by the hospital to deliver emergency room service. It is also possible, however, that a jury could find to the contrary.[10]

Unless the evidence allows but one inference, the question of apparent authority is one of fact for the jury. *City of Delta Junction*, 670 P.2d at 1131; *Themins*, 637 P.2d at 159; *Adamski*, 579 P.2d at 978. In the case at bar, the record is not susceptible to a single inference. Thus, the trial court properly denied summary judgment on this issue.

VI

Jackson's final point is that the trial court erred in refusing to rule, as a matter of law, that FMH, as a general acute care hospital, has a non-delegable duty to provide non-negligent physician care in its emergency room. In essence, Jackson's position is that when a hospital undertakes to operate an emergency room as an integral part of its health care enterprise, public policy dictates that it not be allowed to insulate itself from liability by shunting that responsibility onto another.

FMH, on the other hand, argues that a hospital does not have a non-delegable duty to guarantee safe treatment in its emergency room. Physicians, not hospitals, FMH asserts, have a duty to practice medicine non-negligently. Thus, according to FMH, a hospital cannot be held to have delegated away a duty it never had.

The trial court ruled that "[t]here cannot be a non-delegable duty if there is no contractual relationship." Since it was unclear from the evidence whether or not there was any contractual relationship between ERI and FMH, the court denied Jackson's motion for summary judgment. Initially, we note the trial court's erroneous characterization of the issue. By holding that there can be no "non-delegable duty if there is no contractual relationship," the court confused the question of the existence of a duty with the issue of whether a duty is non-delegable. The flaw in this reasoning is self-evident. As FMH points out, a party cannot be held to have delegated away a duty it never had. Thus, the threshold question is whether FMH had a duty to provide emergency room care. Only if it did, is it necessary to determine what that duty entailed.

[9] FMH is licensed as a "general acute care hospital."[11] As such, it is required to comply with state regulations designed to promote "safe and adequate treatment of individuals in hospitals in the interest of public health, safety and welfare." AS 18.20.060. These regulations provided, at the time of Jackson's accident, that an acute care hospital *shall* "insure that a physician is available to respond to an emergency at all times." Former 7 AAC 12.110(c)(2).[12] Thus, at a minimum, the law imposed a duty on FMH to provide emergency care physicians on a 24-hour basis.

FMH, however, voluntarily assumed a much broader duty. At the time of Jackson's accident, FMH was accredited by the

Power testified that "Jackson was talking" and "completely oriented."

10. In this regard, we agree with the weight of authority that application of apparent authority in the hospital/emergency room physician situation does not require an express representation to the patient that the treating physician is an employee of the hospital. Nor is direct testimony as to reliance required absent evidence that the patient knew or should have known that the treating physician was not a hospital employee when the treatment was rendered. *See* cases cited *supra* p. 1380.

11. A general acute care hospital is a "facility which provides hospitalization for inpatient medical care of acute illness or injury and obstetric care." 7 AAC 12.100.

12. In 1983, this regulation was amended to provide that "[a] general acute care hospital *must* provide ... [among other services not relevant here] emergency care services." 7 AAC 12.105 (emphasis added).

Joint Committee on the Accreditation of Hospitals (JCAH).[13] In order to receive and maintain accreditation,[14] FMH had to comply with the JCAH's standards promulgated in the *Accreditations Manual For Hospitals, Emergency Services.* Standard I mandates that all accredited hospitals implement a well defined plan for emergency care based on community need and the capability of the hospital. The JCAH standards also mandate, among other things, that: (1) FMH's emergency room be directed by a physician member of the active medical staff (Standard II); (2) FMH's emergency room be integrated with other units and departments of the hospital (Standard III); (3) that emergency care be guided by written policies and procedures; and (4) that the quality of care be continually reviewed, evaluated and assured through establishment of quality control mechanisms (Standard V).

Additionally, FMH's own bylaws provided for the establishment and maintenance of an emergency room. Article X, section 1(d)(1)(b) of FMH's Medical Bylaws provides for an emergency room as one of the services of the hospital. Article XI, section 3(e) provides for the creation of an emergency room committee which is required among other things to:

(a) formulate rules and regulations for the continuous coverage of the emergency room; and

(b) supervise the clinical work in that department.

[10] Based upon the above, it cannot seriously be questioned that FMH had a duty to provide emergency room services and that part of that duty was to provide physician care in its emergency room. Having so determined, we must next ascertain whether FMH's duty to provide physician care in the emergency room is non-delegable. That is, we must determine whether, having assumed the duty to staff an emergency room, FMH should be allowed to avoid responsibility for the care rendered therein by claiming that the physicians it provides are not its employees. We conclude that it cannot.

