THE YEAR IN REVIEW 2008

SELECTED CASES FROM THE ALASKA SUPREME COURT, THE ALASKA COURT OF APPEALS, THE UNITED STATES SUPREME COURT, AND THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

INTRODUCTION

The *Alaska Law Review*'s Year in Review is a collection of brief summaries of selected state and federal appellate cases concerning Alaska law. They are neither comprehensive in breadth, as several cases are omitted, nor in depth, as many issues within individual cases are omitted. Attorneys should not rely on these summaries as an authoritative guide; rather, they are intended to alert the Alaska legal community to judicial decisions from the previous year. The summaries are grouped by subject matter.

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Ninth Circuit Court of Appeals

Fairbanks North Star Borough v. U.S. Army Corps of Engineers

In *Fairbanks North Star Borough v. U.S. Army Corps of Engineers*,[1] the Ninth Circuit held that the U.S. Army Corps of Engineers' ("Corps") issuance of an approved jurisdictional determination did not constitute final agency action under the Administrative Procedure Act ("APA") for purposes of judicial review.[2] Fairbanks sought permission from the Corps to develop property for recreational use.[3] The Corps found that the Clean Water Act required that Fairbanks obtain a permit prior to conducting the work.[4] Fairbanks brought suit to set aside the Corps's determination.[5] The district court granted the Corps's motion for judgment on the pleadings, and concluded that the approved jurisdictional determination did not constitute final agency action under the APA.[6] The court of appeals provided two conditions for agency action to be final: (1) the action must mark the consummation of the agency's decision-making process, and (2) the action must be one by which rights or obligations have been determined, or from which legal consequences will flow.[7] The court concluded that the first condition was met, but the second was not.[8] According to the court, the second condition was not met because Fairbanks's rights and obligations remained unchanged by the approved jurisdictional determination, since the determination did not require Fairbanks to do or forbear from anything.[9] The court distinguished Fairbanks's obligation under the Clean Water Act ("CWA") from the Corps's issuance of an approved jurisdictional determination.[10] Ultimately, the court held, Fairbanks was only obligated to act pursuant to the CWA.[11] Because the Corps' view did not impose an obligation, deny a right, or fix some legal relationship, the court found that it did not have jurisdiction to review the Corps's approved jurisdictional determination.[12] Affirming the district court, the the Ninth Circuit held that the Corps's issuance of an approved jurisdictional determination did not constitute final agency action under the APA for purposes of judicial review.[13]

Sam v. Astrue

In *Sam v. Astrue*,[14] the Ninth Circuit held that when an administrative law judge ("ALJ") finds that a person has never been disabled, the ALJ need not follow regulations pertaining to the determination of the onset date of the disability.[15] Sam filed an application for disability insurance in 2003 in which he claimed that he had been unable to work since 1993 due to pain in his neck, back and legs.[16] In 2006, the ALJ handling the case found that Sam was not disabled, as defined by the Social Security Act, at any time prior to the decision.[17] Sam appealed to the district court, arguing that the ALJ erred by not conferring a medical expert to determine a disability onset date.[18] The district court affirmed the ALJ, and Sam appealed.[19] The Ninth Circuit reasoned that if a person had never been disabled, there could be no issue

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[1] 543 F.3d 586 (9th Cir. 2008).
[2] *Id.* at 591.
[3] *Id.* at 589.
[4] *Id.* at 590.
[5] *Id.*
[6] *Id.* at 591.
[7] *Id.*
[8] *Id.*
[9] *Id.* at 593.
[10] *Id.* at 594.
[11] *Id.*
[12] *Id.* at 597.
[13] *Id.* at 591.
[14] 550 F.3d 808 (9th Cir. 2008).
[15] *Id*. at 809.
[16] *Id.*
[17] *Id*. at 810.
[18] *Id.*
[19] *Id.*

pertaining to the onset of the disability.[20] Thus, the regulations used to determine the onset date of a disability were inapplicable to Sam's case.[21] Affirming the district court, the Ninth Circuit held that when an ALJ finds a person to not be disabled at any time before the decision, the ALJ need not follow regulations pertaining to the determination of the onset date.[22]

State v. Federal Subsistence Board

In *State v. Federal Subsistence Board*,[23] the Ninth Circuit held that the Administrative Procedure Act ("APA") does not bar the Federal Subsistence Board ("FSB") from granting Customary and Traditional use determination ("C & T determination") to subsistence communities that grant broader access to land.[24] The FSB granted a C & T determination to Chistochina, a rural subsistence community, which allowed the community to hunt moose in all three pre-delineated sections of a 10,000 square mile game management unit ("GMU").[25] The State challenged the determination, arguing: (1) that Chistochina only used particular areas within each section, (2) that the FSB did not consider the effect its determination would have on specific moose populations, and (3) that the broad determination was arbitrary and capricious.[26] The Ninth Circuit affirmed the district court in rejecting all of these arguments, finding first that Chistochina had adequately shown that it used land in all three sections of the GMU.[27] Second, the court held that the FSB had sufficiently evaluated the effects that the determination would have on twelve specific moose populations.[28] Third, the court found that forcing the FSB to constantly define new areas in each GMU—even though Alaska argued that the FSB did not reflect the use patters of the Christochina residents—would make the system almost impossible to manage.[29] Thus, the Ninth Circuit affirmed the decision of the district court, holding that the APA does not bar the FSB from granting C & T determinations to subsistence communities that grant broader access to land.[30]

Alaska Supreme Court

Alford v. State, Department of Administration

In *Alford v. State, Department of Administration*,[31] the supreme court held that: (1) the Division of Retirement and Benefits' (the "Division") methodology did not violate the Alaska Constitution, (2) the Division's recalculation of pensions were reasonable, and (3) the recapture requirement was not a downward adjustment prohibited by the Public Employees' Retirement System ("PERS") statutes.[32] In 1977, the statute governing calculation of pensions under PERS was amended to alter the calculation of pensions after a subsequent retirement.[33] The Attorney General's office advised the Division that the use of either the old or the new calculation method depended on the employee's retirement date.[34] However, the Attorney General's office later advised the Division that according to the supreme court, the method used should be determined based on the date the employee enrolled in PERS, not the date of retirement.[35] The Division agreed to pay interest on back payments to affected beneficiaries.[36] However, as required by statute, the Division also began to recapture retirement benefits disbursed to those who had originally taken

[20] *Id*.
[21] *Id*. at 811.
[22] *Id.*
[23] 544 F.3d 1089 (9th Cir. 2008).
[24] *Id.* at 1101.
[25] *Id.* at 1092–93.
[26] *Id.* at 1094–97.
[27] *Id.* at 1095.
[28] *Id.* at 1096.
[29] *Id.* at 1099–1100.
[30] *Id.* at 1101.
[31] 195 P.3d 118 (Alaska 2008).
[32] *Id.* at 124–26.
[33] *Id.* at 119–20.
[34] *Id.* at 120.
[35] *Id.* at 121.
[36] *Id.*

early retirement.[37] The Commissioner rejected the early retirees' request to be exempted from the recapture requirement.[38] Both the PERS Board ("Board") and the trial court upheld this decision, and the retirees appealed, arguing that the recapture provision was unconstitutional and that the Division's calculations resulted in a reduced pension, thus violating the statute's prohibition on downward adjustments.[39] The court reasoned that based on its precedent, while PERS members were entitled to choose the best benefits available, they were not entitled to sever statutory provisions from one another and mix and match provisions from one era with that of another.[40] The court also determined that the Division's calculations were supported by quantifiable mathematical basis,[41] and that application of the recapture requirement was a natural extension of applying the former subsection in order to correct the previous error in calculations.[42] The supreme court affirmed the Board's denial of the early retiree's claims, holding that: (1) the Division's methodology did not violate the Alaska Constitution, (2) the Division's recalculations of pensions were reasonable, and (3) the recapture requirement was not a downward adjustment prohibited by PERS statutes.[43]

Amerada Hess Pipeline Corp. v. Regulatory Commission of Alaska

In *Amerada Hess Pipeline Corp. v. Regulatory Commission of Alaska*,[44] the supreme court held that: (1) an administrative agency's use of a settlement contract in calculating rates did not violate the rules of evidence; (2) an administrative agency did not violate the rule against retroactive ratemaking when the rates were suspended when the litigation began; (3) an administrative agency's failure to recuse a staff expert did not necessarily violate procedural due process when that expert has analyzed, in an academic work, an issue currently in contention before the agency.[45] After the Regulatory Commission of Alaska ("RCA") was sued by certain companies that shipped oil ("shippers") in 1997 on the Trans Alaska Pipeline System ("TAPS"), the RCA promulgated Order No. 151 which changed the methodology for calculating shipping rates and ordered the owners of TAPS to refund the shippers' overpayments.[46] TAPS' owners appealed Order No. 151.[47] The supreme court adopted the superior court's opinion as its own.[48] First, the supreme court reasoned that the RCA did not violate the rules of evidence when it considered the settlement contract while determining the total amount of depreciation of the pipeline because it was not used to prove a disputed claim.[49] Thus, the policy rationale against allowing evidence of settlement negotiation in subsequent litigation was not invoked.[50] Second, the superior court reasoned that the RCA did not retroactively set rates because the RCA had properly suspended the rates when litigation commenced in 1997.[51] Third, the superior court reasoned that the RCA did not err when it failed to recuse its economics expert.[52] Although the expert had analyzed the issue under contention (namely, the best methodology for calculating shipping rates on TAPS) in his master's thesis some years before, the court was not apprised of any facts indicating that the economist's testimony or reports dominated the RCA commissioner's decision, nor that any RCA commissioner had prejudged the case.[53] Affirming the superior court, the supreme court held that: (1) an administrative agency's use of a settlement contract in calculating rates did not violate the rules of evidence; (2) an administrative agency did not violate the rule against

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[37] *Id.*
[38] *Id.*
[39] *Id.* at 122–24.
[40] *Id.* at 124.
[41] *Id.* at 124–25.
[42] *Id.* at 126.
[43] *Id.* at 124–26.
[44] 176 P.3d 667 (Alaska 2008).
[45] *Id.* at 669.
[46] *Id.* at 670.
[47] *Id.* at 669.
[48] *Id.* at 669–70.
[49] *Id.* at 682.
[50] *Id.*
[51] *Id.* at 686.
[52] *Id.* at 677.
[53] *Id.* at 676.

retroactive ratemaking when the rates were suspended when the litigation began; (3) an administrative agency's failure to recuse a staff expert did not necessarily violate procedural due process when that expert has analyzed, in an academic work, an issue currently in contention before the agency.[54]

Baker v. State, Department of Health and Social Services

In *Baker v. State, Department of Health and Social Services*,[55] the supreme court held that notices sent to individuals in the Personal Care Attendant Program ("PCA") informing those individuals of reduced services were not sufficient for due process purposes since the notices lacked enough explanation about the reasons for the State's decision to reduce services.[56] The Department of Health and Social Services ("Department") created an objective test to determine the appropriate level of services individuals in the PCA should receive.[57] The test required that a nurse interview and observe an individual and then provide a numerical code to score the level of service the individual required, and form letters informing individuals of the change in PCA services they would receive were then sent out.[58] Baker and Burtness, two individuals in the PCA, filed a class action suit against the Department on the grounds that the notices violated their procedural due process rights because the notices did not include information that would have permitted an appeal.[59] The superior court held that the notices complied with due process.[60] According to the supreme court, a notice must be written in accordance with the standards of federal regulations and must be "complete," which entails the inclusion of specific information on how the agency made its determination to reduce benefits.[61] The court also agreed with Baker that due process required individuals in the PCA to be given an opportunity to understand, review, and, if appropriate, challenge the department's action.[62] Finally, because of the importance of the objective test used in determining the appropriate level of benefits, the supreme court held that the analysis conducted by the nurse during the test must be included in the notice.[63] Reversing the superior court, the supreme court held that notices sent to individuals in the PCA informing those individuals of reduced services were not sufficient for due process purposes since the notices lacked enough explanation about the reasons for the State's decision to reduce services.[64]

Barrington v. Alaska Communications Systems Group, Inc.

In *Barrington v. Alaska Communications Systems Group, Inc.*,[65] the supreme court held that: (1) the Alaska Workers' Compensation Appeals Commission ("Commission") could not be a party in appeals from its decisions to the supreme court, and (2) a doctor's claim for payment was not barred after his patient settles her related workers' compensation claim without joining him as a party or giving him notice of the settlement.[66] Barrington, a physician, performed an evaluation on Williams after she experienced job-related pain; Williams's attorney assured Barrington that his claim for payment would be included with Williams's workers' compensation claim.[67] However, Williams entered into a written settlement agreement with her employer before the Alaska Workers' Compensation Board ("Board") without giving notice to Barrington or attempting to join him as a party in the proceedings.[68] Two months later, Barrington filed his own payment claim against Williams's employer.[69] The Board ruled that Barrington's claim was barred by the settlement, but that he retained a civil claim against Williams; Commission affirmed the Board's ruling,

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[54] *Id.* at 669.
[55] 191 P.3d 1005 (Alaska 2008).
[56] *Id*. at 1006.
[57] *Id*. at 1007–08.
[58] *Id*.
[59] *Id*. at 1008.
[60] *Id.* at 1013.
[61] *Id*. at 1009–10.
[62] *Id*. at 1011.
[63] *Id*. at 1012.
[64] *Id*. at 1006.
[65] 198 P.3d 1122 (Alaska 2008).
[66] *Id.* at 1123–24, 1127–28.
[67] *Id.* at 1124.
[68] *Id.*
[69] *Id.*

holding that Barrington's interests were represented by Williams and that he had no right of notice to the settlement.[70] Barrington appealed to the supreme court, and the Commission asserted that it should be a party in the appeal proceedings.[71] The supreme court ruled that the legislature had authorized the director of the Division of Workers' Compensation, not the Commission, to represent the executive branch in workers' compensation appeals; also, the court found that the Commission, unlike a party, had no interest in defending its decisions and therefore could not be a party to appeals from its own decisions.[72] Turning to Barrington's claim, the court held that due process required the board to join him as a party to Williams's claim or give him notice prior to approving the settlement.[73] The court ruled that Barrington was a necessary party to the Board's proceedings because he had a potential claim for relief, Williams was not an adequate representative for him, and his absence materially limited his ability to safeguard his interests.[74] Thus, the board's failure to join Barrington or give him notice was a due process violation.[75] The supreme court reversed the decision of the Commission, holding that: (1) the Commission could not be a party in appeals from its decisions to the supreme court, and (2) a doctor's claim for payment was not barred after his patient settles her related workers' compensation claim without joining him as a party or giving him notice of the settlement.[76]

Bauer v. State, Department of Corrections

In *Bauer v. State, Department of Corrections*,[77] the supreme court held that an inmate is entitled to an administrative appeal when the relief obtained through such an appeal would be greater than what the Department of Corrections ("DOC") had already provided.[78] Bauer, an inmate at Spring Creek Correctional Center, refused to clean up a blood spill without the assistance of another crew member due to a new safety protocol requiring that two trained crew members clean such a spill.[79] Bauer was found guilty of disobeying a direct order by the DOC and given fifteen days' segregation.[80] Bauer appealed to the superior court, but the superior court dismissed the case after the DOC said it would provide Bauer with a new administrative hearing.[81] Instead, the DOC reduced the incident to an "informational" item in Bauer's record and claimed the need for another hearing was unnecessary.[82] Bauer argued that this reduction was inadequate relief because if he was successful in the new hearing, the record of the underlying incident would be removed from his file.[83] The supreme court agreed with Bauer, reasoning that the case might not be moot if Bauer could be entitled to greater relief through an appeal than DOC had given through the downgrade to an informational item in his report.[84] The court found further that it was unclear whether prison policy would require removal of all record of the incident from his file if Bauer had been found not guilty.[85] Reversing the superior court, the supreme court held that an inmate is entitled to an administrative appeal when the relief obtained through such an appeal would be greater than what the Department of Corrections ("DOC") had already provided.[86]

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[70] *Id.*
[71] *Id.* at 1124–25.
[72] *Id.* at 1125–27.
[73] *Id.* at 1127.
[74] *Id.* at 1127–29.
[75] *Id.* at 1133.
[76] *Id.* at 1123–24, 1127–28.
[77] 193 P.3d 1180 (Alaska 2008).
[78] *Id.* at 1181.
[79] *Id.*
[80] *Id.*
[81] *Id.* at 1182.
[82] *Id.* at 1181–82.
[83] *Id.* at 1181.
[84] *Id.* at 1182.
[85] *Id.* at 1183.
[86] *Id.* at 1181.

Bragg v. Matanuska-Susitna Borough

In *Bragg v. Matanuska-Susitna Borough*,[87] the supreme court held that: (1) plaintiffs have standing when they allege that a government entity encroached upon their procedural rights, (2) Alaska law permits municipalities to levy excise taxes, and (3) locally-enacted excise taxes do not require voter ratification to take effect.[88] By ordinance, the Matanuska-Susitna Borough ("Borough") imposed a tax on the initial acquisition, manufacture, or transport of tobacco, but the ordinance was not submitted for voter ratification.[89] Bragg brought suit, arguing that the ordinance, as an excise tax, could not be adopted by the Borough; alternatively, he argued that if the ordinance is lawful, it required voter ratification.[90] The superior court, assuming that Bragg possessed standing to bring suit, held that excise taxes fall within municipalities' general taxation powers, and also held that such taxes could be enforced without voter ratification.[91] The supreme court addressed Bragg's standing, since lower courts may not avoid such inquiries.[92] The court ruled that Alaska law gives the Borough's taxpayers certain procedural rights prior to the imposition of taxes; it held that to the extent Bragg claimed that the Borough encroached upon these rights, he had standing to bring suit.[93] In addressing the Borough's taxing authority, the court noted that the Alaska Constitution requires a liberal reading of municipal powers and that the Alaska Statutes grant municipalities general powers, including the power to levy taxes.[94] The court then held that Bragg had failed to show any excise tax exception to these municipal powers.[95] Finally, the court ruled that several features of the tax—its one-time application on manufacturers and distributors, goal of discouraging tobacco use, and label as an "excise tax"—suggested that the ordinance imposed an excise tax.[96] The court held that as an excise tax, rather than a sales or use tax, the ordinance did not require voter ratification.[97] The supreme court affirmed the superior court, holding that: (1) plaintiffs have standing when they allege that a government entity encroached upon their procedural rights, (2) Alaska law permits municipalities to levy excise taxes, and (3) locally-enacted excise taxes do not require voter ratification to take effect.[98]

Bridges v. Banner Health

In *Bridges v. Banner Health*,[99] the supreme court held that: (1) where a court has ruled that a motion for intervention as a matter of right is untimely, it is not an abuse of discretion to deny permissive intervention on the same grounds; and (2) legislation is an unconstitutional special act if it creates a permanently closed class.[100] Under §§ 18.07.031 and 18.07.111 of the Alaska Statutes, health care providers must obtain a certificate of need ("CON") from the Department of Health and Social Services ("DHSS") prior to constructing an "independent diagnostic testing facility" (IDTF).[101] Banner Health ("Banner") asked DHSS to investigate whether Alaska Open Imaging Center ("AOIC") was legally building an MRI center without obtaining a CON; DHSS ruled that AOIC was exempt from the CON requirement as a "private physician's office."[102] Banner sought to enjoin both the enforcement of DHSS's ruling and the construction of AOIC's center without a CON.[103] The superior court reversed DHSS's determination since it had relied upon regulations that contradicted the legislature's intent; the judge also

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[87] 192 P.3d 982 (Alaska 2008).
[88] *Id.* at 987–89.
[89] *Id.* at 983.
[90] *Id.* at 983–84.
[91] *Id.* at 984.
[92] *Id.* at 985.
[93] *Id.* at 987.
[94] *Id.*
[95] *Id.* at 988.
[96] *Id.* at 989.
[97] *Id.*
[98] *Id.* at 987–89.
[99] 201 P.3d 484 (Alaska 2008).
[100] *Id.* at 492, 494.
[101] *Id.* at 487.
[102] *Id.* at 487–488.
[103] *Id.* at 488.

enjoined AOIC from building its MRI facility without a CON.[104] Six weeks after entry of the injunctions, AOIC's medical director, Dr. Bridges, sought to intervene because he was also an equity holder and guarantor of debt; the judge denied Bridges's motion as untimely.[105] The superior court later entered a final judgment for Banner.[106] On appeal, the supreme court ruled that since Bridges presented no grounds for his delay, his request for intervention as of right was untimely.[107] Regarding Bridges's permissive intervention motion, the court stated that because such applications are less likely to be granted than motions for intervention as of right, the superior court did not abuse its discretion in holding that Bridges's motion for permissive intervention was likewise untimely.[108] In evaluating AOIC's argument that the statutory CON requirement was unconstitutional, the supreme court held that a statute is unconstitutional special legislation if it creates a permanently closed class.[109] The court ruled that a closed class is one that limits application to current members; since the CON requirement covered IDTFs, whose numbers would grow if other health care providers were to build them, the court held that the legislation created neither a closed class nor a special act.[110] Affirming in part and vacating in part, the supreme court held that: (1) where a court has ruled that a motion for intervention as a matter of right is untimely, it is not an abuse of discretion to deny permissive intervention on the same grounds; and (2) that legislation is an unconstitutional special act if it creates a permanently-closed class.[111]

Carter v. B&B Construction, Inc.

In *Carter v. B&B Construction, Inc.*,[112] the supreme court held that: (1) a doctor's testimony supporting both a work-related injury and a non-work-related injury as contributing "substantial factors" to an employee's permanent total disability ("PTD") claim does not meet the rebuttal standard required of an employer, and (2) the relevant starting period for reemployment benefits is the date on which an employee begins to seek benefits.[113] Carter was injured on the job.[114] Believing he could return to work, he began rehabilitation—entitling him to reemployment benefits—before he became completely unable to work.[115] Seeking compensation for his injuries, Carter filed a claim with the Alaska Workers' Compensation Board ("Board"), which granted him reemployment benefits but denied him PTD benefits.[116] He appealed to the superior court, which affirmed the Board's conclusions.[117] Regarding Carter's PTD claim, the supreme court noted that such claims are subject to a three-stage analysis: (1) the claimant must show a link between the injury and the employment, (2) the employer may then rebut this link with "substantial evidence" that shows the injury was unrelated to the work, and (3) the employee can overcome this presumption with a preponderance of evidence establishing the link.[118] The court reasoned that because the doctor's testimony used by the employer to rebut the presumption suggested two "substantial factors," one work related, and one not, the employer had failed to rebut Carter's link.[119] Regarding the reemployment benefits, the court reasoned that while the statute was ambiguous, the legislature could not have intended for a gap between the expiration of Carter's earlier benefits for which Carter was entitled and his reemployment benefits, the relevant starting period for reemployment benefits is the date on which the employee starts to seek such benefits.[120] Reversing the superior court, the supreme court held that: (1) the doctor's testimony supporting both a work-related injury and a non-work-related injury as contributing "substantial factors" to an

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[104] *Id.*
[105] *Id.* at 488–89.
[106] *Id.* at 489.
[107] *Id.* at 492.
[108] *Id.*
[109] *Id.* at 494–95.
[110] *Id.* at 495.
[111] *Id.* at 492, 494, 496.
[112] 199 P.3d 1150 (Alaska 2008).
[113] *Id.* at 1157–60.
[114] *Id.* at 1151.
[115] *Id.* at 1151–54.
[116] *Id.* at 1154–55.
[117] *Id.*
[118] *Id.* at 1155.
[119] *Id.* at 1157
[120] *Id.* at 1160.

employee's PTD claim does not meet the rebuttal standard required of an employer, and (2) the relevant starting period for reemployment benefits is the date on which an employee begins to seek such benefits.[121]

Fuhs v. Gilbertson

In *Fuhs v. Gilbertson*[122] the supreme court held that: (1) because a citizen was not substantially affected by a proposed new medical facility, he did not have standing to challenge a certificate of need issued by the Alaska Department of Health and Social Services ("ADHSS"); and (2) because the public interest litigant exception to Alaska Civil Rule 82 no longer applies to non-constitutional causes of action, he could not claim an exemption from an award of attorney's fees.[123] Fuhs challenged the granting of a certificate of need ("CON") to Providence Alaska Medical Center for the construction of an open-bore MRI facility.[124] Gilbertson, the ADHSS Commissioner, denied Fuhs's request for a hearing on the CON on the grounds that Fuhs lacked standing under Alaska's CON statute.[125] Fuhs appealed and also sought an injunction against the construction of the facility; the superior court dismissed the case on the grounds that Fuhs lacked standing and awarded attorney's fees to Gilbertson and the Medical Center.[126] Fuhs claimed that § 07.080 of the Alaska Administrative Code granted standing to anyone who could demonstrate good cause; this regulation, however, conflicted with § 18.07.081(a) of the Alaska Statutes, requiring a person be substantially affected in order to have standing.[127] Because Fuhs did not address the question of standing in the supplemental brief requested by the supreme court, the court looked only to the statute and, even under a liberal construction, found that Fuhs was not substantially affected by the construction of the MRI facility.[128] Regarding the award of fees, the supreme court reasoned that even if Fuhs was a public interest litigant, the public interest exception to Rule 82 does not apply to nonconstitutional causes of action.[129] Affirming the superior court, the supreme court held that: (1) because a citizen was not substantially affected by a proposed new medical facility he did not have standing to challenge a CON issued by ADHSS; and (2) because the public interest litigant exception to Alaska Civil Rule 82 no longer applies to non-constitutional causes of action, he could not claim an exemption from an award of attorney's fees.[130]

Haggblom v. City of Dillingham

In *Haggblom v. City of Dillingham,*[131] the supreme court held that: (1) a dog owner's procedural due process rights are not violated when she is not told she has a right to counsel at, or to bring witnesses to, an administrative appeal of a euthanasia order;[132] (2) a city ordinance which mandates euthanasia for an animal that bites a person without provocation is not void for vagueness;[133] and (3) a city's offer to allow a dog owner to remove the animal from the city limits in lieu of euthanasia does not support a claim of arbitrary enforcement.[134] When Haggblom took her dog, Muneca, with her to work, Muneca bit one of Haggblom's coworkers without growling or giving any other warning that she was about to bite.[135] The police were informed of the incident and conducted an investigation.[136] Muneca was deemed "vicious" under the city dog bite ordinance, and she was ordered euthanized or banished from the city.[137] Haggblom administratively appealed the decision and lost.[138] She appealed to the superior court and lost there too.[139]

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[121] *Id.* at 1157–60.
[122] 186 P.3d 551 (Alaska 2008).
[123] *Id.* at 552–53.
[124] *Id.* at 552.
[125] *Id.*
[126] *Id.* at 552–53.
[127] *Id.* at 554–55.
[128] *Id.* at 554–57.
[129] *Id.* at 557–58.
[130] *Id.* at 552–53.
[131] 191 P.3d 991 (Alaska 2008).
[132] *Id.* at 996.
[133] *Id.* at 998.
[134] *Id.*
[135] *Id.* at 994.
[136] *Id.*
[137] *Id.* at 994–95.
[138] *Id.* at 995.

Haggblom appealed to the supreme court, claiming that the dog bite ordinance violated her due process rights, was void for vagueness, and was arbitrarily enforced.[140] The supreme court first determined that because the city ordinance listed the standards for determining whether an animal was vicious and also required notice to the owner of the planned time for euthanasia and the right to appeal, there was no due process violation.[141] The court refused to require municipalities to advise litigants of their procedural rights in city administrative hearings.[142] Next, the court determined that the ordinance's use of the term "without provocation" was not void for vagueness in this case because both parties agreed that Muneca attacked for no reason.[143] Thus, the case fell squarely within the phrase's plain meaning.[144] Finally, the court determined that the city was being lenient by allowing Muneca to be banished instead of euthanized.[145] Thus, its actions did not prove arbitrary.[146] The supreme court affirmed the order for euthanasia or banishment, holding that: (1) a dog owner's procedural due process rights are not violated when she is not told she has a right to counsel at, or to bring witnesses to, an administrative appeal of a euthanasia order;[147] (2) a city ordinance which mandates euthanasia for an animal that bites a person without provocation is not void for vagueness;[148] and (3) a city's offer to allow a dog owner to remove the animal from the city limits in lieu of euthanasia does not support a claim of arbitrary enforcement.[149]

Matanuska Electric Ass'n v. Municipality of Anchorage

In *Matanuska Electric Ass'n v. Municipality of Anchorage*,[150] the supreme court held that: (1) an administrative agency's order regarding the operation of an electrical line will be upheld if it is supported by substantial evidence, and (2) the erroneous denial of a request for cross-examination does not create reversible error if the refusal was harmless.[151] Matanuska Electric Association ("MEA") and the Alaska Energy Authority agreed that the latter would operate a transmission line owned by the former.[152] The line was designed to operate at 115 kV, but was energized to 138 kV for several years.[153] Eventually, MEA attempted to renegotiate the contract in order to operate at 115 kV.[154] The distributors using MEA's line applied to the Regulatory Commission of Alaska ("Commission") for continued use of the line.[155] During a trial focusing primarily on the line's safety, MEA declined to cross-examine Haagenson, one of the appellees' witnesses.[156] When Haagenson was recalled to testify on the following day, MEA was denied the opportunity to cross-examine him because it had not done so on the first day.[157] The Commission later found 138 kV operation to be safe and ordered it to continue.[158] On appeal, MEA argued that the Commission could not order continued operation at 138 kV, because doing so violated safety codes incorporated into state law; MEA also argued that the Commission erred by refusing to permit cross-examination of Haagenson.[159] The supreme court found that MEA had presented no evidence that operation at 138 kV violated state law. MEA had only shown that 138 kV operation was not as safe as 115

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[139] *Id.*
[140] *Id.* at 995, 998.
[141] *Id.* at 996–97.
[142] *Id.* at 996.
[143] *Id.* at 997.
[144] *Id.*
[145] *Id.* at 998.
[146] *Id.*
[147] *Id.* at 996.
[148] *Id.* at 998.
[149] *Id.*
[150] 184 P.3d 19 (Alaska 2008).
[151] *Id.* at 27.
[152] *Id.* at 20–21.
[153] *Id.* at 21.
[154] *Id.*
[155] *Id.*
[156] *Id.* at 21–22.
[157] *Id.* at 22.
[158] *Id.*
[159] *Id.* at 23.

kV operation,[160] but court affirmed the Commission's ruling because there was substantial evidence showing that it was still safe to operate the line at the higher kV level.[161] The supreme court also reasoned that the failure of MEA's attorney to explain why she wished to cross-examine Haagenson constituted a waiver of any claim of error regarding the exclusion of evidence.[162] The court held that since the Commission would have reached the same decision even if it had heard Haagenson's additional testimony, the denial was not reversible error.[163] The supreme court affirmed the Commission, holding that: (1) an administrative agency's order regarding the operation of an electrical line will be upheld if it is supported by substantial evidence and (2) the erroneous denial of a request for cross-examination does not create reversible error if the refusal was harmless.[164]

Regulatory Commission of Alaska v. Tesoro Alaska Company

In *Regulatory Commission of Alaska v. Tesoro Alaska Company*,[165] the supreme court held that a denial to investigate the rates charged by the owners of the Trans-Alaska Pipeline is legitimate when the request is untimely.[166] In 2003, the Regulatory Commission of Alaska ("Commission") received a complaint from Tesoro Alaska Company and William Alaska Petroleum, Inc., about the rates charged for use of the Trans-Alaska Pipeline between 1986 and 1996.[167] Because of the history of investigations that had already been concluded, the Commission found the complaint untimely; on appeal, the superior court remanded the case with orders to conduct a review of the years challenged.[168] The supreme court independently reviewed the Commission's final decision, applying the three-part test found in the Administrative Procedures Act, and applied a reasonable-and-not-arbitrary standard to the Commission's decision to not conduct a further review of the rates in question.[169] The court noted that the Commission had discretion under the Alaska Statutes, and was supported in its decision by case law as well as its own regulations.[170] Using these statutes and cases, the supreme court noted the problems with each of the arguments submitted by Tesoro and William, finding that the Commission had a reasonable basis for its decision.[171] Reversing the superior court, the supreme court held that a denial to investigate the rates charged by the owners of the Trans-Alaska Pipeline is legitimate when the request is untimely.[172]

State, Commercial Fisheries Entry Commission v. Carlson

In *State, Commercial Fisheries Entry Commission v. Carlson*,[173] the supreme court held that under the Constitution's Privileges and Immunities Clause, Alaska was permitted to charge nonresidents more than residents for fishermen license and permit fees, but the differential must be substantially equal to the contribution of each Alaska resident to fisheries management.[174] Between 1984 and 2002, nonresident commercial fishermen paid three times more than resident fishermen for licenses and permits.[175] Carlson filed a class action on behalf of all nonresident Alaska fishermen and demanded a refund for the amount that nonresidents paid in excess of the amount that residents paid.[176] The superior court ruled for Carlson's class and required the state to pay refunds to nonresidents who paid more than their fair contribution to Alaska's fisheries budget,[177] reasoning that Alaska's existing three-to-one fee schedule was not rationally

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[160] *Id.* at 24–26.
[161] *Id.* at 26.
[162] *Id.* at 26–27.
[163] *Id.*
[164] *Id.*
[165] 178 P.3d 1159 (Alaska 2008).
[166] *Id.* at 1161, 1173.
[167] *Id.* at 1163.
[168] *Id.*
[169] *Id.*
[170] *Id.* at 1165–66.
[171] *Id.* at 1165–73.
[172] *Id.* at 1161, 1173.
[173] 191 P.3d 137 (Alaska 2008).
[174] *Id.* at 139.
[175] *Id.*
[176] *Id.*
[177] *Id.* at 139–40.

related to the goal of equalizing the fisheries management burden.[178] The supreme court held that because Alaska has a legitimate interest in equalizing the economic burdens between residents and nonresidents, Alaska need only demonstrate that its fee schedules have a "substantial enough relationship" to the goal of equalizing economic burdens between residents and nonresidents.[179] The supreme court vacated and remanded the superior court's judgment because it required strict equality in calculating the refund owed to nonresident fishermen, holding that under the constitution's Privileges and Immunities Clause, Alaska may charge nonresidents more than residents for fishermen license and permit fees, but the differential must be substantially equal to the contribution of each Alaska resident to fisheries management.[180]

Swetzof v. Philemonoff

In *Swetzof v. Philemonoff*,[181] the supreme court held that it was proper for a city clerk to refuse to certify a proposed initiative that would require the city to refrain from engaging in the sale or delivery of electric power.[182] Swetzof, Clerk of the City of St. Paul, refused to certify two proposed initiatives that would have required the city to stop the sale and delivery of electric power to retail customers and encourage the use of renewable energy.[183] The sponsors of both proposals then filed suit in the superior court challenging the refusals.[184] The superior court ordered certification of both proposals, and Swetzof appealed.[185] The supreme court reversed the superior court's findings, reasoning that the first proposal was not enforceable as a matter of law because the City of St. Paul could not simply discontinue electric service to retail customers but, instead, would have to seek permission from the Regulatory Commission of Alaska.[186] The court said it would rule on the second initiative at a later date.[187] Reversing the superior court, the supreme court held that it was proper for a city clerk to refuse to certify a proposed initiative that would require the city to refrain from engaging in the sale or delivery of electric power.[188]

VECO Alaska, Inc. v. State

In *VECO Alaska, Inc. v. State*,[189] the supreme court held that the Alaska Workers' Compensation Board's ("Board") written record requirement for reimbursement from the Second Injury Fund ("SIF") requires only that the employer have knowledge of a preexisting impairment rather than a specific medical condition.[190] Huizenga began work for VECO after seriously injuring his back at a previous job.[191] Huizenga disclosed his back injuries in a questionnaire to VECO prior to beginning work but did not disclose that he had arthritis resulting from a congenital condition.[192] Almost two years after he began working for VECO, he reinjured his back while on the job, and the injury was exacerbated by his arthritis.[193] VECO initially paid his compensation benefits and then filed a claim for reimbursement out of the SIF.[194] The Board denied VECO's claim, stating that it could not be reasonably inferred from VECO's written records that it had knowledge of Huizenga's arthritis as a prior condition.[195] The superior court upheld the Board's finding, and VECO appealed.[196] Reversing the superior court, the supreme court reasoned that the Board's standard was one that most employers would not be able to meet based on

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[178] *Id.* at 148.
[179] *Id.* at 144–45.
[180] *Id.* at 139, 148.
[181] 192 P.3d 992 (Alaska 2008).
[182] *Id.* at 993.
[183] *Id.* at 992–93.
[184] *Id.* at 993.
[185] *Id.*
[186] *Id.*
[187] *Id.* at 994.
[188] *Id.* at 993.
[189] 189 P.3d 983 (Alaska 2008).
[190] *Id.* at 989–92.
[191] *Id.*
[192] *Id.*
[193] *Id.* at 985–86.
[194] *Id.*
[195] *Id.* at 986.
[196] *Id.* at 987.

information received from employees who may not fully understand their medical conditions, and therefore, the standard used was contrary to the purpose of the SIF.[197] Reversing the superior court, the supreme court held that the Board's written record requirement for reimbursement from the SIF requires only that the employer have knowledge of a preexisting impairment rather than a specific medical condition.[198]

Washington's Army v. City of Seward

In *Washington's Army v. City of Seward*,[199] the supreme court held that even when individuals have taxpayer standing to challenge acts of city council, those individuals may only use a referendum to challenge *official* action by the city council.[200] The Seward City Charter permits referenda to challenge any act of the city council.[201] However, the charter defines official action to require the votes of at least four council members.[202] Intent on challenging a controversial plan, Washington's Army filed an application for a referendum petition.[203] The City of Seward clerk denied the group's application because no official action was taken—only three council members voted for the plan.[204] Washington's Army appealed the superior court's decision denying their right to challenge the controversial plan via referendum.[205] The supreme court held that: (1) the citizen members of Washington's Army, but not the collective entity, had standing to make this appeal because individual citizens—rather than unincorporated entities—may be held accountable for the results of the legal proceedings;[206] but that (2) because the subject of the citizens' proposed referendum was voted on by only three members of the council, it did not constitute official action and thus could not be challenged via referendum.[207] The supreme court affirmed the superior court's dismissal of the citizens' complaint, holding that even when individuals have taxpayer standing to challenge acts of city council, those individuals may only use a referendum to challenge *official* action by the city council.[208]

Wilber v. State, Commercial Fisheries Entry Commission

In *Wilber v. State, Commercial Fisheries Entry Commission*,[209] the supreme court held that the Commercial Fisheries Entry Commission ("CFEC") may combine two seasons into one "year" for the purposes of assessing hardship.[210] The Alaska Legislature passed a bill placing a moratorium on entry into the geoduck fishery and requiring the Commercial Fisheries Entry Commission ("CFEC") to study whether it was necessary to limit entry into the geoduck fishery.[211] Finding that restrictions were appropriate, the CFEC developed a priority classification system for distributing permits to harvest geoducks through the awarding of points.[212] Because the system combined the short January 1996 season (before the moratorium took effect) into the previous year, Wilber was only able to claim ten points in the CFEC system, one point away from being awarded a transferable permit.[213] The supreme court reviewed the decision of the CFEC with a deferential standard, looking only for a reasonable basis in the law.[214] The court agreed with the superior court that CFEC's argument about the flexible meaning of the word "year" was reasonable.[215]

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[197] *Id.* at 988–90.
[198] *Id.* at 989–92.
[199] 181 P.3d 1102 (Alaska 2008).
[200] *Id.* at 1105.
[201] *Id.*
[202] *Id.*
[203] *Id.* at 1103.
[204] *Id.*
[205] *Id.* at 1104.
[206] *Id.* at 1105.
[207] *Id.*
[208] *Id.* at 1105.
[209] 187 P.3d 460 (Alaska 2008).
[210] *Id.* at 461–62.
[211] *Id.* at 462.
[212] *Id.* at 463.
[213] *Id.*
[214] *Id.* at 465.
[215] *Id.*

Moreover, the court held that the legislature's amendment of a statute to give the CFEC broad discretion reinforced the reasonableness of the CFEC's decision.[216] This discretion includes the ability to disregard one or more particular hardships when ranking applicants.[217] Affirming the superior court, the supreme court held that the CFEC may combine two seasons into one "year" for the purposes of assessing hardship.[218]

Alaska Court of Appeals

Holden v. State

In *Holden v. State*,[219] the court of appeals held that it had no jurisdiction to review a final superior court judgment on an administrative appeal and transferred the case to the supreme court.[220] After the Department of Public Safety determined that Holden was required to register as a sex offender, Holden appealed that determination in the superior court.[221] The superior court ruled that a recent change in the registration law had mooted Holden's appeal; Holden then sought review by the supreme court.[222] The supreme court granted the State's motion to transfer the case to the court of appeals on the basis that the court of appeals generally has jurisdiction over cases involving the Sex Offender Registration Act.[223] The court of appeals stated that although the Alaska Statutes give litigants the option to appeal a final decision from the superior court, litigants may not choose the forum in which they will bring their appeals.[224] The court reasoned that the jurisdiction of the state's two appellate courts is not determined by the type of legal issue raised but rather the type of proceeding that gives rise to the appeal.[225] An appeal must be brought in the court of appeals if it regards a type of proceeding specifically within the jurisdiction of the court of appeals; otherwise, it must be brought in the supreme court.[226] The court of appeals lacks jurisdiction over administrative appeals.[227] The court of appeals held that it had no jurisdiction to review a final superior court judgment on an administrative appeal and transferred the case to the supreme court.[228]

BUSINESS LAW

Alaska Supreme Court

Harris v. Ahtna, Inc.

In *Harris v. Ahtna, Inc.*,[229] the supreme court held that: (1) a court may utilize counsels' conclusions of law and findings of fact where they reflect a court's independent evaluation of the evidence; and (2) the admission of evidence was not unfairly surprising where the exploration of an issue was foreseeable, the objecting party already possessed the evidence in question, and the omission of evidence would be misleading.[230] Ahtna, Inc. formed a subsidiary called Ahtna Government Services, Inc.

