# THE YEAR IN REVIEW 2001

# CASES FROM ALASKA SUPREME COURT, ALASKA COURT OF APPEALS, U.S. COURT OF APPEALS FOR THE NINTH CIRCUIT, AND U.S. DISTRICT COURT FOR THE DISTRICT OF ALASKA

TABLE OF CONTENTS

## I. INTRODUCTION

*Year in Review* contains brief summaries of selected decisions handed down in 2001 by the Alaska Supreme Court, Alaska Court of Appeals, U.S. Court of Appeals for the Ninth Circuit and U.S. District Court for the District of Alaska. The summaries focus on the substantive areas of the law addressed, the statutes or common law principles interpreted and the essence of the primary holdings. Attorneys are advised not to rely upon the information contained in this review without further reference to the cases cited. Full summaries of the cases in the Appendix are available at http://www.law.duke.edu/journals/19ALRYearinReview.

The opinions are grouped by general subject matter rather than the nature of the underlying claims. The summaries are presented alphabetically in the following eleven areas of the law: administrative, business, civil procedure, constitutional, criminal, employment, family, insurance, property, torts and trusts and estates.

## II. ADMINISTRATIVE LAW

In *Akootchook v. United States*,[1] the Court of Appeals for the Ninth Circuit affirmed the district court's dismissal of a suit brought by five Alaska Natives challenging denial of their applications for land allotments under the Alaska Native Allotment Act ("ANAA").[2] The district court dismissed the plaintiffs' appeal of the decision of the Interior Board of Land Appeals ("IBLA"), reasoning that the claims were barred by the res judicata effect of earlier class action suits challenging the IBLA's denial of applications based on ancestral use of land rather than personal use. The court of appeals found the application of res judicata improper because the ancestral claims common to the classes were not identical to

1. 271 F.3d 1160 (9th Cir. 2001).
2. *Id.* at 1162.

these plaintiffs' personal claims.[3] However, the court affirmed the district court's ruling by deferring to the IBLA's interpretation of the ANAA and the IBLA's requirement that use of the land applied for must be accomplished by an independent individual acting in his own right and not by a minor.[4] The court acknowledged the plaintiffs' interpretation that the ANAA focuses on communal rather than personal use as reasonable, but held that "it is not the only reasonable interpretation and does not compel us to strike down the IBLA's interpretation."[5]

In *Alaska v. EPA*,[6] the Court of Appeals for the Ninth Circuit held that it had jurisdiction to review three EPA orders which invalidated air quality construction permits.[7] The orders determined that a new power generator at Conmico's Red Dog Mine facility did not comply with the Clean Air Act and prevented Conmico from beginning any construction or modification activities associated with the generator. The Alaska Department of Environmental Conservation and Conmico petitioned the Ninth Circuit for review of the orders. The EPA argued that the court did not have jurisdiction because the orders did not constitute the "final action of the Administrator."[8] The Ninth Circuit held that jurisdiction was proper because the orders (1) represented a final position asserted by the EPA on the factual circumstances upon which the orders were predicated; (2) determined the "rights or obligations" of the parties by preventing further construction or modification at the facility; and (3) indicated that "legal consequences will flow" in the form of penalties if Conmico chose to disregard the orders.[9] However, the court declined to consider the merits of the case until the EPA submitted a complete administrative record, withdrew the orders in question or filed an enforcement action in the appropriate district court.[10]

In *Bullock v. State, Dep't of Community and Regional Affairs*,[11] the supreme court held that when the value of all taxable property of a municipality exceeds the 225% valuation cap on the total property value that municipalities may tax under Alaska Statutes ("A.S.") 29.45.080, the municipality may reduce the value of all

3. *Id.* at 1164-65.
4. *Id.* at 1166-67.
5. *Id.* at 1167.
6. 244 F.3d 748 (9th Cir. 2001).
7. *Id.* at 749.
8. *Id.* at 750.
9. *Id.* (applying Bennett v. Spear, 520 U.S. 154 (1997)).
10. *Id.* at 751.
11. 19 P.3d 1209 (Alaska 2001).