[11] A non-delegable duty is an established exception to the rule that an employer is not liable for the negligence of an independent contractor. W. Keeton, D. Dobbs, R. Keeton, D. Owen, *Prosser and Keeton on The Law of Torts,* § 71 at 511–12 (5th ed. 1984). According to the late Professor Prosser, such a duty "may be imposed by statute, by contract, by franchise or by charter, or by the common law." *Id.* Among the duties considered non-delegable are the following:

> [T]he duty of a carrier to transport its passengers in safety, of a railroad to fence its tracks properly or to maintain safe crossings, and of a municipality to keep its streets in repair; the duty to afford lateral support to adjoining land, to refrain from obstructing or endangering the public highway, to keep premises reasonably safe for business visitors, to provide employees with a safe place to work; the duty of a landlord to maintain common passageways, to make repairs according to covenant, or to use proper

13. The JCAH was formed in the early 1950's by the American College of Surgeons, the American College of Physicians, the American Hospital Association, and the American Medical Association. Its purpose was to establish minimum hospital standards for patient care. For details of the program, see Dornette, *The Legal Impact on Voluntary Standards in Civil Actions Against the Health Care Provider,* N.Y.L.Sch.L.Rev. 925, 925–28 (1977); Holbrook & Dunn, *Medical Malpractice Litigation: The Discoverability and Use of Hospitals' Quality Assurance Committee Records,* 16 Washburn L.J. 54, 57 (1976).

14. Hospitals voluntarily seek accreditation for financial and professional prestige reasons. First, accreditation by the JCAH means the hospital qualifies to participate in the federal Medicare and Medicaid programs. Accreditation by JCAH is deemed substantial compliance with the Medicare conditions of participation. 42 U.S.C. § 1395bb (1982); 42 C.F.R. § 405.1901(d) (1986). *See generally,* Dornette, *supra* n. 13 at 927, Holbrook & Dunn, *supra* n. 13, at 58. Second, JCAH accreditation is often a prerequisite to obtaining approval of internship and residency programs. *See generally, American Medical Association Directory of Accredited Residencies 3* (1975–76), *quoted in* Dornette, *supra* n. 13, at 928. Finally, the institution's reputation and standing in the community is affected by whether it receives JCAH accreditation. *See* Holbrook & Dunn, *supra* n. 13.

> care in making them, and no doubt others.

Id. (footnotes omitted). However:

> It is difficult to suggest any criterion by which the non-delegable character of such duties may be determined, other than *the conclusion of the courts that the responsibility is so important to the community that the employer should not be permitted to transfer it to another.*

Id. at 512 (emphasis added). *Accord, Alaska Airlines v. Sweat,* 568 P.2d 916, 925–26 (Alaska 1977).

Our principal decision on non-delegable duty is *Sweat,* 568 P.2d 916. In that case, Sweat sued Alaska Airlines for injuries sustained in an air crash while traveling aboard a Chitina Air Service plane. *Id.* at 922. Chitina had been engaged under a contract with Alaska Airlines to service a portion of Alaska Airlines' regularly scheduled routes. *Id.* at 921, 922. Alaska Airlines contended that Chitina was an independent contractor and therefore it was not liable for Chitina's negligence. *Id.* at 923. The trial court found Alaska Airlines vicariously liable based on Restatement (Second) of Torts § 428. *Id.* On appeal, we affirmed the trial court's decision on the alternative ground that Alaska Airlines owed a common law nondelegable duty of safety to its passengers. *Id.* at 925. We reasoned:

> We believe that the responsibility of a common carrier for the safety of its passengers is so important that the carrier should not be permitted to transfer it to another. A scheduled common carrier such as Alaska is given a monopoly or semi-monopoly primarily for the purpose of furnishing safe and reliable scheduled air transportation. It should not be permitted to barter away its responsibility to the traveling public by means of contracts with other carriers. If this were permissible, an air carrier could avoid liability by engaging in independent contracts for furnishing food, maintenance of its planes and conceivably even for supplying crews. Regardless of whether such contracts may be permitted by regulatory authorities, the traveling public is entitled to look for protection to the certificated carrier responsible for the scheduled route.

Id. at 926.