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[216] *Id.* at 466.
[217] *Id.*
[218] *Id.* at 461–62.
[219] 190 P.3d 725 (Alaska Ct. App. 2008).
[220] *Id.* at 731.
[221] *Id.* at 727–28.
[222] *Id.* at 728.
[223] *Id.*
[224] *Id.* at 729.
[225] *Id.*
[226] *Id.*
[227] *Id.* at 731.
[228] *Id.*
[229] 193 P.3d 300 (Alaska 2008).
[230] *Id.* at 306, 308.

("AGS").[231] While president of AGS, Harris engineered several contracts with companies he owned, benefitting himself at the expense of AGS.[232] Harris was fired and AGS sued him for breach of fiduciary duty.[233] The trial judge admitted time sheets from one of Harris's companies, which AGS had obtained the previous night, and Harris's objection on grounds of unfair surprise was overruled.[234] The superior court found against Harris on all counts and then ordered AGS to draft findings of fact and conclusions of law, which the court utilized after making certain modifications.[235] On appeal, Harris argued that: (1) the superior court inappropriately used AGS's conclusions and findings, and (2) the admission of the time sheets was unfair surprise.[236] The supreme court held that Alaska Civil Rule 78 permits a court to adopt conclusions and findings drafted by counsel as long as they reflect the court's independent evaluation of the evidence.[237] Since the trial court had clearly deleted significant material regarding a party, the supreme court ruled that this standard had been met.[238] The court further ruled that admission of the time sheets was not unfair surprise, given the allegations of self-dealing in favor of Harris's companies and that the work actually performed by those companies would be an issue at trial.[239] The court noted that since the time sheets had been approved by Harris and came from one of his companies, he was already aware of their contents,[240] and also that excluding the time sheets would have created an inaccurate picture of events.[241] The supreme court affirmed the superior court, holding that: (1) a court may utilize counsels' conclusions of law and findings of fact where they reflect a court's independent evaluation of the evidence; and (2) the admission of evidence was not unfairly surprising where the exploration of an issue was foreseeable, the objecting party already possessed the evidence in question, and the omission of evidence would be misleading.[242]

Alaska Court of Appeals

State v. Greenpeace, Inc.

In *State v. Greenpeace, Inc.*,[243] the court of appeals held that: (1) a person or organization does not qualify as the authorized agent of a principal unless the principal controls or has the legal right to control the purported agent,[244] and (2) adoption or ratification of an agent's actions by a principal requires at a minimum both an awareness of the misconduct and some action to ratify or adopt the misconduct.[245] The vessel *Arctic Sunrise* docked in Ketchikan en route to an anti-logging campaign for Greenpeace, Inc ("Greenpeace").[246] After obtaining permission from Greenpeace International, Greenpeace, chartered the vessel from Stichting Marine Services ("SMS").[247] When the *Arctic Sunrise* arrived in Ketchikan it did not have an approved oil spill contingency plan or certificate of financial responsibility as required by Alaska law, and did not obtain one in Ketchikan.[248] As a result, the State charged Greenpeace and Sorensen, the *Arctic Sunrise's* master, with operating the vessel with criminal negligence.[249] A jury convicted Greenpeace and Sorensen, but the trial court set aside the convictions after ruling that they were not

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[231] *Id.* at 302.
[232] *Id.* at 303–04.
[233] *Id.* at 304.
[234] *Id.* at 307.
[235] *Id.* at 305.
[236] *Id.* at 306–07.
[237] *Id.*
[238] *Id.*
[239] *Id.* at 308.
[240] *Id.*
[241] *Id.*
[242] *Id.* at 306, 308.
[243] 187 P.3d 499 (Alaska Ct. App. 2008).
[244] *Id.* at 505.
[245] *Id.* at 506.
[246] *Id.* at 500.
[247] *Id.*
[248] *Id.*
[249] *Id.*

supported by sufficient evidence.[250] On appeal, the court of appeals first determined that the double jeopardy clause does not bar an appeal from a court's decision to set aside a jury verdict.[251] The court then determined that considerable evidence was presented at trial to show that Greenpeace did not own or control the *Arctic Sunrise*.[252] The evidence showed that SMS, not Greenpeace, had the obligation to ensure that the vessel complied with all regulatory requirements.[253] The evidence also showed that SMS was a separate entity from Greenpeace, and as such Greenpeace had no right to control actions taken by SMS.[254] Thus, Greenpeace could not be held liable as a principal for the actions of SMS.[255] Furthermore, even if the State could prove that SMS was Greenpeace's agent, the State could not prove that Greenpeace ratified the actions taken by SMS.[256] Therefore, there was insufficient evidence for a jury to find that SMS was an agent for Greenpeace.[257] The court of appeals affirmed the district court, holding that: (1) a person or organization does not qualify as the authorized agent of a principal unless the principal controls or has the legal right to control the purported agent,[258] and (2) adoption or ratification of an agent's actions by a principal requires at a minimum both an awareness of the misconduct and some action to ratify or adopt the misconduct.[259]

CIVIL PROCEDURE

Ninth Circuit Court of Appeals

Cysewski v. Astrue

In *Cysewski v. Astrue*,[260] the Ninth Circuit held that a finding of an individual's residual functional capacity ("RFC") must be supported by specific, substantial evidence.[261] Cysewski applied for and was denied disability benefits; the Administrative Law Judge ("ALJ") discounted her testimony regarding the severity of her symptoms because she had been paid to babysit her two grandchildren for fifty hours per week.[262] The ALJ also found that Cysewski's RFC allowed her to work, basing this finding on an incomplete State Agency's Physical Residual Functioning Capacity Assessment form.[263] The Ninth Circuit held that in order to reject an individual's testimony, the ALJ must have had a clear and convincing reason for doing so.[264] Rather than relying almost exclusively on the incomplete assessment form, the ALJ should have conducted a function-by-function assessment of Cysewski's capacities in determining her RFC.[265] The Ninth Circuit reversed the decision of the district court, holding that a finding of RFC by an ALJ must be supported by specific, substantial evidence.[266]

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[250] *Id.*
[251] *Id.* at 503.
[252] *Id.* at 505.
[253] *Id.*
[254] *Id.* at 506.
[255] *Id.*
[256] *Id.*
[257] *Id.*
[258] *Id.* at 505.
[259] *Id.* at 506.
[260] 290 Fed. Appx. 972 (9th Cir. 2008).
[261] *Id.* at 975.
[262] *Id.* at 974.
[263] *Id.* at 975.
[264] *Id.* at 974.
[265] *Id.* at 975.
[266] *Id.* at 974–75.

Oscar v. State, Department of Education and Early Development

In *Oscar v. State, Department of Education and Early Development*,[267] the Ninth Circuit held that dismissal of a party's claim without prejudice is not a judgment on the merits, and, therefore, attorneys' fees may not be awarded.[268] Oscar requested an investigation into violations of his daughter's Individuals with Disabilities Education Act ("IDEA") individualized education plan.[269] The Alaska Department of Education and Early Development ("DEED") refused to recognize his request as a formal complaint because Oscar sent it via an unsigned email.[270] Oscar sued DEED under IDEA.[271] The district court dismissed the case and awarded DEED attorneys' fees.[272] Oscar appealed the award of attorneys' fees.[273] On appeal, the Ninth Circuit noted that the Supreme Court of the United States has held that attorneys' fees may only be awarded to a prevailing party, defined as one who received a judgment on the merits or a court-ordered consent decree.[274] The court reasoned that, consistent with its precedent, a dismissal without prejudice is not a judgment on the merits because it does not change the parties' legal relationship and another complaint could still be filed.[275] Reversing the order of the district court, the Ninth Circuit held that dismissal of a party's claim without prejudice is not a judgment on the merits, and, therefore, attorneys' fees may not be awarded.[276]

Alaska Supreme Court

Beegan v. State, Department of Transportation & Public Facilities

In *Beegan v. State, Department of Transportation & Public Facilities*,[277] the supreme court held that an employee's claim for back pay was not barred under collateral estoppel when the employee did not have the opportunity to argue the back pay claim in front of the Alaska State Commission for Human Rights (the "Commission").[278] Beegan brought a complaint before the Commission against the Department of Transportation and Public Facilities ("DOTPF") for age discrimination and improper retaliation for human rights complaints.[279] The Commission found that the DOTPF's actions against Beegan were retaliation for his human rights complaints but failed to address Beegan's request for back pay damages.[280] The superior court ruled that he was collaterally estopped from seeking back pay damages, and Beegan appealed.[281] The supreme court reasoned that claims can only be precluded by collateral estoppel if the court decided the question or if the party failed to raise the question in the initial forum.[282] Since the remedy of back pay damages was unavailable at the Commission level, the Commission could not have decided the question.[283] The supreme court held that Beegan's claim was not barred under collateral estoppel when he did not have the opportunity to argue the back pay claim in front of the Commission.[284]

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[267] 541 F.3d 978 (9th Cir. 2008).
[268] *Id.* at 582.
[269] *Id.* at 579.
[270] *Id.* at 580.
[271] *Id.*
[272] *Id.*
[273] *Id.* at 579.
[274] *Id.* at 581.
[275] *Id.*
[276] *Id.* at 582.
[277] 195 P.3d 134 (Alaska 2008).
[278] *Id.* at 136.
[279] *Id.* at 137.
[280] *Id.*
[281] *Id.*
[282] *Id.* at 138.
[283] *Id.* at 138–39.
[284] *Id.* at 136.

Byers Alaska Wilderness Adventures v. City of Kodiak

In *Byers Alaska Wilderness Adventures v. City of Kodiak*,[285] the supreme court held that a superior court judge is not required by the law of the case doctrine to follow another judge's ruling on a motion in limine.[286] Byers ran a boat chartering business that specialized in extended hunting, fishing, and site seeing trips, but it failed only after a few weeks.[287] Byers sued Kodiak for defamation.[288] The superior court judge originally assigned to the case granted a motion in limine to prevent the jury from hearing prejudicial statements about Byers's past.[289] Because of scheduling, a different superior court judge actually presided over the trial.[290] The second judge ignored the original motion in limine though he did give curative statements when the defendant's counsel made prejudicial comments.[291] In deciding the case, the supreme court first established that the law of the case doctrine in Alaska does not require superior court judges to follow orders from previous superior court judges.[292] Not only was the superior court allowed to ignore the previous order, it did not err in its own evidentiary rulings because it struck prejudicial references from the record and used curative statements to ensure an unbiased jury.[293] The supreme court affirmed the decision of superior court, holding that a superior court judge is not required by the law of the case doctrine to follow another judge's ruling on a motion in limine.[294]

Hertz v. Carothers

In *Hertz v. Carothers*,[295] the supreme court held that an exception in § 09.38.030(f) of the Alaska Statutes that excludes prisoners from claiming a low income exemption in a statute regarding debt collection was valid.[296] After Hertz, a state prisoner, unsuccessfully litigated a civil rights claim against the prison, he was ordered to pay the state's attorney's fees or have them garnished from his prisoner trust account.[297] Hertz argued that his income fell below the statutory minimum necessary for the debt collection statute to apply or in the alternative, that the statute was unconstitutional.[298] The statute, however, included an exception to the minimum income requirement for prisoners.[299] The supreme court reasoned that Hertz clearly fell under the exception for prisoners articulated in the debt collection statutes and that the exemption from collection for people with low incomes was superseded by Hertz's status as a prisoner.[300] The legislature intended to make it easier for the state to collect against prisoners, so the exception to the exemption provision should be honored.[301] In regards to Hertz's constitutional claims, the court reasoned that it did not violate prisoners' rights to attempt to curtail frivolous litigation by providing penalties for unsuccessful suits, and that the statute did not impede access to courts.[302] Additionally, there was no equal protection violation because indigent prisoners and indigent non-prisoners are not similarly situated, so the law may treat them differently.[303] The supreme court affirmed the decision of the superior court, holding that an exception in § 09.38.030(f) that excludes prisoners from claiming a low income exemption in a statute regarding debt collection was valid.[304]

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[285] *197 P.3d 199 (Alaska 2008).*
[286] *Id. at* 204.
[287] *Id.* at 202.
[288] *Id.* at 203.
[289] *Id.*
[290] *Id.*
[291] *Id.* at 203–04.
[292] *Id.* at 206.
[293] *Id*. at 205, 208.
[294] *Id. at* 204.
[295] 174 P.3d 243 (Alaska 2008).
[296] *Id.* at 244–45.
[297] *Id.* at 245.
[298] *Id.* at 244.
[299] *Id.*
[300] *Id.* at 246.
[301] *Id.* at 247.
[302] *Id.* at 248.
[303] *Id.*
[304] *Id.* at 244.

In re Guardianship of McGregory

In *In re Guardianship of McGregory*,[305] the supreme court held that Alaska Civil Rule 82 ("Rule 82") should not apply to guardianship proceedings if Rule 82 would interfere with the "unique character and purpose" of the proceedings, but if its application would not interfere, then Rule 82's fee-shifting provisions apply.[306] After Decker-Brown removed her mother, McGregory, from a state-run assisted-living facility, the State filed a petition for guardianship of McGregory.[307] McGregory and Decker-Brown filed a motion to dismiss; the State did not oppose this motion after it determined that McGregory was being appropriately cared for.[308] Following dismissal of the motion, McGregory's and Decker-Brown's lawyers sought fees and costs from the State.[309] McGregory's lawyer based her claim on Rule 82, alleging that the State's petition was in bad faith; Decker-Brown's lawyer based her claim on § 13.26.131(d) of the Alaska Statutes, claiming the State's petition was "malicious, frivolous, or without just cause."[310] The supreme court reasoned that guardianship proceedings are protective in nature and, because analogous "protective" proceedings were exempt from Rule 82, it would be inconsistent to not also exempt guardianship proceedings.[311] Moreover, allowing fee shifting might chill an important State function.[312] However, the court held that the exception in §13.26.131(d), which allows for fee shifting if a proceeding is "malicious, frivolous, or without just cause," should also apply to individuals who do not receive appointed counsel.[313] Therefore, affirming the lower court, the supreme court held that Rule 82 should not apply to guardianship proceedings if Rule 82 would interfere with the "unique character and purpose" of the proceedings, but if its application would not interfere, then Rule 82's fee-shifting provisions apply.[314]

In re Protective Proceedings of W.A.

In *In re Protective Proceedings of W.A.*,[315] the supreme court held that: (1) an individual is totally incapacitated if clear and convincing evidence shows that he is unable to ensure his own health and safety, and (2) alternatives to guardianship are not feasible if clear and convincing evidence shows that the individual is incapable of making important life decisions.[316] W.A. was a 45-year-old man living with his 81-year-old mother, and his adult siblings brought an action to obtain a permanent guardian for W.A.[317] The siblings alleged that W.A. had not held a steady job for over 20 years and had been treating his mother abusively.[318] After extensive testimony, the superior court appointed a permanent guardian, reasoning that W.A. met the standard for incapacity and that there were no reasonable alternatives; W.A. appealed.[319] First, the supreme court held that the superior court's finding of incapacity was based on significant testimony of experts and family members, providing more than enough information to find clear and convincing evidence of incapacity.[320] Second, while the superior court did not state that its finding that alternatives to guardianship were not feasible was based on clear and convincing evidence, this finding was rendered irrelevant by the fact that the magistrate's recommendation upon which the court relied stated that the finding was based on clear and convincing evidence.[321] The supreme court affirmed the decision of the superior court, holding that: (1) an individual is totally incapacitated if clear and convincing evidence shows that he is unable to ensure his own health and safety, and (2) alternatives to guardianship are not

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[305] 193 P.3d 295 (Alaska 2008).
[306] *Id.* at 300.
[307] *Id.* at 296–97.
[308] *Id.* at 297.
[309] *Id.*
[310] *Id.* at 298.
[311] *Id.*
[312] *Id.* at 299.
[313] *Id.*
[314] *Id.* at 300.
[315] 193 P.3d 743 (Alaska 2008).
[316] *Id.* at 749–750.
[317] *Id.* at 745.
[318] *Id.*
[319] *Id.* at 748.
[320] *Id.* at 749.
[321] *Id.* at 750.

feasible if clear and convincing evidence shows that the individual is incapable of making important life decisions.[322]

Maness v. Daily

In *Maness v. Daily*,[323] the supreme court held that, unless it is clearly fair and efficient to do so, judicial findings made at criminal sentencing hearings do not estop the defendant from challenging the same issues in a civil suit.[324] In 2001, Alaska State Troopers attempted to take Maness into custody in order to transport him to a hospital for psychiatric evaluation.[325] In an attempt to escape, Maness took a rifle and fled by foot into the woods.[326] State Troopers eventually captured Maness after shooting him in the back.[327] Maness was convicted of being a felon in possession of a firearm.[328] At the sentencing hearing, the federal judge found that Maness assaulted the State Troopers.[329] Maness filed a civil action against the police claiming use of excessive force.[330] The superior court held that Maness was precluded from relitigating the issue of his assault of the State Troopers and dismissed the claim.[331] The supreme court found that Maness was not afforded a fair opportunity to present evidence regarding the assault allegations during the sentencing hearing.[332] Further, the supreme court found that there were still unresolved factual questions as to whether the officers' force was "reasonably necessary."[333] Reversing the superior court on the excessive force claim, the supreme court held that judicial findings made at criminal sentencing hearings do not estop the defendant from challenging the same issues in a civil suit unless it is clearly fair and efficient to do so.[334]

Mitchell v. Teck Cominco Alaska Inc.

In *Mitchell v. Teck Cominco Alaska Inc.*,[335] the supreme court held that: (1) summary judgment on a race-based discrimination claim is improper when the nonmoving party properly requests additional time to respond to the motion; (2) summary judgment is improper on a good faith and fair dealing claim when material facts are still in dispute; (3) summary judgment is improper on a breach of contract claim, even when unopposed by the nonmoving party, if material facts are in dispute; and (4) a Judge may have a conflict of interest when the Judge's spouse might directly benefit from the outcome of a case, even if the spouse's interest is de minimis.[336] Mitchell, an African-American, worked as a warehouse manager for Teck Cominco.[337] Mitchell wanted to start a relationship with an employee of a Cominco contractor and asked a mutual friend to contact the employee about a possible relationship. [338] Teck Cominco discovered the solicitation, which contained overtones of an employment-for-sex trade, and confronted Mitchell, who then lied about having anything do with the note.[339] Mitchell was fired for sexual harassment after the investigation was complete. [340] The supreme court held that Mitchell's Civil Rule 56(f) request for additional time in response to Teck Cominco's summary judgment motion to dismiss the race-based discrimination claim should have been granted because: (1) Mitchell satisfied the three requirements, and

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[322] *Id.* at 749–50.
[323] 184 P.3d 1 (Alaska 2008).
[324] *Id.* at 5–7.
[325] *Id.* at 2.
[326] *Id.* at 3.
[327] *Id.*
[328] *Id.*
[329] *Id.*
[330] *Id.*
[331] *Id.* at 4–5.
[332] *Id.* at 6.
[333] *Id.* at 7.
[334] *Id.* at 6–7.
[335] 193 P.3d 751 (Alaska 2008).
[336] *Id.* at 764–65.
[337] *Id.*
[338] *Id.* at 754–55.
[339] *Id.* at 755.
[340] *Id.*

(2) 56(f) requests should be freely granted.[341] Mitchell also overcame Teck Cominco's summary judgment motion to dismiss the employment contracts claim because there was a triable issue of fact: several Teck Cominco employees violated the company's sexual harassment but were punished less severely.[342] Furthermore, the court held that Mitchell's summary judgment motion for his claim that Teck Cominco breached its covenant of good faith and fair dealing was properly denied even though Teck Cominco did not oppose summary judgment or dispute all of the evidence presented by Mitchell, since significant facts were still in dispute.[343] Finally, because the trial judge's wife was receiving approximately $300 in dividends annually from stock that she owned in Teck Cominco, and even though that amount might be de minimis, there still might be a reasonable question concerning the judge's impartiality that should be considered further.[344] Reversing in part and affirming in part, the supreme court held that: (1) summary judgment on a race-based discrimination claim is improper when the nonmoving party properly requests additional time to respond to the motion; (2) summary judgment is improper on a good faith and fair dealing claim when material facts are still in dispute; (3) summary judgment is improper on a breach of contract claim, even when unopposed by the nonmoving party, if material facts are in dispute; and (4) a Judge may have a conflict of interest when the Judge's spouse might directly benefit from the outcome of a case, even if the spouse's interest is de minimis.[345]

Mullins v. Oates

In *Mullins v. Oates*,[346] the supreme court held a settlement agreement legally binding where no evidence showed coercion or duress during negotiations and the disputing party stated in court that she voluntarily entered into it.[347] Mullins contracted with Oates to purchase three lots of real property and a wooden structure.[348] When Mullins defaulted on the contract, Oates moved to terminate the contract and retain title and whatever payments had been made.[349] The superior court ordered a settlement conference, where an agreement was reached after the mediator informed Mullins that she would likely lose and be forced to pay Oates's attorney's fees.[350] Mullins later moved to set aside the agreement because it was made under duress, Oates had later sent documents constituting a counteroffer, and the agreement violated her constitutional rights.[351] The supreme court reasoned that, based on the length of the settlement conference and the available record, the agreement was not reached under duress.[352] Furthermore, the mediator had correctly stated the law and Mullins had freely entered the agreement in open court.[353] Additionally, while the written terms of settlement mailed by Oates to Mullins contained at least one non-negotiated term, the court found that this term was void but was not material enough to invalidate the entire agreement.[354] Affirming the superior court, the supreme court held a settlement agreement legally binding where no evidence showed coercion or duress during negotiations and the disputing party stated in court that she voluntarily entered into it.[355]

Parson v. State, Alaska Housing Finance Corp.

In *Parson v. State, Alaska Housing Finance Corp.*,[356] the supreme court held that when an administrative agency closes a claim without an adversarial hearing or an adjudication on the merits, the

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[341] *Id.* at 758–59.
[342] *Id.* at 761.
[343] *Id.* at 762.
[344] *Id.* at 764.
[345] *Id.* at 764–65.
[346] 179 P.3d 930 (Alaska 2008).
[347] *Id.* at 936.
[348] *Id.* at 933.
[349] *Id.* at 934.
[350] *Id.*
[351] *Id.* at 936.
[352] *Id.* at 937.
[353] *Id.*
[354] *Id.*
[355] *Id*. at 936.
[356] 189 P.3d 1032 (Alaska 2008).

decision is not a final decision on the merits.[357] After his employment was terminated in October 2002, Parson filed a complaint against the Alaska Housing Finance Corporation ("AHFC") with the Alaska State Commission for Human Rights, claiming that his termination was racially motivated.[358] After an informal investigation, as per the Commission's policy, the Commission determined that the claim was not supported by substantial evidence and closed the case.[359] Parson subsequently sued AHFC in superior court under the Alaska Human Rights Act.[360] AHFC moved for summary judgment on the basis that by closing the complaint, it had entered a final judgment on the merits which could not be relitigated in state court, and the superior court granted its motion.[361] The supreme court overturned the superior court, that the Commission's decision was not an final judgment on the merits because there was neither an adversarial hearing nor an adjudication on the merits.[362] The supreme court further found that because there was no final judgment on the merits, the decision had no preclusive effect.[363] The supreme court reversed the superior court, holding that when an administrative agency closes a claim without an adversarial hearing or an adjudication on the merits, the decision is not a final decision on the merits.[364]

Petitioners for the Dissolution of Skagway v. Local Boundary Commission

In *Petitioners for the Dissolution of Skagway v. Local Boundary Commission*,[365] the supreme court held that litigants acting on behalf of a public entity are not entitled to the public interest litigant exception of Alaska Civil Rule 82.[366] After winning an appeal relating to their petition to form the city of Skagway into a borough, Petitioners filed a motion for attorneys' fees as the prevailing party.[367] The court laid out a four-part test for determining whether Petitioners were public interest litigants: (1) the case must be designed to effectuate strong policy; (2) if the suit is successful, numerous people must be benefited; (3) only a private party can bring the suit; and (4) the litigants must not have a personal economic incentive.[368] The court reasoned that the exception to the general rule is based on public policy, so that litigants acting privately but in the public's best interests would not be deterred from acting for the public good by the cost of litigation; and that factor was lacking here since the litigation could have been initiated by a public entity.[369] Since the city would be precluded from claiming public interest status, petitioners acting on its behalf were similarly precluded.[370] Affirming the decision of the superior court, the supreme court held that litigants acting on behalf of a public entity are not entitled to the public interest litigant exception of Alaska Civil Rule 82.[371]

Pomeroy v. Rizzo ex rel. C.R.

In *Pomeroy v. Rizzo ex rel. C.R.*,[372] the supreme court held that a "no contest" plea to sexual assault precluded the perpetrator from later claiming in a civil suit that an action for damages relating to the assault was frivolous.[373] Pomeroy was charged with four counts of sexual assault of a minor and pled no contest to assault in the third degree.[374] Shortly after Pomeroy's arrest, Rizzo, the minor's mother, filed a

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[357] *Id.* at 1039.
[358] *Id.* at 1034.
[359] *Id.*
[360] *Id.* at 1035.
[361] *Id.*
[362] *Id.* at 1037.
[363] *Id.*
[364] *Id.* at 1039.
[365] 186 P.3d 571 (Alaska 2008).
[366] *Id.* at 572.
[367] *Id.*
[368] *Id.*
[369] *Id.* at 574.
[370] *Id.*
[371] *Id.* at 572.
[372] 182 P.3d 1125 (Alaska 2008).
[373] *Id.* at 1126–27.
[374] *Id.*

civil suit seeking damages for the sexual assault.[375] Pomeroy counterclaimed that the suit was frivolous.[376] The superior court held that Pomeroy's assault conviction precluded him from maintaining his counterclaim.[377] He appealed, arguing that his no contest plea could not be used against him in a civil proceeding.[378] The supreme court reasoned that because Pomeroy was convicted of assault, he could not contest the elements of the assault charge, and thus Rizzo had probable cause to believe that Pomeroy committed the acts alleged in her complaint.[379] The supreme court affirmed the superior court, holding that a no contest plea to sexual assault precluded the perpetrator from later claiming in a civil suit that an action for damages relating to the assault was frivolous.[380]

Wagner v. Wagner

In *Wagner v. Wagner*,[381] the supreme court held that specific performance is an equitable remedy that falls under the guidelines of Alaska Rule of Civil Procedure 82(b)(2).[382] Gregory, the plaintiff, co-signed with his father, Richard, the defendant, for a loan to repay Richard's creditors in return for monthly payments from Richard's oil and gas royalties.[383] When Richard failed to pay, Gregory was awarded a final judgment for back payments along with a partial final judgment for specific performance requiring Richard to fulfill the agreement.[384] Under Rule 82(b)(2), the superior court awarded attorneys' fees, but on appeal, Gregory argued that Rule 82(b)(1) governed the award of attorneys' fees involving monetary specific performance judgments.[385] The supreme court rejected this argument, stating that specific performance is an equitable remedy, not a money judgment, and therefore it falls under Rule 82(b)(2).[386] The supreme court affirmed the superior court's award for attorney's fees in a partial judgment for specific performance, holding that specific performance is an equitable remedy that falls under the guidelines of Rule 82(b)(2).[387]

Wayne B. v. Alaska Psychiatric Institute

In *Wayne B. v. Alaska Psychiatric Institute*,[388] the supreme court held that an individual cannot be involuntarily committed when the State fails to comply with the filing requirements under Alaska Civil Rule 53(d)(1).[389] Wayne was ordered to be involuntarily committed by the superior court based on the recommendations of a superior court standing master.[390] Wayne appealed, claiming that the standing master had failed to file a transcript of the hearing as required by Rule 53(d)(1).[391] The supreme court held that because of the significant curtailment of liberty inherent in the process of involuntary commitment, the superior court must have full knowledge of the evidence that justifies committing Wayne to a mental institution.[392] Here, the superior court lacked full knowledge because the standing master had failed to file the transcript with the court.[393] The supreme court vacated the superior court's order to involuntarily commit Wayne, holding that an individual cannot be involuntarily committed when the State fails to comply with the filing requirements under Rule 53(d)(1).[394]

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[375] *Id.*
[376] *Id.*
[377] *Id.*
[378] *Id.* at 1127–28.
[379] *Id.* at 1129.
[380] *Id.* at 1132.
[381] 183 P.3d 1265 (Alaska 2008).
[382] *Id.* at 1267–68.
[383] *Id.* at 1265.
[384] *Id.* at 1266.
[385] *Id.* at 1267.
[386] *Id.*
[387] *Id.* at 1267–68.
[388] 192 P.3d 989 (Alaska 2008).
[389] *Id.* at 991.
[390] *Id.* at 990.
[391] *Id.*
[392] *Id.* at 991.
[393] *Id.*
[394] *Id.*

Ninth Circuit Court of Appeals

Porter v. Osborn

In *Porter v. Osborn*,[395] the Ninth Circuit held that, in certain situations, the "purpose to harm" standard applies to the level of culpability necessary to shock the conscience when facing a Fourteenth Amendment due process question.[396] Osborn, an Alaska state trooper, responded to a call about an abandoned car and found Porter's son asleep in the driver's seat.[397] A confrontation ensued, resulting in Osborn killing Porter's son.[398] Alleging that his Fourteenth Amendment rights of familial association with his son were violated, Porter filed suit.[399] The district court denied Osborn's motion for summary judgment due to qualified immunity, and Osborn appealed.[400] The court reasoned that to determine whether qualified immunity precluded the lawsuit against Osborn, the court must decide: (1) the proper standard of culpability, and (2) whether Osborn's conduct met that standard.[401] The court determined that the proper standard is whether the conduct occurred with a "purpose to harm" without regard to legitimate goals of law enforcement.[402] The "deliberate indifference" standard applied by the district court was inappropriate because Osborn lacked the time for the deliberation required for the "deliberate indifference" standard to apply.[403] Reversing the district court, the Ninth Circuit held that, in certain situations, the "purpose to harm" standard applies to the level of culpability necessary to shock the conscience when facing a Fourteenth Amendment due process question.[404]

Alaska Supreme Court

City of Valdez v. Polar Tankers, Inc.

In *City of Valdez v. Polar Tankers, Inc.*,[405] the supreme court held that an *ad valorem* property tax using an apportionment formula based on a vessel's time in port does not violate the Due Process, Commerce, or Tonnage Clauses of the Federal Constitution.[406] Valdez adopted an *ad valorem* property tax on certain large vessels; the tax was apportioned based on a vessel's annual ratio of days spent in Valdez to days spent in all ports, including Valdez.[407] Polar Tankers ("Polar"), which paid the tax for several years, sued in superior court, claiming that the assessment violated the Due Process, Commerce, and Tonnage Clauses of the Federal Constitution; the superior court held that the tax's apportionment formula violated the Due Process and Commerce Clauses, but not the Tonnage Clause.[408] The judge concluded that the apportionment was unconstitutional because it created a risk of duplicative taxation.[409] On appeal, the supreme court stated that a tax on mobile property used in interstate commerce satisfies the Due Process and Commerce Clauses if: (1) the property taxed has a substantial nexus with the taxing jurisdiction, (2) the tax is fairly apportioned, (3) the tax does not discriminate against interstate commerce, and (4) the tax is fairly related to the services provided by the taxing jurisdiction.[410] The supreme court ruled that the first

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[395] 546 F.3d 1131 (9th Cir. 2008).
[396] *Id.* at 1142.
[397] *Id.* at 1132.
[398] *Id.*
[399] *Id.* at 1132–33.
[400] *Id.* at 1133.
[401] *Id.* at 1136.
[402] *Id.* at 1133.
[403] *See id.* at 1142.
[404] *Id.*
[405] 182 P.3d 614 (Alaska 2008).
[406] *Id.* at 616.
[407] *Id.*
[408] *Id.* at 617.
[409] *Id.* at 619.
[410] *Id.* at 618.

element was satisfied because of the extensive connections between Valdez and Polar Tankers, which included the funding of a private shipping terminal with municipal bonds, the provision of municipal health and safety services to vessel crews, and the city's involvement in oil spill contingency plans.[411] Regarding the second element, the supreme court ruled that the home port doctrine, which gives dominant taxing rights to a vessel's domicile, had been superseded by a rule of fair apportionment among states with a tax situs.[412] The court had previously determined that Polar's connections with Valdez made the city a tax situs; based on previously-sustained apportionment schemes, the court ruled that Valdez's system was fair, valid, and without risk of duplicative taxation.[413] Additionally, the court found Polar's arguments on the third and fourth elements had been waived; since all four elements were thus met, the supreme court held that the tax did not violate either the Due Process or Commerce Clauses.[414] Finally, the court ruled that although the Tonnage Clause forbids duties on entering, trading in, or lying in a port, a fairly apportioned property tax is not a tonnage duty; since the court had already held that Valdez's tax was a fairly apportioned property tax, it further held that the tax did not violate the Tonnage Clause.[415] Reversing the superior court in part, the supreme court held that an *ad valorem* property tax using an apportionment formula based on a vessel's time in port does not violate the Due Process, Commerce, or Tonnage Clauses of the Federal Constitution.[416]

Glover v. State, Department of Transportation

In *Glover v. State, Department of Transportation*,[417] the supreme court held that: (1) the statute revoking the State's waiver of sovereign immunity for suits by state-employed seamen (a) does not violate the waiver of sovereign immunity in the Alaska Constitution, (b) was not preempted by the Jones Act, and (c) did not violate a seaman's constitutional rights;[418] and (2) a reduction of attorneys' fees for the State is proper when the losing plaintiff undertakes a disproportionate financial burden in litigating the case.[419] In 2003, the Alaska Legislature passed an amendment to § 09.50.250 of the Alaska Statutes, revoking the State's waiver of sovereign immunity for suits by state-employed seamen.[420] The result of the amendment was that seamen who were previously entitled to seek compensation under the federal Jones Act were now required to seek compensation under the State's worker compensation system.[421] A year later, Glover was injured while working for the Alaska Marine Highway System ("AMHS"), and challenged the constitutionality of the statute.[422] The superior court upheld the statute but limited the State's ability to recover attorneys' fees.[423] The supreme court, looking to legislative history and the language of the Alaska Constitution, found that Article II, § 21 of the Alaska Constitution does not contain an absolute waiver of sovereign immunity.[424] Also, the court found that the statute did not discriminate against a federal cause of action, indicating that the Jones Act did not supersede the statute.[425] Furthermore, since common law does not provide a right to a jury trial when there is no right to sue the sovereign, the statute did not infringe upon Glover's constitutional right to a jury trial, and since Glover still maintained a substantial and effective remedy under the new statute, his due process right to access the courts was not violated.[426] Additionally, the statute did not violate equal protection because the State's action bore a fair and substantial relationship to the government's legitimate purpose of creating a uniform system for

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[411] *Id.* at 618–19.
[412] *Id.* at 619–20.
[413] *Id.* at 619–21.
[414] *Id.* at 621–22.
[415] *Id.* at 622–23.
[416] *Id.* at 616.
[417] 175 P.3d 1240 (Alaska 2008).
[418] *Id.* at 1243.
[419] *Id.* at 1259.
[420] *Id.* at 1243.
[421] *Id.* at 1243–44.
[422] *Id.* at 1244.
[423] *Id.* at 1244–45.
[424] *Id.* at 1249.
[425] *Id.* at 1255.
[426] *Id.* at 1256.

compensating state employees.[427] Finally, even though Glover was motivated by economic purposes, the superior court properly allowed the reduction of attorneys' fees, given Glover's disproportionate financial burden as the first seaman to challenge the statute.[428] The supreme court affirmed the decision of the superior court, holding that: (1) the statute revoking the State's waiver of sovereign immunity for suits by state-employed seamen (a) does not violate the waiver of sovereign immunity in the Alaska Constitution, (b) was not preempted by the Jones Act, and (c) did not violate a seaman's constitutional rights;[429] and (2) a reduction of attorneys' fees for the State is proper when the losing plaintiff undertakes a disproportionate financial burden in litigating the case.[430]

Varilek v. McRoberts

In *Varilek v. McRoberts*,[431] the supreme court held that there is no due process right to counsel in a civil action for wrongful death.[432] After the court appointed the Professional Guardianship Services Corporation ("PGSC") to serve as Dunnigan's conservator, and soon after, the PGSC moved Dunnigan to an assisted living home.[433] Due to the negligent care provided at the assisted living home, its assisted living license was revoked the day after Dunnigan's death.[434] As the personal representative of Dunnigan's estate, Varilek brought a pro se suit for wrongful death and sought court-appointed counsel.[435] The court applied the *Matthews v. Eldridge* balancing test, which consists of three factors: (1) the private interest involved, (2) the benefit of additional procedural safeguards, and (3) the cost and administrative burden to the government.[436] Focusing on the first factor, the supreme court reasoned that mere personal pecuniary benefit was not a protected private interest.[437] Therefore, the court held that no due process right to counsel exists in a wrongful death action between private parties.[438] Thus, the trial court's refusal to grant Varilek's requested continuance was not reversible error.[439] The supreme court affirmed the superior court in all regards, holding that there is no due process right to counsel in a civil action for wrongful death.[440]

CONTRACT LAW

Alaska Supreme Court

Carr-Gottstein Foods Co. v. Wasilla, LLC

In *Carr Gottstein Foods Co. v. Wasilla, LLC*,[441] the supreme court held that where a landlord prejudices a tenant by acquiescing to a known breach of the lease over a period of six years, the landlord waives his right to strictly enforce the lease.[442] Carr-Gottstein Properties ("CG") leased shopping center spaces for a liquor store and a supermarket to Carr-Gottstein Foods Co. ("CG Foods"); the separate liquor store was later closed and relocated inside the supermarket.[443] Although CG Foods did not ask CG for

[427] *Id.* at 1258.
[428] *Id.* at 1259.
[429] *Id.* at 1243.
[430] *Id.* at 1259.
[431] 2008 Alaska LEXIS 163 (Dec. 10, 2008).
[432] *Id.* at *16–17.
[433] *Id.* at *3–4.
[434] *Id.* at *8.
[435] *Id.* at *8–9.
[436] *Id.* at *16.
[437] *Id.* at *17.
[438] *Id.* at *16–17.
[439] *Id.* at *16.
[440] *Id.* at *16–17.
[441] 182 P.3d 1131 (Alaska 2008).
[442] *Id.* at 1132.
[443] *Id.* at 1133.

permission to relocate the liquor store, CG knew of the move; CG failed to object that the relocation would violate either the use or sublease clauses of the contract.[444] When Safeway bought CG Foods, it asked CG for certificates indicating that there were no defaults under CG Foods' lease; CG neither signed the certificates nor stated that CG Foods was in default.[445] Later, approximately six years after the relocation, CG informed Safeway that the liquor store's move was a breach of the lease.[446] CG then brought a suit against Safeway, who argued that CG's delay in objecting to the move constituted an implied waiver of its claim for breach; the superior court, after concluding that the lease barred waiver as an affirmative defense, found for CG.[447] On appeal, the supreme court reasoned that where failure to enforce a legal right would reasonably indicate that the right will not be pursued in the future, it constitutes an implied waiver or estoppel.[448] The court noted that CG had chosen to delay its protests against the relocation until the optimum time, maintaining this noncommittal stance despite a duty to respond to Safeway's inquiries about defaults on the lease.[449] The court reasoned that CG's actions prejudiced Safeway and CG Foods by denying them the opportunity to seek alternative leasing arrangements or protection against liability; and held that CG's actions and the resulting prejudice clearly indicated that CG had waived its claim for breach of the lease.[450] The court also held that the non-waiver clause did not bar the defense of waiver in this case; the clause meant that where a lease term had been breached, the landlord's failure to object did not waive the tenant's duty to comply in the future.[451] The supreme court reversed the decision of the superior court, holding that where a landlord prejudices a tenant by acquiescing to a known breach of the lease over a period of six years, the landlord waives his right to strictly enforce the lease.[452]

State v. Alaska State Employees Ass'n.

In *State v. Alaska State Employees Ass'n.*,[453] the supreme court held that the state was not protected by sovereign immunity from payment of a prejudgment interest award made by the superior court according to the terms of a collective bargaining agreement.[454] A union representative was suspended without pay for thirty days for using profanity during an employment dispute.[455] When he lied during investigative proceedings, he was dismissed by the state.[456] Pursuant to a collective bargaining agreement, the Alaska State Employees Association ("ASEA") appealed the state's decision to an arbitrator.[457] The arbitrator upheld the suspension but ordered the state to reinstate the employee and pay backpay.[458] The state refused to comply, and ASEA filed suit in superior court.[459] The superior court sustained the arbitrator's award of backpay and added pre-judgment and post-judgment interest.[460] The state appealed to the Supreme Court, arguing that ASEA's claim was merely an extension of the arbitration proceeding and since the pertinent statute, the Public Employment Relations Act, said nothing about prejudgment interest, it could not be required to pay the award.[461] The supreme court disagreed, reasoning that the suit arose under the collective bargaining agreement and was therefore properly characterized as a contract claim.[462] Contract claims claim are encompassed by § 09.50.250 of the Alaska Statutes, which authorizes the

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[444] *Id.*
[445] *Id.* at 1134.
[446] *Id.*
[447] *Id.* at 1134–35.
[448] *Id.* at 1136.
[449] *Id.* at 1138–39.
[450] *Id.* at 1139.
[451] *Id.* at 1140.
[452] *Id.* at 1132.
[453] 190 P.3d 720 (Alaska 2008).
[454] *Id.* at 725.
[455] *Id.* at 721.
[456] *Id.*
[457] *Id.*
[458] *Id.*
[459] *Id.*
[460] *Id.*
[461] *Id.* at 723.
[462] *Id.* at 725.

payment of prejudgment interest.[463] Therefore, the state's sovereign immunity argument failed.[464] Affirming the superior court, the supreme court held that the state was not protected by sovereign immunity from payment of a prejudgment interest award made by the superior court according to the terms of a collective bargaining agreement.[465]

Wasser & Winters Co. v. Ritchie Bros. Auctioneers, Inc.