taxable property on a pro-rata basis.[12] The court also held that under A.S. 29.45.100, the 225% limitation does not apply to the imposition of taxes for debt service.[13] Bullock asserted that section 29.45.080 requires the municipality to reduce the value of oil and gas property taxes so that when added to the full value of all other taxable property, the total amount does not exceed the cap. The State advocated the pro-rata reduction of the assessed value of all the property in the municipality to arrive at the maximum value under the cap, the method practiced since the introduction of the statute. Finding ambiguity in the statutory language and history, the supreme court deferred to the State's long-standing interpretation of the statute and upheld the pro-rata reduction.[14] Bullock also argued that municipalities must apply the valuation cap to taxes for repaying bonded indebtedness, but the court held that the valuation cap limitations do not apply to taxes levied to pay the principal and interest on bonds.[15]

In *In re Friedman*,[16] the supreme court reduced a sanction entered by the Alaska Bar Association's disciplinary board against an attorney who drew on a settlement trust account to advance funds to his client and to pay himself attorney's fees that were not yet due him.[17] Friedman, the attorney for a plaintiff in a complex tort suit, deposited an $81,000 settlement contribution in his client trust account. Friedman drew on that account almost immediately, without informing the other plaintiffs' attorneys. The supreme court agreed with the disciplinary board's finding that Friedman violated disciplinary rules against conduct involving dishonesty, mishandling of client funds and illegal conduct involving moral turpitude.[18] However, the court disagreed with the finding that Friedman engaged in conduct prejudicial to the administration of justice and reduced Friedman's suspension to three years.[19] Friedman's initial denial of any wrong-doing was an aggravating factor, but his lack of a prior disciplinary record, the absence of loss or injury to his clients, his commitment to pro bono and public service and the measures he took to remedy the problems caused by his misconduct convinced the court that a three-year suspension was appropriate.[20]

---

12. *Id.* at 1214.
13. *Id.* at 1218.
14. *Id.* at 1215.
15. *Id.* at 1218.
16. 23 P.3d 620 (Alaska 2001).
17. *Id.* at 622.
18. *Id.* at 627-30.
19. *Id.* at 628-29, 634.
20. *Id.* at 634.

In *Interior Alaska Airboat Assoc., Inc. v. State*,[21] the supreme court held that the Board of Game's regulations establishing two controlled use areas ("CUAs") are constitutional, are within the Board's authority and are neither arbitrary nor capricious.[22] The Noatak and Nenana CUAs restrict hunter access by aircraft in certain areas to help reduce moose harvests, to prevent habitat alteration and to resolve conflicts between hunters using planes and airboats for access and hunters using other transportation. The Interior Alaska Airboat Association challenged the regulations, but the supreme court affirmed the grant of summary judgment for the Board.[23] The court rejected the Association's constitutional arguments that the regulations deny equal access, finding that the CUAs are open to any resident who wants to use them and that the equipment limitations apply equally to all users.[24] The court found that the regulations are within the statutory authority of the Board and are consistent with its conservation and development goals, and that the record showed that the Board's decisionmaking process was neither unreasonable nor arbitrary.[25]

In *Municipality of Anchorage v. Repasky*,[26] the supreme court reversed the superior court and held that the mayoral invocation of the item veto power to reduce the annual budgets of a school district and the local source appropriations for those budgets was a valid exercise of the mayor's veto power.[27] In 1995 and 1997, Mayor Mystrom reduced the budget and local source appropriation as approved by the Anchorage Municipal Assembly. Citizens challenged his authority to veto the district's budgets, claiming that the mayor did not have line item veto authority over the school budget and that state law impliedly prohibited his veto power. The supreme court interpreted subsection 5.02(c) of the Home Rule Charter for the Municipality of Anchorage as granting the mayor both general and line item veto power over the school district budget and local appropriation ordinances.[28] The court held that Alaska law did not expressly prohibit the grant of veto power to the mayor and that A.S. 14.14.060(c) did not impliedly prohibit the municipality's veto power, even though it is silent about the