We have little trouble concluding that patients, such as Jackson, receiving treatment at a hospital emergency room are as deserving of protection as the airline passengers in *Sweat.* Likewise, the importance to the community of a hospital's duty to provide emergency room physicians rivals the importance of the common-carriers' duty for the safety of its passengers. We also find a close parallel between the regulatory scheme of airlines and hospitals. Undoubtedly, the operation of a hospital is one of the most regulated activities in this state. Besides the license,[15] and certificate of need,[16] requirements mentioned above, a hospital must comply with state regulations promulgated to control its activities, AS 18.20.070, 7 AAC 12.610; adopt a state approved risk management program "to minimize the risk of injury to patients," AS 18.20.075; and undergo "annual inspections and investigations" of its facilities, AS 18.20.080. Failure to comply with these statutory requirements can lead to suspension or revocation of the hospital's license. AS 18.20.050.

The hospital regulatory scheme and the purpose underlying it (to "provide for the development, establishment, and enforcement of standards for the care and treatment of hospital patients that promote safe and adequate treatment" AS 18.20.010), along with the statutory definition of a hospital, (an institution devoted primarily to providing diagnosis, treatment or care to individuals, AS 18.20.130(3)), manifests the legislature's recognition that it is the hospital as an institution which bears ultimate responsibility for complying with the mandates of the law. It is the hospital that is required to ensure compliance with the regulations and thus, relevant to the instant case, it is the hospital that bears final ac-

15. *See* AS 18.20.020.

16. *See* AS 18.07.031.

countability for the provision of physicians for emergency room care. We, therefore, hold that a general acute care hospital's duty to provide physicians for emergency room care is non-delegable. Thus, a hospital such as FMH may not shield itself from liability by claiming that it is not responsible for the results of negligently performed health care when the law imposes a duty on the hospital to provide that health care.

We are persuaded that the circumstances under which emergency room care is provided in a modern hospital mandates the rule we adopt today. Not only is this rule consonant with the public perception of the hospital as a multifaceted health care facility responsible for the quality of medical care and treatment rendered, it also treats tort liability in the medical arena in a manner that is consistent with the commercialization of American medicine. Finally, we simply cannot fathom why liability should depend upon the technical employment status of the emergency room physician who treats the patient. It is the hospital's duty to provide the physician, which it may do through any means at its disposal. The means employed, however, will not change the fact that the hospital will be responsible for the care rendered by physicians it has a duty to provide.

[12] This holding is necessarily limited. We do not change the standard of care with which a physician must comply, nor do we extend the duty which we find non-delegable beyond its natural scope. Our holding does not extend to situations where the patient is treated by his or her own doctor in an emergency room provided for the convenience of the doctor. Such situations are beyond the scope of the duty assumed by an acute care hospital. Rather our holding is limited to those situations where a patient comes to the hospital, as an institution, seeking emergency room services and is treated by a physician provided by the hospital. In such situations, the hospital shall be vicariously liable for damages proximately caused by a physician's negligence or malpractice.

[13] In the instant case, Jackson came to FMH as an institution seeking emergency room services. Dr. Power was a physician FMH had a non-delegable duty to provide. FMH is, therefore, vicariously liable as a matter of law for any negligence or malpractice that Dr. Power may have committed. Accordingly, the trial court's ruling on this issue must be reversed. Jackson is entitled to partial summary judgment on the issue of FMH's vicarious liability.

VII

For the reasons outlined above, the trial court's denial of summary judgment on Jackson's theories of enterprise liability and apparent authority are AFFIRMED. However because we hold that FMH has a non-delegable duty to provide non-negligent physician care in its emergency room, the trial court's denial of summary judgment on the theory of non-delegable duty, is REVERSED and REMANDED with instructions to enter partial summary judgment on the issue of FMH vicarious liability in favor of Jackson.

AFFIRMED in part; REVERSED in part; and REMANDED.

MOORE, J., not participating.

From Jerry Reinbold 2/23/88

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FEB 23 1988

M E M O R A N D U M November 4, 1987

TO: Dale Shirk, Executive Director
Health Association of Alaska

FROM: David C. Crosby

RE: Jackson v. Power

Attached for your information is the October 16, 1987, opinion of the Alaska Supreme Court in Jackson v. Power, No. 3237. The Supreme Court held that a general acute care hospital has a non-delegable duty to provide physicians for emergency room care. As a consequence, the court ruled that a general acute care hospital will be vicariously liable for the negligence of emergency room physicians, even though those physicians are independent contractors and even if the general public is notified that the physicians are not employees of the hospital.

You have asked me to analyze the ruling of the court and to advise you and your membership concerning the consequences of the ruling.