In *Wasser & Winters Co. v. Ritchie Bros. Auctioneers, Inc.*,[466] the supreme court held that reformation of a contract based on mutual mistake was proper when neither party was aware of certain liens on the property underlying the contract.[467] Wasser, a creditor, authorized Ritchie, an auctioneer, to sell off pieces of equipment in which Wasser held an interest.[468] Wasser agreed to release its interest upon payment, not to exceed the entire amount owed to Wasser, of the net proceeds from the auction.[469] After the auction, Ritchie discovered several other tax liens on the equipment to which Wasser's interest was subordinate.[470] At the time of the agreement, neither party knew there were other tax liens on the equipment.[471] The superior court found mutual mistake of fact and reformed the contract to reflect payoff to the senior creditors before Wasser.[472] On appeal, Wasser argued that rewriting the contract was not appropriate because the mistake did not have a material effect on the transaction and that the risk of mistake rested with Ritchie.[473] Affirming the superior court, the supreme court reasoned that: (1) the mistake was material because it significantly reduced the net proceeds from the auction, (2) Ritchie's interest in accurate lien information was much lower than Wasser's, and (3) Wasser had the ability to obtain the information.[474] Affirming the superior court, the supreme court held that reformation of a contract based on mutual mistake was proper when neither party was aware of certain liens on the property underlying the contract.[475]

Wolff v. Cunningham

In *Wolff v. Cunningham*,[476] the supreme court held that because a third party's contractual promise to pay another person's child support obligations did not modify those obligations, that contract was enforceable against the third party when supported by consideration.[477] Cunningham co-owned a business with Clanton.[478] When Clanton decided to sell his share of the business to Cunningham, they, along with Wolff, executed a promissory note making Clanton's share of the business, in the amount of $25,000, payable to Wolff.[479] The promissory note also provided that the $25,000 would satisfy Clanton's child support obligations to Wolff.[480] The supreme court reasoned that the contract between Clanton and Wolff did not violate Alaska Civil Rule 90.3 because it did not modify the child support agreement.[481] Thus, the contract between Clanton and Cunningham was enforceable, and supported by consideration: (1) Cunningham received Clanton's share of the business and a promise to not compete there against, (2) Wolff received a promise of $25,000 from Cunningham, and (3) Clanton received satisfaction of his outstanding

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[463] *Id.*
[464] *Id.* at 725.
[465] *Id.* at 725.
[466] 185 P.3d 73 (Alaska 2008).
[467] *Id.* at 75, 78.
[468] *Id.* at 75–76.
[469] *Id.*
[470] *Id.*
[471] *Id.*
[472] *Id.* at 76–77.
[473] *Id.* at 77–78.
[474] *Id.* at 78–80.
[475] *Id.* at 75, 78.
[476] 187 P.3d 479 (Alaska 2008).
[477] *Id.* at 480.
[478] *Id.*
[479] *Id.* at 481.
[480] *Id.*
[481] *Id.* at 482.

child support debts.[482] Reversing the superior court, the supreme court held that because a third party's contractual promise to pay another person's child support obligations does not modify those obligations, that contract is enforceable against the third party when supported by consideration.[483]

CRIMINAL LAW

Ninth Circuit Court of Appeals

Osborne v. District Attorney's Office

In *Osborne v. District Attorney's Office*,[484] the Ninth Circuit held that a convicted defendant's due process rights prohibit a State from denying him reasonable access to biological evidence for the purpose of additional DNA testing, where: (1) the biological evidence was used to secure his conviction; (2) the testing will be conducted with new, more accurate methods; (3) such methods are capable of conclusively determining whether the defendant is the source of the genetic material; (4) the testing can be conducted without cost or prejudice to the State; and (5) the evidence is material to available forms of post-conviction relief.[485] Osborne was convicted of kidnapping and sexual assault.[486] Subsequently, he applied for post-conviction relief arguing that he had a right to retest the DNA using methods unavailable at the time of trial; when this application was rejected, Osborne filed a claim in federal district court under § 1983 alleging that the District Attorney's Office violated his federal constitutional rights to access DNA for post-conviction testing.[487] The district court determined that under the specific facts presented in the case, the defendant had a very limited right to the desired testing.[488] On appeal, the Ninth Circuit reasoned that a defendant's right to access evidence extends to post-conviction proceedings and that Osborne could assert these rights in a § 1983 claim.[489] Analyzing the materiality of Osborne's proposed DNA tests, the court reasoned that the results would be material if a habeas proceeding on an actual innocence claim by Osborne would be unworthy of confidence without the DNA evidence.[490] The court also concluded that the results could have extraordinary exculpatory potential, because they could both disprove Osborne's guilt and specifically implicate the actual perpetrator.[491] Finally, the court concluded that the evidence Osborne sought could be produced easily and without prejudice to the State because Osborne had offered to pay for the testing himself.[492] The Ninth Circuit affirmed the district court, holding that a convicted defendant's due process rights prohibit a State from denying him reasonable access to biological evidence for the purpose of additional DNA testing, where: (1) the biological evidence was used to secure his conviction; (2) the testing will be conducted with new, more accurate methods; (3) such methods are capable of conclusively determining whether the defendant is the source of the genetic material; (4) the testing can be conducted without cost or prejudice to the State; and (5) the evidence is material to available forms of post-conviction relief.[493]

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[482] *Id.* at 483.
[483] *Id.* at 480.
[484] 521 F.3d 1118 (9th Cir. 2008).
[485] *Id.* at 1141–42.
[486] *Id.* at 1124.
[487] *Id.* at 1124–26.
[488] *Id.* at 1126–27.
[489] *Id.* at 1132.
[490] *Id.* at 1134.
[491] *Id.* at 1139–40.
[492] *Id.* at 1141.
[493] *Id.* at 1141–42.

United States v. Weyhrauch

In *United States v. Weyhrauch*,[494] the Ninth Circuit held that the United States Code creates a uniform standard of "honest services" that is independent of state law.[495] The government filed an interlocutory appeal of a district court ruling excluding evidence that Weyhrauch, a state legislator, failed to disclose a conflict of interest—Weyhrauch promised to vote favorable on oil tax legislation for future legal word—regarding pending legislation because Alaska law did not require him to disclose the conflict.[496] The government argued that the evidence was admissible to support an "honest services" fraud conviction, which criminalizes the use of the postal service in carrying out fraud, and which does not rely on a violation of state law.[497] Reasoning that the purpose of the public "honest services" law is to ensure transparency that enables the public to determine whether public officials are complying with their duty of honesty, the Ninth Circuit held that the "honest services" law does not depend on a state law violation.[498] Reversing the district court, the Ninth Circuit held that the United States Code creates a uniform standard of "honest services" that is independent of state law.[499]

Alaska Supreme Court

Lewis v. State

In *Lewis v. State*,[500] the supreme court held that when a criminal defendant waives his Fifth Amendment rights, the trial court may: (1) order psychiatric evaluations of the defendant, (2) allow the parties to introduce the results of those evaluations into evidence, and (3) instruct the jurors on a possible "guilty but mentally ill" verdict.[501] Lewis was convicted of several counts of assault.[502] During trial, his attorney announced that despite Lewis's chronic mental illness, Lewis did not wish to claim insanity or use his mental disease to negate a culpable mental state.[503] Despite this, the trial court ordered a psychiatric evaluation on the grounds that Lewis had already raised the issue by bringing it up at trial, and his sanity could later become an issue in the case through the testimony of the witnesses.[504] After Lewis was convicted, he appealed, arguing that the psychiatric evaluations violated his Fifth Amendment right against self-incrimination, and since he had not raised the issue, the State was barred from introducing evidence of mental disease or defect.[505] The supreme court reasoned that a defendant waives his Fifth Amendment rights by raising the issue in court.[506] Although Lewis did not give advance warning of his intention to claim "no culpable mental state by reason of mental defect," it was the strategy his attorney took during trial.[507] Affirming the superior court, the supreme court held that when a criminal defendant waives his Fifth Amendment rights, the trial court may: (1) order psychiatric evaluations of the defendant, (2) allow the parties to introduce the results of those evaluations into evidence, and (3) instruct the jurors on a possible "guilty but mentally ill" verdict.[508]

Morris v. State, Department of Administration

In *Morris v. State, Department of Administration*,[509] the supreme court held that even when the disparity between a breath test and a blood test for alcohol is greater than would be explained by the

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[494] 548 F.3d 1237 (9th Cir. 2008).
[495] *Id.* at 1247.
[496] *Id.* at 1239.
[497] *Id.* at 1239–40.
[498] *Id.* at 1247.
[499] *Id.*
[500] 195 P.3d 622 (Alaska 2008).
[501] *Id.* at 624.
[502] *Id.* at 623.
[503] *Id.*
[504] *Id.* at 624, 626.
[505] *Id.* at 632.
[506] *Id.* at 633.
[507] *Id.* at 633–37.
[508] *Id.* at 624.
[509] 186 P.3d 575 (Alaska 2008).

average rate of alcohol processing by the body, the breath test is not necessarily unreliable.[510] After making an illegal turn, Morris was pulled over by a police officer.[511] The officer administered a preliminary breath test, a second breath test, and then a blood test, and determined that Morris was intoxicated. At a hearing regarding revocation of his license, Morris argued that the results of the first breath test were inconsistent with the normal rate of alcohol elimination and could not be relied upon, but his license was revoked and the revocation was upheld by the superior court.[512] On appeal, the supreme court found that it is not impossible for a person to have a higher rate of alcohol elimination than the normal rate, and that state law defines a violation in terms of a breath test, not a blood test.[513] Moreover, the court noted that the results between the second breath test and the blood test fell within the normal range of alcohol elimination, supporting the conclusion that Morris was over the legal limit at the time of his first test.[514] Affirming the superior court, the supreme court held that even when the disparity between a breath test and a blood test for alcohol is greater than would be explained by the average rate of alcohol processing by the body, the breath test is not necessarily unreliable.[515]

Pastos v. State

In *Pastos v. State*,[516] the supreme court held that an individual does not violate a no-contact order by cashing a check written three years earlier by the subject of the no-contact order.[517] After having unlawful contact with K.Y. in violation of the terms of a protective order, the court prohibited Pastos from contacting K.Y. until Pastos reported to state custody the following morning.[518] However, later that afternoon Pastos cashed a check that K.Y. had written him three years earlier.[519] The trial court and the court of appeals held that cashing the check violated the no-contact order because Pastos should have known that cashing the check would have an impact on K.Y.[520] The supreme court disagreed, holding that cashing a check does not constitute a "communication" between the parties and thus did not violate the no-contact order.[521] Reversing the lower court, the supreme court held that an individual does not violate a no-contact order by cashing a check written three years earlier by the subject of the no-contact order.[522]

Whiting v. State

In *Whiting v. State*,[523] the supreme court held that the mitigating factor contained in § 12.55.155(d)(15) of the Alaska Statutes, applicable when a controlled substance is a small amount for personal use in one's home, does not hinge on where the controlled substance is found, but rather on where and for what purpose the defendant intended to use the controlled substance.[524] Whiting pleaded no contest to possession of oxycodone after two pills were discovered in Whiting's car as he was driving away from his residence.[525] The superior court ruled that the mitigating factor did not apply because the substances were not found in the defendant's home.[526] On appeal, Whiting argued that where and how he had intended to use the substance, rather than the physical location of the pills, should have been the controlling fact in deciding the issue of the mitigating factor.[527] Because the supreme court was not provided with any case law or statutory history as to how the statute should be interpreted, the court used a canon of statutory

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[510] *Id.* at 577.
[511] *Id.* at 576.
[512] *Id.* at 576–77.
[513] *Id.* at 579–80.
[514] *Id.* at 582.
[515] *Id.* at 577.
[516] 194 P.3d 387 (Alaska 2008).
[517] *Id.* at 389.
[518] *Id.*
[519] *Id.*
[520] *Id.* at 392.
[521] *Id.*
[522] *Id.* at 393.
[523] 191 P.3d 1016 (Alaska Ct. App. 2008).
[524] *Id.* at 1023.
[525] *Id.* at 1018, 1022.
[526] *Id.*
[527] *Id.* at 1022.

interpretation called the "last antecedent rule."[528] Application of this canon resulted in requiring the mitigating factor to apply when the defendant possesses a small amount of a controlled substance for the purpose of using it personally in his or her home.[529] Thus, the supreme court vacated the superior court's ruling, holding that the mitigating factor contained in § 12.55.155(d)(15) does not hinge on where the controlled substance is found, but rather on where and for what purpose the defendant intended to use the controlled substance.[530]

Alaska Court of Appeals

Abel v. State

In *Abel v. State*,[531] the court of appeals held that an officer may enter a private residence without a warrant to prevent the likely destruction of evidence.[532] Upon arriving at a residence in response to a report of neglected animals, an officer observed a woman walk into the house and say, "[p]ut it away, guys. The cops."[533] The officer walked onto the porch, and observed through an open door that Abel was holding a bag containing a green substance and money in his hand.[534] Believing that he was witnessing a drug sale and that if he left, the evidence would be destroyed while he went to obtain a warrant, the officer entered the residence and arrested Abel.[535] Abel filed a motion to suppress all evidence that the officer obtained via the warrantless search and seizure.[536] The court of appeals held that, because of the possibility that evidence would be destroyed in the time it took to obtain a warrant, the officer was justified in entering the house and seizing the evidence without a warrant.[537] The court further noted that probable cause does not require conclusive proof that a crime had occurred, only a fair probability or substantial chance of criminal activity.[538]The court of appeals affirmed the superior court, holding that an officer may enter a private residence without a warrant to prevent the likely destruction of evidence.[539]

Baker v. State

In *Baker v. State*,[540] the court of appeals held that a criminal defendant is not entitled to a jury trial on the issue of whether he is a "worst offender," because such a finding does not depend on the kinds of facts that juries must hear.[541] Baker was convicted for felony driving while intoxicated, felony refusal to submit to a breath test and driving with a revoked license.[542] The trial court sentenced Baker to 11.5 years in prison based on his conviction of three or more felonies and his substantial history of criminal conduct.[543] Baker appealed the sentence asserting that he was entitled to a jury trial on the issues of his prior felonies and "worst offender" status, and that the sentence was excessive.[544] In determining whether a "worst offender" finding must be made by a jury, the court of appeals concluded that such a finding is based on traditional sentencing criteria which look to the characteristics of the offense and the offender to justify the imposition of a maximum sentence.[545] According to the court, the "worst offender" finding does not involve the types of factual issues which must be submitted to a jury pursuant to *Blakely v.*

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[528] *Id.*
[529] *Id.* at 1023.
[530] *Id.*
[531] 2008 Alaska App. LEXIS 71 (Ct. App. July 2, 2008).
[532] *Id.* at *13.
[533] *Id.* at *2.
[534] *Id.* at *3.
[535] *Id.*
[536] *Id.* at *1.
[537] *Id.* at *13.
[538] *Id.* at *12.
[539] *Id.*
[540] 182 P.3d 655 (Alaska Ct. App. 2008).
[541] *Id.* at 658.
[542] *Id.* at 657.
[543] *Id.*
[544] *Id.*
[545] *Id.* at 658.

Washington.[546] Because of this, the court of appeals rejected Baker's claim that the trial court erred in finding that he was a worst offender.[547] Thus, the court of appeals affirmed the superior court, holding that a criminal defendant is not entitled to a jury trial on the issue of whether he is a "worst offender," because such a finding does not depend on the kinds of facts that juries must hear.[548]

Berumen v. State

In *Berumen v. State*,[549] the court of appeals held that suppression of evidence was the proper remedy for a serious violation of the "knock and announce" law.[550] While trying to serve a warrant for Berumen's arrest,[551] police officers entered Berumen's hotel room without announcing their authority—in violation of the "knock and announce" law—and collected evidence leading to an indictment for third-degree controlled-substance misconduct and two counts of second-degree contributing to the delinquency of a minor.[552] The superior court denied Berumen's motion to suppress the evidence found in the hotel room.[553] On appeal Berumen argued suppression was warranted because the police violated the "knock and announce" statute.[554] The court of appeals concluded the "knock and announce" violation was not excused under the substantial compliance doctrine.[555] The court of appeals then reasoned that the exclusionary rule applied because: (1) the "knock and announce" law was clear and widely known, (2) the statute was designed to protect individual rights, (3) admission of evidence obtained in contravention of the statute would condone "dirty business," and (4) it appeared that police engaged in repeated of violations of the statute.[556] The court of appeals reversed the superior court's dismissal of Berumen's suppression motion,[557] holding that suppression of evidence was the proper remedy for a serious violation of the "knock and announce" law.[558]

Gates v. State

In *Gates v. State*,[559] the court of appeals held that when a defendant prematurely terminates a court-ordered treatment program, the actual time spent in the program counts as credit against his or her sentence.[560] Under court order, Gates was supposed to complete two residential treatment programs prior to sentencing.[561] When she failed to complete the ordered treatment programs, the superior court held that, under *Nygren v. State*[562] and § 12.55.027 of the Alaska Statutes, when defendants fail to complete court ordered treatment programs, they are not entitled to any credit against their sentences.[563] The court of appeals examined the legislative history of § 12.55.027.[564] Reasoning that the statute's legislative history implied a legislative intent *not* to require completion of court-ordered treatment programs, the court of appeals held that Gates could receive credit against her sentence when she attended, but failed to complete, a treatment program. [565] The court of appeals reversed the superior court, holding that when a defendant

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[546] *Id.* at 659.
[547] *Id.*
[548] *Id.* at 658.
[549] 182 P.3d 635 (Alaska Ct. App. 2008).
[550] *Id.* at 637.
[551] *Id.* at 636.
[552] *Id.* at 637.
[553] *Id.*
[554] *Id.*
[555] *Id.* at 640.
[556] *Id.* at 641–42.
[557] *Id.* at 642.
[558] *Id.* at 637.
[559] 178 P.3d 1173 (Alaska Ct. App. 2008).
[560] *Id.* at 1175.
[561] *Id.* at 1174.
[562] 658 P.2d 141 (Alaska Ct. App. 1983).
[563] *Gates*, 178 P.3d at 1174–75.
[564] *Id.* at 1175.
[565] *Id.*

prematurely terminates a court-ordered treatment program, the actual time spent in the program should count as credit against his or her sentence.[566]

Gottlieb v. State

In *Gottlieb v. State*,[567] the court of appeals held that: (1) an indictment for perjury must be obtained within one year of discovering a fair probability or substantial chance of the existence of perjury; (2) an instrument or document is forged only if it is altered, completed, or otherwise created so as to falsely appear or purport to be an authentic creation of someone other than its true maker; and (3) the proper forum to attack the validity of a medical license in the first instance is the State Medical Board.[568] When Gottlieb applied to the State Medical Board for a license to practice medicine in Alaska, he falsely declared that he had completed his required post-graduate internship.[569] The State Medical Board issued Gottlieb a license based on his false answer.[570] The State eventually discovered Gottlieb's deception and convicted him of a variety of crimes, including perjury, forgery, and first-degree theft (on the basis that Gottlieb was paid for medical services which he rendered under the authority of an invalid license).[571] On appeal, the court of appeals first determined that Gottlieb's perjury conviction was barred because the State likely knew of the perjury for more than one year before the prosecution commenced, thus exceeding the statute of limitations.[572] Regarding the forgery conviction, the court because Gottlieb only lied on his medical license application and did not falsely alter, complete, or make the document as defined by § 11.46.580(a) of the Alaska Statutes, his conviction could not stand.[573] Next, the court of appeals determined that Gottlieb's convictions for first-degree theft were invalid because the State premised the convictions on the assertion that Gottlieb's medical license was invalid despite the fact that the State Medical Board had the exclusive authority to regulate a physician's license and had not made a ruling in this case.[574] Because the State failed to first challenge Gottlieb's license before the Medical Board, it could not argue at trial that Gottlieb's license was invalid, nor could it support the charge of first-degree theft.[575] Thus, vacating the superior court's conviction on the perjury charge and reversing the conviction for first-degree theft, the court of appeals held that: (1) an indictment for perjury must be obtained within one year of discovering a fair probability or substantial chance of the existence of perjury, (2) an instrument or document is forged only if it is altered, completed, or otherwise created so as to falsely appear or purport to be an authentic creation of someone other than its true maker, and (3) the proper forum to attack the validity of a medical license in the first instance is the State Medical Board.[576]

Harmon v. State

In *Harmon v. State*,[577] the court of appeals held that: (1) a criminal trial for murder and sexual assault is not prejudiced by media reports when the jurors in the trial have little knowledge of the media reports; (2) evidence concerning a prior sexual assault on the victim may be admitted when its more probative than prejudicial: and (3) a 72-year sentence may not be excessive, even for a first-time felony offender.[578] Harmon was convicted of second-degree murder and first-degree sexual assault for his attack on M.W. in 2003.[579] The trial was held in Juneau, where the attack garnered significant media attention.[580] After his conviction, Harmon appealed on three grounds: (1) media reports had prejudiced his trial, (2)

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[566] *Id.*
[567] 175 P.3d 664 (Alaska Ct. App. 2008).
[568] *Id.* at 668–73.
[569] *Id.* at 666.
[570] *Id.*
[571] *Id.* at 672.
[572] *Id.* at 668.
[573] *Id.* at 669.
[574] *Id.* at 673.
[575] *Id.*
[576] *Id.* at 668–73.
[577] 193 P.3d 1184 (Alaska App. 2008).
[578] *Id.* at 1186.
[579] *Id.*
[580] *Id.* at 1186, 1192.

evidence of a previous incident where he sexually assaulted M.W. was overly prejudicial, and (3) his sentence of 72 years in prison was excessive.[581] The court of appeals applied the *Mallet* test to Harmon's complaints of pretrial publicity prejudice, holding that a motion for change of venue shall be granted when potentially prejudicial material is disseminated, if there is a substantial likelihood that in the absence of a change, a fair trial by an impartial jury is impossible.[582] Finding that the trial judge had appropriately dismissed all potential jurors with more than a cursory knowledge of the case or who knew of Harmon's incriminating statements,[583] the court held that the trial judge did not abuse his discretion by denying Harmon's request for a change of venue.[584] Similarly, the court did not abuse its discretion by admitting evidence of Harmon's alleged earlier sexual assault on M.W.[585] because the evidence helped establish Harmon's identity as the person who attacked M.W., and the probative value of the evidence outweighed its prejudicial value.[586] Lastly, the court held that Harmon's sentence was not excessive even though it exceeded the *Page* benchmark range.[587] Harmon's actions after the murder—living in M.W.'s cabin, eating her food, and playing poker with her money—outweighed the fact that this was his first felony offense.[588] Affirming Harmon's conviction, the court of appeals held that: (1) a criminal trial for murder and sexual assault is not prejudiced by media reports when the jurors in the trial have little knowledge of the media reports; (2) evidence concerning a prior sexual assault on the victim may be admitted when its more probative than prejudicial; and (3) a 72-year sentence may not be excessive, even for a first-time felony offender.[589]

Haywood v. State

In *Haywood v. State*,[590] the court of appeals held that under former § 28.33.140 of the Alaska Statutes, a person who held a commercial driver's license and was convicted under § 28.35.030 for driving under the influence while in a private vehicle would not lose his or her commercial driver's license.[591] While driving a private vehicle, Haywood was stopped by an Anchorage police officer for exceeding the posted speed limit.[592] The officer found evidence of intoxication.[593] Prior to trial, Haywood argued that § 28.33.140 only granted trial judges the authority to revoke commercial driver's licenses when the crime of driving under the influence was committed in conjunction with operating a commercial vehicle.[594] He subsequently entered a plea and was convicted; at sentencing, the trial judge revoked Haywood's commercial driver's license.[595] The court of appeals looked to the legislative history of former § 28.33.140 and found that it was drafted to parallel corresponding federal regulations.[596] These federal regulations disqualified individuals from having a commercial driver's license if they had committed certain crimes, but each of these crimes required that a commercial vehicle be involved.[597] Although § 28.33.140(a) did not mention the commercial vehicle requirement, § 28.33.140(b) did.[598] The court of appeals resolved this ambiguity to provide the most lenient penalty.[599] Reversing the superior court, the court of appeals held that under former § 28.33.140 of the Alaska Statutes, a person who held a commercial driver's license and

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[581] *Id.* at 1186.
[582] *Id.*
[583] *Id.* at 1200.
[584] *Id.*
[585] *Id.* at 1201.
[586] *Id.*
[587] *Id.*
[588] *Id.*
[589] *Id.* at 1186.
[590] 193 P.3d 1203 (Alaska Ct. App. 2008).
[591] *Id*.
[592] *Id*.
[593] *Id*.
[594] *Id*.
[595] *Id*.
[596] *Id*. at 1205.
[597] *Id.*
[598] *Id*.
[599] *Id*. at 1206.

was convicted of § 28.35.030 for driving under the influence while in a private vehicle would not lose his or her commercial driver's license.[600]

Hinson v. State

In *Hinson v. State*,[601] the court of appeals held that: (1) a jury may use circumstantial evidence to convict a criminal defendant; (2) larger sentences may be justified if the defendant, *inter alia*, has an extensive criminal record; and (3) when trial courts impose unusually strict parole restrictions, they must lay out their reasons with particularity.[602] Hinson was convicted of murder based on forensic evidence, the inconsistency of the defendant's story, and other relevant evidence.[603] On appeal, the court of appeals held that a jury could reasonably infer the defendant's guilt—even though the evidence was purely circumstantial—since Alaska law makes no distinction between direct and circumstantial evidence.[604] The court further held that a seventy-year sentence was not excessive, reasoning that it had previously upheld a sixty-year sentence for the same crime by a younger offender and Hinton had an extensive criminal record, substance abuse problems, and had proved resistant to rehabilitation.[605] However, the court held that the trial court insufficiently laid out its reasons for its unusually strict parole restrictions.[606] Also, a parole restriction requiring the defendant to arrange visitation with his children through his ex-girlfriend did not rationally relate to his reformation and was based on unsubstantiated and unrelated allegations of sexual abuse.[607] In part affirming and in part vacating the superior court, the court of appeals held that: (1) a jury may use circumstantial evidence to convict a criminal defendant; (2) larger sentences may be justified if the defendant, *inter alia*, has an extensive criminal record; and (3) when trial courts impose unusually strict parole restrictions, they must lay out their reasons with particularity.[608]

Hunter v. State

In *Hunter v. State*,[609] the court of appeals held that the superior court did not violate the double jeopardy clause when it imposed the same 95-year composite sentence on remand because the sentence still reflected the criminal conduct.[610] Hunter was convicted of offenses relating to attacks on five different women over the course of six years.[611] At the time of his sentencing he had three prior felony convictions.[612] Hunter argued that the superior court had violated the double jeopardy clause by changing the terms of his prior sentences in order to keep the composite sentence at 95 years.[613] The court found that because Hunter was convicted of nine counts based on the five attacks—for which the composite sentence could have reached 200 years—the superior court had not violated double jeopardy by adjusting the terms and re-imposing the 95-year composite sentence.[614] Additionally, the court held that the 95-year composite sentence was not excessive.[615] The court found that the sentence was appropriate because of the nature of Hunter's crimes and his long criminal history which render him one "of the rare class of offenders who must be incarcerated for the remainder of their life for the protection of the public."[616] Affirming the superior court, the court of appeals held that the superior court did not violate the double jeopardy clause

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[600] *Id*. at 1203.
[601] 199 P.3d 166 (Alaska Ct. App. 2008).
[602] *Id*. at 1168, 1170–75.
[603] *Id.* at 1168–70.
[604] *Id*. at 1170–71.
[605] *Id*. at 1172–73.
[606] *Id*. at 1173–74.
[607] *Id.* at 1174–75.
[608] *Id*. at 1168, 1170–75.
[609] 182 P.3d 1146 (Alaska Ct. App. 2008).
[610] *Id.* at 1147.
[611] *Id.*
[612] *Id.*
[613] *Id.* at 1148.
[614] *Id.* at 1149.
[615] *Id.* at 1150.
[616] *Id*. at 1150–51.

when it imposed the same 95-year composite sentence on remand because the sentence still reflected the criminal conduct.[617]

Itta v. State

In *Itta v. State*,[618] the court of appeals held that: (1) the trial judge acted properly by refusing to give a definitive answer to the admissibility of other-crimes evidence before Itta chose whether to take the stand, and (2) there was sufficient corroboration of Itta's accomplices' testimony because corroboration on every element of the crime was not necessary.[619] Itta was convicted of assault.[620] During trial, the judge refused to give a definitive answer on whether other-crimes evidence was admissible before Itta made a decision on whether to take the stand.[621] Itta appealed his conviction, arguing that: (1) the judge infringed Itta's right to testify by refusing to give a final answer on the admissibility of other-crimes evidence until the content of the defense case was known, and (2) there was insufficient corroboration of the testimony offered by Itta's accomplices to support a conviction.[622] The court of appeals reasoned that the judge needed to preserve his right to change his ruling because the content of Itta's testimony could have altered the balance between the probative value of the evidence and its potential for unfair prejudice.[623] The court further reasoned that Alaska law only requires independent corroboration of a defendant's connection to the crime, not every element of the crime.[624] The court held that: (1) the trial judge acted properly by refusing to give a definitive answer as to the admissibility of other-crimes evidence, and (2) there was sufficient corroboration of Itta's accomplices' testimony because corroboration on every element of the crime was not necessary.[625]

Ivie v. State

In *Ivie v. State*,[626] the court of appeals held that a person released to a halfway house was not under "official detention" and could not be charged with escape.[627] Ivie was convicted for escape in the second degree for walking away from a halfway house.[628] Ivie appealed, arguing that he was not under official detention at the halfway house because he was confined on an order of conditional bail release.[629] Relying on the superior court judge's comments at trial, the court of appeals concluded that the judge intended to release Ivie to the halfway house, and did not intend to order the Department of Corrections to confine him.[630] The court vacated Ivie's conviction for escape, and held that a person released to a halfway house was not under official detention and could not be charged with escape.[631]

Johnson v. State

In *Johnson v. State*,[632] the court of appeals held that a jury could reasonably convict a father of manslaughter because his knowledge that his child was being starved by the mother made her subsequent deadly assault upon the child foreseeable.[633] Johnson and Heather had a small daughter, Christina, whom Heather subjected to extreme starvation.[634] Eventually, Heather killed Christina by intentionally dropping

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[617] *Id.* at 1147.
[618] 191 P.3d 1013 (Alaska Ct. App. 2008).
[619] *Id.* at 1015–16.
[620] *Id.* at 1014.
[621] *Id.*
[622] *Id.* at 1014–15.
[623] *Id.* at 1015.
[624] *Id.* at 1015–16.
[625] *Id.*
[626] 179 P.3d 947 (Alaska Ct. App. 2008).
[627] *Id.* at 950.
[628] *Id.* at 948.
[629] *Id.*
[630] *Id.* at 950.
[631] *Id.* at 951.
[632] 175 P.3d 674 (Alaska Ct. App. 2008).
[633] *Id.* at 680.
[634] *Id.* at 675.

the child on her head.[635] Afterwards, the State prosecuted Johnson on the theory that he had breached his parental duty to protect Christina, and the jury convicted Johnson of manslaughter.[636] When a special verdict form was presented to the jurors, they unanimously indicated that Christina's death was caused solely by head trauma.[637] On appeal, Johnson argued that he should acquitted because even when the evidence was viewed most favorably for the verdict, it was clear that Christina's death resulted from Heather's unforeseeable assault.[638] The court of appeals reasoned that Johnson's duty to care for his daughter could have been breached only if he had been aware of a risk but refrained from taking action.[639] The court also reasoned that harm to a victim would be foreseeable if it was of the same general type the defendant could foresee, even if the precise nature of the harm was unforeseeable.[640] The court further reasoned that Johnson could foresee Christina's death through some type of parental abuse, because he knew she was being starved and that Heather might utilize other forms of abuse, including physical assaults.[641] The court concluded that even if Christina had died solely from head trauma, Johnson would still have breached his parental duty to protect her.[642] The court of appeals affirmed the superior court, holding that a jury could reasonably convict a father of manslaughter because his knowledge that his child was being starved by the mother made her subsequent deadly assault upon the child foreseeable.[643]

Johnson v. State

In *Johnson v. State*,[644] the court of appeals held that a judge was under no duty to explain Johnson's right of self-representation because Johnson did not clearly and unequivocally invoke his right to self-representation.[645] During the sentencing phase of Johnson's trial for driving under the influence, Johnson indicated that he was dissatisfied with his current attorney and desired a new one.[646] When the court refused to grant this request, Johnson made comments about representing himself in the matter.[647] The judge replied that Johnson would be allowed to give his opinion on sentencing, and Johnson did not renew his representation request.[648] On appeal, Johnson argued that he had been entitled to a more detailed explanation of his right to self-representation.[649] The court reasoned that only clear and unequivocal requests to proceed pro se oblige a trial judge to explain that right.[650] Since Johnson brought up self-representation only once, the court held it was reasonable to conclude that Johnson had solely been interested in commenting on sentencing.[651] The court of appeals affirmed the superior court's judgment, holding that a judge was under no duty to explain Johnson's right of self-representation because there was no clear and unequivocal request for self-representation.[652]

Lyons v. State

In *Lyons v. State*,[653] the court of appeals held that police could legally search an unlocked glove box where the vehicle's owner had been arrested immediately after exiting his vehicle.[654] Lyons unsuccessfully sought suppression of a handgun found during a search of his vehicle that was conducted

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[635] *Id.*
[636] *Id.* at 675–76.
[637] *Id.* at 676.
[638] *Id.* at 678.
[639] *Id.*
[640] *Id.* at 680.
[641] *Id.*
[642] *Id.*
[643] *Id.*
[644] 188 P.3d 700 (Alaska Ct. App. 2008).
[645] *Id.* at 705.
[646] *Id.* at 702.
[647] *Id.* at 703–04.
[648] *Id.*
[649] *Id.* at 703.
[650] *Id.* at 704.
[651] *Id.* at 705.
[652] *Id.*
[653] 182 P.3d 649 (Alaska Ct. App. 2008).
[654] *Id.* at 649–51.

immediately after he was arrested[655] He argued that because he had closed and locked his vehicle prior to being arrested, the search exceeded the lawful scope of a search incident to arrest.[656] The court reasoned that when arresting a person, police may normally make a warrantless search of the arrestee's person and the area within the arrestee's immediate control.[657] The court pointed out that in *Crawford v. State*,[658] the Alaska Supreme Court had upheld the search of a vehicle's unlocked center console incident to the arrest of the driver.[659] The *Crawford* court had held that because a center console was functionally similar to a clothing pocket, it should be subject to search limitations similar to those for an arrestee's pocket.[660] The court of appeals reasoned that a glove box was functionally similar to a center console.[661] The court held that a search of an unlocked glove box is permissible incident to arrest if the driver is arrested in the vehicle or immediately upon exiting it.[662] Affirming the superior court, the court of appeals held that the search of Lyons's unlocked glove box was legal because he had been arrested immediately after exiting his vehicle.[663]

Mattox v. State

In *Mattox v. State*,[664] the court of appeals held that § 28.35.032(f) of the Alaska Statutes makes it a crime for a person to refuse to take a breath test if he is arrested for driving while intoxicated.[665] Mattox was arrested for driving while intoxicated.[666] He was read an implied consent warning informing him that he would be charged with a crime if he did not submit to a breath test.[667] Mattox refused to submit to the breath test, but instead offered to take a blood test.[668] Mattox was eventually convicted of felony refusal to submit to a chemical test.[669] He appealed, claiming that § 28.35.032(f) permits a blood test to be offered in lieu of a breath test when a motorist is arrested for driving while under the influence.[670] In determining whether the refusal statute allows a blood test in lieu of a breath test, the court of appeals concluded that § 28.35.032(f) makes it a crime to refuse "to submit to a chemical test authorized by . . . [§] 28.35.031 (a) or (g)."[671] Because § 28.35.031(a) only authorizes a *breath* test of any person arrested for driving while under the influence, Mattox did not have a right to request a blood test in lieu of a breath test.[672] Thus, the court of appeals affirmed Mattox's conviction, holding that § 28.35.032(f) makes it a crime for a person to refuse to take a breath test if he is arrested for driving while intoxicated.[673]

Molina v. State

In *Molina v. State*,[674] the court of appeals held that Arizona's statutory definition of driving under the influence is sufficiently similar to Alaska's definition to permit an Arizona conviction to constitute a predicate offense for a conviction in Alaska.[675] Molina was convicted of felony driving under the influence ("DUI"), an offense which requires that the defendant (1) drove under the influence and (2) had at least two

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[655] *Id.* at 650.
[656] *Id.*
[657] *Id.*
[658] 138 P.3d 254 (Alaska 2006).
[659] *Lyons*, 182 P.3d at 650.
[660] *Id.*
[661] *Id.* at 651.
[662] *Id.*
[663] *Id.*
[664] 191 P.3d 148 (Alaska Ct. App. 2008).
[665] *Id.* at 152.
[666] *Id.* at 150.
[667] *Id.*
[668] *Id.*
[669] *Id.*
[670] *Id.* at 152.
[671] *Id.*
[672] *Id.*
[673] *Id.*
[674] 186 P.3d 28 (Alaska Ct. App. 2008).
[675] *Id.* at 32.

previous DUI convictions.[676] One of Molina's prior convictions was a DUI conviction from Arizona.[677] Molina appealed, arguing that Arizona's statutory definition of DUI is not sufficiently similar to Alaska's definition to permit consideration of the Arizona DUI conviction as a predicate conviction for the present felony DUI conviction.[678] In *Gundersen v. Anchorage*,[679] the court of appeals interpreted Alaska's DUI statute to require proof of a certain level of impairment, and the wording of Arizona's DUI statute appeared to require proof of a lesser level of impairment than the *Gundersen* test.[680] However, Arizona case law has consistently suggested that Arizona's DUI statute is in fact very similar to Alaska's.[681] The court of appeals affirmed Molina's conviction for felony driving under the influence, holding that Arizona's statutory definition of driving under the influence is sufficiently similar to Alaska's definition to permit an Arizona conviction to constitute a predicate offense for a conviction in Alaska.[682]

Muller v. State

In *Muller v. State*,[683] the court of appeals held that a person accused of criminal trespass must show "some evidence" to raise a necessity defense.[684] Muller was convicted of criminal trespass after entering United States Senator Ted Stevens's office with a group of people to protest the war in Iraq, spending the afternoon there, and refusing to leave when the office closed for the day.[685] At trial, Muller raised a defense of necessity.[686] Though the trial judge used her own jury instruction instead of Muller's proffered instruction, he did not raise an objection, and was convicted of trespass.[687] The court of appeals reasoned that a defendant attempting to establish a necessity defense must prove that: (1) the charged act was committed to stop a serious evil, (2) the defendant had no adequate alternative course of action, and (3) the resulting harm was not disproportionate to the avoided harm.[688] Though Muller was correct that the jury was improperly instructed, as the trial judge did not properly characterize the mental state required for the first two elements of the necessity defense, Muller was not entitled to raise this defense based on the facts of his case.[689] Affirming a jury's conviction, the court of appeals held that a person accused of criminal trespass must show "some evidence" to raise a necessity defense.[690]

Osborne v. State

In *Osborne v. State*,[691] the court of appeals held that § 12.55.120(e) of the Alaska Statutes only bars the appeal of a composite sentence that is less than or equal to the minimum consecutive sentence mandated by § 12.55.127.[692] Osborne was convicted of three counts of second-degree assault and one count of driving under the influence.[693] He was sentenced to three years in prison for each of the assault charges and one year in prison for driving under the influence.[694] The assault sentences were to be served consecutively, and the sentence for driving under the influence was to be served concurrently with the assault sentences.[695] All but ten months of each assault sentence was suspended; Osborne was thus required

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[676] *Id.* at 28.
[677] *Id.*
[678] *Id.* at 28–29.
[679] 762 P.2d 104 (Alaska Ct. App. 1988).
[680] *Molina*, 186 P.3d at 29.
[681] *Id.*
[682] *Id.* at 32.
[683] 196 P.3d 815 (Alaska Ct. App. 2008).
[684] *Id.* at 816.
[685] *Id.*
[686] *Id.*
[687] *Id.* at 816–17.
[688] *Id.* at 816.
[689] *Id.* at 817–18.
[690] *Id.* at 816.
[691] 182 P.3d 1155.
[692] *Id.* at 1158.
[693] *Id.* at 1156.
[694] *Id.* at 1157.
[695] *Id.*

to serve thirty months in prison with seventy-eight months suspended.[696] Osborne appealed his sentence, claiming that it was excessive.[697] The court of appeals first determined that § 12.55.120(e) did not prevent Osborne from appealing his sentence because his sentence exceeded the upper limit of the presumptive range for a single count of second-degree assault.[698] After making a determination that Osborne had a right to appeal his sentence, the court of appeals determined that his sentence was not excessive given the severity of his crimes.[699] The court of appeals held that § 12.55.120(e) only bars the appeal of a composite sentence that is less than or equal to the minimum consecutive sentence mandated by § 12.55.127.[700]

Oyoumick v. State

In *Oyoumick v. State*,[701] the court of appeals held that a judge may impose a probation revocation sentence that exceeds the maximum original sentence if exceptional circumstances show that the defendant's prospects for rehabilitation are poor.[702] Oyoumick was convicted of a felony, and the judge gave him a three-year sentence—three years in prison, with two of those years suspended.[703] In order to sentence him to more than one year in prison, the prosecution would have had to show evidence of an aggravating circumstance, an option that was not explored at the original trial.[704] After two violations of his probation, including persistent refusal to attend his court-mandated sex offender treatment, the judge imposed the remainder of the three-year sentence, resulting in a prison sentence that exceeded the two-year maximum allowed in the original trial.[705] The court of appeals found that the superior court had carefully evaluated Oyoumick's situation and determined that exceptional circumstances warranted the imposition of the entire three-year sentence.[706] Oyoumick had a criminal record, had violated his probation several times by becoming intoxicated, and had refused sex offender treatment.[707] Because he had been given multiple opportunities to become rehabilitated, the court of appeals agreed that his poor prospects for rehabilitation constituted an exceptional circumstance.[708] The court of appeals affirmed the superior court, holding that a judge may impose a probation revocation sentence that exceeds the maximum original sentence if exceptional circumstances show that the defendant's prospects for rehabilitation are poor.[709]