21. 18 P.3d 686 (Alaska 2001).
22. *Id.* at 687.
23. *Id.*
24. *Id.* at 695.
25. *Id.* at 690-91, 694.
26. 34 P.3d 302 (Alaska 2001).
27. *Id*. at 304, 315.
28. *Id*. at 307-10.

power.[29] Citing the express prohibition of a mayoral veto of "appropriation items in a school budget ordinance" in all locations other than home rule municipalities, the court held that the silence reflected the legislature's intent to grant each home rule municipality the freedom to decide whether to give its mayor the power to veto a school district budget.[30]

In *National Parks & Conservation Ass'n v. Babbitt*,[31] the Court of Appeals for the Ninth Circuit enjoined the National Park Service ("NPS") from implementing its plan to increase the number of cruise ships entering Glacier Bay because the NPS had not complied with the National Environmental Policy Act ("NEPA").[32] NEPA requires a federal agency undertaking any major action to take a "hard look" at the effects of its decision on the environment.[33] The agency must first prepare an Environmental Assessment ("EA"), followed by an Environmental Impact Statement ("EIS") if the EA reveals an adverse environmental impact.[34] The NPS did not complete an EIS even though the EA showed that there were many unknown effects on whales, Steller sea lions, bald eagles and waterfowl, and that increased disturbance levels could compromise the survival and reproduction of marine mammals. The court determined that "unknown" effects of the increase in cruise ships constituted grounds for the preparation of an EIS because uncertainty is the reason for the preparation of an EIS, not an excuse to avoid its completion.[35]

In *Newmont Alaska Ltd. v. McDowell*,[36] the supreme court held that an original claimant had not abandoned mining claims because a deficient yet timely payment of second year's rent entitled him to an opportunity to cure the deficiency.[37] Miners who stake claims to state lands must pay the first year's rent within ninety days and the second year's rent within a set three-month period or the claims will be considered abandoned.[38] Clay, the predecessor in interest to Newmont, was the original locator of most of the 224 mining claims at issue. The Department of Natural Resources ("DNR") applied Clay's payment to his second year rent,

29. *Id*. at 311-12.
30. *Id*. at 310-12.
31. 241 F.3d 722 (9th Cir. 2001).
32. *Id.* at 725.
33. *Id.* at 730.
34. *Id*. (citing 40 C.F.R. § 1501.4 (2001)).
35. *Id.* at 729.
36. 22 P.3d 881 (Alaska 2001).
37. *Id.* at 885.
38. *Id.* at 882.

determining that he had failed to pay year one and thus had abandoned his claim. The DNR division director rejected this determination, finding Clay's payment to be a deficient but timely partial payment that is curable under A.S. 38.05.265. The supreme court agreed, finding that Clay had actually paid more than one year's rent because he paid $400 over his year one obligation.[39] Therefore, his year two payment was deficient, but timely and abandonment did not result.[40]

In *Snyder v. State, Dep't of Public Safety*,[41] the supreme court affirmed the revocation of Snyder's driver's license based on his refusal to take a breath test.[42] After his arrest for driving while intoxicated, Snyder made two requests for a blood alcohol content test, which were refused. Snyder attempted to take a breath test several times, but never provided an adequate sample and was charged with refusal to submit to a test. Snyder's driver's license was revoked, but he claimed that a chest injury had prevented him from blowing sufficiently into the machine. The hearing officer found that Snyder was unwilling to perform the tests, not merely physically incapable. In affirming, the supreme court reasoned that the revocation was based solely on Snyder's refusal to take the breath test, irrespective of what a blood test might have revealed.[43]