A brief review of the facts in the Power case will put the Supreme Court's holding in context. The plaintiffs were Brett Jackson, a 16 year old at the time of her injury, and her mother. They alleged that Brett was injured in a fall that occurred on May 22, 1981, and that she was admitted to the Fairbanks Memorial Hospital ("Hospital") emergency room in an unconscious state. The complaint alleges that, due to physician negligence, internal injuries were not immediately diagnosed or properly treated, and that as a result Brett lost both kidneys. Medical bills are alleged to exceed $500,000.

The defendants included Dr. John Power, an employee of Emergency Room, Inc. ("ERI"), who treated Brett on the evening of her admission, several other doctors who were subsequently involved in the treatment of Brett, and the Hospital. Dr. Power was a member of the medical staff of the Hospital, but not an employee of the Hospital. ERI staffed the emergency room pursuant to an arrangement with the Hospital. The Supreme Court assumed, for purposes of

the appeal, that Dr. Power was an independent contractor, that neither of the plaintiffs had any knowledge of the relationship between the Hospital and Dr. Power, and neither of the plaintiffs had any say in where Brett would be treated, or by whom.

Fairbanks Memorial Hospital is the only general acute care hospital servicing the Fairbanks area. In addition to being regulated by the State of Alaska, the Hospital is also accredited by the Joint Commission on Accreditation of Hospitals.

Plaintiffs did not suggest that either the Hospital or its employee staff was negligent in any respect. Liability was asserted solely on the ground that the Hospital may be held vicariously liable for the negligence of its emergency room doctors. Specifically, the plaintiffs asserted three theories of liability against the Hospital:

(1) As a matter of law (that is, there are no facts that would make any difference), provision of emergency room services is part of the enterprise of the Hospital, and the Hospital is vicariously liable for any negligence that occurs in the emergency room. The Supreme Court ruled in favor of the Hospital and the amicus curiae Health Association of Alaska on this issue.

(2) As a matter of law, Dr. Power was the "apparent agent" of the Hospital for purposes of providing emergency room services. The Supreme Court also rejected this theory of liability. The court ruled that, while the theory of apparent agency applies to the relationship between hospitals and independent contractor physicians, whether such apparent agency exists in any case is a question of fact for the jury. The Supreme Court held, however, that the plaintiffs would not have to prove that they actually relied upon any representations made to them by the Hospital. Presumably, if the Hospital is able to prove that it informed the plaintiffs of the relationship between the Hospital and the emergency room physicians, or that no reasonable patient under all the circumstances would have believed that the emergency room doctor was an employee or the agent of the Hospital, the Hospital would prevail on this theory.

(3) Finally, the plaintiffs argued that the Hospital had a non-delegable duty to insure the safety of emergency room services. That is, the Hospital could not insulate itself from liability by interposing an independent contractor relationship with ERI and Dr. Power.

The Supreme Court placed principal reliance upon the following factors to support its ruling that the Hospital has a duty to provide physicians for the emergency room and that this duty is non-delegable: (1) Former 7 AAC 12.110(c)(2), which provided at the time of Jackson's accident that an acute care hospital shall "insure that a physician is available to respond to an emergency at all times." (2) JCAH standards requiring accredited hospitals to have a plan for emergency care, to staff the emergency room with members of the active medical staff, and to review the quality of care in the emergency room. (3) The Hospital's own bylaws, which provided for the establishment and maintenance of an emergency room.

The Supreme Court concluded that imposing a non-delegable duty on the Hospital to provide emergency room physicians is consistent with the public perception of hospitals as being ultimately responsible for the quality of medical care throughout the facility. The Court reasoned that liability should not hinge upon the technical employment status of the emergency room physician who treats the patient, and concluded:

> It is the hospital's duty to provide the physician. which it may do through any means at its disposal. The means employed, however, will not change the fact that the hospital will be responsible for the care rendered by physicians it has a duty to provide.

The court limited its holding to situations where a patient comes to the hospital, as an institution, seeking emergency room services and is treated by a physician provided by the hospital. The ruling does not extend to situations where the patient is treated by his or her own doctor in an emergency room provided for the convenience of the doctor.

The practical effect of this ruling is that, unless the patient selects the physician (and that physician is not a hospital employee), the general acute care hospital is now a guarantor of the acts of the physician in the emergency room, regardless of the legal relationship between the hospital and the emergency room physician. The hospital is "vicariously" liable. That is, the hospital is liable whenever the physician is negligent, and to the same extent that the physician is liable. The plaintiff may sue the hospital directly, and need not even join the negligent

doctor. In the latter case, the hospital may bring the doctor into the litigation as a third-party defendant.