State v. Bourdon

In *State v. Bourdon*,[710] the court of appeals held that inmates are entitled to "good time" for obeying the rules of the halfway house to which they are assigned by the Department of Corrections ("DOC").[711] After being arrested for violating his parole, Bourdon was placed at the Glacier Manor halfway house for 248 days.[712] Alaska law entitles inmates to "good time"—a deduction of one-third of a term of imprisonment—provided that they obey the rules of the institutions to which they are assigned.[713] Bourdon contended that he was entitled to 83 days of "good time" from Glacier Manor; DOC disagreed, arguing that "good time" could not be earned there because Glacier Manor was not a state-run institution.[714] Bourdon filed an application for post-conviction relief, and the superior court ruled in his

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[696] *Id.*
[697] *Id.* at 1156.
[698] *Id.* at 1158.
[699] *Id.* at 1159.
[700] *Id.* at 1158.
[701] 185 P.3d 771 (Alaska Ct. App. 2008).
[702] *Id.* at 775–76.
[703] *Id.* at 772.
[704] *Id.* at 773.
[705] *Id.*
[706] *Id.* at 774.
[707] *Id.* at 775.
[708] *Id.* at 775–76.
[709] *Id.*
[710] 193 P.3d 1209 (Alaska Ct. App. 2008).
[711] *Id.* at 1211.
[712] *Id.* at 1210.
[713] *Id.*
[714] *Id.*

favor.[715] The court of appeals focused on the definitions used in the Alaska Statutes and found that "good time" may only be earned in a "correctional facility." The court ruled that the DOC Commissioner's broad authority to assign prisoners meant that "correctional facility" included any placement the Commissioner designated to house prisoners.[716] The court held that because DOC had placed Bourdon at Glacier House following his arrest, he was entitled to earn "good time" for following the halfway house's rules.[717] The court also indicated that a contrary holding would subject prisoners at non-state-run institutions to longer sentences than prisoners in state-run institutions.[718] The court of appeals affirmed the superior court, holding that inmates are entitled to "good time" for obeying the rules of the halfway house to which they are assigned by the DOC.[719]

State v. Smith

In *State v. Smith*,[720] the court of appeals held that an affidavit linking an officer's ability to smell marijuana to the probability of a commercial growing operation provided probable cause for issuing a search warrant.[721] After smelling a moderate odor of marijuana outside Smith's mobile home, Officer Young applied for a warrant to search Smith's mobile home for a possible marijuana growing operation.[722] The search produced nearly ten pounds of marijuana; after being indicted, Smith filed a motion to suppress the evidence and dismiss the charges on the basis that the search warrant was issued without probable cause.[723] Based on *State v. Crocker*,[724] the superior court granted Smith's motion because Young had observed no specific facts suggesting that Smith possessed a non-constitutionally protected amount of marijuana.[725] The court of appeals reasoned that Young's affidavit—which included information about his ability to smell marijuana, his past experiences locating commercial operations, and statistical analyses of previous cases with his unit—linked the marijuana odor to the quantity of marijuana, thereby overcoming the deficiency in *Crocker* and establishing probable cause.[726] The court of appeals reversed the superior court's, holding that an affidavit linking an officer's ability to smell marijuana to the probability of a growing operation provided probable cause for issuing a search warrant.[727]

State v. Waterman

In *State v. Waterman*,[728] the court of appeals held that: (1) the State maintains its right to an interlocutory appeal of dismissed indictments when double jeopardy has not attached,[729] and (2) if a statement by law enforcement officials informs a suspect that non-cooperation will be reported to the trial judge or jury, then the statement is coercive.[730] Two of Waterman's friends confessed to murdering Waterman's mother, and they told law enforcement officials that Waterman was involved.[731] When law enforcement officials initially interviewed Waterman, she denied involvement;[732] during a subsequent interview, she confessed.[733] The superior court found *sua sponte* that Waterman's confession was non-voluntary and consequently dismissed the indictment.[734] The court of appeals reasoned that the State was

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[715] *Id.*
[716] *Id.* at 1210–11.
[717] *Id.* at 1211.
[718] *Id.*
[719] *Id.*
[720] 182 P.3d 651 (Alaska Ct. App. 2008).
[721] *Id.* at 652.
[722] *Id.*
[723] *Id.* at 652–53.
[724] 97 P.3d 93 (Alaska Ct. App. 2004).
[725] *Smith*, 182 P.3d at 653.
[726] *Id.* at 654.
[727] *Id.* at 652.
[728] 196 P.3d 1115 (Alaska Ct. App. 2008).
[729] *Id*. at 1119.
[730] *Id*. at 1123.
[731] *Id*.
[732] *Id*. at 1116–17.
[733] *Id*. at 1117.
[734] *Id*. at 1117–18.

permitted to bring an interlocutory appeal under § 22.07.020(d)(2) of the Alaska Statutes because the legislative history of the statute showed a clear legislative intent to expand the State's right to appeal.[735] Since curtailing the State's pre-existent right to interlocutory appeal was inconsistent with this legislative intent, the court of appeals held that the State had properly brought an interlocutory appeal.[736] Second, the court of appeals reasoned that a defendant generally has a right against self-incrimination and that coercive interrogation techniques violate that right.[737] Since the defendant's confession followed the interrogator's statement that non-cooperation would be reported to the trial judge and jury, Waterman was coerced.[738] Affirming in part and reversing in part, the court of appeals held that: (1) the State maintains its right to an interlocutory appeal of dismissed indictments when double jeopardy has not attached,[739] and (2) if a statement by law enforcement officials informs a suspect that non-cooperation will be reported to the trial judge or jury, then the statement is coercive.[740]

Tice v. State

In *Tice v. State*,[741] the court of appeals held that a twenty-five year composite sentence on two class A felony convictions is not clearly mistaken for a defendant with poor character and rehabilitation prospects.[742] Tice was convicted of manslaughter and assault in the first degree following a car accident that killed one girl and injured her sister; he faced a presumptive minimum sentence of fifteen years' imprisonment for each of these class A felonies.[743] The superior court found that an aggravating factor existed because Tice knew or should have known that the victims were vulnerable given their youth; based on this aggravator, the judge imposed twenty years per charge, with a twenty-five year composite sentence.[744] Tice appealed, arguing that the "vulnerable victim" aggravator did not apply because his conduct was neither targeted at the girls nor exploitative of their vulnerability.[745] The court held that the history of the federal sentencing guidelines created an ambiguity that it may have to resolve in Tice's favor; however, rather than rule on whether the aggravator applied only if the victim was targeted, the court chose to evaluate the trial judge's alternative sentence under the "clearly mistaken" standard.[746] Because superior court judge believed that a twenty-five year sentence was necessary given Tice's history, which included theft, drug dealing, sexual abuse, and convincing the accident victims' mother to claim that she had been driving, the court of appeals held that the superior court was not clearly mistaken in believing that this history reflected so poorly on Tice's character and rehabilitation prospects that a twenty-five year composite sentence was appropriate.[747] The court of appeals affirmed the superior court's sentence, holding that a twenty-five year composite sentence on two class A felony convictions is not clearly mistaken for a defendant with poor character and rehabilitation prospects.[748]

Twogood v. State

In *Twogood v. State*,[749] the court of appeals held that where a prisoner's parole eligibility is unclear because of an ambiguity in the structure of partially or fully consecutive sentences, the ambiguity must be resolved in favor of the prisoner.[750] Following convictions for attempted murder and sexual assault, Twogood received sentences of fifteen and ten years of imprisonment, respectively; the judge sentenced him to a combined, partially-consecutive sentence of twenty years, but failed to specify how the

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[735] *Id*. at 1118.
[736] *Id*. at 1119.
[737] *Id*.
[738] *Id*. at 1123.
[739] *Id*. at 1119.
[740] *Id*. at 1123.
[741] 199 P.3d 1175 (Alaska Ct. App. 2008).
[742] *Id.* at 1176–79.
[743] *Id.* at 1176.
[744] *Id.*
[745] *Id.* at 1176–77.
[746] *Id.*
[747] *Id.* at 1177–79.
[748] *Id.* at 1176–79.
[749] 196 P.3d 1109 (Alaska Ct. App. 2008).
[750] *Id.* at 1114–15.

two sentences were structured to reach the composite twenty-year term.[751] After he was imprisoned, Twogood filed a motion to have his sentence clarified because the ambiguous structure affected his parole eligibility.[752] The district court dismissed the motion, finding that discretionary parole calculations were entrusted only to the Alaska Parole Board and the Department of Corrections.[753] On appeal, the court of appeals ruled that Alaska courts may correct any sentence that is legally incomplete.[754] In judging whether Twogood's sentence was legally incomplete, the court considered whether the structure of Twogood's sentence would affect his eligibility for parole.[755] It noted that a prisoner who receives consecutive sentences is not eligible for discretionary parole until he has served a certain portion of his "primary" sentence and a different portion of all other sentences.[756] The statutes under which Twogood was sentenced contained no criteria for determining which sentence was his "primary" one; if the Twogood's attempted murder sentence were primary, he would have to wait ninety months before he would become eligible for discretionary parole, but if the rape charge were primary, Twogood would become eligible after seventy months.[757] Since any after-the-fact sentence increase would violate state law, the court held that the sentencing ambiguity must be resolved in Twogood's favor by choosing the shorter eligibility period.[758] The court of appeals reversed the superior court, holding that where a prisoner's parole eligibility is unclear because of an ambiguity in the structure of partially or fully consecutive sentences, the ambiguity must be resolved in favor of the prisoner.[759]

Vickers v. State

In *Vickers v. State*,[760] the court of appeals held that an individual's express consent to contact with a defendant who has been judicially ordered not to contact the individual is insufficient to permit the defendant to invoke the mistake defense if the defendant is aware of the judicial order.[761] Vickers was indicted for assaulting and attempting to murder Jamestown.[762] Vickers was only orally forbidden to have contact with Jamestown as a condition of his parole because an inadvertent oversight caused the "no contact" box to remain unchecked.[763] Shortly thereafter, Vickers was arrested for having contact with Jamestown and sentenced to five years' probation.[764] Jamestown then wrote a letter to the district attorney that stated she consented to contact with Vickers.[765] A detective spotted the two together and again Vickers was arrested for violating his probation.[766] On appeal, the court of appeals reasoned that a defense of mistake is allowed if the defendant was unaware of the judicial order's existence and contents.[767] Because Vickers knew his actions could violate his probation, an honest belief that Jamestown's consent overrode that condition was not sufficient.[768] Further, the court reasoned that though the correct box was not checked on the release, on at least two occasions, the judge, in Vickers's presence, forbade him from having contact with Jamestown, and that it was irrelevant whether the order was communicated orally or in writing.[769] The court of appeals affirmed the superior court, holding that an individual's express consent to contact with a

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[751] *Id.* at 1110.
[752] *Id.*
[753] *Id.* at 1110–11.
[754] *Id.* at 1111.
[755] *Id.*
[756] *Id.* at 1111–12.
[757] *Id.* at 1112–14.
[758] *Id.*
[759] *Id.*
[760] 175 P.3d 1280 (Alaska Ct. App. 2008).
[761] *Id.* at 1282.
[762] *Id.*
[763] *Id.*
[764] *Id.*
[765] *Id.*
[766] *Id.*
[767] *Id.* at 1283.
[768] *Id.* at 1284.
[769] *Id.* at 1282, 1285.

defendant who has been judicially ordered not to contact the individual is insufficient to permit the defendant to invoke the mistake defense if the defendant is aware of the judicial order.[770]

W.S. v. State

In *W.S. v. State*,[771] the court of appeals held that: (1) the superior court had authority to order restitution to both a victim's aunt and mental health counselor, and (2) a minor's obligation to pay restitution was not extinguished when the minor's term of probation ended.[772] W.S. was adjudicated a delinquent minor for assaulting a twelve-year old boy.[773] The superior court ordered W.S. and his parents to pay restitution to the victim's aunt and to the victim's mental health counselor.[774] W.S. appealed, arguing that the superior court only had the authority to grant restitution to the direct victim of the offense and that his restitution obligations should terminate when his term of probation ended.[775] The court concluded that, as the victim's guardian and physical custodian, the victim's aunt qualified as a "victim" for restitution purposes.[776] The court then concluded that "suitable restitution" in § 47.12.010(b)(12) of the Alaska Statutes encompasses mental health counseling for victims.[777] The court also concluded that because the Delinquency Rules did not specify whether a minor's restitution obligation extended past the end of the minor's probation, § 47.12.170(a) was not inconsistent with the Delinquency Rules and W.S.'s restitution obligations did not end when the superior court lost its juvenile jurisdiction over him.[778] Affirming the lower court, the court of appeals held that: (1) the superior court had authority to order restitution to both a victim's aunt and mental health counselor, and (2) a minor's obligation to pay restitution was not extinguished when the minor's term of probation ended.[779]

CRIMINAL PROCEDURE

Ninth Circuit Court of Appeals

United States v. Turvin

In *United States v. Turvin*,[780] the Ninth Circuit held that a vehicle search was lawful when an officer's prior questions and request for consent to search the vehicle did not unreasonably prolong the traffic stop.[781] Officer Christenson stopped Turvin for minor traffic violations; when Trooper Powell arrived on scene, he informed Christensen that a drug lab had previously been found in Turvin's truck.[782] Christensen ceased writing citations and went to speak with Turvin.[783] Turvin consented to Christensen's request to search of his truck; the search yielded methamphetamine and an illegal weapon.[784] At trial, the district court granted Turvin's motion to suppress, holding that Christensen's questions about suspected drug activity had converted a lawful traffic stop into a lengthy, unlawful detention that made Turvin's consent to search involuntary.[785] The Ninth Circuit reasoned that since no reasonable suspicion is needed to

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[770] *Id.* at 1282, 1288.
[771] 174 P.3d 256 (Alaska Ct. App. 2008).
[772] *Id.* at 257.
[773] *Id.*
[774] *Id.*
[775] *Id.* at 258–30.
[776] *Id.* at 258–59.
[777] *Id.* at 259.
[778] *Id.* at 261.
[779] *Id.* at 257.
[780] 517 F.3d 1097 (9th Cir. 2008).
[781] *Id.* at 1103–04.
[782] *Id.* at 1098.
[783] *Id.*
[784] *Id.* at 1099.
[785] *Id.*

justify police questioning that does not prolong an initially lawful stop, the key issue was whether Christensen's questioning had extended the stop into an unlawful detention.[786] The court reasoned that because only fourteen minutes elapsed from the initial stop until consent was given to search the vehicle, the decision to ask questions about drug activity was reasonable.[787] The Ninth Circuit also observed that it had previously upheld asking questions while slowly writing citations, and reasoned that there was no reason why briefly pausing from writing a ticket in order to ask questions should not also be permissible.[788] The court held that officers do not need reasonable suspicion to ask questions unrelated to a lawful stop if the questioning does not unreasonably extend the duration of the stop.[789] The Ninth Circuit reversed the district court, holding that a vehicle search is lawful when the Trooper's prior questions and request for consent to search the vehicle did not unreasonably prolong the traffic stop.[790]

United States v. Weyhrauch

In *United States v. Weyhrauch*,[791] the Ninth Circuit held that where anyone other than a U.S. Attorney certifies an interlocutory appeal under 18 U.S.C. § 3731, he must demonstrate that he is authorized to do so.[792] Weyhrauch was indicted in a prosecution conducted by the Department of Justice ("DOJ") after the U.S. Attorney's Office recused itself from the case.[793] The day before trial, the trial court excluded evidence proffered by the government.[794] The attorney for the DOJ orally stated his intent to file an interlocutory appeal of the exclusion under § 3731.[795] Under § 3731, the U.S. Attorney must certify an interlocutory appeal.[796] The DOJ argued that its certification was appropriate, because it was made in consultation with a DOJ director who was overseeing this prosecution or because the director submitted a subsequent written certification.[797] The Ninth Circuit held that the DOJ did not show cause why the appeal should be granted despite the improper certification here.[798] First, the court held that where someone other than a U.S. Attorney certifies the appeal, he must document that he received proper delegation to certify the appeal.[799] Here, the DOJ did not submit any documentation that the attorney himself was so delegated.[800] Second, the court held that special appointment under 28 U.S.C § 515(a) to conduct a legal proceeding that the U.S. Attorney's Office is authorized to conduct is not sufficient to prove authority to certify an appeal.[801] The court ordered the government to submit evidence that someone in the DOJ was properly delegated authority to certify the appeal, holding that where anyone other than a U.S. Attorney certifies an interlocutory appeal under 18 U.S.C. § 3731, he must demonstrate that he is authorized to do so.[802]

Alaska Supreme Court

Manrique v. State

In *Manrique v. State*,[803] the supreme court held that: (1) a hearing is needed to determine whether a juror is biased when there is insufficient evidence in the record to make such a determination, and (2) employing a three-judge panel to review a sentence is only necessary if the defendant can show evidence of

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[786] *Id.* at 1100–01.
[787] *Id.* at 1101–02.
[788] *Id.* at 1103.
[789] *Id.* at 1103–04.
[790] *Id.*
[791] 544 F.3d 969 (9th Cir. 2008).
[792] *Id.* at 973–75.
[793] *Id.* at 970.
[794] *Id.*
[795] *Id.*
[796] *Id.* at 970–71.
[797] *Id.* at 971.
[798] *Id.* at 975.
[799] *Id.* at 973–74.
[800] *Id.* at 974.
[801] *Id.*
[802] *Id.* at 973–75.
[803] 177 P.3d 1188 (Alaska 2008).

an extraordinary potential for rehabilitation.[804] A jury found Manrique guilty of sexual assault and burglary, but Manrique contended that two jurors were biased.[805] The supreme court used a two-part test to evaluate juror misconduct, which asked whether the juror violated his or her duty, and if so, whether the violation resulted in an unfair trial.[806] Here, there was not enough evidence to make this determination, so the case had to be remanded and a special hearing held to determine whether juror bias affected the verdict.[807] The court also held that Manrique was not entitled to have his sentence reviewed by a three-judge panel because he failed to prove by clear and convincing evidence his exceptional potential for rehabilitation.[808] Despite Manrique's prior good citizenship, he failed to prove that he was significantly different from a typical offender or that his conduct was significantly different from a typical offense.[809] Affirming the superior court, the supreme court held that: (1) a hearing is needed to determine whether a juror is biased when there is insufficient evidence in the record to make such a determination, and (2) employing a three-judge panel to review a sentence is only necessary if the defendant can show evidence of an extraordinary potential for rehabilitation.[810]

Alaska Court of Appeals

Ackerman v. State

In *Ackerman v. State*,[811] the court of appeals held that a convicted criminal was not entitled to a credit against his sentence for time spent on electronic monitoring.[812] Ackerman was arrested and released on electronic monitoring until his trial.[813] After he was convicted, Ackerman requested that the superior court credit the time he spent on electronic monitoring against his sentence, but the court denied his request.[814] On appeal, Ackerman argued that the Alaska Legislature intended to give credit to defendants who are released on bail under electronic monitoring and that his release under electronic monitoring was significantly different from release without the monitoring and thus gave rise to a credit.[815] Reasoning that: (1) the Alaska legislature specifically intended to limit the scope to prisoners serving their sentence, not to those on bail, and (2) the electronic monitoring did not add to the restrictions placed on his bail, the supreme court denied Ackerman's request.[816] Affirming the superior court, the court of appeals held that Ackerman was not entitled to credit against his sentence for time spent on electronic monitoring.[817]

Bradley v. State

In *Bradley v. State*,[818] the court of appeals held that: (1) a lost recording of an arrest does not require the trial court to suppress evidence, (2) a trial judge may decline to grant co-counsel status to a defendant with his public defender, (3) inadvertent statements to prospective jurors do not constitute plain error unless the defendant shows that the statements were prejudicial, (4) an individual may be convicted of driving under the influence ("DUI") without the results of a breath test, and (5) the sentencing dates of prior offenses are the relevant dates for determining whether those offenses elevate the current charge.[819] Police arrested Bradley for DUI, but they lost the audio recording of the arrest.[820] Bradley chose to represent

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[804] *Id.* at 1190.
[805] *Id.*
[806] *Id.* at 1192.
[807] *Id.* at 1191–92.
[808] *Id.* at 1193.
[809] *Id.* at 1194.
[810] *Id.* at 1190.
[811] 179 P.3d 951 (Alaska Ct. App. 2008).
[812] *Id.* at 953.
[813] *Id.* at 951.
[814] *Id.*
[815] *Id.* at 952–53.
[816] *Id.*
[817] *Id.* at 953.
[818] 197 P.3d 209 (Alaska Ct. App. 2008).
[819] *Id.* at 210–11.
[820] *Id.*

himself, declining the judge's offer to appoint a public defender in an advisory position, and he was subsequently convicted.[821] On appeal, he argued: (1) that the trial court should have suppressed the breath test results, (2) that the public defender should have been appointed as co-counsel, (3) that the prospective jury should not have been told about the felony DUI charge, and (4) that the trial judge should not have used the sentencing dates to determine whether his prior convictions elevated the current charge.[822] The court of appeals rejected these arguments, finding first that the sanction imposed by the trial judge for the lost evidence—instructing the jury to presume that the lost recording would have been favorable to Bradley—was not plainly insufficient.[823] Second, the trial judge did not dismiss Bradley's request for co-counsel status out-of-hand, but rather gave him an opportunity to have a public defender appointed as an advisor.[824] Third, although the trial judge improperly instructed the prospective jury, he quickly corrected himself and told the jury that none of the charges were to be taken as evidence.[825] Fourth, based on the officers' testimony about Bradley's impaired condition, a jury could have convicted him of DUI even without the results of the breath test.[826] Fifth, in determining whether prior convictions are relevant for the purposes of elevating the current charge, the relevant date is the sentencing date.[827] Thus, the court of appeals affirmed the superior court, holding that: (1) a lost recording of an arrest does not require the trial court to suppress evidence, (2) a trial judge may decline to grant co-counsel status to a defendant with his public defender, (3) inadvertent statements to prospective jurors do not constitute plain error unless the defendant shows that the statements were prejudicial, (4) an individual may be convicted of DUI without the results of a breath test, and (5) the sentencing dates of prior offenses are the relevant dates for determining whether those offenses elevate the current charge.[828]

Brown v. State

In *Brown v. State*,[829] the court of appeals held that because the Alaska Constitution imposes greater restrictions than the Federal Constitution on a police officer's authority to request a motorist's permission to conduct a search during a routine traffic stop, a police officer was prohibited from requesting permission to conduct a search that was unrelated to the basis for the stop and otherwise unsupported by a reasonable suspicion of criminality.[830] Brown was pulled over because her license plate was not properly illuminated.[831] Officer Salinas never told Brown why she was stopped and was ready to let her go with a warning before he asked for Brown's permission to search her person and her vehicle for drugs and weapons.[832] Brown consented to the search and drugs were found.[833] The superior court upheld the validity of the search,[834] and Brown appealed, claiming that because the circumstances surrounding her encounter with Officer Salinas implicitly coerced her to consent, the search of her vehicle was not valid.[835] The court of appeals recognized that motorists who are stopped for traffic infractions do not act from a position of psychological independence when they decide how to respond to a police officer's request for a search.[836] The psychological pressures inherent in a stop, combined with individuals' ignorance of their rights, lead the vast majority of motorists who are asked for permission to search their vehicles to give it.[837] Because traffic violations are so frequent and because motorists often accede to police searches of their vehicles, the court found that the Fourth Amendment rules governing traffic stops were not sufficient to protect

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[821] *Id.* at 211–12.
[822] *Id.* at 210–11.
[823] *Id.* at 213–14.
[824] *Id.* at 215.
[825] *Id.* at 216.
[826] *Id.* at 216–17.
[827] *Id.* at 218.
[828] *Id.* at 210–11.
[829] 182 P.3d 624 (Alaska 2008).
[830] *Id.* at 626.
[831] *Id.* at 624.
[832] *Id.* at 625.
[833] *Id.*
[834] *Id* at 627.
[835] *Id* at 625.
[836] *Id* at 626.
[837] *Id.*

Alaskans' privacy.[838] Here, the search was invalid because Brown was never told why she was stopped, and therefore did not know the basis for the officer's assertion of authority over her.[839] As a result, she could not have known whether she had the right to refuse the search.[840] Thus, the court of appeals reversed of the superior court, holding that that because the Alaska Constitution imposes greater restrictions than the Federal Constitution on a police officer's authority to request a motorist's permission to conduct a search during a routine traffic stop, a police officer was prohibited from requesting permission to conduct a search that was unrelated to the basis for the stop and otherwise unsupported by a reasonable suspicion of criminality.[841]

Burton v. State

In *Burton v. State*,[842] the court of appeals held that a convicted criminal is not entitled to post-conviction relief for ineffective assistance of counsel when the individual does not present a prima facie case of attorney incompetence or of prejudice resulting from such incompetence.[843] Over ten years after he was convicted of first-degree murder, Burton submitted a petition for post-conviction relief, arguing that his trial attorney's failure to pursue certain legal tactics constituted ineffective assistance of counsel.[844] The superior court dismissed the petition, holding that the man had failed to present a prima facie case of his attorney's incompetence and that he had failed to demonstrate that any incompetence would have had a negative effect on the outcome of the original trial.[845] The court of appeals affirmed, finding that the superior court was justified in partially relying on Burton's direct appeal, in which the court of appeals had found that the attorney's alleged incompetence did not constitute plain error.[846] Because the finding of no plain error was based on the fact that any alleged incompetence did not prejudice the defendant, the superior court could deny post-conviction relief for ineffective assistance of counsel as long as the pleadings did not indicate any reason why the plain error finding in the direct appeal was incorrect.[847] Furthermore, the court of appeals affirmed that any failure of the man's attorney to object to potential hearsay evidence did not have a prejudicial effect on his defense.[848] The court also found that there was no error in failing to instruct the jury on criminally negligent homicide and manslaughter, because (1) there was insufficient evidence to support either verdict, and (2) the jury was instructed on second-degree murder and still found the defendant guilty of first-degree murder, a more serious charge.[849] Finally, the court found that the man did not present a prima facie case of his trial attorney's incompetence in her preparation of the defense's firearms expert or her cross-examination of the prosecution's firearms expert.[850] Although the appellant argued that his attorney should have pursued different lines of questioning, he did not offer any evidence that the attorney's legal strategy demonstrated incompetence.[851] The court of appeals affirmed the superior court, holding that a convicted criminal is not entitled to post-conviction relief for ineffective assistance of counsel when the individual does not present a prima facie case of attorney incompetence or of prejudice resulting from such incompetence.[852]

Collins v. State

In *Collins v. State*,[853] the court of appeals held that even though a defendant has a right to be present at all stages of the trial, a defendant's absence during the trial judge's decision to release an ill juror

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[838] *Id.*
[839] *Id.* at 635.
[840] *Id.*
[841] *Id* at 626.
[842] 180 P.3d 964 (Alaska Ct. App. 2008).
[843] *Id.* at 976.
[844] *Id.* at 967.
[845] *Id.*
[846] *Id.* at 967–69.
[847] *Id.* at 969.
[848] *Id.* at 971.
[849] *Id.* at 972.
[850] *Id.* at 974–76.
[851] *Id.*
[852] *Id.* at 976.
[853] 182 P.3d 1159 (Alaska Ct. App. 2008).

or during the trial judge's questioning of a different juror about media exposure does not amount to reversible error.[854] During Collins's murder trial, the trial judge, without Collins present, released a juror because of illness and questioned another juror about media exposure.[855] Appealing his conviction, Collins argued that his right to be present was violated.[856] The court of appeals reasoned that medical emergency situations sometimes arise which require the protection of a juror's rights, and the defendant was not prejudiced by the juror's release.[857] Furthermore, it reasoned that the trial judge sufficiently established that the other juror had not been exposed to the media.[858] The court of appeals went on to hold that both releasing a juror in medical emergencies without the defendant present and questioning a juror about media exposure without the defendant present are harmless error beyond a reasonable doubt.[859] Affirming the superior court, the court of appeals held that even though a defendant has a right to be present at all stages of the trial, a defendant's absence during the trial judge's decision to release an ill juror or during the trial judge's questioning of a different juror about media exposure does not amount to reversible error.[860]

Cooper v. State

In *Cooper v. State*,[861] the court of appeals held that failing to correct an improper analogy used by the prosecutor in her closing argument to describe reasonable doubt only constitutes plain error if the statement was so prejudicial that failing to correct it would create a miscarriage of justice.[862] Cooper was tried for several sex crimes.[863] During the prosecutor's closing argument, she compared the concept of proof beyond a reasonable doubt to the idea of deciding whether to purchase a house.[864] The defense attorney did not object to this statement, and Cooper was subsequently convicted.[865] The court of appeals affirmed the conviction, holding that the judge's failure to correct the prosecutor's statement did not constitute plain error.[866] Although the law in many States precludes prosecutors from making analogies to reasonable doubt, Alaska did not have any cases criticizing such analogies.[867] Furthermore, because the judge gave the jury proper instruction on the legal definition of reasonable doubt, the prosecutor's statement was not so prejudicial to Cooper that failing to correct it would have resulted in a miscarriage of justice.[868] The court of appeals affirmed the superior court, holding that failing to correct an improper analogy used by the prosecutor in her closing argument to describe reasonable doubt only constitutes plain error if the statement was so prejudicial that failing to correct it would create a miscarriage of justice.[869]

Dominguez v. State

In *Dominguez v. State*,[870] the court of appeals held that a judge should not preside over an omnibus hearing after being disqualified from a case by a peremptory challenge.[871] During the state's prosecution of Dominguez in Kenai superior court, his attorney peremptorily challenged Judge Moran.[872] Alaska Criminal Rule 25(d)(3) states that when a party peremptorily challenges a judge, the judge may not participate further in the action unless the challenged judge is the presiding judge, who may only perform

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[854] *Id.* at 1163–64.
[855] *Id.* at 1161–62.
[856] *Id.* at 1162.
[857] *Id.* at 1163.
[858] *Id.* at 1164.
[859] *Id.* at 1163–64.
[860] *Id.*
[861] 2008 Alaska App. LEXIS 91 (Ct. App. Oct. 15, 2008).
[862] *Id.* at *10.
[863] *Id.* at *2.
[864] *Id.* at *2–3.
[865] *Id.* at *2.
[866] *Id.* at *10.
[867] *Id.* at *7.
[868] *Id.* at *7–9.
[869] *Id.* at *10.
[870] 181 P.3d 1111 (Alaska Ct. App. 2008).
[871] *Id.* at 1115.
[872] *Id.* at 1112.

the ministerial functions of a presiding judge.[873] After the challenge, the superior court re-assigned Dominguez's case to another judge, but the order also set an omnibus hearing before Judge Moran.[874] During the omnibus hearing, the attorney for Dominguez questioned Judge Moran's authority to hear the case, but Judge Moran proceeded with the hearing.[875] Dominguez then asked the appellate court to review Judge Moran's action.[876] The appellate court stated common law standards for disqualified judges did not apply in this case because a specific State statute prohibited a disqualified judge from further participation in litigation and it was irrelevant that Judge Morgan was merely performing administrative matters.[877] The appellate court reversed the superior court, holding that a judge should not preside over an omnibus hearing after being disqualified from a case by a peremptory challenge.[878]

Duncan v. State

In *Duncan v. State*,[879] the court of appeals held that police have probable cause for arrest when a citizen informant reports the activity of a suspect with a reputation for dealing drugs who is found in an area known for drug activity.[880] Two police officers, responding to a citizen's complaint of drug dealing outside his business, stopped and searched Duncan and arrested him for misconduct involving a controlled substance after finding crack cocaine and a crack pipe on his person.[881] Duncan moved to suppress the cocaine from evidence at trial, arguing that the searches were unlawful and were not incident to arrest.[882] The superior court denied his motion.[883] On appeal, the court of appeals reasoned that police may search a suspect without a warrant if: (1) the police have probable cause for the arrest, (2) the search is at roughly the same time as the arrest, (3) the arrest is not a pretext for the search, and (4) the suspect may have evidence on his person of the offense for which the arrest is taking place.[884] Probable cause for arrest exists if the facts known to the police support a belief that the suspect has committed the offense in question, and information provided by a citizen informant may be presumed to be trustworthy as long as the police verify some details before making an arrest.[885] Here, the police knew Duncan and knew of his reputation for drug dealing, and they knew that the area where they found Duncan had the reputation for drug activity; these were sufficient to constitute probable cause for Duncan's arrest.[886] The court of appeals affirmed the superior court, holding that police have probable cause for arrest when a citizen informant reports the activity of a suspect with a reputation for dealing drugs who is found in an area known for drug activity.[887]

Erickson v. State

In *Erickson v. State*,[888] the court of appeals held that the state may not search and seize an abandoned object when an illegal search or seizure may have prompted that act of abandonment.[889] A police officer found marijuana on Erickson during an illegal search.[890] After making this illegal discovery, the officer noticed a black bag outside of Erickson's car.[891] After Erickson denied ownership of the bag, the

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[873] *Id.*
[874] *Id.*
[875] *Id.* at 1113.
[876] *Id.*
[877] *Id.* at 1114.
[878] *Id.* at 1115.
[879] 178 P.3d 467 (Alaska Ct. App. 2008).
[880] *Id.* at 469, 471.
[881] *Id.*
[882] *Id.*
[883] *Id.*
[884] *Id.*
[885] *Id.* at 470.
[886] *Id.* at 471.
[887] *Id.* at 469, 471.
[888] 181 P.3d 1117 (Alaska Ct. App. 2008).
[889] *Id.* at 1119.
[890] *Id.* at 1118.
[891] *Id.*

officer found that it contained methamphetamines.[892] The superior court admitted the evidence found in the black bag, and Erickson appealed.[893] Because Erickson's decision to disclaim ownership of the bag may have been influenced by the officer's earlier illegal search of Erickson, the court of appeals held that the evidence in the bag should be suppressed as the tainted fruit of the illegal search.[894] The court of appeals reversed the superior court, holding that the state may not search and seize an abandoned object when an illegal search or seizure may have prompted that act of abandonment.[895]

Fungchenpen v. State

In *Fungchenpen v. State*,[896] the court of appeals held that a convicted criminal defendant was not entitled to a credit against a criminal sentence for time spent on bail release prior to sentencing.[897] A man convicted of assault was granted a conditional release during the 200-day period between his conviction and sentencing.[898] He requested that this 200-day period be credited against his sentence, and the superior court denied his request.[899] The court of appeals ruled that the conditions of the man's bail release were not materially different from conditions considered in prior cases where credit was also denied.[900] The court also rejected the appellant's argument that this prior decision was wrongly decided and should be overruled, noting that the Alaska Legislature codified the reasoning of this earlier decision in § 12.55.027(d) of the Alaska Statutes.[901] The court of appeals affirmed the decision of the superior court, holding that a convicted criminal defendant was not entitled to a credit against a criminal sentence for time spent on bail release prior to sentencing.[902]

Harris v. State

In *Harris v. State*,[903] the court of appeals held that the superior court had the authority to preclude expert testimony from a criminal trial when the judge found that the defense attorney willfully violated his obligation to disclose the evidence before trial.[904] In a case about the alleged assault of a baby by his parents, the public defender for one of the parents failed to meet the requirements of Alaska Criminal Rule 16(c)(4) ("Rule 16(c)(4)") when he failed to provide a written description of the expected testimony of a doctor he planned to call as an expert witness.[905] In response to the lack of a report, the trial judge granted the prosecutor's motion to preclude the defense from calling the doctor.[906] On the first day of the trial, the public defender finally produced the doctor's report.[907] The public defender appealed the trial judge's decision to preclude the testimony, arguing that: (1) the trial judge erred when he required disclosure of witnesses' reports by a certain date before trial, (2) the trial judge violated Alaska law by imposing the sanction of preclusion of evidence without proof of a willful violation of the pre-trial disclosure obligations, (3) lesser sanctions would have been sufficient, and (4) a law allowing preclusion of evidence is unconstitutional.[908] First, the court of appeals held that because the pubic defender did not raise the claim of error during the trial, he failed to preserve the issue for appeal; moreover, although the claim could be raised on the grounds of plain error, the court held no plain error existed because Rule 16(c)(4) clearly

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[892] *Id.*
[893] *Id.* at 1118–19.
[894] *Id.* at 1119.
[895] *Id.*
[896] 181 P.3d 1115 (Alaska Ct. App. 2008).
[897] *Id.* at 1116.
[898] *Id.* at 1115.
[899] *Id.*
[900] *Id.* at 1116.
[901] *Id.*
[902] *Id.*
[903] 195 P.3d 161 (Alaska Ct. App. 2008).
[904] *Id.* at 164–65.
[905] *Id.* at 167–68.
[906] *Id.* at 169–70.
[907] *Id.* at 170.
[908] *Id.* at 172.

requires disclosure and disclosure was not made until the morning the trial began.[909] Second, the court upheld the trial judge's decision to preclude the evidence because there was no evidence proving that the trial judge's conclusion—that the public defender's violation of the disclosure obligation was "willful"—was clearly erroneous.[910] Third, the court explained why prior cases on point should not control this case, noting that Rule 16 has been changed and now explicitly authorizes the sanctions imposed by the trial judge.[911] Finally, the court rejected the fourth argument because Rule 16 is entitled to a presumption of constitutionality, the public defender did not explain why the Alaska Constitution should offer greater protection than the corresponding provision of the Federal Constitution, and the Alaska Constitution does not absolutely bar judges from precluding evidence.[912] Affirming the superior court, the court of appeals held that the superior court had the authority to preclude expert testimony from a criminal trial when the judge found that the defense attorney willfully violated his obligation to disclose the evidence before trial.[913]

Hewitt v. State

In *Hewitt v. State*,[914] the court of appeals held that: (1) a police officer's observations of a vehicle provided sufficient evidence for the jury to find that the defendant was driving the car, and (2) a judge need not necessarily dismiss a jury after accidentally reading a part of the indictment, which both parties agreed should not be disclosed.[915] A police officer observed Hewitt parking his car at an auto garage late at night.[916] After asking for his identification, the officer discovered that Hewitt was driving with a revoked license.[917] Hewitt admitted to the officer that he, and not his friend, had been driving the car.[918] At trial, the judge began to read a part of the indictment that the parties had agreed would be kept from the jury; the judge then stopped and gave the jury a corrective instruction.[919] On appeal, Hewitt argued that the police testimony was insufficient to prove that he had been driving and that the judge's mistake had tainted the jury, requiring a new venire.[920] The court of appeals held that the evidence presented was sufficient to support the jury's guilty verdict, since a reasonable person could have concluded that Hewitt was driving.[921] The court of appeals also rejected Hewitt's argument that a new venire was required, since the judge had stopped before reading an entire sentence of exempted material, immediately corrected himself, and emphasized to the jury that the indictment should not be taken as evidence against the defendant.[922] The court held that given these circumstances, the judge did not abuse his discretion in refusing to dismiss the jury.[923] The court of appeals affirmed the superior court, holding that: (1) a police officer's observations of a vehicle provided sufficient evidence for the jury to find that the defendant was driving the car, and (2) a judge need not necessarily dismiss a jury after accidentally reading a part of the indictment, which both parties agreed should not be disclosed.[924]

Hoekzema v. State

In *Hoekzema v. State*,[925] the court of appeals held that: (1) multiple felony charges arising from the same case constitute a single felony conviction for the purposes of presumptive sentencing, and (2) a

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[909] *Id.* at 173–74.
[910] *Id.* at 174–75.
[911] *Id.* at 175–80.
[912] *Id.* at 181.
[913] *Id.* at 164–65.
[914] 188 P.3d 697 (Alaska Ct. App. 2008).
[915] *Id.* at 698.
[916] *Id.*
[917] *Id.*
[918] *Id.* at 699.
[919] *Id.*
[920] *Id.*
[921] *Id.*
[922] *Id.* at 699–700.
[923] *Id.* at 700.
[924] *Id.* at 698.
[925] 193 P.3d 765 (Alaska Ct. App. 2008).

trial court should undertake a law- and fact-based analysis to determine whether the defendant had a "small amount" of drugs that would mitigate his sentence.[926] Hoekzema was arrested after being caught with thirty-one grams of marijuana equally divided into twelve plastic baggies and a separate bottle containing 4.4 grams that he called his "personal stash."[927] He was subsequently convicted of possession of more than one ounce (28.35 grams) of marijuana with intent to deliver.[928] Hoekzema appealed, arguing that: (1) the jury did not have sufficient evidence to convict him; (2) he should have been sentenced as a second-felony, rather than a third-felony, offender; and (3) the judge should have found mitigating factors in determining his sentence.[929] First, the court of appeals found that the jury had sufficient evidence to convict Hoekzema, given the facts that he was acting suspiciously after being detained during a traffic stop, the marijuana was found on the ground near him after he made a furtive movement, he had equally divided the marijuana into small baggies, and he called the separate bottle his "personal stash."[930] Second, the court held that the judge should reconsider whether Hoekzema should have been classified as a second-felony offender rather than a third-felony offender, because both of his prior felony convictions arose from "a single, continuous criminal episode."[931] Third, the court held that the sentencing judge should have found that the fact that Hoekzema possessed such a small amount of marijuana was a mitigating factor because:[932] (1) "more than one ounce" could apply to a warehouse full of marijuana, placing thirty-one grams on the low end of the statute's possible range,[933] and (2) if Hoekzema had been carrying ten baggies instead of twelve, the case would have been a misdemeanor instead of a felony, suggesting that the amount was very small as a factual matter.[934] Affirming in part and reversing in part, the court of appeals held that: (1) multiple felony charges arising from the same case constitute a single felony conviction for the purposes of presumptive sentencing, and (2) a trial court should undertake a law- and fact-based analysis to determine whether the defendant had a "small amount" of drugs that would mitigate his sentence.[935]