In *Tlingit-Haida Regional Electric Authority v. State*,[44] the supreme court upheld the Alaska Public Utility Commission's ("Commission") decision to eliminate overlap between two utilities.[45] Twenty-five years ago, the Commission created overlapping service territory between the Tlingit-Haida Regional Electric Authority ("THREA") and the Alaska Power Company. In 1993, the Commission awarded the Klawock territory to Alaska Power, eliminating the overlap. THREA appealed the award to the superior court, which remanded the case to the Commission for further factual determinations. On remand, the Commission found, as before, that the public interest required that Alaska Power serve Klawock exclusively and that this would not hinder the purposes of the Rural Electrification Act. THREA appealed, and the superior court affirmed but found THREA's loss of its Klawock facility to be a compensable taking. The supreme court affirmed, finding that the Commission did not err when it chose to favor one expert's tes-

39. *Id.* at 883-84.
40. *Id*.
41. 31 P.3d 770 (Alaska 2001).
42. *Id.* at 771-72.
43. *Id.* at 776.
44. 15 P.3d 754 (Alaska 2001).
45. *Id.* at 770.

timony over that of another, that THREA was entitled to compensation for the physical assets stranded by the Commission's decision and that the Rural Electrification Act did not preempt the Commission's restriction of THREA's territory.[46]

In *Whitesides v. State, Dep't of Public Safety*,[47] the supreme court held that the Division of Motor Vehicles ("DMV") violated Whitesides' due process rights when it denied him an in-person license revocation hearing.[48] Whitesides was arrested for driving while intoxicated and had his driver's license revoked for refusing to take a breath test. Whitesides claimed he had agreed to take the test and sought review of the revocation. The DMV scheduled a telephone hearing over Whitesides' objections, and the hearing officer found that Whitesides had refused the breath test and revoked his license for one year. The supreme court found that a driver's license is an important property interest, that in-person testimony is a valuable tool for evaluating the credibility of witnesses and that the government's interest in cost savings would not be greatly prejudiced by granting in-person hearings where credibility is at issue.[49] The court held that there were material issues about Whitesides' credibility that needed to be resolved and, therefore, an in-person revocation hearing should have been held.[50]

In *In re Wiederholt*,[51] the supreme court held that a disbarred attorney petitioning for reinstatement must show by clear and convincing evidence that he or she has acknowledged wrongdoing, rehabilitated past conduct and is fit to practice law.[52] Wiederholt was disbarred in 1994 for knowingly filing a false pleading and affidavit and for forging his client's signature to endorse a check. Wiederholt petitioned for reinstatement after five years, but the Bar Association Disciplinary Board denied his request. In a matter of first impression, the supreme court held that under the Alaska Bar Rules, a presumption against reinstatement exists to protect the public and the petitioning attorney must show by clear and convincing evidence that he or she has met the competency and knowledge requirements under Alaska Bar Rule 29.[53] The court affirmed, holding that the Board appropriately considered Wieder-

46. *Id.* at 764-67.
47. 20 P.3d 1130 (Alaska 2001).
48. *Id.* at 1132.
49. *Id.* at 1132-38 (applying Mathews v. Eldridge, 424 U.S. 319, 335 (1976)).
50. *Id.* at 1139.
51. 24 P.3d 1219 (Alaska 2001).
52. *Id.* at 1225-26.
53. *Id.* at 1223, 1226.

holt's past conduct, remorse and acknowledgment of wrongdoing and the length of his disbarment when considering reinstatement.[54]