As between the hospital and and the physician, the hospital will have a common law right of indemnity, including reimbursement of attorney's fees, if it is liable solely because of the negligence of the physician. If, however, the hospital is negligent by, for example, failing to take adequate precautions to deny staff privileges to an incompetent doctor, or if an employee nurse is negligent, the hospital's remedy will be solely by way of contribution under AS 09.16.010. Here, the hospital will share liability pro rata, that is, the total judgment will be divided by the number of negligent defendants, regardless of degree of fault.

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It should be understood that neither indemnity nor contribution, as between the defendants, will affect the hospital's liability to the plaintiff, who may enforce the entire judgment against the Hospital. If the physician does not have insurance, or the amount of the judgment that the physician must pay exceeds the physician's assets or coverage, then any right to indemnity or contribution will be worth very little.

The Supreme Court did not address the liability of hospitals for the negligence of other independent staff members, such as anesthesiologists, pathologists and radiologists. We would expect the same rules to apply, however. If the anesthesiologist, pathologist or radiologist is requested by the patient, the hospital will probably not be vicariously liable for any acts of negligence. If, however, the anesthesiologist or radiologist is not requested by the patient but is made available by the hospital as a member of the on-duty staff, we see little reason why the logic of the Powers decision would not result in a finding of vicarious liability if the anesthesiologist, pathologist or radiologist is negligent.

The options of acute care hospitals, in light of the Powers decision, include the following:

1. Acute care hospitals may choose to re-examine their relationships to emergency room physicians and, if necessary, tighten quality control measures. One approach would be to make all emergency room physicians employees of the hospital to insure closer supervision and control.

2. The presence of a corporate hospital in a malpractice action will tend to increase jury sympathy for

- 211: cap on non-economics

the plaintiff and the size of damage awards. The acute care hospital may wish to review its own insurance and the insurance requirements for medical staff membership. One possible way to decrease the burden on the hospital is to require physicians to sign indemnity agreements, to carry larger malpractice policies, and to name the hospital as an additional insured.

3. The time may be ripe for a legislative solution before plaintiffs get used to the revised liability rules. As an amicus curiae, most of the arguments made in the Health Association's brief to the Supreme Court reflected policy considerations. These arguments may be addressed to the Legislature as well as to the Supreme Court. The limited immunity provided to hospitals for the negligence of intensive care paramedics suggests that a legislative solution might be viewed as sensible and equitable.

If you have any further questions regarding the Powers decision, please do not hesitate to give me a call.

CORRECT COPY 2/11/88

DRAFT -- 2/3/88 "An Act relating to the liability of hospitals"

LEGISLATIVE INTENT -- Hospitals are not vicariously liable for the negligence of non-employee physicians or other health care providers, as that term is defined in AS 18.23.070, solely because the hospital is required to provide services and is subject to strict regulation in the provision of those services.

Adding new Article 4 -- Miscellaneous to Chapter 20 of Title 18, Alaska Statutes.

A hospital that is required to provide services by this chapter or any implementing regulations, or that is subject to regulation with respect to the provision of services, is not, solely for that reason, liable for civil damages as a result of any act or omission in administering those services by a physician or other health care provider, as that term is defined in AS 18.23.070, who is not an employee of the hospital. Compliance with the standards of a public or private licensing or accreditation agency with respect to provision of services, or adoption of by-laws or regulations by the hospital governing provision of services, shall not be construed as an assumption of civil liability by the hospital for the acts or omissions of a physician or other health care provider who is not an employee of the hospital.

This section does not preclude liability or civil damages that are the proximate result of the hospital's own negligence or intentional misconduct.

Health Association of Alaska
586-1790

Contact: Harlan Knudson

LEGISLATIVE SUMMARY -- JACKSON V. POWER

** The Jackson decision imposes liability on hospitals for the negligence of non-employee emergency room physicians solely because the hospital is required by law to provide emergency room services and is regulated in the provision of those services, without requiring the plaintiff to show that the hospital has been negligent or that it has violated any specific regulatory requirement. No other American jurisdiction has gone so far.

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

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

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

** The Jackson ruling could decrease hospital and emergency room response time if hospitals react to the ruling by requiring emergency room physicians to practice more "legal" or "defensive medicine" -- more tests, more consultations, etc. Emergency situations are inherently