Horner v. State

In *Horner v. State*,[936] the court of appeals held that a police officer's questioning of an individual did not constitute an investigative stop because the officer did not cause the individual to reasonably believe that he was being detained, and therefore the evidence obtained during such a stop was admissible.[937] A police officer was suspicious of three individuals at an airport.[938] He began asking them questions, and one of them admitted that they were in the process of illegally importing alcohol.[939] Horner entered a *Cooksey* plea and was convicted.[940] The court of appeals rejected Horner's argument that the officer's language or physical position created a reasonable belief that the officer was detaining him.[941] The court emphasized the importance of context, stating that all of the circumstances surrounding the incident must be examined to determine whether a reasonable innocent person would have believed he was free to leave.[942] In this situation, the officer was friendly and did not do anything to suggest that he planned to prevent the citizens from leaving.[943] Thus, Horner could not have reasonably believed that he was being detained.[944] The court of appeals upheld Horner's conviction, holding that a police officer's questioning of

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[926] *Id.* at 773.
[927] *Id.* at 767.
[928] *Id.* at 766.
[929] *Id.*
[930] *Id.* at 767–68.
[931] *Id.* at 770.
[932] *Id.* at 772–73.
[933] *Id.*
[934] *Id.* at 773.
[935] *Id.*
[936] 2008 Alaska. App. LEXIS 24 (Ct. App. Feb. 6, 2008).
[937] *Id.* at *1.
[938] *Id.* at *3.
[939] *Id.* at *3–5.
[940] *Id.* at *5–6.
[941] *Id.* at *10–11, *13.
[942] *Id.* at *7.
[943] *Id.* at *13.
[944] *Id.*

an individual did not constitute an investigative stop because the officer did not cause the individual to reasonably believe that he was being detained, and therefore the evidence obtained during such a stop was admissible.[945]

I.J. v. State

In *I.J. v. State*,[946] the court of appeals held that: (1) a minor had the right to a jury trial in a delinquency proceeding, and (2) that a late request for a jury trial should be granted under certain circumstances.[947] The State filed a juvenile delinquency petition against I.J. for fourth-degree controlled substance misconduct.[948] Since I.J. did not request a jury trial, the case was scheduled for a bench trial.[949] I.J. received a new attorney just before trial due to a conflict of interest with his original attorney, and the attorney was advised by the court that she could file a motion requesting a jury trial, which she did seven days later.[950] Her motion was denied by the superior court for being untimely under Delinquency Rule 21(a).[951] The court of appeals reasoned that the Alaska Constitution guarantees the right to a jury trial in juvenile delinquency cases if the charged conduct would carry a possible sentence of incarceration when pertaining to an adult.[952] Further, the supreme court has determined that minors have the right to jury trials in delinquency proceedings based on Alaska Civil Rules 38 and 39, which preserve the right to a jury trial for all parties.[953] The supreme court referred to its framework for determining when a trial court abuses its discretion in denying a late request for a jury trial: (1) whether the request was prompt in light of the entire history of the case, (2) whether the granting of the request would cause administrative problems for the court, (3) whether there was reason to not hold the party to his earlier agreement to a bench trial, and (4) whether the opposing party would suffer any prejudice from the court's granting the request.[954] Based on these factors, the appellant's request should have been granted by the superior court.[955] The court of appeals reversed the superior court, holding that: (1) a minor had the right to a jury trial in a delinquency proceeding, and (2) that a late request for a jury trial should be granted under certain circumstances.[956]

Juarez v. State

In *Juarez v. State*,[957] the court of appeals held that the timeliness of a peremptory challenge of a judge is determined in relation to when express assignment to a judge occurs.[958] Juarez made a peremptory challenge of the trial judge in his misdemeanor case.[959] The judge denied his challenge, stating that because Kodiak was a single-judge district, it was obvious that he would be the judge in Juarez's case.[960] The court of appeals stated that a criminal defendant is entitled to one peremptory challenge of a judge as long as the challenge is made within five days after the defendant is made aware of the judge in his case.[961] The critical factor of whether the peremptory challenge is timely is not the party's knowledge that the district is a single-judge district, but rather when the court gives express notice of assignment to a judge.[962] Juarez filed his peremptory challenge within five days of the judge being assigned, so the trial court wrongly denied Juarez's peremptory challenge right.[963] The court of appeals reversed the lower court's order,[964]holding

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[945] *Id.* at *15.
[946] 182 P.3d 643 (Alaska 2008).
[947] *Id.* at 647.
[948] *Id.* at 643.
[949] *Id.*
[950] *Id.* at 644.
[951] *Id.*
[952] *Id.*
[953] *Id.* at 645–46.
[954] *Id.* at 647.
[955] *Id.*
[956] *Id.*
[957] 193 P.3d 773 (Alaska Ct. App. 2008).
[958] *Id.* at 774.
[959] *Id.*
[960] *Id.*
[961] *Id.*
[962] *Id.* at 775.
[963] *Id.*

that the timeliness of a peremptory challenge of a judge is determined in relation to when express assignment to a judge occurs.[965]

Leavitt v. State

In *Leavitt v. State*,[966] the court of appeals held that a trial judge may limit the cross-examination of an alleged rape victim to exclude evidence of prior assaults and mental health problems.[967] Leavitt was convicted of first-degree sexual assault after he forced the victim to have sex with him by threatening her with a pair of scissors.[968] The victim had a prior history of assaults that the defense attorney sought to introduce as evidence to show that she would not be intimidated by the scissors, but the trial judge held that the same evidential result could be achieved through her general testimony and it was not necessary to introduce the victim's prior convictions.[969] On appeal, the court of appeals reasoned that it was within the judge's discretion to decide that allowing evidence of prior assaults was irrelevant and would unnecessarily prejudice the jury.[970] But because of the victim's own admission, the defense was still able to introduce evidence of the victim's violent behavior.[971] The court further reasoned that it was within the judge's discretion to decide that allowing evidence of prior mental health problems was unnecessary because the defense had not shown that there was any connection to her testimony in this case.[972] The court of appeals affirmed the superior court, holding that that a trial judge may limit the cross-examination of an alleged rape victim to exclude evidence of prior assaults and mental health problems.[973]

Marshall v. State

In *Marshall v. State*,[974] the court of appeals held that: (1) it is not necessarily entrapment for the police to use a third party to set up a drug sale between a suspect and the police, and (2) any accusations of entrapment must be supported by at least a modicum of evidence.[975] Marshall was convicted of misconduct involving a controlled substance after he sold Oxycontin to an undercover officer in exchange for six hundred dollars.[976] The sale was set up by police informants, who acted with the hope of receiving reduced sentences after they were convicted of selling drugs to undercover officers themselves.[977] Marshall appealed, arguing, *inter alia*, that the superior court improperly failed to consider his claim of entrapment and that certain evidence should have been suppressed.[978] The court reasoned that the admission of the evidence of additional pills that officers found when they searched his car was harmless, and therefore it was irrelevant that it was not excluded.[979] On the entrapment claim, the court reasoned that although the supreme court has announced that the *Bueno* theory of entrapment is compatible with general Alaska entrapment doctrine, the supreme court has not yet explicitly adopted it.[980] The *Bueno* theory of entrapment states that an individual accused of selling drugs has been entrapped when the police supply drugs to an informant, arrange the sale, and then establish the informant as the middleman.[981] The court of appeals avoided the issue in this case by stating that even if the doctrine did exist, Marshall does not meet the burden of proof to claim it.[982] The court reasoned that although Marshall claimed that the pills belonged to

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[964] *Id.*
[965] *Id.* at 774.
[966] 2008 Alaska App. LEXIS 4 (Ct. App. Jan. 9, 2008).
[967] *Id.* at *3.
[968] *Id.* at *1.
[969] *Id.* at *2.
[970] *Id.* at *5–6.
[971] *Id.*
[972] *Id.* at *6–8.
[973] *Id.* at *3.
[974] 198 P.3d 567 (Alaska Ct. App. 2008).
[975] *Id.* at 571–73.
[976] *Id.* at 570.
[977] *Id.*
[978] *Id.* at 569.
[979] *Id.* at 577.
[980] *Id.* at 571.
[981] *Id.*
[982] *Id.*

the police informant and not to him, he did not provide any factual basis for this assertion.[983] Since Marshall did not provide even a modicum of evidence, such as an affidavit, the superior court was not obligated to hold a factual hearing.[984] Affirming the superior court, the court of appeals held that: (1) it is not necessarily entrapment for the police to use a third party to set up a drug sale between a suspect and the police, and (2) any accusations of entrapment must be supported by at least a modicum of evidence.[985]

Moore v. State

In *Moore v. State*,[986] the court of appeals held that vacated juvenile adjudications could be used to establish a history of repeated instances of assaultive behavior in an adult criminal case.[987] At his resentencing for attempted first-degree sexual assault, attempted second-degree sexual assault, and first-degree burglary, Moore conceded he had two juvenile adjudications for assault.[988] The superior court found that § 12.55.155(c)(8) of the Alaska Statutes ("aggravator (c)(8)") applied.[989] On appeal, Moore argued that a vacated adjudication should not be used to support aggravator (c)(8).[990] The court of appeals reasoned that a defendant's conduct as a juvenile was relevant for sentencing purposes and that Moore's adjudication established beyond a reasonable doubt that he engaged in repeated instances of assaultive behavior.[991] The court of appeals affirmed the judgment of the superior court, holding that vacated juvenile adjudications could be used to establish a history of repeated instances of assaultive behavior in an adult criminal case.[992]

Oviuk v. State

In *Oviuk v. State*,[993] the court of appeals held that a criminal defendant has a right to self-representation even if the defendant will be confined in shackles during the trial.[994] Oviuk was charged with first and second degree murder and attempted to represent himself pro se.[995] Based on a history of dramatic violence, recommendations of corrections officers, and Oviuk's history of disobeying court orders, the trial judge decided that the defendant should be shackled during the trial.[996] Because the shackling would not allow the defendant to represent himself effectively, the judge ruled that he could not proceed pro se.[997] The court of appeals rejected the reasoning of the superior court, stating that shackling alone is not a sufficient basis for denying the right to self-representation.[998] The judge must inform the defendant of potential problems arising from trying a case in shackles, but ultimately the judge must accept the defendant's final decision.[999] Thus, the defendant in this case was wrongly denied the right to self-representation.[1000] The court of appeals reversed the decision of the superior court, holding that a criminal defendant has a right to self-representation even if the defendant will be confined in shackles during the trial.[1001]

Phillips v. State

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[983] *Id.* at 571–72.
[984] *Id.*
[985] *Id.* 571–73.
[986] 174 P.3d 770 (Alaska Ct. App. 2008).
[987] *Id.* at 771–72.
[988] *Id.* at 771.
[989] *Id.*
[990] *Id.*
[991] *Id.*
[992] *Id.* at 771–72.
[993] 180 P.3d 388 (Alaska Ct. App. 2008).
[994] *Id.* at 391.
[995] *Id.* at 389.
[996] *Id.*
[997] *Id.*
[998] *Id.* at 390.
[999] *Id.* at 390–91.
[1000] *Id.* at 391.
[1001] *Id.*

In *Phillips v. State*,[1002] the court of appeals held that Appellate Rule 216 allows for expedited appeals on a peremptory challenge.[1003] Phillips, using Rule 216, appealed the denial of his request to exercise a peremptory challenge of a superior court judge.[1004] Appellate Rule 216(a) was amended in 1982 to allow for expedited appeals on a peremptory challenge, but Rule 216(c) continued to require a final judgment by a lower court before an appeal could be filed.[1005] The court reasoned that when the literal import of the text is inconsistent with the legislative meaning or intent, courts should modify the statute to coincide with the legislature's intent.[1006] Here, the court reasoned, the supreme court clearly meant for Rule 216 to apply to peremptory challenges even in the absence of a final judgment.[1007] Reversing the superior court, the court of appeals accepted the defendant's appeal for filing, holding that Appellate Rule 216 allows for expedited appeals on a peremptory challenge.[1008]

Rockwell v. State

In *Rockwell v. State*,[1009] the court of appeals held that an individual must be advised of his *Miranda* rights when he is taken into custody, and one is in custody after being told he will be taken to the police station.[1010] Rockwell was in a car accident and was questioned by a police officer at the scene who noticed that he seemed intoxicated.[1011] The officer also questioned him in the police car and at the station.[1012] After sobriety tests were performed at the station, Rockwell was arrested for driving while under the influence and was taken to another station where he was read his *Miranda* rights.[1013] The officer continued his questioning after Rockwell requested an attorney.[1014] The superior court admitted all statements made during the interrogations, and Rockwell was convicted of felony driving while under the influence and driving with a canceled, suspended, or revoked license.[1015] Rockwell appealed.[1016] The court of appeals reasoned that while an investigative stop is not "custody" for purposes of *Miranda*, police custody occurs when a reasonable person would believe that he was not free to leave and cease questioning by the police.[1017] The court found that Rockwell was definitely in police custody after he was told the officer would take him to the station.[1018] The court also found that he may have been in custody during the interrogation inside the police car prior to being told he would go to the station, but that this was a question of fact for the superior court.[1019] Affirming the superior court, the court of appeals held that that an individual must be advised of his *Miranda* rights when he is taken into custody, and one is in custody after being told he will be taken to the police station.[1020]

Smith v. State

In *Smith v. State*,[1021] the court of appeals held that the decision whether to file a cross-petition is a tactical choice for the defense attorney, rather than the client, to make.[1022] Smith was convicted of

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[1002] 183 P.3d 493 (Alaska Ct. App. 2008).
[1003] *Id.* at 495.
[1004] *Id.* at 494.
[1005] *Id.*
[1006] *Id.* at 495.
[1007] *Id.*
[1008] *Id.*
[1009] 176 P.3d 14 (Alaska Ct. App. 2008).
[1010] *Id.* at 17–18, 21–22.
[1011] *Id.* at 17.
[1012] *Id.*
[1013] *Id.*
[1014] *Id.*
[1015] *Id.* at 18.
[1016] *Id.*
[1017] *Id.*
[1018] *Id.* at 21–22.
[1019] *Id.* at 21.
[1020] *Id.* at 17–18, 21–22.
[1021] 185 P.3d 767 (Alaska Ct. App. 2008).
[1022] *Id.* at 770.

kidnapping and raping a fourteen-year old girl.[1023] His conviction was overturned by the court of appeals.[1024] In response, the State petitioned for and received a hearing in the supreme court.[1025] The supreme court ruled in favor of the state and reinstated Smith's conviction.[1026] Smith subsequently filed an application for post-conviction relief on the basis that his appellate attorney provided ineffective assistance of counsel.[1027] Smith claimed that his attorney should have filed a cross-petition with the supreme court on a legal issue that the court of appeals had decided against him.[1028] In reaching its decision in this case, the court of appeals reasoned that the decision to petition for review is a complicated strategic and tactical decision that is usually best left to the attorney.[1029] The attorney was better equipped than the client to make the decision whether filing a cross-petition would help or hinder the client within the overall framework of the case, so the decision was one for the attorney to decide.[1030] The court of appeals affirmed the superior court's dismissal of Smith's application for post-conviction relief, holding that the decision whether to file a cross-petition is a tactical choice for the defense attorney, rather than the client, to make.[1031]

Smith v. State

In *Smith v. State*,[1032] the court of appeals held that § 12.55.127(a) of the Alaska Statutes does not mandate consecutive sentences for separate judgments, and that a defendant is entitled to appeal consecutive sentences;[1033] however a composite sentence of twenty years is not excessive when the defendant has a lengthy history of convictions and is incorrigible.[1034] Smith was convicted of a variety of felonies and misdemeanors relating to a four-month period in which he: repeatedly stole cars; committed burglaries, robberies, and assaults; illegally obtained and used firearms; caused extensive property damage; and attempted to escape custody while on a one-day release for his father's funeral.[1035] Smith appealed the imposition of a twenty-year composite sentence for twelve criminal convictions in eight separate judgments.[1036] Section 12.55.127(a) states that if a defendant is required to serve a term of imprisonment under a separate judgment, then any term of imprisonment imposed in a later judgment, amended judgment, or probation revocation shall be consecutive.[1037] Section 12.55.120 also takes away the right of appeal in certain consecutive sentencing decisions.[1038] Since the statutes were recently enacted, the court first looked at the legislative history and the interpretation of the prior statute to conclude that the consecutive sentences requirement applies only when the defendant's new crime was committed after the entry of judgment for the prior crime.[1039] The court reasoned that the language of the new sentencing statute was intended to mirror the prior statute so that "later judgment [or] amended judgment" refers to a judgment based on a crime that was committed after the court entered judgment for the defendant's "separate" crime.[1040] The court determined that the statute was designed to require sentencing judges to impose a defendant's mandatory minimum sentences consecutively, but not in all cases where there were merely separate judgments, thereby maintaining the old rules relating to concurrent sentencing.[1041] Having determined that Smith could therefore appeal from a decision to run his sentences consecutively, the court reasoned that nonetheless a twenty-year composite sentence was not excessive because of Smith's

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[1023] *Id.* at 767.
[1024] *Id.* at 768.
[1025] *Id.*
[1026] *Id.*
[1027] *Id.*
[1028] *Id.*
[1029] *Id.* at 769.
[1030] *Id.* at 770.
[1031] *Id.*
[1032] 187 P.3d 511 (Alaska Ct. App. 2008).
[1033] *Id.* at 520.
[1034] *Id.* at 511.
[1035] *Id.* at 521–23.
[1036] *Id.* at 511.
[1037] *Id.* at 512.
[1038] *Id.* at 513.
[1039] *Id.* at 514, 517–18.
[1040] *Id.* at 515.
[1041] *Id.* at 517–18.

history.[1042] Acknowledging that ten years is usually the maximum sentence necessary, the court held that with "good reason," a judge may go over that limit, and the judge in this case had abundant "good reason" because of the defendant's criminal record and unwillingness to be rehabilitated.[1043] Affirming the superior court, the court of appeals held that § 12.55.127(a) of the Alaska Statutes does not mandate consecutive sentences for separate judgments, and that a defendant is entitled to appeal consecutive sentences;[1044] however a composite sentence of twenty years is not excessive when the defendant has a lengthy history of convictions and is incorrigible.[1045]

State v. Batts

In *State v. Batts*,[1046] the court of appeals held that Alaska Rule of Evidence 412 ("Rule 412") permitted the State to impeach a defendant's testimony using statements obtained after the defendant invoked his *Miranda* rights, but resorting to Rule 412 was unconstitutional when the violation of the defendant's *Miranda* rights was intentional or egregious.[1047] Batts was interviewed by police after a murder, and after each of the first two invocations of his right to silence, the officers clarified that Batts was only invoking his *Miranda* rights as to those specific questions.[1048] Subsequently, however, the officers failed to continue clarifying the extent of his *Miranda* invocations.[1049] Batts was charged with murder and tried twice, with both trials ending in hung juries.[1050] In the first trial, the judge held that Rule 412 did not permit the State to use statements made by Batts after the interviewing officers stopped clarifying his *Miranda* assertions, and in the second trial, the judge held that Rule 412 permitted the State to use this evidence to impeach Batts's testimony but that the rule itself was unconstitutional.[1051] The court of appeals partially affirmed the latter interpretation, holding first that the Alaska legislature intended to allow the State to impeach a defendant's testimony using statements made after any *Miranda* violation.[1052] In determining whether Rule 412 violated the Alaska Constitution, the court weighed the interest in deterring police misconduct against the importance of protecting the integrity of the judicial system.[1053] The court reasoned that if officers knew that they would be able to impeach a defendant's testimony even if it was obtained after the defendant invoked his *Miranda* rights, they would have an incentive to continue the interrogation, thereby decreasing the deterrent effect of Alaska's exclusionary rule.[1054] The court of appeals affirmed the superior court, holding that Rule 412 permitted the State to impeach a defendant's testimony using statements obtained after the defendant invoked his *Miranda* rights, but resorting to Rule 412 was unconstitutional when the violation of the defendant's *Miranda* rights was intentional or egregious.[1055]

State v. Campbell

In *State v. Campbell*,[1056] the court of appeals held that the exclusionary rule bars the admission of evidence of a defendant's illegal conduct committed in response to an illegal seizure by a police officer.[1057] An officer attempted to stop Campbell for violating an ordinance that prohibits driving without illuminated headlights more than thirty minutes after sunset.[1058] Campbell attempted to evade the police officer instead of pulling over.[1059] The state charged Campbell with first-degree eluding a police officer.[1060] Campbell

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[1042] *Id.* at 529.
[1043] *Id.* at 528–29.
[1044] *Id.* at 520.
[1045] *Id.* at 511.
[1046] 195 P.3d 144 (Alaska Ct. App. 2008).
[1047] *Id.* at 146.
[1048] *Id.* at 146–47.
[1049] *Id.* at 147.
[1050] *Id.* at 148.
[1051] *Id.* at 148–49.
[1052] *Id.* at 152.
[1053] *Id.* at 155.
[1054] *Id.* at 158.
[1055] *Id.* at 146.
[1056] 198 P.3d 1170 (Alaska Ct. App. 2008).
[1057] *Id.* at 1175.
[1058] *Id.* at 1171.
[1059] *Id.*

moved to suppress the evidence, claiming that the officer illegally stopped him, as he was not violating the ordinance at the time of the stop.[1061] The superior court granted Campbell's motion.[1062] But the court of appeals held that the sun had not set at the time Campbell was initially pulled over (at 11:20 P.M.) and even if the officer made an honest mistake in initiating the stop, that mistake was unreasonable.[1063] Therefore, the exclusionary rule excludes any evidence discovered against Campbell as a result of the illegal seizure.[1064] The court of appeals affirmed the superior court, holding that the exclusionary rule bars the admission of evidence of a defendant's illegal conduct committed in response to an illegal seizure by a police officer.[1065]

State, Department of Corrections v. Lundy

In *State, Department of Corrections v. Lundy*,[1066] the court of appeals held that in a criminal sentencing proceeding, a court cannot decide the constitutionality of treatment offered to sex offenders,[1067] but a court may assign treatment providers who are suggested by a defendant.[1068] Three individuals were convicted of criminal offenses related to the sexual abuse of a minor.[1069] The Alaska Department of Corrections ("DOC") recently stopped providing treatment for sex offenders while incarcerated, favoring instead treatment during parole and probation.[1070] The superior court decided that the Alaska Constitution guarantees defendants the right to treatment while in prison, but the court of appeals held that the constitutionality of the change must be decided in a civil suit, not in a criminal sentencing.[1071] However, the court of appeals upheld the superior court's decision to allow one defendant to seek treatment from a therapist who was not approved by the DOC, reasoning that the broad powers given to a sentencing court allow for decisions regarding a defendant's offense and rehabilitation.[1072] In part reversing and in part affirming the superior court, the court of appeals held that in a criminal sentencing proceeding, a court cannot decide the constitutionality of treatment offered to sex offenders,[1073] but a court may assign treatment providers who are suggested by a defendant.[1074]

Stock v. State

In *Stock v. State*,[1075] the court of appeals held that the admissibility of statements obtained after a suspect exercises his right to silence depends on several non-exclusive factors; there is no bright-line rule.[1076] The police responded to Stock's apartment after receiving a report of a disturbance.[1077] The police took Stock into custody when they arrived at the scene.[1078] Stock responded to some questions without receiving his *Miranda* warnings.[1079] The police subsequently Mirandized Stock, and he made some incriminating statements before invoking his right to remain silent.[1080] Stock was eventually convicted of assault and appealed on the basis that several of his statements were inadmissible because they were

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[1060] *Id.* at 1171–72.
[1061] *Id.* at 1172.
[1062] *Id.*
[1063] *Id.*
[1064] *Id.* at 1173–74.
[1065] *Id.* at 1175.
[1066] 188 P.3d 692 (Alaska Ct. App. 2008).
[1067] *Id.* at 696.
[1068] *Id.*
[1069] *Id.* at 693.
[1070] *Id.*
[1071] *Id.* at 695.
[1072] *Id.* at 696.
[1073] *Id.*
[1074] *Id.*
[1075] 191 P.3d 153 (Alaska Ct. App. 2008).
[1076] *Id.* at 161.
[1077] *Id.* at 154.
[1078] *Id.*
[1079] *Id.* at 155.
[1080] *Id.*

obtained in violation of his *Miranda* rights.[1081] The trial court excluded all statements made prior to Stock hearing his *Miranda* rights, but Stock contended that even his post-*Miranda* statements should have been excluded because they were tainted by the earlier *Miranda* violations.[1082] The court noted that in deciding whether additional questions are permissible after a suspect has exercised his right to silence, a court must examine whether the suspect's rights were "scrupulously honored," which includes consideration of: the time between interrogations, whether the *Miranda* warnings were given prior to a new round of questioning, if the subsequent questions relate to the same area that the suspect already declined to speak about, and the degree of coercion used to break the suspect down.[1083] None of the factors are dispositive.[1084] The court concluded that although the questions were about the same subject, Stock knew his rights and was not unduly coerced.[1085] Affirming the trial court, the court of appeals held that the admissibility of statements obtained after a suspect exercises his right to silence depends on several, non-exclusive factors; there is no bright-line rule.[1086]

Tritt v. State

In *Tritt v. State*,[1087] the court of appeals held that manifest necessity for a mistrial does not exist when the trial judge could cure the problem with a jury instruction.[1088] During his opening statement, Tritt's attorney told the petit jury that prosecutors had presented three inculpatory witnesses to the grand jury, but had failed to call an exculpatory witness.[1089] The State objected to this comment, claiming that it had irreparably tainted the petit jury.[1090] Judge Kauvar offered the option of a mistrial to the State; the prosecutors accepted this offer.[1091] Tritt's attorney moved to dismiss the second trial on grounds of double jeopardy.[1092] The motion was denied, after which Tritt appealed.[1093] The court of appeals reasoned that trials may only be stopped before a verdict under two circumstances: (1) if the defendant consents, or (2) if manifest necessity for a mistrial arises.[1094] The court believed that Judge Kauvar had granted the mistrial because the judge felt that jurors would interpret the comments of Tritt's attorney as an accusation of prosecutorial misconduct.[1095] In fact, the court of appeals reasoned that those comments had only been a description of typical grand jury proceedings.[1096] Furthermore, the court reasoned that any jury misunderstanding could have been cured by an instruction.[1097] Since any misunderstanding was curable, the court reasoned that there was no manifest necessity for a mistrial.[1098] The court thus held that the double jeopardy clause barred a second trial.[1099] The court of appeals reversed the superior court, holding that manifest necessity for a mistrial does not exist when the trial judge could cure the problem with a jury instruction.[1100]

Vizcarra-Medina v. State

[1081] *Id.* at 154, 156.
[1082] *Id.*
[1083] *Id.* at 157–61.
[1084] *Id.* at 161.
[1085] *Id.*
[1086] *Id.*
[1087] 173 P.3d 1017 (Alaska Ct. App. 2008).
[1088] *Id.* at 1018.
[1089] *Id.*
[1090] *Id.* at 1018–19.
[1091] *Id.* at 1019.
[1092] *Id.*
[1093] *Id.*
[1094] *Id.*
[1095] *Id.* at 1019.
[1096] *Id.* at 1019–20.
[1097] *Id.*
[1098] *Id.*
[1099] *Id.*
[1100] *Id.* at 1018.

In *Vizcarra-Medina v. State*,[1101] the court of appeals held that a defendant's petition for post-conviction relief is not frivolous if: (1) the defendant is prepared to offer testimony that he did not understand key aspects of a plea agreement, and (2) it appears that—despite contrary evidence—the defendant would be entitled to post-conviction relief if the trial court believed his testimony.[1102] As part of a plea agreement, Vizcarra-Medina pled no contest to charges of theft.[1103] Later, Vizcarra-Medina filed a petition for post-conviction relief in which he sought to withdraw his plea; the superior court appointed Schmitt to represent him in the proceedings.[1104] Vizcarra-Medina told Schmitt that he did not understand the terms of the plea agreement when he accepted it.[1105] However, Schmitt concluded that his client had no non-frivolous basis for withdrawing it.[1106] Schmitt filed a certificate to that effect under Alaska Rule of Criminal Procedure 35.1 ("Rule 35.1"); the superior court then dismissed Vizcarra-Medina's petition.[1107] The court of appeals stated that Schmitt's approach misconstrued the meaning of "frivolous" under Rule 35.1.[1108] The court held that an attorney may only declare the claim frivolous if the client would not prevail even if the court believed him.[1109] The court further held that Vizcarra-Medina was entitled to testify that he misunderstood the plea agreement.[1110] The court of appeals reversed the superior court's dismissal of Vizcarra-Medina's petition, holding that a defendant's petition for post-conviction relief is not frivolous if: (1) the defendant is prepared to offer testimony that he did not understand key aspects of the plea agreement, and (2) it appears that—despite contrary evidence—the defendant would be entitled to post-conviction relief if the trial court believed his testimony.[1111]

Vui Gui Tsen v. State

In *Vui Gui Tsen v. State*,[1112] the court of appeals held that even when a criminal defendant has difficulty speaking or understanding English, a translator is only constitutionally required if the defendant's understanding of the trial is so low as to be "fundamentally unfair."[1113] Tsen was charged with two counts of third-degree controlled substance misconduct and one count of third-degree promoting prostitution.[1114] A jury convicted Tsen on all three counts.[1115] On appeal, Tsen argued that his right to due process was violated when the judge refused to order word-for-word translation of the jury voir dire and the trial testimony.[1116] Assuming—without deciding—that Alaska law mirrored federal law on the issue of a criminal defendant's right to the assistance of an interpreter, the court of appeals stated that a judge should make an assessment of the defendant's need for an interpreter based on the level of the defendant's English skills and the particular facts of the case.[1117] Recognizing that Tsen had difficulty speaking English, the court noted that the record contained no indication that Tsen failed to comprehend any of the testimony, and that the primary question is whether the defendant would otherwise understand so little of the trial proceedings that the trial would be "fundamentally unfair."[1118] The court of appeals highlighted the fact that the defense strategy did not require Tsen to carefully analyze the details of the testimony or to actively participate in the cross-examinations.[1119] The court of appeals affirmed the superior court, holding that even when a criminal defendant has difficulty speaking or understanding English, a translator is only

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[1101] 195 P.3d 1095 (Alaska Ct. App. 2008).
[1102] *Id.* at 1097.
[1103] *Id.*
[1104] *Id.*
[1105] *Id.*
[1106] *Id.* at 1098.
[1107] *Id.*
[1108] *Id.* at 1099.
[1109] *Id.* at 1100.
[1110] *Id.*
[1111] *Id.* at 1097.
[1112] 176 P.3d 1 (Alaska Ct. App 2008).
[1113] *Id.* at 10, 12.
[1114] *Id.* at 3.
[1115] *Id.* at 6.
[1116] *Id.*
[1117] *Id.* at 7–8.
[1118] *Id.* at 10–11.
[1119] *Id.* at 12.

constitutionally required if the defendant's understanding of the trial is so low as to be "fundamentally unfair."[1120]

ELECTION LAW

Ninth Circuit Court of Appeals

Alaska Independence Party v. State

In *Alaska Independence Party v. State*,[1121] the Ninth Circuit held that Alaska's state-run mandatory primary election system was facially constitutional because it survived strict scrutiny.[1122] The Alaska Independence Party ("AIP") and the Alaska Libertarian Party ("ALP") argued that Alaska's law requiring political parties to nominate candidates through a state-run mandatory primary election violated their First Amendment right to free association because it permitted voters who self-identified as a party member to run in that party's primary whether or not the candidate met the party's internal membership requirements.[1123] The AIP and ALP claimed that the system forced these groups to be associated with candidates they may not consider desirable since these candidates' names could appear on primary ballots as members of the AIP or ALP.[1124] The Ninth Circuit reasoned that whether an election law is permissible under the First Amendment depends on the balance between the burden it places on individuals' constitutional rights and the state's interests.[1125] Alaska's primary system did not impose a severe burden on the constitutional rights of any political parties, and the state interest of protecting against corrupt electoral practices was compelling.[1126] The Ninth Circuit affirmed the lower court's decision, holding that Alaska's state-run mandatory primary election system was facially constitutional because it survived strict scrutiny.[1127]

Alaska Supreme Court

Anchorage v. Mjos

In *Anchorage v. Mjos*,[1128] the supreme court held that: (1) there is a presumption in favor of candidate eligibility for elected office; and (2) when a statute can be reasonably interpreted in two ways, the reading that favors candidate eligibility should be chosen.[1129] Traini, a member of the Anchorage Assembly, sought to run for reelection after serving for one year following a special term election and then two subsequent full, three-year terms.[1130] Anchorage Municipal Charter 4.02 stipulates that an individual may only serve three consecutive terms.[1131] Traini argued that this meant three full terms, and a local attorney rendered the same opinion.[1132] Mjos filed for an injunction prohibiting Traini from running again.[1133] The superior court ruled in favor of Mjos, holding that a partial term counted as a term for purposes of Anchorage Municipal Charter 4.02. Holding that there is a presumption in favor of candidate eligibility, the supreme court found that, when reasonable, a statute should be read to authorize eligibility.[1134] The court further reasoned that although it could be significant that the word "full" is used in one part of the statute, but was not used in the

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[1120] *Id.* at 10, 12.
[1121] 545 F.3d 1173 (9th Cir. 2008).
[1122] *Id.* at 1177.
[1123] *Id.* at 1180.
[1124] *Id.* at 1175.
[1125] *Id.* at 1176.
[1126] *Id.* at 1179–80.
[1127] *Id.* at 1177.
[1128] 179 P.3d 940 (Alaska 2008).
[1129] *Id.* at 944.
[1130] *Id.* at 942.
[1131] *Id.* at 943.
[1132] *Id.* at 942–43.
[1133] *Id.* at 943.
[1134] *Id.*

section referring to three terms, it is also reasonable to interpret the omission as insignificant.[1135] Overruling the superior court, the supreme court held that: (1) there is a presumption in favor of candidate eligibility for elected office; and (2) when a statute can be reasonably interpreted in two ways, the reading that favors candidate eligibility should be chosen.[1136]

Braun v. Denali Borough

In *Braun v. Denali Borough*,[1137] the supreme court held that: (1) attorneys' fees are appropriate in a challenge to a reapportionment plan under the catalyst theory, (2) the city's plan did not violate equal protection, and (3) a challenge to a voter-approved reapportionment plan is an election challenge.[1138] The Denali Borough Assembly ("Assembly") developed a number of reapportionment proposals to present to the public for a special election, the last of which was voted on and approved.[1139] Braun filed a number of suits challenging the Assembly's reapportionment plans, arguing that the approved plan was unconstitutional and that he was entitled to attorney's fees for one of his earlier challenges, which resulted in the Assembly developing a new plan.[1140] The superior court dismissed all the issues except that of attorneys' fees and granted summary judgment to the Assembly.[1141] On appeal, the supreme court reasoned that Braun was entitled to attorneys' fees because he was the prevailing party under the catalyst theory, which requires that the litigant achieve his adjudicatory goal and that his lawsuit prompt the defendant to settle.[1142] The court also held that the plan did not violate the Equal Protection Clause because the dual standards of "one person, one vote" and "fair and effective representation to voters" were met.[1143] Further, the plan did not violate Alaska's equal protection clause because Braun presented no evidence that the plan was intended to disenfranchise certain voters.[1144] Lastly, the court held that Braun's challenge to the re-apportionment plan was an election challenge and that he failed to plead the elements of such a challenge.[1145] Reversing the superior court in part and affirming in part, the supreme court held that: (1) attorneys' fees are appropriate in a challenge to a reapportionment plan under the catalyst theory, (2) the city's plan did not violate equal protection, and (3) a challenge to a voter-approved reapportionment plan is an election challenge.[1146]

EMPLOYMENT LAW

Ninth Circuit Court of Appeals

Townsend v. University of Alaska

In *Townsend v. University of Alaska*,[1147] the Ninth Circuit held that: (1) federal courts lack jurisdiction over a Uniformed Services Employment and Reemployment Rights Act ("USERRA") action brought by an individual against a state, and (2) USERRA does not create a cause of action against State employee-supervisors.[1148] Townsend sued his employer, the University of Alaska, in federal district court

[1135] *Id.*
[1136] *Id.* at 944.
[1137] 193 P.3d 719 (Alaska 2008).
[1138] *Id.* at 735.
[1139] *Id.* at 723.
[1140] *Id.* at 723–24.
[1141] *Id.* at 724–25.
[1142] *Id.* at 726–27.
[1143] *Id.* at 728–31.
[1144] *Id.* at 731.
[1145] *Id.* at 732–33.
[1146] *Id.* at 735.
[1147] 543 F.3d 478 (9th Cir. 2008).
[1148] *Id.* at 481.

for violations of USERRA.[1149] The district court dismissed the claim, stating that it did not have jurisdiction over individual suits against a state under USERRA.[1150] The Ninth Circuit reasoned that prior to the 1998 amendments to USERRA, the district court would have had jurisdiction, but since the amendments, federal courts are no longer permitted to hear claims by individuals against a state.[1151] The court further reasoned that its interpretation of USERRA was supported by its legislative history, which shows that Congress had passed the amendments in reaction to the Supreme Court's decision in *Seminole Tribe v. Florida*, holding that Congress cannot abrogate state sovereign immunity when it is acting under its commerce powers.[1152] In light of that decision, Congress specified that USERRA suits by individuals against a state must be brought in state court, not in federal court.[1153] The court further held that it was not an error to disallow Townsend to amend his complaint to include the defendants in their individual capacity, because the statute does not create a private cause of action against the individuals.[1154] Affirming the decision of the district court, the Ninth Circuit held that: (1) a federal district court lacks jurisdiction over a USERRA action brought by an individual against a state, and (2) USERRA does not create a cause of action against State employee-supervisors.[1155]

Alaska Supreme Court

Air Logistics of Alaska, Inc. v. Throop

In *Air Logistics of Alaska, Inc. v. Throop*,[1156] the supreme court held that: (1) under the Alaska Wage and Hour Act ("AWHA"), all compensable hours should be used in overtime calculations when employees are on call in a remote location; (2) AWHA claims are always governed by a two-year statute of limitations; and (3) because the employer reasonably believed that it was complying with the AWHA, it was not liable for liquidated damages.[1157] Air Logistics, a helicopter company, required its mechanics to work two-week shifts at remote locations and paid them for ten hours per day even though they typically worked fewer hours.[1158] In calculating overtime pay, Air Logistics only used the hours actually worked.[1159] A mechanic sued Air Logistics over this method of calculation.[1160] The superior court partially granted Air Logistics's motion for summary judgment on hours worked and did not impose liquidated damages, but—treating the AWHA claim as a contract claim—disagreed with Air Logistics that the statute of limitations had run.[1161] Both parties appealed.[1162] The supreme court reasoned that the AWHA requires employers to calculate overtime pay using all compensable hours rather than actual hours worked, because the mechanics were in a remote location for an extended period of time.[1163] However, it reversed summary judgment on the statute of limitations issue, holding that an AWHA claim can only be brought as a breach of contract claim if the employment contract explicitly includes the term in dispute, and otherwise all AWHA claims are subject to a two-year statute of limitations.[1164] Finally, it affirmed the superior court's denial of liquidated damages.[1165] Air Logistics cleared its wage plan with the Department of Labor and never made any attempts to hide any aspects of the plan, evidencing a good faith attempt to comply with the law.[1166]

[1149] *Id.*
[1150] *Id.*
[1151] *Id.* at 482–83.
[1152] *Id.* at 483–84.
[1153] *Id.* at 484.
[1154] *Id.* at 486–87.
[1155] *Id.* at 481.
[1156] 181 P.3d 1084 (Alaska 2008).
[1157] *Id.* at 1087.
[1158] *Id.*
[1159] *Id.* at 1088.
[1160] *Id.*
[1161] *Id.* at 1089.
[1162] *Id.*
[1163] *Id.* at 1092.
[1164] *Id.* at 1096–97.
[1165] *Id.* at 1100.
[1166] *Id.* at 1099.