## III. BUSINESS LAW

In *Alderman v. Iditarod Properties, Inc.*,[55] the supreme court held that where a trade name has acquired secondary meaning prior to use by another business, it is infringed when confusion results from another's use of it.[56] The court also held that A.S. 10.35.040 requires prior use of a business name for its valid registration.[57] Iditarod Properties, Inc. ("Iditarod") restored the historic Fourth Avenue Theatre and ran several businesses from the premises. The Aldermans ran a trolley from the theater. After a disagreement resulted in severance of the oral agreement between Iditarod and the Aldermans, the Aldermans registered the business name "Fourth Avenue Theater Trolley Tours." Iditarod later ran a trolley tour business under the same name, and filed suit for trade name infringement against the Aldermans. Because the evidence supported the jury's finding that the trade name "Fourth Avenue Theater" had acquired secondary meaning, the supreme court found that the Aldermans' use was infringing.[58] The court also affirmed the interpretation of section 10.35.040 to require prior use for registration of a trade name.[59]

In *Hartung v. State, Dep't of Labor*,[60] the supreme court held that when bankruptcy intervenes, a corporate officer is not liable for tax payments that become due during the post-petition period during which bankruptcy prevents the officer from making payments.[61] Hartung was the chief financial officer of MarkAir, which filed for bankruptcy in April 1995. The Department of Labor determined that Hartung was responsible for paying $135,026 in unemployment taxes owed by MarkAir for the first quarter of 1995. The superior court affirmed the Department's decision on appeal. However, the supreme court reversed, finding that Hartung was not a party against whom tax liability for unemployment contributions could be assessed because the bankruptcy order prevented him from compelling payment and because he was not in a position to ensure that MarkAir paid employer contributions due in the

54. *Id.* at 1227-28.
55. 32 P.3d 373 (Alaska 2001).
56. *Id.* at 390.
57. *Id.* at 392-94.
58. *Id.* at 387-89.
59. *Id.* at 392-94.
60. 22 P.3d 1 (Alaska 2001).
61. *Id*. at 4.

post-petition period.[62] The court noted that Hartung might be held liable for the employee contribution portion of the taxes but that the issue was not adequately addressed by the parties.[63]

In *Hoffman Construction Co. of Alaska v. U.S. Fabrication & Erection, Inc.*,[64] the supreme court held that the duty to defend in an indemnity clause is triggered by claims of injury falling within the scope of the clause, while the duty to indemnify is not triggered until the indemnitee is liable for damages.[65] Four U.S. Fabrication & Erection, Inc. ("USF&E") employees brought suit alleging that they had been exposed to asbestos while working at a construction project at Providence Hospital in Anchorage. Hoffman settled the suit and sought indemnity from subcontractor USF&E under a contractual indemnity provision. USF&E simultaneously sought indemnity and defense from Hoffman under an implied contractual theory, and Providence sought indemnity and defense costs from Hoffman under a contractual indemnity provision. Because the workers' claims were within the scope of the Providence/Hoffman contract, the supreme court held that Hoffman owed Providence the duty to defend, but not to indemnify, since Hoffman had settled with the workers.[66] The court reversed the ruling that USF&E did not owe Hoffman a duty to defend because the employees' claims were within the scope of the Hoffman/USF&E indemnity clause and because A.S. 45.45.900, the public duty exception, the policy of nondelegable duties and the doctrine of unclean hands did not prevent enforcement of the indemnity clause.[67] Lastly, the court reversed the grant of summary judgment for USF&E on the issue of implied contractual indemnity because the indemnitor, Hoffman, was receiving rather than performing the contractual service and, as a result, the *Kandik Construction*[68] model for implied contractual indemnity did not apply.[69]

In *Long v. Holland America Line Westours, Inc.*,[70] the supreme court reversed a grant of summary judgment because it found a limitations clause in Holland America's contract unenforceable.[71]

---

62. *Id.*

63. *Id.* at 5.

64. 32 P.3d 346 (Alaska 2001).

65. *Id.* at 352.

66. *Id.* at 355-56.

67. *Id.* at 360.

68. Fairbanks North Star Borough v. Kandik Const., Inc., 823 P.2d 632 (Alaska 1991).

69. *Hoffman*, 32 P.3d at 361-62.