Reversing in part and affirming in part, the supreme court held that: (1) under the AWHA, all compensable hours should be used in overtime calculations when employees are on call in a remote location; (2) AWHA claims are always governed by a two-year statute of limitations; and (3) because the employer reasonably believed that it was complying with the AWHA, it was not liable for liquidated damages.[1167]

Anchorage Police Department Command Officers' Ass'n v. Municipality of Anchorage

In *Anchorage Police Department Command Officers' Ass'n v. Municipality of Anchorage*,[1168] the supreme court held that police department lieutenants and captains qualify as supervisors under the Anchorage Municipal Code, and are thus exempt from collective bargaining.[1169] A group of police lieutenants and captains tried to gain union representation through the Anchorage Police Department Command Officers Ass'n ("APDCOA").[1170] The Anchorage Municipal Employee Relations Board ("Board") denied the petition for representation because, among other reasons, in the Board's opinion the officers fulfilled supervisory roles, and under Anchorage Municipal Code § 3.70.060C(2), supervisory employees are exempt from collective bargaining.[1171] The supreme court, applying a substantial evidence test, examined the job descriptions of the police lieutenants and captains and found both to be supervisory in nature.[1172] However, the supreme court also noted APDCOA's argument that the statute requires the supervisory activity to be performed "regularly" or with "independent judgment."[1173] Looking at the testimony from the Board's hearing, the supreme court accepted the Board's conclusion that testimony in support of the officers was not credible.[1174] The court also independently found that the balance of the evidence was against the officers.[1175] Thus, affirming the superior court, the supreme court held that police department lieutenants and captains qualify as supervisors under the Anchorage Municipal Code and are thus except from collective bargaining.[1176]

Baseden v. State

In *Baseden v. State*,[1177] the supreme court held that: (1) a State employee may be fired after failing to report for work subsequent to reinstatement after an earlier termination, and (2) back pay may be limited to the time prior to an employee's refusal of an offer of reinstatement.[1178] In April 2000, Baseden was terminated after thirteen months of employment with the State.[1179] After Baseden filed a grievance in 2001, the State offered to both reinstate him and provide him with arrears of pay dating to April 2000.[1180] However, Baseden desired arbitration because he wanted attorneys' fees and compensatory damages in addition to the terms the State had offered.[1181] When Baseden did not report for work on the first day of his reinstated job, the State deemed him to have relinquished the position.[1182] Subsequently, Arbitrator Dorsey determined that the State had reasonable cause to terminate Baseden because of his refusal to return to work.[1183] In a separate proceeding, Arbitrator Gaunt determined that Baseden was entitled to back pay with interest for the period from his April 2000 firing until his October 2001 relinquishment.[1184] The superior

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[1167] *Id.* at 1087.
[1168] 177 P.3d 839 (Alaska 2008).
[1169] *Id.* at 840.
[1170] *Id.*
[1171] *Id.* at 841.
[1172] *Id.* at 842.
[1173] *Id.* at 843.
[1174] *Id.*
[1175] *Id.*
[1176] *Id.*
[1177] 174 P.3d 233 (Alaska 2008).
[1178] *Id.* at 239–40, 243.
[1179] *Id.* at 235.
[1180] *Id.* at 235–36.
[1181] *Id.* at 236.
[1182] *Id.*
[1183] *Id.*
[1184] *Id.* at 237.

court affirmed the determinations of the arbitrators, and Baseden appealed.[1185] The supreme court reasoned that although it was not clear whether the arbitrators' decisions should be reviewed under a gross error standard or an arbitrary and capricious standard, the decisions survived both levels of review.[1186] The court reasoned that Dorsey's decision should be affirmed because, after listening to Baseden's concerns about the uncertain terms of his new employment, he had reasonably found that Baseden's failure to report to work was unjustified.[1187] The court also reasoned that Gaunt's award of back pay with interest was not arbitrary and capricious since Baseden refused to work after the State offered him reinstatement and back pay without interest.[1188] The supreme court affirmed the superior court, holding that: (1) a State employee may be fired after failing to report for work subsequent to reinstatement after an earlier termination, and (2) back pay may be limited to the time prior to an employee's refusal of an offer of reinstatement.[1189]

Geneva Woods Pharmacy, Inc. v. Thygeson

In *Geneva Woods Pharmacy, Inc. v. Thygeson*,[1190] the supreme court held that an employer that failed to keep adequate employment records provided insufficient evidence to overturn a finding that overtime wages were due to an employee.[1191] A registered nurse, who had previously been misclassified as an employee exempt from overtime pay, sued her employer to recover unpaid overtime wages.[1192] Since the employer failed to keep accurate records, the superior court calculated the employee's overtime award based on time cards, mileage logs, and other evidence.[1193] The supreme court reasoned that when an employer does not keep accurate records, an employee may prove her claim by presenting sufficient evidence from which the court may draw a reasonable inference.[1194] The supreme court held that the employee met the minimal burden of proof to establish a reasonable inference that the overtime wages were due.[1195] The supreme court also found that the lack of accurate records kept by the employer forced the employer to disprove the employee's claim, and that the employer's evidence failed to show that the superior court's finding constitutes clear error.[1196] The supreme court affirmed the superior court's award of overtime pay, holding that an employer that failed to keep adequate employment records provided insufficient evidence to overturn the trial court's finding that overtime wages were due to an employee.[1197]

Hallam v. Holland America Line, Inc.

In *Hallam v. Holland America Line, Inc.*[1198] the supreme court held that an ex-employee could not file a claim under § 23.05.140 of the Alaska Statutes for failure to pay wages in a timely manner unless he demanded that his employer provide his final paycheck within three working days of the termination of his employment.[1199] Hallam was employed as a seasonal bus driver for Holland America.[1200] Although his last day of work was August 20, 1994, he did not receive his final paycheck until September 1, and did not receive his incentive bonus until October 27.[1201] Hallam filed suit against Holland America for various claims, including its failure to pay his wages in a timely manner.[1202] The superior court granted Holland America's motion for summary judgment on the wage claim and Hallam appealed.[1203] The supreme court

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[1185] *Id.*
[1186] *Id.* at 238.
[1187] *Id.* at 239–40.
[1188] *Id.* at 240.
[1189] *Id.* at 239–40, 243.
[1190] 181 P.3d 1106 (Alaska 2008).
[1191] *Id.* at 1111.
[1192] *Id.* at 1107.
[1193] *Id.* at 1108.
[1194] *Id.* at 1109.
[1195] *Id.*
[1196] *Id.* at 1110.
[1197] *Id.* at 1111.
[1198] 180 P.3d 955 (Alaska 2008).
[1199] *Id.* at 960.
[1200] *Id.* at 956.
[1201] *Id.*
[1202] *Id.* at 957.
[1203] *Id.* at 958.

determined that § 23.05.140 afforded Hallam no relief.[1204] It would be unjustified to punish Holland America based on the company's established practice of paying bonuses outside of the three working day window following an employee's termination absent a demand from the employee for earlier payment.[1205] Because Hallam did not demand early payment, he was not entitled to relief under § 23.05.140.[1206] The supreme court affirmed the superior court, holding that an ex-employee could not file a claim under § 23.05.140 of the Alaska Statutes for failure to pay wages in a timely manner unless he demanded that his employer provide his final paycheck within three working days of the termination of his employment.[1207]

Kim v. Alyeska Seafoods, Inc.

In *Kim v. Alyeska Seafoods, Inc.*,[1208] the supreme court held that because the language for requesting a hearing under § 23.30.110(c) of the Alaska Statutes is directory rather than mandatory, substantial compliance, defined as the timely filing of a request for a hearing, is enough to toll the statute of limitations while the claimant requests additional time to prepare for the hearing.[1209] Kim suffered a back injury while working for Alyeska Seafoods.[1210] After Alyeska controverted workers' compensation benefits, Kim filed a workers' compensation claim.[1211] Alyeska controverted Kim's compensation claim.[1212] Two days before the second anniversary of Alyeska's controversion of his compensation claim, Kim filed a motion for a continuance because he needed more time to prepare for a hearing.[1213] Instead of granting the motion, the Workers' Compensation Board ("Board") found that Kim's claim was time-barred, and the appeals commission affirmed.[1214] In determining whether § 23.30.110(c) is directory rather than mandatory, the supreme court considered three factors: (1) whether the wording was affirmative or prohibitive, (2) the legislative intent, and (3) the consequences under a mandatory interpretation.[1215] The court determined that the language in § 23.30.110(c) is affirmative; it does not prohibit action.[1216] Second, the court found that the legislative history evinced a directory intent.[1217] Finally, the court reasoned that this case demonstrates the serious consequences of making the statutory language mandatory, thus it ought to be directory.[1218] Reversing the Commission's order dismissing Kim's claim, the supreme court held that because the language for requesting a hearing under § 23.30.110(c) is directory rather than mandatory, substantial compliance, defined as the timely filing of a request for a hearing, is enough to toll the statute of limitations while the claimant requests additional time to prepare for the hearing.[1219]

Seybert v. Cominco Alaska Exploration

In *Seybert v. Cominco Alaska Exploration*,[1220] the supreme court held that: (1) a workers' compensation insurer does not owe a fiduciary duty to a claimant[1221] and (2) a contract may be avoided for a non-fraudulent material misrepresentation.[1222] In 1993, Seybert injured his neck while working as a millwright for Cominco Alaska Exploration.[1223] In 1995, Seybert and Cominco executed a Compromise

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[1204] *Id.* at 960.
[1205] *Id.*
[1206] *Id.* at 961.
[1207] *Id.* at 960.
[1208] 197 P.3d 193 (Alaska 2008).
[1209] *Id.* at 198.
[1210] *Id.* at 194.
[1211] *Id.*
[1212] *Id.*
[1213] *Id.* at 194–95.
[1214] *Id* at 195.
[1215] *Id.* at 197.
[1216] *Id.*
[1217] *Id.*
[1218] *Id.*
[1219] *Id.* at 198.
[1220] 182 P.3d 1079 (Alaska 2008).
[1221] *Id.* at 1090.
[1222] *Id.* at 1094.
[1223] *Id.* at 1083.

and Release ("C&R") to settle Seybert's workers' compensation claims.[1224] Prior to executing the C&R, Cominco made statements that led Seybert to believe that he was only eligible for three areas of benefits.[1225] In 2001, Seybert asked the Alaska Workers' Compensation Board to set aside the C&R because he executed it based on Cominco's misleading statements about which benefits he was eligible to receive.[1226] The board denied Seybert's request to set aside the C&R because the misrepresentations were not fraudulently made.[1227] Reasoning that because the Alaska Workers' Compensation Act sets up an adversarial system between the worker's compensation insurer and the claimant, the supreme court held that a worker's compensation insurer does not owe a fiduciary duty to a claimant.[1228] However, contract principles allow a contract to be avoided for any material misrepresentation that reasonably induced the formation of the contract.[1229] The supreme court reversed the board's denial of Seybert's petition and remanded the case back to the board to determine if Seybert was induced into the C&R by a material misrepresentation, holding that: (1) a workers' compensation insurer does not owe a fiduciary duty to a claimant,[1230] but that (2) a contract may be avoided for a non-fraudulent material misrepresentation.[1231]

State v. Alaska Public Employees Ass'n

In *State v. Alaska Public Employees Ass'n*,[1232] the supreme court held that: (1) an arbitrator's assessment of prejudgment interest on back pay against the State was not gross error where the award of interest was fair, and (2) the arbitrator could have determined that the State had waived their sovereign immunity by submitting the claim to binding arbitration.[1233] After Basedan was terminated from state employment, the Alaska Public Employees Association filed a grievance on his behalf.[1234] The State eventually conceded that Basedan's termination was without good cause, and the arbitrator awarded back pay from the termination date to the date of reinstatement and also required the State to pay interest on the net award; the State appealed.[1235] The general rule is that prejudgment interest cannot be assessed against the state unless specifically waived by legislation.[1236] The supreme court reasoned that in the case of arbitration, however, it is the arbitrator's duty to determine the scope of the State's waiver of immunity from liability for prejudgment interest.[1237] It was reasonable for the arbitrator to conclude that the legislature's enactment of an arbitration clause constituted a waiver of the state's immunity against prejudgment interest liability.[1238] Reasoning that policy favors effective arbitration, the court concluded that the arbitrator's decision did not constitute gross error.[1239] The supreme court affirmed the arbitrator's award of prejudgment interest on back pay against the State, holding that: (1) an arbitrator's assessment of prejudgment interest on back pay against the State was not gross error where the award of interest was fair, and (2) the arbitrator could have determined that the State had waived their sovereign immunity by submitting the claim to binding arbitration.[1240]

Villaflores v. State, Commission for Human Rights

In *Villaflores v. State, Commission for Human Rights*,[1241] the supreme court held that when a potential employee's application does not demonstrate the minimum requirements as stated by the

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[1224] *Id.*
[1225] *Id.*
[1226] *Id.*
[1227] *Id.*
[1228] *Id.* at 1088.
[1229] *Id.* at 1094.
[1230] *Id.* at 1090.
[1231] *Id.* at 1094.
[1232] 199 P.3d 1161 (Alaska 2008).
[1233] *Id.* at 1165.
[1234] *Id.* at 1162.
[1235] *Id.*
[1236] *Id.* at 1163.
[1237] *Id.* at 1164.
[1238] *Id.*
[1239] *Id.* at 1165.
[1240] *Id.*
[1241] 175 P.3d 1275 (Alaska 2008).

prospective employer, the applicant is barred from claiming that he or she was denied the position due to discrimination.[1242] Villaflores applied for a human resources position with ConocoPhillips Alaska, Inc.[1243] In advertising the job, the company sought applicants with at least a bachelor's degree in human resources and five to ten years of experience in the human resources field;[1244] Villaflores did not list either of these requirements on his resume or application.[1245] ConocoPhillips then hired another person, and Villaflores filed a complaint of employment discrimination on the basis of age and race with the Alaska State Commission for Human Rights ("Commission").[1246] The Commission dismissed Villaflores's complaint as not supported by substantial evidence, after which Villaflores appealed.[1247] The supreme court reasoned that without direct evidence of discriminatory intent, a complainant is required to make a prima facie showing of discrimination by demonstrating that the complainant: (1) belongs to a protected class, (2) applied for and was qualified for a job for which the employer was seeking applicants, (3) was rejected, and (4) the employer hired a person not belonging to the protected class.[1248] The supreme court reasoned that Villaflores was not qualified for the job because he did not have the requisite experience.[1249] The supreme court affirmed the decision of the superior court, holding that when an potential employee's application does not demonstrate the minimum requirements as stated by the prospective employer, the applicant is barred from claiming that he or she was denied the position due to discrimination.[1250]

ENVIRONMENTAL LAW

Ninth Circuit Court of Appeals

Bering Strait Citizens for Responsible Resource Development v. United States Army Corps of Engineers

In *Bering Strait Citizens for Responsible Resource Development v. United States Army Corps of Engineers*,[1251] the Ninth Circuit held that: (1) the Clean Water Act ("CWA") permits mitigation strategies to be developed after a permit is issued, provided that the fully-developed strategies already in existence are adequate[1252] and (2) under the National Environmental Policy Act ("NEPA"), an agency preparing an Environmental Assessment ("EA") need not always circulate it, but must provide the public with sufficient environmental information to permit members of the public to participate in the agency's decision-making process.[1253] Alaska Gold Company ("AGC") applied to the Army Corp of Engineers ("Corps") for a permit to discharge dredged or fill materials into wetlands at the Rock Creek Mine.[1254] The permit was issued on the condition that AGC undertake a variety of measures to mitigate environmental damage.[1255] In order to obtain public comment on the proposed permit, the Corps placed a notice on its website and sent electronic and hardcopy notices to several federal, state, and local agencies, as well as to individuals in the local community.[1256] The Corps subsequently issued the permit, along with a Finding of No Significant Impact ("FONSI") for the project, meaning that the Corps did not have to issue an Environmental Impact

[1242] *Id.* at 1278.
[1243] *Id.* at 1276.
[1244] *Id.*
[1245] *Id.* at 1277.
[1246] *Id.* at 1276–77.
[1247] *Id.* at 1277.
[1248] *Id.* at 1277–78.
[1249] *Id.* at 1278.
[1250] *Id.*
[1251] 524 F.3d 938 (9th Cir. 2008).
[1252] *Id.* at 951.
[1253] *Id.* at 953.
[1254] *Id.* at 944.
[1255] *Id.* at 945–46.
[1256] *Id.* at 944–45.

Statement.[1257] Bering Strait Citizens for Responsible Resource Development ("BSC") sought a preliminary restraining order and temporary injunction against the project.[1258] The Ninth Circuit first determined that the CWA allowed permits to be issued even when some aspects of a mitigation plan were not yet finalized.[1259] The court held that issuing a permit while intending to develop mitigation plans in the future does not violate the CWA unless the mitigation measures that have been fully developed are inadequate; the court concluded that here, the fully developed measures were adequate.[1260] The court next determined that although NEPA required agencies to implement its procedures with public involvement, the law did not require circulation of a draft EA in all cases.[1261] When preparing an EA, an agency must provide the public with sufficient environmental information, considered in the totality of circumstances, to permit members of the public to weigh in with their views and thus inform agency decision-making.[1262] The court concluded that this requirement had been satisfied by the efforts of the Corps and AGC to keep the Nome community informed about the project.[1263] Thus, the Ninth Circuit affirmed the district court, holding that: (1) the CWA permits mitigation strategies to be developed after a permit is issued, provided that the fully developed strategies already in existence are adequate,[1264] and (2) under NEPA, an agency preparing an EA need not always circulate it, but must provide the public with sufficient environmental information to permit members of the public to participate in the agency's decision-making process.[1265]

ETHICS AND PROFESSIONAL RESPONSIBILITY

Alaska Supreme Court

Froines v. Valdez Fisheries Development Ass'n

In *Froines v. Valdez Fisheries Development Ass'n*,[1266] the supreme court held that the mere presence of certain factors delineated in Alaska Rule of Professional Conduct 1.5 ("Conduct Rule 1.5") does not necessarily support limiting an award of attorneys' fees.[1267] In a breach of contract action, Froines made a settlement offer to Valdez Fisheries Development Association ("Valdez"), which rejected the offer, and the case went to trial.[1268] After trial, the jury found in favor of Froines and Froines moved to recover attorneys' fees.[1269] The superior court awarded attorneys' fees to Froines, but limited his award to $10,000, and Froines appealed.[1270] Conduct Rule 1.5 enumerates factors to consider when determining if attorneys' fees are reasonable.[1271] The supreme court reasoned that three of these factors, when considered in the context of Alaska Civil Rule 68, are probative as to whether Froines litigated unreasonably at trial and whether the case was a good one for settlement: (1) the lack of novelty of the legal issues involved, (2) the probability of only a modest recovery, and (3) minimal award.[1272] Since these factors cut both ways in terms of their probative value, the mere presence of these factors did not support the superior court's

[1257] *Id.* at 946.
[1258] *Id.*
[1259] *Id.* at 950–51.
[1260] *Id.* at 951.
[1261] *Id.* at 952.
[1262] *Id.* at 953.
[1263] *Id.*
[1264] *Id.* at 951.
[1265] *Id.* at 953.
[1266] 175 P.3d 1234 (Alaska 2008).
[1267] *Id.* at 1235.
[1268] *Id.*
[1269] *Id.* at 1235–36.
[1270] *Id.* at 1236.
[1271] *Id.*
[1272] *Id.* at 1237.

limiting of the attorneys' fees award.[1273] Reversing the superior court, the supreme court held that the mere presence of certain factors delineated in Conduct Rule 1.5 does not necessarily support limiting an award of attorneys' fees.[1274]

FAMILY LAW

Alaska Supreme Court

Audrey H. v. State, Office of Children's Services

In *Audrey H. v. State, Office of Children's Services*,[1275] the supreme court held that: (1) under § 47.10.011(9) of the Alaska Statutes, a child may be at risk of emotional harm when regularly confronted by parental abuse of alcohol or drugs, and (2) the State makes reasonable efforts to reunite children with a parent who suffers from organic brain damage when the State takes "affirmative steps" to do so.[1276] On June 8, 2005, two of Audrey H.'s daughters were removed from their home because Audrey H. failed to provide a safe and clean living environment and exposed them to alcohol abuse, drug abuse, and prostitution in their home.[1277] The State made efforts to reunite Audrey H. with her daughters by providing access to services and taking steps to ensure Audrey H.'s compliance.[1278] When Audrey H. failed to utilize the required services, the State moved for termination of parental rights, which the superior court granted.[1279] On appeal, the supreme court first reasoned that § 47.10.011(9) permitted termination of parental rights when a child was at risk of emotional harm.[1280] Furthermore, the specific mention of alcohol and drug abuse in §§ 47.10.011(10) and 47.10.011(11) did not preclude the consideration of how those facts affect the risk of emotional harm to the child under § 47.10.011(9).[1281] Second, the supreme court reasoned that, when a parent suffers from organic brain damage, the State is obligated to take affirmative steps to ensure the parent's compliance with any required services.[1282] Since the State took affirmative steps, the supreme court concluded that the State had met the reasonable-efforts standard.[1283] Affirming the superior court, the supreme court held that: (1) under § 47.10.011(9) of the Alaska Statutes, a child may be at risk of emotional harm when regularly confronted by parental abuse of alcohol or drugs, and (2) the State makes reasonable efforts to reunite children with a parent who suffers from organic brain damage when the State takes "affirmative steps" to do so.[1284]

Barile v. Barile

In *Barile v. Barile*,[1285] the supreme court held that when a parent makes a motion to modify custody, a court must hold an evidentiary hearing when the allegations, if proved, could warrant a change in custody.[1286] When Tammy and Primo divorced, the superior court ordered that Primo receive sole custody of their child, Chance.[1287] Tammy later filed a motion for sole custody of Chance.[1288] Tammy argued that this modification was supported by several changed circumstances, including the parents' new marriages, the abuse and neglect of Chance, the abuse of Primo's new stepson, and Chance's preference for living with Tammy.[1289] The superior court determined that these allegations did not rise to the level of a

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[1273] *Id.*
[1274] *Id.* at 1235.
[1275] 188 P.3d 668 (Alaska 2008).
[1276] *Id.* at 675, 680–81.
[1277] *Id.* at 670.
[1278] *Id.* at 670–71.
[1279] *Id.* at 671.
[1280] *Id.* at 674–75.
[1281] *Id.* at 675.
[1282] *Id.* at 680–81.
[1283] *Id.*
[1284] *Id.* at 675, 680–81.
[1285] 179 P.3d 944 (Alaska 2008).
[1286] *Id.* at 947.
[1287] *Id.* at 945.
[1288] *Id.*
[1289] *Id.*

substantial change in circumstances and dismissed the motion without an evidentiary hearing.[1290] On appeal, the supreme court reasoned that a motion to modify custody may only be dismissed without an evidentiary hearing under two circumstances: (1) when the allegations, if proved, would not warrant a custody modification; or (2) if the allegations created no genuine issue of fact requiring a hearing.[1291] The court noted that although the superior court had addressed several of Tammy's allegations in its decision, it did not address her allegations that Chance and his stepbrother were abused.[1292] The court reasoned that because a finding of domestic abuse would establish changed circumstances, it was error to deny Tammy a hearing in which she could attempt to prove the allegations.[1293] Additionally, the court found that Chance's safety and access to medical care may have been at risk.[1294] Since Tammy's allegations, if proved, could warrant a custody modification, a factual hearing was required before her motion could be dismissed.[1295] The supreme court reversed the superior court, holding that when a parent makes a motion to modify custody, a court must hold an evidentiary hearing when the allegations, if proved, could warrant a change in custody.[1296]

Chesser v. Chesser-Witmer

In *Chesser v. Chesser-Witmer*,[1297] the supreme court held that an interim custody order with a fixed date of termination may be modified at a continuation hearing following the date of the order's termination and that a court does not need to make express findings on all statutory factors.[1298] Following a divorce, the superior court ordered a temporary custody arrangement such that the child would spend the school year with her father on a military base in New York and summer vacations with her mother in Alaska.[1299] This temporary order expired after one year and the arrangement was permanently changed to give custody to the mother during the school year.[1300] The father appealed, arguing that the court needed to consider each of the statutory factors and that the mother needed to show a change of circumstances to modify the custody order.[1301] The supreme court held that the superior court's decision was not clearly erroneous because the superior court was not obligated to make express findings on all nine of the statutorily mandated factors.[1302] Additionally, it reasoned that since the one-year arrangement was temporary, the mother did not need to show a change in circumstances or request a modification and that the new custody hearing should merely be viewed as a continuation of the previous hearing.[1303] Affirming the decision of the superior court, the Supreme Court of Alaska held that an interim custody order with a fixed date of termination may be modified at a continuation hearing following the date of the order's termination and that the trial court does not need to make express findings on all of the statutory factors.[1304]

Eniero v. Brekke

In *Eniero v. Brekke*,[1305] the supreme court held that in determining the best interests of the child, a trial court may consider whether an out-of-state move by one parent was partially, and not primarily, illegitimate in determining the best interests of the child.[1306] Eniero and Brekke had cohabitated for four

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[1290] *Id.* at 946.
[1291] *Id.*
[1292] *Id.* at 946–47.
[1293] *Id.* at 947.
[1294] *Id.*
[1295] *Id.*
[1296] *Id.*
[1297] 178 P.3d 1154 (Alaska 2008).
[1298] *Id.* at 1155, 1159.
[1299] *Id*. at 1155–56.
[1300] *Id.*
[1301] *Id.* at 1157–58.
[1302] *Id.* at 1158–59.
[1303] *Id.* at 1157.
[1304] *Id.* at 1155, 1159.
[1305] 192 P.3d 147 (Alaska 2008).
[1306] *Id.* at 150.

years and had a daughter, Miranda, together.[1307] After the couple separated, the parents agreed to share custody of Miranda on an alternating-weeks basis.[1308] Desiring to move to Oregon, Eniero filed a motion to modify the terms of the custody arrangement to allow Miranda to move with her.[1309] Brekke opposed the motion, arguing that Eniero's principal motivation was to prevent him from playing an active role in Miranda's life.[1310] The superior court applied a two-step approach to determine whether the custody arrangement allowed the move.[1311] First, the court found that Eniero primarily had legitimate reasons for the move.[1312] Second, the court found that preventing Brekke's involvement in Miranda's life was a secondary motivation for the move, and on the whole, that the move was not in the best interests of the child.[1313] Therefore, the court held that if Eniero moved, Miranda would remain with Brekke.[1314] Affirming the superior court's decision, the supreme court held that in determining the best interests of the child, a trial court may consider whether an out-of-state move by one parent was partially, and not primarily, illegitimate in determining the best interests of the child.[1315]

Ferguson v. Ferguson

In *Ferguson v. Ferguson*,[1316] the supreme court held that a divorce settlement could not be modified, even if it used a lump sum in lieu of future child support payments, if the circumstances had not changed and the settlement was more than the statutory cap.[1317] James and Victoria divorced in 2001 and settled on a $233,000 lump sum payment instead of future child support payments. [1318] Counsel for both parties pushed for the unconventional approach and convinced the superior judge they understood the ramifications. [1319] In 2006, Victoria filed a motion to modify the settlement because unemployment forced her to liquidate most of the $233,000 and pay the tax penalties associated with the early withdrawals on 401ks and pension funds which were part of the lump sum. [1320] The supreme court held that the lump sum settlement was already based on Victoria's unemployment and both parties considered the tax penalties for liquidating the assets.[1321] The settlement was also based on James earning $100,000, but the maximum adjusted income that can be considered is $84,000, which further showed the settlement was fair and should not be modified in Victoria's favor.[1322] The supreme court affirmed the decision of the superior court, holding that a divorce settlement could not be modified, even if it used a lump sum in lieu of future child support payments, if the circumstances had not changed and the settlement was more than the statutory cap.[1323]

Haines v. Cox

In *Haines v. Cox*,[1324] the supreme court held that: (1) in valuing property for equitable distribution purposes in a divorce trial, courts may use an older tax assessment if a more current tax assessment is not available until after divorce trial; and (2) when determining the value of the marital property, courts must consider the fair rental value of the home and the cost of insurance premiums paid by one spouse.[1325]

[1307] *Id.* at 147.
[1308] *Id.* at 148.
[1309] *Id.*
[1310] *Id.* at 149.
[1311] *Id.* at 150.
[1312] *Id.*
[1313] *Id.*
[1314] *Id.*
[1315] *Id.*
[1316] 195 P.3d 127 (Alaska 2008).
[1317] *Id.* at 128.
[1318] *Id.* at 128–29.
[1319] *Id.* at 129.
[1320] *Id.* at 129–30.
[1321] *Id.* at 131.
[1322] *Id.* at 133.
[1323] *Id.* at 127.
[1324] 182 P.3d 1140 (Alaska 2008).
[1325] *Id.* at 1146.

Haines and Cox separated in May 2003, and their divorce trial was held in October 2005.[1326] After the couple separated, Haines left the marital home but continued to pay property insurance premiums and property taxes while Cox remained in the house.[1327] The superior court used a 2005 tax assessment when determining the value of the marital home.[1328] On appeal, Haines argued the court should have used the 2006 assessment for valuation purposes despite it being unavailable until three months after the trial ended.[1329] The supreme court found that the lower court was required to use the best assessment of value available during the trial.[1330] However, the supreme court found that the superior court erred when it failed to consider Cox's continued use of the home.[1331] Cox's occupancy was "as though he received rent from the marital estate."[1332] Additionally, the insurance premiums paid by Haines continued to benefit Cox, and the lower court should have considered the payments in valuing the marital property.[1333] Affirming the superior court in part and reversing in part, the supreme court held that: (1) in valuing property for equitable distribution purposes in a divorce trial, courts may use an older tax assessment if a more current tax assessment is not available until after divorce trial; and (2) when determining the value of the marital property, courts must consider the fair rental value of the home and the cost of insurance premiums paid by one spouse.[1334]

Hooper v. Hooper

In *Hooper v. Hooper*,[1335] the supreme court held that an award of greater than half of a marital estate to one spouse during a divorce was acceptable when it was supported by sufficient findings of fact.[1336] In divorce proceedings for Sabra and Taggart Hooper, the superior court decided that Sabra was entitled to 67% of the estate based on factors such as her time spent raising the children and each party's relative earning capacities and economic needs.[1337] Taggart appealed and argued that the superior court did not apply the appropriate legal standards.[1338] The supreme court acknowledged that an equal division of property is presumed to be the most equitable, but also recognized that the trial court has broad discretion to deviate from absolute equality.[1339] The supreme court decided that the superior court did not abuse its discretion because it entered thoughtful and detailed findings of fact discussing all of the relevant factors set out in the law.[1340] The supreme court affirmed the superior court and held that an award of greater than half of a marital estate to one spouse during a divorce was acceptable when it was supported by sufficient findings of fact.[1341]

Iverson v. Griffith

In *Iverson v. Griffith*,[1342] the supreme court held that: (1) a mother was entitled to an evidentiary hearing to determine if recent changes in the father's employment circumstances required modification of an existing custody arrangement, and (2) a court must explain its decision to deny a motion to appoint a guardian ad litem.[1343] In a custody dispute, Iverson, the mother, sought an evidentiary hearing to determine if Griffith's new job, which required him to leave their daughter with another family for two weeks a

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[1326] *Id.*
[1327] *Id.*
[1328] *Id.* at 1143.
[1329] *Id.*
[1330] *Id.* at 1143–44.
[1331] *Id.* at 1144.
[1332] *Id.* at 1145.
[1333] *Id.*
[1334] *Id.* at 1146.
[1335] 188 P.3d 681 (Alaska 2008).
[1336] *Id.* at 683.
[1337] *Id.* at 684.
[1338] *Id.* at 685.
[1339] *Id.*
[1340] *Id.* at 686.
[1341] *Id.* at 683.
[1342] 180 P.3d 943 (Alaska 2008).
[1343] *Id.*at 948.

month, affected his ability to care for the child.[1344] The superior court denied Iverson's hearing request.[1345] On appeal, the supreme court held Griffith's new job constituted a change in circumstances that could impact his ability to care for their daughter; therefore, Iverson was entitled to a hearing to determine if the custody arrangement should be modified.[1346] The supreme court also stated that § 25.24.310(c) of the Alaska Statutes requires a court to explain its denial of a motion to appoint a guardian ad litem.[1347] The supreme court vacated and remanded the superior court's decision, holding that: (1) a mother was entitled to an evidentiary hearing to determine if recent changes in the father's employment circumstances required modification of an existing custody arrangement, and (2) a court must explain its decision to deny a motion to appoint a guardian ad litem.[1348]

Jacob v. State, Department of Health and Social Services

In *Jacob v. State, Department of Health and Social Services*,[1349] the supreme court held that the State violated the rights of grandparents seeking custody of their grandchildren in State care when they were not informed of proceedings involving the children.[1350] The Jacobs had joint custody of their grandchildren with the children's mother, who had moved the children from Washington, where the Jacobs lived, to Alaska.[1351] After the mother began abusing drugs, the Office of Children's Services ("OCS") took the children into State custody.[1352] For the next three years, the grandparents contacted OCS dozens of times to seek information about the children and to attempt to place the grandchildren in their home.[1353] During this time, OCS never gave the Jacobs notice of proceedings involving the children, even when the law required such notice.[1354] The Jacobs filed for declaratory and injunctive relief in superior court.[1355] OCS filed a motion to dismiss, which the superior court granted, while also giving the Jacobs the opportunity to intervene in the children's Child in Need of Aid ("CINA") hearings.[1356] The Jacobs subsequently intervened and appealed.[1357] The supreme court reasoned that the CINA statutes prefer to place children with actual family members rather than foster families, and grandparents must have notice of CINA hearings.[1358] The supreme court found that because the Jacobs were not given custody or notice of proceedings involving the children, the Jacobs were entitled to declaratory judgment.[1359] However, the Jacobs' injunctive request was moot, because after the superior court decision, they received: (1) notice of the hearings involving their grandchildren; (2) an opportunity to be heard; and (3) custody of two of the children while proceedings were ongoing over the custody of the third.[1360] Reversing the superior court, the supreme court held that the State violates the rights of grandparents seeking custody of their grandchildren in state care when they were not informed of proceedings involving the children.[1361]

Karrie B. v. Catherine J.

In *Karrie B. v. Catherine J.*,[1362] the supreme court held that in a determination of a child's best interest during a hearing on the termination of parental rights, a court may consider the lack of adoptive

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[1344] *Id.* at 944.
[1345] *Id.*
[1346] *Id.* at 948.
[1347] *Id.*
[1348] *Id.*
[1349] 177 P.3d 1181 (Alaska 2008).
[1350] *Id.* at 1183.
[1351] *Id.*
[1352] *Id.*
[1353] *Id.*
[1354] *Id.*
[1355] *Id.* at 1183–84.
[1356] *Id.* at 1184.
[1357] *Id.*
[1358] *Id.* at 1185.
[1359] *Id.* at 1185–86.
[1360] *Id.* at 1186.
[1361] *Id.* at 1183.
[1362] 181 P.3d 177 (Alaska 2008).

placement options, the parent's determination to change, and the parent/child bond.[1363] Karrie and Crystal were born to Catherine in 1998 and 2001 respectively.[1364] From birth until 2005, both children witnessed alcohol abuse by their mother and father, witnessed domestic violence between their mother and father, and suffered from domestic violence.[1365] At the time of the first altercation in 1998, the Office of Children's Services ("OCS") became involved in the family's affairs, setting requirements the parents had to meet.[1366] Between 1998 and 2005, both parents periodically failed to meet the requirements set forth by the OCS.[1367] The children's guardian ad litem moved for termination of Catherine's parental rights;[1368] the superior court denied the motion based on the best interests of the children as evidenced by: (1) the lack of alternative options for permanent placement of the children, (2) Catherine's determination to change, and (3) the strong mother/child bond between Catherine and her daughters.[1369] First, the court stated that because favorable current placements could be considered in determining that the best interests of a child supported termination of parental rights, the lack of permanent placement options could weigh against termination of parental rights.[1370] Second, the court stated that under Alaska law, a parent's determination to change may be considered in determining the best interests of the child.[1371] Third, the court stated that the bond between a parent and child may receive consideration in proceedings for the termination of parental rights, because that bond can imply that the child's best interests may be served by continued contact with the parent.[1372] Affirming the superior court, the supreme court held that in a determination of a child's best interest during a hearing on the termination of parental rights, a court may consider the lack of adoptive placement options, the parent's determination to change, and the parent/child bond.[1373]

Kestner v. Clark

In *Kestner v. Clark*,[1374] the supreme court held that: (1) in determining the amount of child support due, a court may impute income to a parent who is voluntarily unemployed;[1375] and (2) it is appropriate to permit discovery of the non-custodial parent's new spouse's finances when that parent seeks a variance from the payment schedule, or when that parent does not work because of the new spouse's income.[1376] After Clark and Kestner divorced, the latter remarried and voluntarily left the workforce in order to be a stay-at-home mom for her children from the new marriage.[1377] During a subsequent hearing to modify child support payments, Clark filed a motion to impute income to Kestner based on her earning potential.[1378] Kestner opposed the motion, arguing that it was reasonable for her to be voluntarily unemployed because of her relatively low potential income and the high cost of child care.[1379] Clark then filed a discovery motion requesting production of documents relating to the finances of Kestner's new spouse.[1380] The supreme court reasoned that because public policy prioritizes the fulfillment of paying child support over most all other obligations, the superior court correctly imputed Kestner's earning potential to her, and correctly accounted for her spouse's finances when determining the appropriate amount of child support due.[1381] The supreme court affirmed the superior court, holding that: (1) to determine the amount of child support due,

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[1363] *Id.* at 185–87.
[1364] *Id.* at 178.
[1365] *Id.* at 178–81.
[1366] *Id.* at 178.
[1367] *Id.* at 178–81.
[1368] *Id.* at 181–82.
[1369] *Id.* at 185–87.
[1370] *Id.* at 185.
[1371] *Id.* at 186.
[1372] *Id.* at 186–87.
[1373] *Id.* at 185–87.
[1374] 182 P.3d 1117 (Alaska 2008).
[1375] *Id.* at 1123.
[1376] *Id.* at 1124.
[1377] *Id.* at 1119.
[1378] *Id.* at 1119–20.
[1379] *Id.* at 1120.
[1380] *Id.*
[1381] *Id.* at 1123–24.

the superior court may impute income to a parent who is voluntarily unemployed,[1382] and (2) it is appropriate to permit discovery of the non-custodial parent's new spouse's finances when that parent seeks a variance from the payment schedule, or that parent does not work because of the new spouse's income.[1383]

Krushensky v. Farinas

In *Krushensky v. Farinas*,[1384] the supreme court held that a court may not enter a qualified domestic relations order ("QDRO") containing a qualified pre-retirement survivor annuity ("QPSA"), if doing so contradicts a memorializing final property order and violates the parties' prior agreement.[1385] Krushensky filed for divorce from Farinas in 2004 and the parties reached a settlement involving all property, including Krushensky's two defined-benefit retirement accounts.[1386] The superior court memorialized the settlement with a property order directing the entry of a QDRO providing that Farinas would receive fifty-five percent of the retirement benefits Krushensky had accumulated during their marriage.[1387] Eventually, Farinas filed a proposed QDRO that would grant her a QPSA containing separate interests in Krushensky's retirement accounts.[1388] Under a shared interest, Farinas's interest in an account would terminate if Krushensky died before retiring; under a separate interest, her interest would continue regardless of Krushensky's death.[1389] The QPSA would provide Farinas with an annuity in the event of Krushensky's pre-retirement death.[1390] Krushensky agreed to the separate interests, but argued that the QPSA violated the property order and was unnecessary because of the separate interests.[1391] Nevertheless, the superior court granted Farinas's proposed QDRO.[1392] On appeal, the supreme court ruled that the inclusion of a QPSA contradicted the parties' settlement intent by changing Farinas's entitlements in the event of Krushensky's death.[1393] Because of the QPSA, if Krushensky died before retiring, Farinas would actually receive a total of 67.4% of his retirement benefits, and prejudicing future beneficiaries of Krushensky.[1394] Additionally, the court stated that the QPSA was unnecessary because the separate interest agreed upon protected Farinas in case of Krushensky's death.[1395] Since the QDRO contradicted both the parties' expectations and the property order, the supreme court held that it could not be enforced.[1396] The supreme court reversed the superior court, holding that a court may not enter a qualified domestic relations order ("QDRO") containing a qualified pre-retirement survivor annuity ("QPSA"), if doing so contradicts a memorializing final property order and violates the parties' prior agreement.[1397]

Littleton v. Banks

In *Littleton v. Banks*,[1398] the supreme court held that Alaska Rule of Civil Procedure 90.6(c) requires a child custody investigator to disclose the existence of a personal association with an attorney in a case on which she is working.[1399] Littleton challenged the superior court's decision to grant Banks sole custody of their daughter because the court admitted into evidence a report by a custody investigator who failed to disclose that she had recently visited Peru with Banks' attorney.[1400] The supreme court determined that the investigator's potential bias made it improper for the superior court to consider any of her

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[1382] *Id.* at 1123.
[1383] *Id.* at 1124.
[1384] 189 P.3d 1056 (Alaska 2008).
[1385] *Id.* at 1057.
[1386] *Id.* at 1058.
[1387] *Id.*
[1388] *Id.* at 1059.
[1389] *Id.* at 1058.
[1390] *Id.* at 1059.
[1391] *Id.*
[1392] *Id.* at 1059–60.
[1393] *Id.* at 1062–63.
[1394] *Id.* at 1063.
[1395] *Id.*
[1396] *Id.*
[1397] *Id.* at 1057.
[1398] 192 P.3d 154 (Alaska 2008).
[1399] *Id.* at 158.
[1400] *Id.* at 158–59.

findings.[1401] The court reasoned that the personal association between the custody investigator and Banks' attorney could directly affect the investigator's recommendations and therefore could have a direct effect on the parties.[1402] However, the supreme court found that the record amply demonstrated that it was in the child's best interest for Banks to have sole custody and that the superior court did not abuse its discretion in so deciding.[1403] Thus, the supreme court affirmed the superior court, holding that Rule 90.6(c) requires a child custody investigator to disclose the existence of a personal association with an attorney in a case on which she is working.[1404]

Maisy W. v. State, Department of Health and Social Services

In *Maisy W. v. State, Department of Health and Social Services*,[1405] the supreme court held that termination of parental custody was warranted when a parent with a history of neglect for her children repeatedly failed to follow case plans developed by the Office of Children's Services ("OCS").[1406] A mother appealed the judgment of the superior court that terminated her parental rights because she had mentally injured and neglected her children and had a history of substance abuse.[1407] The superior court also found termination was warranted because OCS had created and updated at least ten case plans for the family, none of which the mother followed.[1408] The supreme court reasoned that the children needed aid because their mother failed to follow any of the numerous case plans developed by OCS.[1409] The State demonstrated by clear and convincing evidence that social workers made active efforts to provide rehabilitation services and programs to the mother to try to prevent the breakup of the family.[1410] Because the State had tried to assist the mother for several years, and she had refused to comply with case plans or other rehabilitative services, the court found that the mother's parental rights should be terminated.[1411] The supreme court affirmed the superior court, holding that termination of parental custody was warranted when a parent with a history of neglect for her children repeatedly failed to follow case plans developed by OCS.[1412]

McLane v. Paul

In *McLane v. Paul*,[1413] the supreme held that a court may not modify a child custody arrangement when there had been no substantial change in circumstances.[1414] When Paul and McLane divorced, they signed a custody agreement for their daughter Alexis.[1415] Under the plan, McLane would have custody during the school year, while Paul would have custody during the summer.[1416] In 2007, Alexis spent time at Paul's residence in Illinois, and her parents eventually made arrangements for her to enroll in a local school.[1417] Shortly after Alexis matriculated, McLane demanded her return to Alaska.[1418] On the basis of the schooling arrangements, Paul filed a motion to modify custody.[1419] The superior court granted the motion, which McLane appealed.[1420] The supreme court reasoned that in order to avoid disturbing a child

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[1401] *Id.* at 159.
[1402] *Id.* at 158.
[1403] *Id.* at 161.
[1404] *Id.* at 158.
[1405] 175 P.3d 1263 (Alaska 2008).
[1406] *Id.* at 1268–69.
[1407] *Id.* at 1265–67.
[1408] *Id.* at 1269.
[1409] *Id.* at 1267–68.
[1410] *Id.* at 1268.
[1411] *Id.* at 1269.
[1412] *Id.* at 1268–69.
[1413] 189 P.3d 1039 (Alaska 2008).
[1414] *Id.* at 1045.
[1415] *Id.* at 1041.
[1416] *Id.*
[1417] *Id.*
[1418] *Id.*
[1419] *Id.*
[1420] *Id.*

with changes, a movant seeking to modify custody must prove that a substantial change in circumstances has occurred. [1421] The court concluded that the plan for Alexis to attend school in Illinois had been an experimental arrangement, not a substantial change in circumstances,[1422] and reasoned that if experimental custody arrangements constituted substantial changes, it would discourage parents from granting each other generous custody terms.[1423] The supreme court reversed the superior court, holding that a court may not modify a child custody arrangement when there had been no substantial change in circumstances.[1424]

Michele M. v. Richard R.

In *Michele M. v. Richard R.*,[1425] the supreme court held that when making a child custody determination, a court may: (1) emphasize a child's educational needs so long as it also considers all other relevant best interests factors, and (2) disregard the child's stated preference to live with a particular parent, but (3) must explicitly determine if a parent's previous instance of domestic abuse triggers the statutory presumption against awarding custody.[1426] Richard moved to gain full custody of his son Charles after learning that he was doing poorly in school.[1427] The superior court awarded Richard full custody after weighing the required statutory best interest factors.[1428] Michele, the child's mother, appealed the decision, claiming that the court: (1) placed too much weight on the child's educational needs, (2) should have allowed the child to live with whichever parent he preferred to live with, and (3) failed to properly consider past allegations of domestic abuse against Richard.[1429] The supreme court determined that because Charles was chronically absent from school and behind in his studies, the trial court did not abuse its discretion by emphasizing his educational needs in making a custody determination.[1430] In addition, there was evidence that Charles was immature and preferred living with his mother because she allowed him to skip school and play hockey.[1431] Thus, the trial court need not give much weight to the child's preference.[1432] Finally, the court found that because § 25.24.150 of the Alaska Statutes creates a rebuttable presumption against placing a child in the custody of a parent with a history of "perpetrating domestic violence," the trial court erred when it did not explicitly determine if the previous allegations against Richard constituted a history of perpetrating domestic violence.[1433] The supreme court vacated and remanded to determine if the father had a history of "perpetrating domestic violence," holding that when making a child custody determination, a court may: (1) emphasize a child's educational needs so long as it also considers all other relevant best interests factors, and (2) disregard the child's stated preference to live with a particular parent, but (3) must explicitly determine if a parent's previous instance of domestic abuse triggers the statutory presumption against awarding custody.[1434]

Mikesell v. Waterman

In *Mikesell v. Waterman*,[1435] the supreme court held that a superior court may properly decline to exercise jurisdiction in a child custody proceeding, even though Alaska was the child's "home state," for purposes of the Uniform Child Custody Jurisdiction and Enforcement Act ("UCCJEA").[1436] When Mikesell and Waterman separated they agreed to alternate custody of their child on a yearly basis.[1437] Four

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[1421] *Id.* at 1042.
[1422] *Id.* at 1044.
[1423] *Id.* at 1042.
[1424] *Id.* at 1045.
[1425] 177 P.3d 830 (Alaska 2008).
[1426] *Id.* at 838.
[1427] *Id.* at 831.
[1428] *Id.*
[1429] *Id.*
[1430] *Id.* at 835.
[1431] *Id.* at 838.
[1432] *Id.*
[1433] *Id.* at 836.
[1434] *Id.* at 838.
[1435] 197 P.3d 184 (Alaska 2008).
[1436] *Id.* at 188–92.
[1437] *Id.* at 185–86.

years later, Mikesell, the father, began a custody hearing in Alaska, asking for sole custody of the child.[1438] Waterman, the mother, filed a separate custody action in New Mexico, and asked the Alaska court to decline jurisdiction on Mikesell's custody hearing on the grounds that it was an inconvenient forum.[1439] The superior court, despite finding that Alaska was the child's "home state" under the UCCJEA, granted Waterman's motion without a hearing.[1440] Although Alaska courts generally give preference to home-state jurisdiction in custody matters, a court may properly decline to exercise jurisdiction if other factors are present.[1441] Since substantial evidence was available in New Mexico, and since the child and her mother both had a significant connection to that state,[1442] the supreme court reasoned that the superior court had adequate evidence to support its finding that declining to exercise jurisdiction in Alaska was proper.[1443] Thus, affirming the superior court, the supreme court held that a superior court may properly decline to exercise jurisdiction in a child custody proceeding, even though Alaska was the child's "home state," for purposes of the UCCJEA.[1444]

Millette v. Millette

In *Millette v. Millette*[1445] the supreme court held that a modification of child support without a valid motion would be retroactive and thus prohibited, even where circumstances have materially changed and a modification would likely be permitted with a proper motion.[1446] Carol Jean and Matthew Millette separated in June 2003.[1447] The couple had a son, Jesse.[1448] In August 2004, the superior court gave Carol Jean interim sole legal and primary physical custody of Jessie.[1449] Following the order, Child Support Services Division ordered that Matthew pay ninety dollars per month in child support.[1450] In October 2005, the superior court entered a permanent custody award, and ordered Matthew to pay $348 in child support retroactive to August 2004.[1451] Matthew appealed the child support award on the basis that it was impermissibly retroactive.[1452] Citing precedent, the supreme court determined that the superior court erred in ordering Matthew to pay a higher child support retroactive to August 2004.[1453] The court determined that modification of child support must be made pursuant to a valid motion, and that absent such motion a trial court cannot modify child support payments even where circumstances have materially changed.[1454] Since Carol Jean did not file a motion for modification of child support until November 24, 2004, that was the earliest possible date that the superior court could have ordered higher child support payments.[1455] Because of this, the superior court erred in making the higher payments retroactive to August 2004.[1456] Thus, the supreme court reversed the superior court's child support award, holding that a modification of child support without a valid motion would be retroactive and thus prohibited, even where circumstances have materially changed and a modification would likely be permitted with a proper motion.[1457]

Pam R. v. State, Department of Health and Social Services

[1438] *Id.* at 186.
[1439] *Id.*
[1440] *Id.*
[1441] *Id.* at 188–89.
[1442] *Id.* at 189.
[1443] *Id.* at 189, 192.
[1444] *Id.* at 188–92.
[1445] 177 P.3d 258 (Alaska 2008).
[1446] *Id.* at 266.
[1447] *Id.* at 260.
[1448] *Id.*
[1449] *Id.*
[1450] *Id.* at 261.
[1451] *Id.*
[1452] *Id.*
[1453] *Id.* at 266.
[1454] *Id.*
[1455] *Id.*
[1456] *Id.*
[1457] *Id.*

In *Pam R. v. State, Department of Health and Social Services*,[1458] the supreme court held that the grandmother of two young children and an infant was not their "Indian custodian" under the Indian Child Welfare Act ("ICWA") when: (1) neither parent had transferred physical custody of the two older children to the grandmother, and (2) the Office of Children's Services ("OCS") had assumed emergency custody of the infant before the mother designated custody to the grandmother.[1459] Mark and Sally had three children, each of whom was an "Indian child" within the meaning of the ICWA.[1460] The older two sons lived with their maternal grandmother, an Alaska Native.[1461] After Sally gave birth to her third son,[1462] she obtained a document indicating that the maternal grandmother was to be the infant's "Indian custodian."[1463] However, OCS had already taken the infant into protective custody after he tested positive for cocaine.[1464] Sally advocated for the maternal grandmother to be designated as the children's "Indian custodian," but both Mark and the children's guardian ad litem objected.[1465] The supreme court reasoned that since no state or tribal court had placed legal custody of the children with the maternal grandmother, the grandmother could only be an "Indian custodian" if the parents had transferred physical custody of the children to her.[1466] The children had not been consistently or exclusively in the grandmother's care, and the parents had maintained both legal and physical custody over their children;[1467] as a result, the trial court's finding that neither parent had transferred physical control of the children to the grandmother was not clearly erroneous.[1468] The court also determined that OCS had assumed emergency custody of the infant before temporary physical custody had been transferred to the grandmother.[1469] The supreme court affirmed the trial court's determination that the grandmother of two young children and an infant is not their "Indian custodian" under the ICWA when: (1) neither parent had transferred physical custody of the two older children to the grandmother, and (2) the OCS had assumed emergency custody of the infant before the mother designated custody to the grandmother.[1470]

Richardson v. Kohlin

In *Richardson v. Kohlin*,[1471] the supreme court held that a father's unemployment and decreased income constituted a material change in circumstances, which supported recalculation of his required child support payments.[1472] After being laid off from his job, a father, Kohlin, moved to the Pacific Northwest and was only able to find employment that paid about half of his previous salary. Kohlin sought to change a child support order to reflect his lower income.[1473] Since Kohlin was unemployed at the time of the original child support calculation, the mother, Richardson, argued his continued unemployment could not constitute a material change of circumstances, and that Kohlin was voluntarily and unreasonably unemployed.[1474] In finding for Kohlin, the superior court held the father's significant reduction in income constituted a material change of circumstances.[1475] Because a material change of circumstances is defined as a difference of at least fifteen percent between the support order amount and an amount calculated according to the relevant formula, and because here that difference was forty percent, the supreme court held that the standard for modification of child support payments was met.[1476] Further, the supreme court rejected the

[1458] 185 P.3d 67 (Alaska 2008).
[1459] *Id.* at 72.
[1460] *Id.* at 68.
[1461] *Id.*
[1462] *Id.* at 69.
[1463] *Id.* at 70.
[1464] *Id.*
[1465] *Id.*
[1466] *Id.* at 71.
[1467] *Id.* at 72.
[1468] *Id.*
[1469] *Id.*
[1470] *Id.* at 73.
[1471] 175 P.3d 43 (Alaska 2008).
[1472] *Id.* at 45.
[1473] *Id.* at 45–46.
[1474] *Id.*
[1475] *Id.* at 47.
[1476] *Id.*

mother's argument that the father's unemployment was involuntary or unreasonable, because the father actively sought high-paying work.[1477] The supreme court affirmed the superior court, holding that a father's unemployment and decreased income constituted a material change in circumstances, which supported recalculation of his required child support payments.[1478]

Robertson v. Riplett

In *Robertson v. Riplett*,[1479] the supreme court held that in a child custody case decided by a foreign court, an Alaska court could not modify the foreign court's decision since it lacks subject matter jurisdiction, but it could enforce the decision and require the defendant to disclose his tax information.[1480] Robertson is a resident of Ohio, but his previous wife and their two children, of whom she had custody, moved to Alaska. [1481] Prior to the move, an Ohio court issued a decision suspending Robertson's visitation rights until he took a psychological assessment and completed an anger management program. [1482] The supreme court refused Robertson's request to modify this decision because it lacked subject matter jurisdiction; the Ohio court had not declined jurisdiction or determined that Alaska is a more convenient forum. [1483] However, the supreme court held that Robertson must disclose his tax return to aid in enforcing his child support obligation determined by the Ohio court.[1484] The supreme court affirmed the finding of the superior court, holding that in a child custody case decided by a foreign court, a superior could not modify the foreign court's decision because it lacked subject matter jurisdiction, but it could enforce the decision and require the defendant to disclose his tax information.[1485]

Samuel H. v. State, Office of Children's Services

In *Samuel H. v. State, Office of Children's Services*,[1486] the supreme court held that termination of a father's parental rights was not warranted when his testimony indicated he had made efforts to secure his daughter's safety and care by making arrangements with the mother and both maternal grandparents.[1487] The Office of Children's Services began a Child in Need of Aid ("CINA") proceeding shortly after Samuel's daughter was born cocaine-positive.[1488] The child was placed in the maternal grandmother's care because Samuel was in prison at the time.[1489] The superior court terminated Samuel's parental rights because it found that he had not made adequate arrangements for his child's care.[1490] Samuel appealed.[1491] The supreme court reasoned that adequate arrangements did not necessarily mean following a formal procedure to begin legal proceedings for the placement of the child.[1492] The court concluded that the father's testimony that he had made efforts to make arrangements with the mother and the child's maternal grandparents demonstrated that Samuel had made adequate arrangements for his daughter.[1493] Reversing the superior court, the supreme court held that termination of a father's parental rights was not warranted when his testimony indicated he had made efforts to secure his daughters safety and care by making arrangements with the mother and both maternal grandparents.[1494]

Sawicki v. Haxby

[1477] *Id.* at 49.
[1478] *Id.* at 45, 49–50.
[1479] 194 P.3d 382 (Alaska 2008).
[1480] *Id.* at 383.
[1481] *Id.* at 383–84.
[1482] *Id.* at 384.
[1483] *Id.* at 385–86.
[1484] *Id.* at 387.
[1485] *Id.* at 383.
[1486] 175 P.3d 1269 (Alaska 2008).
[1487] *Id.* at 1275.
[1488] *Id.* at 1270.
[1489] *Id.*
[1490] *Id.* at 1271–72.
[1491] *Id.* at 1272.
[1492] *Id.* at 1275.
[1493] *Id.*
[1494] *Id.*

In *Sawicki v. Haxby*,[1495] the supreme court held that in an action for reduction of child support, once the custodial parent produced prima facie evidence that the supporting parent was underemployed, then the burden of proof shifted to the supporting parent to contradict that evidence.[1496] Sawicki filed a motion for reduction of child support after she quit a well-paying job for one that paid significantly less.[1497] She switched jobs because the previous job had required too much travel.[1498] The court reasoned that prima facie evidence from the custodial parent could consist of showing the change in jobs was "unreasonable."[1499] In determining whether someone is unreasonably employed, the court considered the totality of the circumstances, including work history, prior income, qualifications, education and reasons for leaving the job.[1500] The supreme court noted that in this case, Sawicki did not provide any evidence supporting her assertion that her prior job required significant amounts of travel, and she contradicted herself in her testimony.[1501] The supreme court affirmed the decision of the superior court and held that in an action for reduction of child support, once the custodial parent produced prima facie evidence that the supporting parent was underemployed, the burden of proof shifts to the supporting parent to contradict that evidence.[1502]

Seth D. v. State, Department of Health and Social Services

In *Seth D. v. State, Department of Health and Social Services*,[1503] the supreme court held that an incarcerated father's due process rights were not violated when his request for transport to a hearing on the state's petition to end his parental rights was denied.[1504] Seth had a history of drug use and incarceration for drug possession and violation of probation.[1505] While in prison, the Office of Children's Services filed a petition to terminate Seth's parental rights.[1506] Seth asked to be transferred so that he could attend the hearing in person; his request was denied and he participated by phone until his sentence ended four days into the trial, at which point he attended and testified in person.[1507] The supreme court ruled that there was no violation of Seth's due process rights because there is no procedural due process right for incarcerated parents to be transported to their parental rights termination trials, and Seth testified in person after his sentence ended.[1508] On the more general question of due process claims for Seth as a parent at termination hearings, the court applied the *Mathews v. Eldridge*[1509] balancing test and again concluded that the denial of the transport request did not violate Seth's due process rights.[1510] However, the court warned that in the future, opposition to transport motions must contain a specific showing about the burden of such transport.[1511] Finally, the supreme court held that the lack of evidence supporting Seth's argument concerning his ability to participate via phone and in person sufficiently supported the lower court's decision to deny Seth's transport request.[1512] The supreme court affirmed the superior court, holding that an incarcerated father's due process rights were not violated when his request for transport to a hearing on the state's petition to end his parental rights was denied.[1513]

Skinner v. Hagberg

[1495] 186 P.3d 546 (Alaska 2008).
[1496] *Id.*
[1497] *Id.* at 546–47.
[1498] *Id.*
[1499] *Id.* at 549.
[1500] *Id.* at 550–51.
[1501] *Id.* at 549.
[1502] *Id.*
[1503] 175 P.3d 1222 (Alaska 2008).
[1504] *Id.* at 1225.
[1505] *Id.* at 1225–26.
[1506] *Id.* at 1226.
[1507] *Id.*
[1508] *Id.* at 1227.
[1509] 424 U.S. 319 (1976).
[1510] *Seth D.*, 175 P.3d at 1228–29.
[1511] *Id.* at 1231.
[1512] *Id.* at 1229–30.
[1513] *Id.* at 1222.

In *Skinner v. Hagberg*,[1514] the supreme court held that: (1) a biological parent's duty to pay child support begins on his child's date of birth, not when paternity is adjudicated; and (2) any deductions in child support payments which are used to pay for visitation expenses must be on an actual dollar-for-dollar basis.[1515] Skinner gave birth to a son in January 2002.[1516] Genetic testing conducted in May 2004 confirmed that Hagberg was the child's biological father.[1517] During proceedings to determine legal and physical custody arrangements for the child, the superior court ruled that Hagberg's child support obligation began when genetic testing confirmed that he fathered Skinner's child.[1518] The superior court also ordered that Skinner and Hagberg split visitation expenses equally.[1519] On appeal, the supreme court noted that while paternity adjudication may be a prerequisite to enforcing a child support duty, Hagberg's duty to pay child support arose on his child's date of birth.[1520] The court also reasoned that because children are entitled to receive the full ordered amount of child support, any excess credit against Hagberg's payments that resulted in underpayment violated his son's right to support.[1521] Thus, the only way to ensure that the child receives all of the support to which he is entitled is to deduct visitation expenses on an actual dollar-for-dollar, rather than estimated, basis.[1522] Thus, the supreme court reversed the superior court, holding that: (1) a biological parent's duty to pay child support begins on his child's date of birth, not when paternity is adjudicated; and (2) any deductions in child support payments which are used to pay for visitation expenses must be on an actual dollar-for-dollar basis.[1523]

Smith v. Groleske

In *Smith v. Groleske*,[1524] the supreme court held that due process requires an evidentiary hearing before a court may assess sanctions in a custody case when there are disputed issues of material fact in the parties' affidavits.[1525] After Groelske and Smith divorced, they established a custody agreement where the children would live primarily with Smith, their mother, and would spend seven consecutive weeks of the year with their father, Groelske.[1526] The children were scheduled to visit Groelske, and Smith became concerned about who would be watching her children while they were with their father and advised Groelske that she was preventing the children from visiting him.[1527] Without a hearing, the superior court ordered a motion to enforce visitation, and awarded visitation damages of $5,502.[1528] The supreme court determined there was a high risk that Smith's important interest in not being assessed unwarranted and chilling monetary sanctions could be compromised if the court was permitted to assess sanctions based solely on conflicting affidavits.[1529] Since the fiscal and administrative burden of holding the evidentiary hearing did not outweigh the benefits of possibly avoiding unwarranted sanctions, due process required that Smith be afforded an evidentiary hearing.[1530] The supreme court overturned the superior court, holding that due process requires an evidentiary hearing before the court may assess sanctions in a custody case when there are disputed issues of material fact in the parties' affidavits.[1531]

[1514] 183 P.3d 486 (Alaska 2008).
[1515] *Id.* at 489, 492.
[1516] *Id.* at 487.
[1517] *Id.*
[1518] *Id.* at 488.
[1519] *Id.*
[1520] *Id.* at 489.
[1521] *Id.* at 492.
[1522] *Id.*
[1523] *Id.* at 489, 492.
[1524] 196 P.3d 1102 (Alaska 2008).
[1525] *Id.* at 1106.
[1526] *Id.* at 1104.
[1527] *Id.*
[1528] *Id.* at 1105.
[1529] *Id.* at 1106.
[1530] *Id.* at 1106–07.
[1531] *Id.* at 1106.

Smith v. Stafford

In *Smith v. Stafford*,[1532] the supreme court held that: (1) no cause of action existed for violation of Child in Need of Aid ("CINA") procedures when there was no relevant duty of care, (2) child social workers were entitled to qualified but not absolute immunity from state law claims, and (3) a 42 U.S.C. § 1983 claim may be blocked by qualified immunity under federal law.[1533] Smith was the father of A.B., a minor.[1534] After her birth, A.B. was taken from her parents' custody and placed in the custody of the Office of Child Services ("OCS").[1535] OCS placed social worker Cox and supervisor Stafford in charge of the claim.[1536] Cox required that Smith complete numerous detailed counseling requirements.[1537] The relationship between the two gradually deteriorated to the point where Cox was removed from the case.[1538] Smith was eventually granted custody of A.B. and sued Stafford and Cox, alleging numerous violations of CINA procedures, defamation and privacy torts, and violations of 42 U.S.C. § 1983.[1539] The district court dismissed the claims on defendants' motion for summary judgment based on three alternative grounds.[1540] First, the court held that collateral estoppel barred all of Smith's claims.[1541] Second, at least qualified immunity applied under federal law and barred Smith's § 1983 claim.[1542] Third, either absolute or qualified official immunity applied and barred all of Smith's state law claims.[1543] On appeal, the supreme court grouped Smith's claims into three categories and evaluated the lower court's grant of summary judgment with regard to each.[1544] The supreme court found that the grant of summary judgment was appropriate regarding Smith's CINA claims because no duty of care had been violated.[1545] The court also found that Stafford and Cox were entitled to official immunity for all actions taken within the scope of their duties, but were not entitled to absolute immunity from Smith's tort claims; absolute immunity was unnecessary to protect social workers from lawsuits and denying all claims would prevent victims the opportunity to seek redress.[1546] Therefore, the court found while most of Smith's tort claims were barred by official immunity, an issue of fact existed with regard to Smith's invasion of privacy and defamation claims.[1547] Lastly, summary judgment was appropriate for the § 1983 claim because it was barred by qualified immunity under federal law.[1548] The supreme court vacated and remanded the superior court in part, holding that: (1) no cause of action existed for violation of CINA procedures when there is no relevant duty of care, (2) child social workers are entitled to qualified but not absolute immunity from state law claims, and (3) a 42 U.S.C. § 1983 claim may be blocked by qualified immunity under federal law.[1549]

Tessa v. State, Department of Health and Social Services

In *Tessa v. State, Department of Health and Social Services*,[1550] the supreme court held that a mother's failure to remedy her conduct within a reasonable period of time, after having been given ample opportunity to work on parenting skills, was grounds for the termination of custodial rights.[1551] Tessa's parental custody rights were terminated after an extensive and prolonged process during which child

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[1532] 189 P.3d 1065 (Alaska 2008).
[1533] *Id.* at 1077.
[1534] *Id.* at 1068–69.
[1535] *Id.*
[1536] *Id.*
[1537] *Id.*
[1538] *Id.*
[1539] *Id.* at 1070.
[1540] *Id.*
[1541] *Id.*
[1542] *Id.*
[1543] *Id.*
[1544] *Id.* at 1070–71.
[1545] *Id.* at 1071.
[1546] *Id.* at 1072.
[1547] *Id.*
[1548] *Id.* at 1077.
[1549] *Id.*
[1550] 182 P.3d 1110 (Alaska 2008).
[1551] *Id.* at 1115.

services attempted to reunite her and her daughter, who had been systematically abused.[1552] The trial court separated Tessa from her daughter after determining that Tessa did not show any interest in improving her parenting skills and did not recognize that she had emotional and mental problems that contributed to her daughter's physical and mental condition.[1553] After months of counseling, Tessa still would not acknowledge that her daughter had been abused, and the court found this evinced a lack of concern for her daughter's welfare.[1554] The supreme court affirmed the decision of the superior court, holding that a mother's failure to remedy her conduct within a reasonable period of time, after having been given ample opportunity to work on parenting skills, was grounds for the termination of custodial rights.[1555]

Thomas v. State, Department of Health and Social Services

In *Thomas v. State, Department of Health and Social Services*,[1556] the supreme court held that the parental rights of a father with a long history of substance abuse and incarceration should be terminated.[1557] Thomas H. was the father of two small children.[1558] At birth, the girls had traces of controlled substances in their blood and the Office of Child Services ("OCS") began its involvement with the children.[1559] Thomas had been arrested twelve times since 2001and had a long history of substance abuse and incarceration, although at the time of the trial he had been sober for two years.[1560] Thomas's conduct before the trial led the court to determine that he had failed to address the problems in a reasonable time as required in the statute.[1561] Additionally, OCS had made active efforts to keep the family together, but Thomas's actions, especially his incarcerations, had frustrated OCS's efforts.[1562] Lastly, the court held that allowing Thomas back into the children's life would likely result in physical or emotional harm to the children.[1563] The supreme court affirmed the judgment of the superior court, holding that the parental rights of a father with a long history of substance abuse and incarceration should be terminated.[1564]

Tillmon v. Tillmon

In *Tillmon v. Tillmon*,[1565] the supreme court held that: (1) an individual is entitled to deduct certain expenses from his income for child support calculations, and (2) a modified child support order can only be retroactive back to the date of service.[1566] Clifton and Susan Tillmon filed for divorce after thirteen years of marriage.[1567] Clifton objected to the court's calculation of his child support obligation, arguing that it did not include deductions for work-related daycare payments or involuntary retirement contributions, and that it should be modified because the Tillmon's oldest daughter had begun living with him.[1568] The supreme court held that Clifton could deduct the daycare and retirement payments when calculating his child support; since it could not determine whether the support award had included these deductions, the supreme court remanded the issue of award size to the superior court.[1569] The supreme court also held that the modified support order could be effective no earlier than the date when Clifton's modification motion was served, although it could begin later with good cause.[1570] In part affirming and in part remanding the superior court, the supreme court held that: (1) an individual is entitled to deduct certain expenses from his

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[1552] *Id.*
[1553] *Id.* at 1112–14, 1117.
[1554] *Id.* at 1116.
[1555] *Id.* at 1115.
[1556] 184 P.3d 9 (Alaska 2008).
[1557] *Id.* at 19.
[1558] *Id.* at 10.
[1559] *Id.* at 11.
[1560] *Id.*
[1561] *Id.* at 14.
[1562] *Id.* at 17.
[1563] *Id.*
[1564] *Id.* at 19.
[1565] 189 P.3d 1022 (Alaska 2008).
[1566] *Id.* at 1023.
[1567] *Id.* at 1024.
[1568] *Id.* at 1025.
[1569] *Id.* at 1028–29.
[1570] *Id.* at 1029–30.

income for child support calculations, and (2) a modified child support order can only be retroactive back to the date of service.[1571]

Worland v. Worland

In *Worland v. Worland*,[1572] the supreme court held that when a litigant unreasonably prolongs litigation, a grant of attorney's fees to the adverse party may be acceptable even if the motion for attorneys' fees is not timely.[1573] After four hours of off-the-record settlement negotiations, the parties agreed on the record to the terms of a divorce settlement.[1574] Weeks later, the husband, Charles, had a change of heart regarding some of the terms previously agreed to.[1575] Charles argued that the original agreement omitted material terms and thus was invalid.[1576] The superior court enforced the property settlement agreement and awarded attorneys' fees to Charles's ex-wife, and Charles appealed.[1577] After reviewing Charles's claims about omitted terms, the supreme court found that the original agreement incorporated all material terms and thus was valid.[1578] Moreover, the court held that because Charles unreasonably prolonged the litigation with frivolous arguments, his ex-wife's motion for attorneys' fees was valid even though it was not timely filed, because trial courts have some discretion over such filing deadlines.[1579] Affirming the superior court, the supreme court held that when a litigant unreasonably prolongs litigation, a grant of attorney's fees to the adverse party may be acceptable even if the motion for attorneys' fees is not timely.[1580]

INSURANCE LAW

Ninth Circuit Court of Appeals

Certain Underwriters at Lloyds v. Inlet Fisheries, Inc.

In *Certain Underwriters at Lloyds v. Inlet Fisheries, Inc.*,[1581] the Ninth Circuit held that: (1) the federal maritime doctrine of *uberrimae fidei* applies to marine insurance contracts, (2) vessel pollution insurance is a type of marine insurance for the purposes of *uberrimae fidei*, and (3) a vessel pollution policy may be voided under *uberrimae fidei* for failure to disclose information material to the insurer's risks.[1582] Inlet Fisheries, Inc. and Inlet Fish Producers, Inc. ("Inlet") insured four vessels with a vessel pollution policy from Lloyd's of London ("Lloyd's").[1583] Inlet omitted several facts from its insurance application: its then-current policy was at risk of cancellation for Inlet's failure to survey its vessels and pay premiums, its vessels had questionable seaworthiness, and a fifth Inlet vessel had been involved in two recent environmental incidents.[1584] When Inlet filed a claim under its pollution policy, Lloyd's launched an investigation that uncovered the omissions. Lloyd's then sought a declaratory judgment allowing it to void the policy under *uberrimae fidei*.[1585] This doctrine obliges the insured to voluntarily disclose to the insurer all information that is material in calculating an insurance risk.[1586] The district court held that *uberrimae*

[1571] *Id.* at 1023, 1032.
[1572] 193 P.3d 735 (Alaska 2008).
[1573] *Id.* at 742.
[1574] *Id.* at 737.
[1575] *Id.* at 737–38.
[1576] *Id.* at 739.
[1577] *Id.* at 736.
[1578] *Id.* at 739–41.
[1579] *Id.* at 743.
[1580] *Id.* at 742.
[1581] 518 F.3d 645 (9th Cir. 2008).
[1582] *Id.* at 654–56.
[1583] *Id.* at 648.
[1584] *Id.* at 647–48.
[1585] *Id.* at 648.
[1586] *Id.*

fidei applied and permitted Lloyd's to void the contract.[1587] On appeal, the Ninth Circuit reasoned that Lloyd's could void the policy if *uberrimae fidei* was an established federal admiralty rule that governed Inlet's policy.[1588] Since *uberrimae fidei* had existed in American law for two centuries and was still valid in several Circuit Courts of Appeal, the Ninth Circuit found that it was an established rule and applied to marine insurance contracts.[1589] Because vessel pollution policies share their general terms with typical marine insurance policies, the court held that the similarities in these types of insurance meant that Inlet's policy could be characterized as marine insurance for the purposes of *uberrimae fidei*.[1590] Finally, the Ninth Circuit reasoned that *uberrimae fidei* permitted an insurer to rescind a contract upon a showing that the insured intentionally misrepresented facts or failed to disclose any material fact, regardless of intent.[1591] The court also reasoned that Lloyd's had shown that information about Inlet's previous insurers and vessel conditions was material and because Inlet omitted this information on its application, Lloyd's was entitled to void its policy.[1592] The Ninth Circuit affirmed the district court, holding that: (1) the federal maritime doctrine of *uberrimae fidei* applies to marine insurance contracts, (2) vessel pollution insurance is a type of marine insurance for the purposes of *uberrimae fidei*, and (3) a vessel pollution policy may be voided under *uberrimae fidei* for failure to disclose information material to the insurer's risks.[1593]

Alaska Supreme Court

Amos v. Allstate Insurance Co

In *Amos v. Allstate Insurance Co.*,[1594] the supreme court held that an insurance company may accept late payment of an insurance premium to reinstate coverage for any future accidents without retroactively reinstating coverage for the period of the lapsed payment.[1595] Tatum, a boat owner, was in an accident on August 9, 2000, but his insurer, Allstate, contended that he did not have coverage since he was delinquent in his payments.[1596] Allstate had previously sent Tatum notice that his policy would be cancelled as of July 15 if the full monthly payment was not paid.[1597] Tatum did not make the payment until August 14, five days after the accident occurred.[1598] Allstate then notified Tatum that the policy had been canceled as of July 15 and would be reinstated as of August 15—the date the payment was received.[1599] Tatum filed a complaint against Allstate alleging breach of contract, negligence and bad faith.[1600] Allstate counterclaimed for material misrepresentation and fraud because of backdated checks that Tatum attempted to introduce as evidence.[1601] The trial court found that an insurance company cannot accept payment conditioned upon a lapse in coverage unless that condition is in the policy, and that since Allstate had accepted the payment, they are estopped from arguing that the policy lapsed.[1602] On appeal, the supreme court reversed the decision of the trial court, holding that Tatum's coverage had lapsed between July 15 and August 15.[1603] The court reasoned that under § 21.36.220(a)(1) of the Alaska Statutes, Allstate is allowed to cancel a policy for nonpayment of premiums by written notice, which they provided in this case.[1604] The court further reasoned that, although Allstate accepted payments subsequent to the accident, they made it clear

[1587] *Id.*
[1588] *Id.* at 650.
[1589] *Id.* at 651–52, 653–54.
[1590] *Id.* at 654–55.
[1591] *Id.* at 655.
[1592] *Id.* at 655–56.
[1593] *Id.* at 654–56.
[1594] 184 P.3d 28 (Alaska 2008).
[1595] *Id.* at 37.
[1596] *Id.*
[1597] *Id.* at 30.
[1598] *Id.*
[1599] *Id.*
[1600] *Id.* at 31.
[1601] *Id.*
[1602] *Id.* at 32–33.
[1603] *Id.* at 35.
[1604] *Id.*

that it would not afford retroactive coverage and was only to be effective from that day forward.[1605] Reversing the decision of the lower court, the supreme court held that an insurance company may accept late payment of an insurance premium to reinstate coverage for any future accidents without retroactively reinstating coverage for the period of the lapsed payment.[1606]

Progressive Corp. v. Peter

In *Progressive Corp. v. Peter*,[1607] the supreme court held that: (1) Alaska Civil Rule 68 and § 09.30.065 of the Alaska Statutes require that an offer of judgment include every claim, (2) an underinsured motorist ("UIM") recovery may be considered in denying a request for Rule 68 fees, (3) a party may be treated as a prevailing party if the recovery was not incidental and was related to the main focus of the litigation, and, (4) awarding Alaska Civil Rule 82 ("Rule 82") attorneys' fees based on a UIM already including attorneys' fees is not necessarily duplicative.[1608] Peter was hit by a car and refused both offers of his insurer, Progressive.[1609] The superior court held that the two offers were invalid; Progressive appealed.[1610] Progressive argued that: (1) its offer of judgment satisfied Alaska Civil Rule 68 because it satisfied the purposes and texts of Rule 68 and § 09.30.065, (2) its second offer was greater than the judgments finally rendered, and (3) the Peters were not entitled to attorneys' fees.[1611] The court found that Rule 68 and § 09.30.065 required an offer to include every claim,[1612] and because Progressive's first offer did not include every claim and would not have ended the entire litigation, the first offer was invalid.[1613] The court next found that Progressive's argument that the second offer was greater than the judgments—because voluntary payments and partial settlements should not be the standard for evaluating offers of judgment—would encourage abusive offer-of-judgment tactics.[1614] The court also determined that because trial courts have broad discretion in determining which party "prevails," and because the Peters needed counsel in order to enforce the UIM payment, the trial court properly awarded attorneys' fees both under the terms of the UIM and Rule 82.[1615] Affirming the superior court, the supreme court held that: (1) Rule 68 and § 09.30.065 require that an offer of judgment include every claim, (2) a UIM recovery may be considered in denying a request for Rule 68 fees, (3) a party may be treated as a prevailing party if the recovery was not incidental and was related to the main focus of the litigation, and (4) awarding Rule 82 attorneys' fees based on a UIM already including attorneys' fees is not necessarily duplicative.[1616]

Sidney v. Allstate Insurance Co.

In *Sidney v. Allstate Insurance Co.*,[1617] the supreme court held that: (1) the provider of underinsured motorist ("UIM") coverage was liable only for the portion of damages in excess of available liability insurance, (2) the provider was not liable for prejudgment interest and attorneys' fees when the insured party elected to forgo those add-ons on the initial settlement with the liability insurer, and (3) the insured party was entitled to a pro rata share of attorneys' fees.[1618] Sidney was injured when a car driven by Kanteh struck her vehicle.[1619] Sidney received $25,000 from Allstate for medical payments,[1620] and Safeco, Kanteh's insurance company, paid Sidney $25,000 and assumed responsibility for the $25,000 medical payments lien asserted by Allstate against Kanteh, resulting in a $50,000 net settlement to Sidney.[1621] An

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[1605] *Id.* at 37.
[1606] *Id.*
[1607] 195 P.3d 1083 (Alaska 2008).
[1608] *Id.* at 1088, 1090, 1094, 1095.
[1609] *Id.* at 1086.
[1610] *Id.* at 1085.
[1611] *Id.* at 1087, 1090, 1092–94.
[1612] *Id.* at 1088.
[1613] *Id.*
[1614] *Id.* at 1090.
[1615] *Id.* at 1094–95.
[1616] *Id.* at 1088, 1090, 1094, 1095.
[1617] 187 P.3d 443 (Alaska 2008).
[1618] *Id.* at 456.
[1619] *Id.* at 445.
[1620] *Id.* at 446.
[1621] *Id.*

arbitrator awarded Sidney total damages of $118,432.[1622] The superior court reduced many of these amounts, and both parties appealed, Sidney arguing for the original amounts and Allstate challenging the superior court's award of attorneys' fees and interest.[1623] Under Alaska law, an injured party may supplement available liability coverage by purchasing UIM insurance, though an injured person must exhaust all available underlying policy limits before pursuing UIM benefits.[1624] Here, the supreme court reduced Allstate's liability by $50,000, reasoning that Allstate was only liable for the amount above the $50,000 Sidney had already collected.[1625] The supreme court reasoned that since Sidney elected not to pursue prejudgment interest and attorneys' fees from Safeco in the initial settlement, she was not underinsured for those amounts, and was thus not entitled to UIM recovery.[1626] Sidney, however, was entitled to recover from Allstate a pro rata share of attorneys' fees from pursuing the settlement, as the settlement procured a direct benefit for Allstate.[1627] The supreme court affirmed in part and reversed in part, holding that: (1) the provider of UIM coverage was liable only for the portion of damages in excess of available liability insurance, (2) the provider was not liable for prejudgment interest and attorneys' fees when the insured party elected to forgo those add-ons on the initial settlement with the liability insurer, and (3) the insured party was entitled to a pro rata share of attorneys' fees.[1628]

State Farm Mutual Automobile Insurance Co. v. Dowdy

In *State Farm Mutual Automobile Insurance Co. v. Dowdy*,[1629] the supreme court held that insurance policies that extend coverage to persons who are injured "in the same accident" cannot be reasonably construed to refer to emotional injuries that result from viewing a dead or injured person away from an accident scene.[1630] Asa and Barbara Dowdy suffered severe emotional distress as a result of their daughter's death in a traffic accident.[1631] The Dowdys were not at the scene of the accident.[1632] Their personal insurance policy included underinsured motorist coverage with additional per-person policy limits for individuals who are injured "in the same accident" as another person.[1633] The superior court found that the Dowdys were injured in the same accident as their daughter and awarded them compensatory damages.[1634] State Farm appealed.[1635] The supreme court reasoned that under the facts and circumstances at issue, it was clear that "in the same accident" could not reasonably be construed to cover their emotional distress claims.[1636] The Dowdys were not injured in, nor did they witness, the accident.[1637] Rather, the Dowdys were injured as a result of the death of their daughter in an accident.[1638] The conclusion that either Asa or Barbara Dowdy were injured "in the same accident" would stretch the meaning of the phrase beyond any generally accepted usage.[1639] The supreme court reversed the superior court, holding that insurance policies that extend coverage to persons who are injured "in the same accident" cannot be reasonably construed to refer to emotional injuries that result from viewing a dead or injured person away from an accident scene.[1640]

[1622] *Id.*
[1623] *Id.* at 447.
[1624] *Id.* at 448.
[1625] *Id.* at 450.
[1626] *Id.* at 453.
[1627] *Id.* at 453–54.
[1628] *Id.* at 456.
[1629] 192 P.3d 994 (Alaska 2008).
[1630] *Id.* at 995.
[1631] *Id.*
[1632] *Id.*
[1633] *Id.* at 995–96.
[1634] *Id.* at 998.
[1635] *Id.*
[1636] *Id.* at 1002.
[1637] *Id.*
[1638] *Id.*
[1639] *Id.* at 999.
[1640] *Id.* at 995.

Whittier Properties, Inc. v. Alaska National Insurance. Co.

In *Whittier Properties, Inc. v. Alaska National Insurance Co.*,[1641] the supreme court held that: (1) gasoline leaking from a broken pipe constitutes a "pollutant" within the meaning of an insurance policy's language, and (2) it was therefore unreasonable to believe that damages from the leaked gasoline would be covered by the insurance policies.[1642] The insured, owner of a gas station, had installed a 20,000 gallon underground gasoline storage tank.[1643] The insurer issued the insured five liability insurance policies over the course of the insured's ownership of the station, each of which contained an absolute pollution exclusion clause that explicitly excluded damages from pollutants.[1644] A year after the gas station closed, local environmental authorities investigated the land and found almost a foot of free-standing gasoline as a result of a broken pipe in the storage unit.[1645] A number of lawsuits were brought by the state and neighbors who claimed property damage from the leak.[1646] The insured sought indemnity from the insurer, who denied coverage, claiming the leaked gasoline was a pollutant that fell within the absolute pollution exclusion clauses of the policies.[1647] The insured sued the insurer for various contract claims, after which both parties moved for summary judgment, and the superior court granted the insurer's motions.[1648] The supreme court reasoned that contract exclusions should be construed narrowly in favor of the insured and that most jurisdictions have found these clauses unambiguous; the clause here was unambiguous because once the gasoline had leaked from the storage unit, it was useless and is therefore properly characterized as a pollutant.[1649] Under Alaska's doctrine of reasonable expectations, courts should construe insurance policies to give effect to the insured's reasonable expectations, but as determined by an objective standard.[1650] Here, the insured's expectations of coverage were not reasonable.[1651] The supreme court affirmed the superior court, holding that: (1) gasoline leaking from a broken pipe constitutes a "pollutant" within the meaning of an insurance policy's language, and (2) it was therefore unreasonable to believe that damages from the leaked gasoline would be covered by the insurance policies.[1652]

NATIVE LAW

Ninth Circuit Court of Appeals

Stratman v. Leisnoi, Inc.