70. 26 P.3d 430 (Alaska 2001).

71. *Id*. at 437.

Long sustained injuries during a Holland America tour of Alaska. The tour contract contained a choice of law provision stating that Washington state law would control and that notice of personal injury claims must be provided within six months of the alleged injury and suit filed within one year. Long's attorney gave Holland America notice of Long's claim after ten and one-half months and filed suit after sixteen months. The supreme court found that the limitations provision in the contract was enforceable because Alaska law was applicable under the Restatement (Second) of Conflict of Laws,[72] because applying Washington state law would violate a fundamental policy of the State of Alaska,[73] and because a contractual limitations period is unenforceable in Alaska.[74]

In *Louisiana-Pacific Corp. v. State, Dep't of Revenue*,[75] the supreme court held that a waiver agreement with the IRS stays the statute of limitations for Alaska state income taxes to the extent that the tax issue is covered by the federal waiver.[76] Louisiana-Pacific received a refund of taxes paid to the State, but a subsequent audit revealed that the corporation did not request the refund within the three-year period required. Louisiana-Pacific maintained that waiver agreements with the IRS stayed the statute of limitations and refused to return the refund. The supreme court held that a waiver agreement between the IRS and a taxpayer stays the statute of limitations for Alaska state taxes.[77] The court reasoned that the adoption of the Internal Revenue Code by reference under A.S. 43.20.021 includes the portion concerning extensions of the statute of limitations.[78] The court remanded to determine whether the issues in the waiver agreements were related to Louisiana-Pacific's state tax liability and refund.[79]

In *McCormick v. City of Dillingham*,[80] the supreme court held that Dillingham's business license fee and sales tax are valid, and that McCormick was personally liable for his corporation's failure to pay them.[81] Dillingham sued to collect its business license fee and sales taxes from McCormick, who alleged that those ordi-

72. *Id.* at 432-33 (citing RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 187(2)(b) (1971)).
73. *Id.* at 432-34.
74. *Id*. at 435-37.
75. 26 P.3d 422 (Alaska 2001).
76. *Id.* at 429.
77. *Id.* at 427 (citing Hickel v. Stevenson, 416 P.2d 236, 238 (Alaska 1966)).
78. *Id.*
79. *Id.* at 430.
80. 16 P.3d 735 (Alaska 2001).
81. *Id*. at 745.

nances had never been legally enacted. The superior court granted summary judgment for Dillingham, finding the ordinances valid and McCormick personally liable for his corporation's debts. On appeal, the supreme court found that McCormick had failed to overcome the presumption that "proceedings of the governing body of a municipality have been conducted in accordance with the law."[82] Although Dillingham's sales tax ordinance included a reference to a lost exhibit and was mislabeled, the court held that these "anomalies . . . [do] not [establish] that the city failed to comply with the law."[83] The court also found that the business license fee ordinance had been properly enacted and was not preempted by the state business license law.[84] Finally, the supreme court determined that the trial court had not acted improperly in piercing the corporate veil because the company was under McCormick's control and was incorporated by him, was inadequately capitalized and used McCormick's personal property without payment.[85]

In *Magden v. Alaska USA Federal Credit Union*,[86] the supreme court upheld the delayed execution of judgment against a creditor because the credit union had no evidence that the creditor had any assets upon which it could execute and it had been barred from collecting against the creditor's income.[87] The Alaska USA Federal Credit Union ("AUSA") sought to execute a deficiency judgment against Magden. However, Magden successfully moved to exempt her income and entered into a settlement in which AUSA agreed not to execute against her permanent fund dividends. After Magden failed to adhere to the settlement, AUSA moved for execution. Magden opposed the motion, arguing that execution was barred by A.S. 09.35.020, which provides that no execution may be entered when five years have elapsed after entry of judgment unless the creditor provides "just and sufficient reasons" for delay. The court found that AUSA had "just and sufficient reasons" because it was barred from executing against Magden's permanent fund dividend and could not execute against her regular income because she had successfully sought exemption.[88]

In *Old Harbor Native Corp. v. Afognak Joint Venture*,[89] the supreme court reversed a grant of summary judgment because the

82. *Id*. at 738.
83. *Id*. at 738-39.
84. *Id*. at 739.
85. *Id.* at 742-45.
86. 36 P.3d 659 (Alaska 2001).
87. *Id.* at 662.
88. *Id.*
89. 30 P.3d 101 (Alaska 2001).