In *Stratman v. Leisnoi, Inc.*,[1653] the Ninth Circuit held that a corporation can qualify as a deficiency village corporation under the Alaska National Interest Lands Conservation Act ("ANILCA") even if the corporation does not meet the requirements established under the Alaska Native Claims Settlement Act ("ANCSA").[1654] In 1976, Stratman filed suit to enjoin the Department of the Interior from issuing land to Leisnoi, Inc. on Kodiak Island because the village did not satisfy the ANCSA requirements.[1655] ANILCA was passed by Congress in 1980 to settle any land disputes that remained after

[1641] 185 P.3d 84 (Alaska 2008).
[1642] *Id.* at 90–92, 94.
[1643] *Id.* at 87.
[1644] *Id.*
[1645] *Id.*
[1646] *Id.* at 87–88.
[1647] *Id.*
[1648] *Id.* at 88.
[1649] *Id.* at 88–91.
[1650] *Id.* at 91.
[1651] *Id.* at 91–92.
[1652] *Id.* at 90–92, 94.
[1653] 545 F.3d 1161 (9th Cir. 2008).
[1654] *Id.* at 1163.
[1655] *Id.* at 1166.

ANCSA.[1656] Stratman argued that the language of ANILCA incorporates the eligibility requirements of the older ANCSA.[1657] The supreme court did not agree; the purpose of ANILCA was to facilitate the exchange of deficiency lands as soon as possible, and therefore Leisnoi qualified as an eligible village regardless of whether it met the ANCSA requirements.[1658] The court further held that Leisnoi's eligibility under ANCSA was irrelevant because courts must follow valid legislation even if Congress acted under a misapprehension of fact or law.[1659] Thus, the Ninth Circuit affirmed the district court's dismissal because a corporation can qualify as a deficiency village corporation under ANILCA even if the corporation does not meet the requirements established under ANCSA.

Alaska Supreme Court

Bodkin v. Cook Inlet Region, Inc.

In *Bodkin v. Cook Inlet Region, Inc.*,[1660] the supreme court held that: (1) the Alaska Native Claims Settlement Act ("ANCSA") authorizes elder benefit programs that limit beneficiaries to elders who owned original shares of stock,[1661] and (2) constitutional challenges to an act of Congress must first be made in a federal court before a state court can exercise jurisdiction.[1662] Pursuant to ANCSA, Cook Inlet Region, Inc. ("CIRI") created an Elders Benefit Program that provided quarterly monetary payments to any shareholder older than sixty-five years who received CIRI shares as an original enrollee.[1663] Several CIRI shareholders who did not benefit from this arrangement challenged the plan, claiming: (1) ANCSA did not authorize CIRI's benefit plan, and (2) if ANCSA did authorize such a plan it would violate the Fifth Amendment's takings clause.[1664] The supreme court held that both the plain language and the legislative history of ANCSA expressly permit such benefit plans.[1665] Also, the court found that because the federal Tucker Act vests federal courts with jurisdiction over claims based upon an act of Congress, the State supreme court did not have jurisdiction to hear the constitutional challenges.[1666] The supreme court affirmed the superior court, holding that: (1) the Alaska Native Claims Settlement Act ("ANCSA") authorizes elder benefit programs that limit beneficiaries to elders who owned original shares of stock,[1667] and (2) constitutional challenges to an act of Congress must first be made in a federal court before a state court can exercise jurisdiction.[1668]

Starr v. George

In *Starr v. George*,[1669] the supreme court held that an adoption proceeding in a tribal council was not enforceable in state court on the basis of full faith and credit when an interested party to the proceeding did not receive proper notice of the tribal council's hearings.[1670] The Starrs adopted two of their grandchildren through proceedings in their local tribal council.[1671] When the tribal adoptions took place, the Starrs and the children's other grandparents, the Georges, were fighting in state court over custody and guardianship of the children.[1672] The Starrs attempted to use the tribal adoption to dismiss the state court

[1656] *Id.* at 1161, 1165–66.
[1657] *Id.* at 1168.
[1658] *Id.* at 1170.
[1659] *Id.* at 1172.
[1660] 182 P.3d 1072 (Alaska 2008).
[1661] *Id.* at 1076–78.
[1662] *Id.* at 1078.
[1663] *Id.* at 1074.
[1664] *Id.* at 1076.
[1665] *Id.* at 1077–78.
[1666] *Id.* at 1077–79.
[1667] *Id.* at 1076–78.
[1668] *Id.* at 1078.
[1669] 175 P.3d 50 (Alaska 2008).
[1670] *Id.* at 59.
[1671] *Id.* at 52.
[1672] *Id.*

proceedings, but the trial court refused and granted custody to the Georges.[1673] The Starrs appealed, claiming that the tribal council's decision was entitled to full faith and credit in state courts.[1674] Citing precedent, the supreme court first determined that the Indian Child Welfare Act's divorce exception does not extend to custody disputes between grandparents or other members of a child's extended family.[1675] The court then found that the Georges' involvement in state custody proceedings entitled them to notice of the tribal council's adoption proceedings.[1676] Since the Georges never received notice, their due process rights were violated.[1677] The court reasoned that just as Alaska is not required to give full faith and credit to procedurally deficient decisions in other states, it is also not required to do so for procedurally deficient tribal council proceedings.[1678] Thus, the supreme court affirmed the superior court's order denying the Starrs' motion to dismiss their child custody case, holding that an adoption proceeding in a tribal council was not enforceable in state court on the basis of full faith and credit when an interested party to the proceeding did not receive proper notice of the tribal council's hearings.[1679]

Wilson v. State

In *Wilson v. State*,[1680] the supreme court held that the Office of Child Services ("OCS") complied with the Indian Child Welfare Act ("ICWA") by making active efforts to keep a family together before filing to retain custody of four children.[1681] OCS learned that four Alaska Native children were living in a physically abusive home, and OCS removed them from their parents' custody.[1682] After obtaining temporary custody over the children, OCS devised and attempted to implement a rehabilitation plan for the parents—an ICWA requirement before OCS can file for permanent custody.[1683] The parents would not comply with the OCS plan, refusing to attend classes and failing to comply with the terms of the OCS-supervised visits with the children.[1684] The superior court granted the OCS request for full custody, finding that the efforts made by OCS constituted "active efforts" under the ICWA.[1685] The supreme court agreed and rejected the father's argument that OCS had not complied with ICWA; the court emphasized that OCS continued working with the parents despite the father's repeated violent threats against OCS social workers.[1686] Moreover, OCS attempted to give the parents financial assistance so that they could afford to drive to parenting classes and visitations, and OCS workers went beyond their normal operating procedures to organize OCS-supervised visitations for the mother.[1687] Therefore, these sincere actions constituted "active efforts" under the ICWA, even though they were unsuccessful.[1688] The supreme court affirmed the superior court, holding that OCS complied with the ICWA by making active efforts to keep a family together before filing to retain custody of four children.[1689]

PROPERTY LAW

[1673] *Id.* at 53.
[1674] *Id.*
[1675] *Id.* at 54.
[1676] *Id.* at 56–57.
[1677] *Id.* at 57.
[1678] *Id.* at 57–58.
[1679] *Id.* at 59.
[1680] 185 P.3d 94 (Alaska 2008).
[1681] *Id.* at 103.
[1682] *Id.* at 97.
[1683] *Id.* at 97–99.
[1684] *Id.* at 98–99.
[1685] *Id.* at 99–100.
[1686] *Id.* at 101–02.
[1687] *Id.* at 102–03.
[1688] *Id.* at 103.
[1689] *Id.*

Alaska Supreme Court

Black v. Municipality of Anchorage, Board of Equalization

In *Black v. Municipality of Anchorage, Board of Equalization*,[1690] the supreme court held that land under and around an owner's condominium was a limited common element associated with the condominium unit and was therefore subject to taxation.[1691] Anchorage assessed taxes for the land around a condominium unit,[1692] and Black appealed, claiming that he did not own the land and should not have to pay taxes on it.[1693] The supreme court reasoned that under Alaska law, limited common elements attached to condominiums.[1694] Since the owners' treatment of the land indicated it was reserved for the use of one or more (but less than all) owners,[1695] the land was thus a limited common element attributable to the owner of the condominium unit attached to the land.[1696] Anchorage was therefore permitted to tax Black for both the condominium unit and the limited common element.[1697] Further, Anchorage was taxing Black for the limited common element, just as it did for any other condominium owner, so the tax did not violate his equal protection rights.[1698] The supreme court affirmed the superior court's ruling that the land under and around the owner's condominium was a limited common element associated with the condominium unit, and was therefore subject to taxation.[1699]

Griswold v. City of Homer

In *Griswold v. City of Homer*,[1700] the supreme court held that an initiative amending the city's zoning code was invalid because the City Council did not have the authority to pass zoning amendments without involving the Advisory Planning Commission.[1701] The residents of Homer approved an initiative increasing the floor area limitations for retail and wholesale stores in the Commercial District to 66,000 square feet.[1702] Griswold, a Homer resident, filed suit, claiming that the initiative was invalid.[1703] The supreme court reasoned that the Alaska Statutes required that the city's Advisory Planning Commission have an active role in developing a comprehensive plan for reviewing zoning recommendations, to reinforce their role in implementing organized social development.[1704] Since the initiatives approved by the City Council bypassed the Planning Commission entirely, the zoning by initiative was invalid.[1705] The supreme court reversed the superior court, holding that an initiative amending the zoning code was invalid because the City Council did not have the authority to pass zoning amendments without involving the Advisory Planning Committee.[1706]

Vanek v. State, Board of Fisheries

In *Vanek v. State, Board of Fisheries*,[1707] the supreme court held that fishing permits issued by the Alaska Commercial Fishing Entry Commission ("CFEC") were not property interests under the Takings Clauses of the Federal and Alaska Constitutions.[1708] After commercial fishery regulations were repeatedly

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[1690] 187 P.3d 1096 (Alaska 2008).
[1691] *Id.* at 1106.
[1692] *Id.* at 1098.
[1693] *Id.*
[1694] *Id.* at 1101.
[1695] *Id.* at 1100.
[1696] *Id.* at 1101.
[1697] *Id.*
[1698] *Id.* at 1102.
[1699] *Id.* at 1106.
[1700] 186 P.3d 558 (Alaska 2008).
[1701] *Id.* at 563.
[1702] *Id.* at 560.
[1703] *Id.*
[1704] *Id.* at 562.
[1705] *Id.* at 563.
[1706] *Id.* at 565.
[1707] 193 P.3d 283 (Alaska 2008).
[1708] *Id.* at 285.

changed between 1996 and 2005 to limit the salmon harvest and shorten the commercial fishing season, commercial salmon fishers sued the State for the unconstitutional taking of private property for public use without just compensation.[1709] The superior court granted the State's motion to dismiss, and the fishers appealed.[1710] The supreme court reasoned that the CFEC permits were not private property under the takings clauses because: (1) § 16.43.150(e) of the Alaska Statutes defined an entry permit as a "use privilege,"[1711] (2) characterizing CFEC permits as private property would violate §§ 3 and 5 of Article VIII of the Alaska Constitution,[1712] and (3) past case law did not support characterizing CFEC permits as property for purposes of the Takings Clauses.[1713] With regard to the prior case law, the court had previously characterized CFEC permits as property for purposes of Inheritance and the Due Process Clauses of the Alaska Constitution, but distinguished the same permits for purposes of the Takings Clauses.[1714] Affirming the superior court, the supreme court held that fishing permits issued by CFEC were not property interests under the Takings Clauses of the Federal and Alaska Constitutions.[1715]

TORT LAW

United States Supreme Court

Exxon Shipping Co. v. Baker

In *Exxon Shipping Co. v. Baker*,[1716] the United States Supreme Court held that: (1) the Clean Water Act's ("CWA") water pollution penalties did not preempt punitive damage awards in maritime spill cases,[1717] and (2) punitive damages cannot exceed compensatory damages in maritime cases.[1718] The Exxon Valdez ran aground on a reef and spilled eleven million gallons of crude oil into Prince William Sound.[1719] In the aftermath of the disaster, a group of commercial fishermen, Native Alaskans, and landowners brought a class action suit to recover for their economic losses stemming from the oil spill.[1720] A jury ultimately awarded the plaintiffs $287 million in compensatory damages and $5 billion in punitive damages.[1721] Exxon appealed the punitive damages award, claiming that the CWA foreclosed the award of punitive damages and that the punitive damages award was excessive as a matter of maritime common law.[1722] In determining whether the CWA foreclosed the award of punitive damages, the Supreme Court noted that the statute allowed compensatory damages for injuries resulting from oil spills and other water pollution.[1723] The Court decided that it would be untenable to claim that the CWA preempted punitive damages but not compensatory damages.[1724] Since nothing in the statute pointed to that result, the Court rejected Exxon's attempt to sever the punitive damage remedy from the causes of action under the CWA.[1725] Further, the Court observed that the CWA did not contain a clear indication of congressional intent to preempt punitive damages, nor was it likely that the CWA's remedial scheme would be frustrated

[1709] *Id*. at 286.
[1710] *Id.*
[1711] *Id*. at 288.
[1712] *Id.* at 290.
[1713] *Id.* at 292.
[1714] *Id.* at 291–92.
[1715] *Id.* at 285.
[1716] 128 S. Ct. 2605 (2008).
[1717] *Id.* at 2617.
[1718] *Id.* at 2633.
[1719] *Id.* at 2612–13.
[1720] *Id.* at 2613.
[1721] *Id.* at 2614.
[1722] *Id.*
[1723] *Id.* at 2619.
[1724] *Id.*
[1725] *Id.*

by allowing punitive damages for private harms.[1726] Thus, punitive damages were allowed against Exxon.[1727] The Court also addressed the issue of whether the punitive damages leveled against Exxon were excessive. The Court reviewed three different approaches to arrive at a standard for assessing maritime punitive damages before ultimately deciding that punitive damages awards should be pegged to compensatory damages in a fixed ratio.[1728] In determining what would constitute a proper ratio, the Court relied on studies of punitive damages awards in thousands of cases.[1729] Because the median ratio of punitive damages to compensatory damages in those studies was 0.65:1, the Court determined that punitive damages should not exceed compensatory damages in maritime cases.[1730] The United States Supreme Court reversed the punitive damages award against Exxon, holding that: (1) the CWA water pollution penalties did not preempt punitive damage awards in maritime spill cases,[1731] and (2) punitive damages cannot exceed compensatory damages in maritime cases.[1732]

Alaska Supreme Court

Burnett v. Covell

In *Burnett v. Covell*,[1733] the supreme court held that: (1) the doctrine of strict products liability does not extend to business owners who have furniture that clients may use, and (2) a plaintiff in a negligence claim must show that evidence can be produced that would enable a jury to decide whether the defendant has breached his duty of care.[1734] Burnett visited Covell, his lawyer, for a meeting in Covell's office.[1735] Burnett sat on one of Covell's chairs and it broke, prompting Burnett to sue Covell under the doctrines of strict products liability and negligence.[1736] The superior court granted Covell summary judgment on the strict products liability claim and partial summary judgment on the negligence claim.[1737] The supreme court affirmed on both counts.[1738] First, strict products liability only extends to parties who have placed a product in the stream of commerce.[1739] Offering a chair for clients to use while in a business owner's office does not place the chair in the stream of commerce, and therefore Covell could not be liable under strict products liability.[1740] Second, a plaintiff in a negligence action must have evidence that the defendant had actual or constructive knowledge of the alleged danger.[1741] Burnett did not have any evidence that the chair had shown signs of deterioration or that it was common practice to replace chairs once they have reached a particular age, and therefore there was no evidence to suggest that Covell had actual or constructive knowledge of the chair's dangerous condition.[1742] Thus, the supreme court affirmed the decision of the superior court, holding that: (1) the doctrine of strict products liability does not extend to business owners who have furniture that clients may use, and (2) a plaintiff in a negligence claim must show that evidence can be produced that would enable a jury to decide whether the defendant has breached his duty of care.[1743]

[1726] *Id.*
[1727] *Id.*
[1728] *Id.* at 2627–33.
[1729] *Id.* at 2633.
[1730] *Id.*
[1731] *Id.* at 2617.
[1732] *Id.* at 2633.
[1733] 191 P.3d 985 (Alaska 2008).
[1734] *Id.* at 991.
[1735] *Id.* at 987.
[1736] *Id.*
[1737] *Id.*
[1738] *Id.* at 991.
[1739] *Id.* at 988.
[1740] *Id.* at 988–89.
[1741] *Id.* at 989.
[1742] *Id.* at 991.
[1743] *Id.*

Capolicchio v. Levy

In *Capolicchio v. Levy*,[1744] the supreme court held that the superior court was not obliged to instruct a pro se litigant on his right to file a response to a motion for summary judgment.[1745] Capolicchio, a short-term resident of a homeless shelter, was denied entrance and evicted after violating the shelter's policies against alcohol consumption and misconduct.[1746] Capolicchio, acting pro se, filed suit for discrimination and harassment.[1747] The superior court did not inform Capolicchio of his right to respond to a motion for summary judgment, and granted summary judgment and attorneys' fees to the defendants.[1748] The supreme court found that the superior court was not required, under *Bauman*, to notify a pro se litigant of his right to file when he has filed nothing.[1749] The court found that the lower court properly found no prima facie case for discrimination because Capolicchio failed to deny Levy's allegations that his eviction occurred for violating shelter rules.[1750] Therefore, the lower court's decision did not violate Capolicchio's constitutional rights.[1751] Affirming the superior court, the supreme court held that the superior court was not obliged to instruct a pro se litigant on his right to file a response to a motion for summary judgment.[1752]

Edenshaw v. Safeway, Inc.

In *Edenshaw v. Safeway, Inc*,[1753] the supreme court held that actual or constructive notice of a hazardous condition is not an element of a prima facie case in a slip-and-fall action against a grocery store owner.[1754] Edenshaw slipped and fell at a grocery store owned by Safeway, Inc.[1755] Safeway removed the case to federal court and moved for summary judgment on the grounds that: (1) it fulfilled its duty of care with a "regularized method of finding hazards," and (2) it had no notice of the hazard in the location of the fall.[1756] After denial of the motion for summary judgment and motion for reconsideration, Safeway moved, under Alaska Rule of Appellate Procedure 407, to certify the question of whether or not notice of an unsafe condition is an element of a prima facie case in slip-and-fall actions.[1757] The supreme court rejected the argument that the rule from road hazard cases—that actual or constructive notice to the state of a dangerous condition was a necessary element for proving the negligent maintenance of a road—should be extended to injuries in grocery stores.[1758] Rather, noting the differences between a highway and a grocery store, the supreme court applied the previously established general rule of negligence, requiring reasonableness in the maintenance of property in light of all circumstances.[1759] The supreme court held that actual or constructive notice of a hazardous condition is not an element of a prima facie case in a slip-and-fall action against a grocery store owner.[1760]

Estate of Logusak ex rel. Logusak v. City of Togiak

In *Estate of Logusak ex rel. Logusak v. City of Togiak*,[1761] the supreme court held that: (1) police officers did not breach their duty to protect a girl when they acted reasonably in releasing her to her parents, and (2) the officers were immune from suit for their discretionary acts.[1762] Sixteen-year-old

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[1744] 194 P.3d 373 (Alaska 2008).
[1745] *Id.* at 375.
[1746] *Id.* at 376.
[1747] *Id.*
[1748] *Id.*
[1749] *Id.* at 379.
[1750] *Id.* at 380.
[1751] *Id.*
[1752] *Id.* at 382.
[1753] 186 P.3d 568 (Alaska 2008).
[1754] *Id.* at 569.
[1755] *Id.*
[1756] *Id.*
[1757] *Id.*
[1758] *Id.* at 570.
[1759] *Id.*
[1760] *Id.* at 571.
[1761] 185 P.3d 103 (Alaska 2008).
[1762] *Id.* at 110.

Logusak killed herself shortly after being released to her parents from police custody.[1763] Her parents sued the city, alleging the police officers were negligent in failing to keep their daughter in protective custody.[1764] The supreme court reasoned that because the officers acted reasonably in releasing Logusak to her parents and because her parents failed to show that there was a lawful reason to keep her in custody, the officers did not breach their duty.[1765] Additionally, because Logusak's parents failed to show the officers' decision was capricious or malicious, the decision was an exercise of discretion and thus immune under discretionary function official immunity.[1766] The supreme court affirmed the superior court's grant of summary, holding that: (1) police officers did not breach their duty to protect a girl when they acted reasonably in releasing her to her parents, and (2) the officers were immune from suit for their discretionary acts.[1767]

Jarvill v. Porky's Equipment, Inc.

In *Jarvill v. Porky's Equipment, Inc.*,[1768] the supreme court held that in products liability cases, the statute of limitations begins to run when the injury or damage is suffered.[1769] Jarvill contracted with Haag, an employee of Porky's, to construct a boat for $90,000.[1770] In order to secure financing, Jarvill hired an inspector who noted that the hull needed external support.[1771] Less than three years after purchase, the boat sank while at the dock.[1772] Jarvill sued, claiming product defect, breach of warranty, and negligence.[1773] The superior court found that the two-year statute of limitations had expired because it had started running when Jarvill's agent, the inspector, knew that no external support for the hull had been provided.[1774] The supreme court noted that short statutes of limitations should be construed narrowly, and that the statute of limitations begins to run when the damage is suffered, rather than at the time of sale, since the right of action begins only when the damages actually occur.[1775] Since the damages began accruing with the sinking of the ship, so too did the statute of limitations.[1776] The fact that Jarvill's agent knew of problems did not begin the statute of limitations because no damage had been suffered at that point.[1777] Reversing the superior court in relevant part, the supreme court held that in products liability cases, the statute of limitations begins to run when the injury or damage is suffered.[1778]

Maddox v. Hardy

In *Maddox v. Hardy*,[1779] the supreme court held that a bill of sale was sufficient to constitute transfer of title, preventing the transferor from joint and several liability resulting from use of the property after the transfer.[1780] Lorenz, Maddox's neighbor, started a large fire to remove debris and garbage from her property, causing embers, smoke, and pieces of metal from the fire to land on Maddox's property, covering it with ash.[1781] Maddox asserted multiple tort claims against Lorenz, including nuisance, negligence, and offensive contact, and asked for compensatory and punitive damages.[1782] Maddox also attempted to impose joint and several liability on Hardy, because Hardy had sold the property to Lorenz

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[1763] *Id.* at 104.
[1764] *Id.*
[1765] *Id.* at 108.
[1766] *Id.* at 110.
[1767] *Id.*
[1768] 189 P.3d 335 (Alaska 2008).
[1769] *Id.* at 340.
[1770] *Id.* at 336.
[1771] *Id.*
[1772] *Id.* at 337.
[1773] *Id.*
[1774] *Id.*
[1775] *Id.* at 340.
[1776] *Id.*
[1777] *Id.*
[1778] *Id.*
[1779] 187 P.3d 486 (Alaska 2008).
[1780] *Id.* at 491–93.
[1781] *Id.* at 490.
[1782] *Id.*

prior to the fire but had not yet executed and recorded the quitclaim deed.[1783] The jury found Lorenz and another co-defendant partially liable in nuisance, but declined to allocate any fault to Hardy.[1784] The supreme court refused to impose joint and several liability on Hardy, holding that execution of the bill of sale was sufficient to transfer title to Lorenz.[1785] Affirming the superior court in relevant part, the supreme court held that a bill of sale was sufficient to constitute transfer of title, preventing the transferor from joint and several liability resulting from use of the property after the transfer.[1786]

Moore v. Peak Oilfield Service Co.

In *Moore v. Peak Oilfield Service Co.*,[1787] the supreme court held that: (1) a driving while intoxicated conviction ("DWI") establishes that the driver was reckless and negligent as a matter of law, and (2) whether the driver's recklessness and negligence legally caused the accident is a genuine issue of material fact that precludes summary judgment.[1788] Moore's car overturned and his passenger was seriously injured when he hit a dead moose in the road, which had been struck and killed by a truck owned by Peak Oilfield Service ("Peak").[1789] Moore's passenger sued Peak, who filed a third-party claim against Moore for comparative fault because the appellant was convicted of driving while intoxicated during the accident.[1790] A jury found Peak not liable, but did not reach the question of Moore's comparative fault in causing the accident.[1791] After an appeal and remand, the jury found Peak liable and Peak appealed, arguing that Moore's DWI established that he was reckless and negligent as a matter of law.[1792] The supreme court reasoned that if a defendant pleaded no contest to a serious crime and had a fair trial leading to a conviction, he is precluded from denying an element of a civil action that the conviction establishes.[1793] Because a DWI is a serious crime, and the appellant did not contest it after a fair trial, the DWI established that Moore was reckless and negligent.[1794] Moore may still argue that his recklessness and negligence was not the legal cause of the accident, but he cannot contest that he was reckless and negligent.[1795] The supreme court reversed the superior court's denial of partial summary judgment and remanded the case to the superior court, holding that: (1) a DWI establishes that the driver was reckless and negligent as a matter of law; and (2) whether the driver's recklessness and negligence legally caused the accident is a genuine issue of material fact that precludes summary judgment.[1796]

Noffke v. Perez

In *Noffke v. Perez*,[1797] the supreme court held that: (1) a court may not exclude medical records as hearsay when the records meet the business exception to the hearsay rule and exclusion prejudices the party trying to enter the evidence, (2) a court may require an expert witness to produce tax returns for himself and his employer when their probative value outweighs privacy concerns, and (3) compliance with the posted speed limit does not *ipso facto* rule out negligence.[1798] Jose Perez, the injured driver of a car, and his passenger, Neyda Perez, sued Dora Noffke, the driver of a car that struck Perez's vehicle in May 2003.[1799] Noffke conceded negligence but the jury determined the legal cause of injury and damages.[1800] The jury

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[1783] *Id.* at 490, 492.
[1784] *Id.* at 491.
[1785] *Id.* at 492.
[1786] *Id.* at 491–93.
[1787] 175 P.3d 1278 (Alaska 2008) (per curiam).
[1788] *Id.* at 1280.
[1789] *Id.* at 1279.
[1790] *Id.*
[1791] *Id.*
[1792] *Id.*
[1793] *Id.* at 1280.
[1794] *Id.*
[1795] *Id.*
[1796] *Id.*
[1797] 178 P.3d 1141 (Alaska 2008).
[1798] *Id.* at 1143, 1148, 1151–52, 1153.
[1799] *Id.* at 1143.
[1800] *Id.*

awarded $102,000 to the Perezes and the trial court entered final judgment in January 2006.[1801] Noffke appealed, arguing that: (1) certain exhibits should have been admitted as evidence and not treated as hearsay, and (2) his expert witness and the witness's employer should not have to submit their tax returns.[1802] The supreme court held that the medical records met the foundational requirements for the business exception to the hearsay rule and that Perez waived any authenticity or foundation objections during the pretrial conference.[1803] The supreme court also held that the lower court's error prejudiced Noffke because her defense focused on the Perezes' preexisting medical conditions, which could not be fully demonstrated without the records.[1804] Additionally, the supreme court held that the risk of bias outweighed privacy concerns regarding disclosure of the expert witness's tax returns, and thus the tax returns were discoverable.[1805] Lastly, the supreme court held that the trial court erred when it granted a directed verdict in favor of Perez on the issue of comparative negligence.[1806] The question to be evaluated was whether a jury could have found Jose Perez breached his duty to drive safely in light of the road conditions, road work, and speed at which other nearby cars were traveling.[1807] The mere fact of compliance with the speed limit did not mean Perez was not a negligent driver.[1808] In part affirming and in part reversing the superior court, the supreme court held that: (1) a court may not exclude medical records as hearsay when the records meet the business exception to the hearsay rule and exclusion prejudices the party trying to enter the evidence, (2) a court may require an expert witness to produce tax returns for himself and his employer when their probative value outweighs privacy concerns, and (3) compliance with the posted speed limit does not *ipso facto* rule out negligence.[1809]

Rhodes v. Erion

In *Rhodes v. Erion*,[1810] the supreme court held that an award of attorneys' fees under Alaska Civil Rule 82 ("Rule 82") may be proper when the grant of attorneys' fees will not impair access to the courts, even when the fees are greater than the amount in controversy.[1811] Rhodes sued Erion after a car accident, and Erion made three offers of judgment under Alaska Civil Rule 68 ("Rule 68"), which Rhodes failed to accept.[1812] The jury ultimately awarded Rhodes $18,281.85 in past damages and no future losses.[1813] With prejudgment interest, attorneys' fees and court costs, Rhode's verdict totaled $27,016.12, which was at least five percent less favorable than an earlier offer of $30,000.[1814] Erion moved for attorney's fees under Rule 68 and Rhodes requested that the superior court apply Civil Rule 82 to reduce the award.[1815] The trial judge held that Rule 82 did not require the court to deny Erion attorneys' fees and the court later denied Rhodes's motion for reconsideration, finding Erion's award reasonable because of Rhodes' vigorous prosecution.[1816] On appeal, Rhodes argued that the court should reduce Erion's award because Erion spent more on her defense than the amount in controversy.[1817] The supreme court held a reduction was not warranted because the attorneys' fees accumulated by Erion were largely due to Rhodes' continued prosecution and pursuit of a large verdict.[1818] The supreme court considered the award under Civil Rule 82(b)(3)(I)–(J) and determined the award would not deter similarly situated litigants from future, voluntary

[1801] *Id.*
[1802] *Id.* at 1149.
[1803] *Id.* at 1147.
[1804] *Id.* at 1148.
[1805] *Id.* at 1150–52.
[1806] *Id.* at 1153.
[1807] *Id.*
[1808] *Id.*
[1809] *Id.* at 1143, 1148, 1151–52, 1153.
[1810] 189 P.3d 1051 (Alaska 2008).
[1811] *Id.* at 1053–55.
[1812] *Id.*
[1813] *Id.* at 1053.
[1814] *Id.*
[1815] *Id.* at 1052.
[1816] *Id.* at 1053.
[1817] *Id.*
[1818] *Id.* at 1054.

use of the courts.[1819] Affirming the superior court, the supreme court held that an award of attorneys' fees under Rule 82 may be proper when the grant of attorneys' fees will not impair access to the courts, even when the fees are greater than the amount in controversy.[1820]

Sheldon v. City of Ambler

In *Sheldon v. City of Ambler*,[1821] the supreme court held that a police officer had qualified immunity in an excessive force claim when the officer reasonably believed that his use of force during an arrest was lawful.[1822] Sheldon was found intoxicated in public, beating his girlfriend, and refusing to let her to go home. Officer Jones told Sheldon to let the woman leave.[1823] When Sheldon refused, Jones secured Sheldon in a "bear hug" and threw him to the ground to arrest him.[1824] Sheldon's head struck the ground, and he later died from his injuries.[1825] Sheldon's family sued Jones for excessive force, but the superior court held that Jones had qualified immunity because he reasonably believed that his use of force was lawful.[1826] The supreme court affirmed this decision, modifying its earlier decision in *Samaniego v. City of Kodiak*[1827] to remove ambiguity.[1828] The *Samaniego* decision could have been read to require an officer's use of force be objectively reasonable.[1829] The supreme court held that qualified immunity only requires a police officer to have a reasonable belief that his actions are lawful, even if they are not objectively reasonable.[1830] Because there was no indication that Jones should have been aware that placing Sheldon in a bear hug and throwing him to the ground constituted excessive force, it was reasonable for him to believe that his actions were lawful.[1831] Thus, the supreme court affirmed the superior court, holding that a police officer had qualified immunity in an excessive force claim when the officer reasonably believed that his use of force during an arrest was lawful.[1832]

Southern Alaska Carpenters Health and Security Trust Fund v. Jones

In *Southern Alaska Carpenters Health and Security Trust Fund v. Jones*,[1833] the supreme court held that a state law claim for negligent misrepresentation is not preempted by the Federal Employee Retirement Income Security Act ("ERISA").[1834] Jones was told by his employer and a union-sponsored trust that he was covered by health insurance when in fact he was not.[1835] Jones sued the employer and the trust for negligent misrepresentation; the superior court found in favor of Jones and awarded compensatory damages, including damages for emotional distress.[1836] On appeal, the employer and trust argued that Jones's claim was barred by § 412 of ERISA and that damages for emotional distress should not have been granted because there was no physical injury and neither the employer nor the trust owed a duty of care to Jones.[1837] The supreme court reasoned that Jones was not a participant or beneficiary of an ERISA plan, preemption would deny Jones recovery for his injuries, and negligent misrepresentation is an area traditionally of state concern.[1838] Thus, affirming the superior court, the supreme court held that a state law

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[1819] *Id.* at 1054–55.
[1820] *Id.* at 1053–55.
[1821] 178 P.3d 459 (Alaska 2008).
[1822] *Id.* at 467.
[1823] *Id.* at 461.
[1824] *Id.* at 462.
[1825] *Id.*
[1826] *Id.*
[1827] 2 P.3d 78 (Alaska 2000).
[1828] *Sheldon*, 178 P.3d at 463.
[1829] *Id.* at 465.
[1830] *Id.* at 465–66.
[1831] *Id.* at 466–67.
[1832] *Id.* at 467.
[1833] 177 P.3d 844 (Alaska 2008).
[1834] *Id.* at 854.
[1835] *Id.* at 846.
[1836] *Id.*
[1837] *Id.* at 850, 54–55.
[1838] *Id.* at 853–54.

claim for negligent misrepresentation is not preempted by the Federal Employee Retirement Income Security Act ("ERISA").[1839]

Sowinski v. Walker

In *Sowinski v. Walker*,[1840] the supreme court held that: (1) a dram shop is liable only for its share of fault in actions involving minors' use of alcohol they illegally purchased from the shop; (2) a tort defendant may not receive a reduction in damages based on a pre-trial settlement by another defendant; (3) the estate of a decedent without a spouse, children, or dependents may not recover damages for loss of enjoyment of life; and (4) the non-dependent sibling of a wrongful death victim may not assert a wrongful death claim for non-pecuniary harm.[1841] Minors Vaughn and Walker died when their ATV struck a cable stretched across an access road.[1842] The families of Vaughn and Walker sued DelRois Liquor Store, which had sold alcohol to the boys and, the jury concluded, was 35% at fault for the accident.[1843] The trial judge, reasoning that comparative negligence was not a defense under Alaska Statutes and case law, combined the jury's finding of 35% liability for DelRois with the 27% liability the jury placed on Vaughn and Walker and held DelRois responsible for 62% of the verdict.[1844] The supreme court held that the enactment of pure several liability in § 09.65.210 of the Alaska Statutes meant that a dram shop owner who sold alcohol to minors would be liable for only its own share of fault, so DelRois should only pay for its own 35% of the fault.[1845] Turning to the pre-trial settlements, the court ruled that the statute implementing several liability mandated an award corresponding to each defendant's share of fault and reasoned that denying a reduction of the award would encourage settlements while denying a windfall to non-settling plaintiffs.[1846] Thus, the court held that the superior court correctly denied DelRois a reduction for the other defendants' pre-trial settlements.[1847] Regarding the jury's award for loss of enjoyment of life, the supreme court noted that Alaska's wrongful death claim statute limited an estate's recovery to pecuniary losses where the decedent has no spouse, children, or dependents.[1848] Because these decedents had no spouses, children, or dependents, and, according to the court, the intangible loss of enjoyment of life is non-pecuniary harm, the court held that the families could not recover damages for loss of enjoyment of life.[1849] The supreme court also vacated the jury's award to Walker's sister for emotional harm resulting from Walker's death because the wrongful death claim statute unambiguously barred non-pecuniary claims by non-dependent siblings.[1850] Thus, vacating the judgment of the superior court and remanding the case for modifications, the supreme court held that: (1) a dram shop is liable only for its share of fault in actions involving minors' use of alcohol they illegally purchased from the shop; (2) a tort defendant may not receive a reduction in damages based on a pre-trial settlement by another defendant; (3) the estate of a decedent without a spouse, children or dependents may not recover damages for loss of enjoyment of life; and (4) the non-dependent sibling of a wrongful death victim may not assert a wrongful death claim for non-pecuniary harm.[1851]

State Farm Mutual Automobile Insurance Co. v. Wilson

In *State Farm Mutual Automobile Insurance Co. v. Wilson*,[1852] the supreme court held that when determining excess damages for underinsured motorist ("UIM") claims, the insured's damages should be

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[1839] *Id.* at 854.
[1840] 198 P.3d 1134 (Alaska 2008).
[1841] *Id.* at 1140, 1156–57, 1160–62.
[1842] *Id.* at 1140.
[1843] *Id.* at 1141–42.
[1844] *Id.* at 1142.
[1845] *Id.* at 1155–56, 1167.
[1846] *Id.* at 1156–57.
[1847] *Id.*
[1848] *Id.* at 1160–61.
[1849] *Id.*
[1850] *Id.* at 1161–62, 1167.
[1851] *Id.* at 1140, 1156–57, 1160–62.
[1852] 199 P.3d 581 (Alaska 2008).

considered in the aggregate unless there are compelling reasons to do otherwise.[1853] During the course of his employment, Wilson suffered injuries in a car accident while riding as a passenger.[1854] An arbitration panel determined that Wilson's co-worker, the driver, was 40% at fault, while the driver of the other vehicle was 60% at fault.[1855] The panel also determined the amount of damages Wilson suffered, consisting of general damages and lost wages.[1856] Wilson received worker's compensation as a result of his employer's immunity and received the maximum amount of liability insurance the other driver had in coverage.[1857] However, the total amount received was less than the total amount of damages determined by the arbitration panel.[1858] Wilson was also eligible for UIM coverage through his co-worker's insurance policy.[1859] But the insurer disputed the amount to be paid under the UIM statute.[1860] The insurer argued on appeal that the lost wages and general damages should be considered separately when determining excess damages under the statute.[1861] The supreme court rejected this argument, reasoning that the policy rationale for the UIM statute was to fully compensate the injured after all available liability coverage had been exhausted, while preventing the injured from receiving double recovery.[1862] Affirming the superior court, the supreme court held that when determining excess damages for UIM claims, the insured's damages should be considered in the aggregate unless there are compelling reasons to do otherwise.[1863]

Alaska Court of Appeals

Savely v. State

In *Savely v. State*,[1864] the court of appeals held that in order to form a reasonable estimate of future expenses in a restitution case, courts should look to evidence regarding the victim's current condition and likely cost and duration of possible future treatments.[1865] Savely was convicted of contributing to the delinquency of a minor for having sexual intercourse with a fourteen-year old girl.[1866] As part of his plea bargain with the State, Savely agreed to pay restitution in an amount determined by the court for past and future expenses such as medical treatment and counseling.[1867] The superior court found that Savely had infected the minor with herpes and ordered him to pay approximately $40,000 in restitution.[1868] Despite Savely's claim that he was not the source of the herpes, the court of appeals found sufficient evidence to support the conclusion that Savely had infected the minor with herpes.[1869] However, the court also held that the restitution charges were invalid.[1870] According to the court, the psychologist who made the recommendation about the cost of future counseling testified well before the restitution hearing and by the date of the hearing it was unclear what treatment the minor would need and how much it would cost.[1871] The court remanded the case so that the lower court could develop a more "reasonable estimate" based on the victim's prognosis.[1872] Thus, affirming the lower court's decision but vacating the lower court's award of damages, the court of appeals held that in order to form a reasonable estimate of future expenses in a

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[1853] *Id.* at 589–90.
[1854] *Id.* at 582.
[1855] *Id.*
[1856] *Id.*
[1857] *Id.*
[1858] *Id.*
[1859] *Id.*
[1860] *Id.* at 582–83.
[1861] *Id.* at 583.
[1862] *Id.* at 589–90.
[1863] *Id.* at 589–91.
[1864] 180 P.3d 961 (Alaska Ct. App. 2008).
[1865] *Id.* at 964.
[1866] *Id.* at 962.
[1867] *Id.*
[1868] *Id.*
[1869] *Id.* at 963.
[1870] *Id.*
[1871] *Id.*
[1872] *Id.* at 964.

restitution case, courts should look to evidence regarding the victim's current condition and likely cost and duration of possible future treatments.[1873]

TRUSTS & ESTATES LAW

Alaska Supreme Court

Dieringer v. Martin

In *Dieringer v. Martin*,[1874] the supreme court held that: (1) a probate master may not make new factual findings on the merits when a case is remanded to the probate master for reconsideration of fees only,[1875] and (2) a trustee is not entitled to compensation for an attempted defense of bad-faith conduct when he was found guilty of that misconduct.[1876] The supreme court had previously vacated the superior court's award of fees to a trustee, and remanded the case for reconsideration of the amount of fees owed.[1877] On remand, the probate master deemed the case completely open, and recommended that the superior court uphold its prior award of fees to the trustee.[1878] The superior court rejected the master's recommendation, and reduced the fee award to the trustee.[1879] The trustee appealed the superior court's rejection of the master's new factual findings.[1880] The supreme court reasoned that because the case was remanded only for consideration of the fee amount, the case was not completely open, and the superior court properly excluded the probate master's new factual findings.[1881] The supreme court also found that the trustee had committed intentional bad-faith acts, precluding reimbursement for his defense of that misconduct.[1882] The supreme court affirmed the superior court, holding that: (1) a probate master may not make new factual findings on the merits when a case is remanded to the probate master for reconsideration of fees only,[1883] and (2) a trustee is not entitled to compensation for an attempted defense of bad-faith conduct when he was found guilty of that misconduct.[1884]

[1873] *Id.*
[1874] 187 P.3d 468 (Alaska 2008).
[1875] *Id.* at 474.
[1876] *Id.* at 476.
[1877] *Id.* at 472.
[1878] *Id.*
[1879] *Id.* at 472–73.
[1880] *Id.* at 473.
[1881] *Id.* at 474.
[1882] *Id.* at 475.
[1883] *Id.* at 474.
[1884] *Id.* at 476.