Afognak Joint Venture had a fiduciary duty to disclose the status of a contemporaneous lawsuit after the Old Harbor Native Corporation withdrew from the venture.[90] In 1982, Old Harbor Native Corporation ("Old Harbor") and Akhiok-Kaguyak, Inc. ("Akhiok") entered into a joint venture agreement with other corporations to receive land from the federal government. In 1989, Old Harbor and Akhiok relinquished membership in the Joint Venture after the Exxon Valdez spilled oil on the Joint Venture's land. In July 1991, Old Harbor, Akhiok and the Joint Venture reached a partition agreement and executed a release of claims. Subsequently, the Joint Venture received $22 million in a settlement with Exxon. The supreme court held that the release of claims in 1991 did not bar the corporations' claims to their part of the settlement agreement.[91] The court held that because members of a dissolving joint venture continue to owe each other a fiduciary duty of disclosure from the time of dissolution until the venture winds up its affairs, the Joint Venture owed a duty to disclose the status of the Exxon claim during the period following the corporations' withdrawal and prior to the completion of the partitioning process.[92]

In *Sierra v. Goldbelt, Inc.*,[93] the supreme court held that the Alaska Native Claims Settlement Act ("ANCSA") authorizes Native corporations to issue shares to certain groups of Native elders without consideration.[94] The court was equally divided on whether Goldbelt satisfied its disclosure duty in its proxy statement regarding the elder benefit program.[95] In 1997, a majority of Goldbelt shareholders authorized issuance of one hundred shares to original Goldbelt shareholders who reached the age of 65. Sierra filed suit, arguing that Goldbelt could not limit issuance of these new shares to elders who were original shareholders or to elders who are no longer shareholders. Sierra appealed the grant of summary judgment for Goldbelt. The supreme court held that the ANCSA clearly allows Native corporations to discriminate in favor of original shareholders and does not limit the corporations' ability to issue elder stock only to those elders who still own the original shares.[96] The court also held that because the ANCSA expressly preempts Alaska corporate law, Goldbelt was authorized to issue

90. *Id*. at 109.
91. *Id*. at 105-06.
92. *Id*. at 106-07.
93. 25 P.3d 697 (Alaska 2001).
94. *Id*. at 698.
95. *Id*.
96. *Id*. at 701-02.

new stock to non-shareholders without consideration.[97] The court split on the question of the adequacy of Goldbelt's proxy solicitation, thereby affirming the lower court's summary judgment on the issue "without substantive discussion."[98]

In *Sprucewood Investment Corp. v. Alaska Housing Finance Corp.*,[99] the supreme court affirmed the ruling that Sprucewood's appeal of a temporary restraining order was moot.[100] Alaska Housing Finance Corporation ("AHFC") awarded a contract to Northern Construction and Equipment for the demolition of various buildings. After the contract was awarded, Northern Construction learned that other bidders had intended to move the buildings off site and salvage them. Consequently, Northern Construction abandoned its plans to raze the buildings and instead sold them to Sprucewood. Upon learning that the buildings had been sold, AHFC obtained a temporary restraining order against Sprucewood and was granted summary judgment on its breach of contract claims against Northern Construction. AHFC then sold the buildings to another investment company rather than demolish them. On appeal, the supreme court held that Sprucewood's appeal of the restraining order was moot because a reversal of the order would not enable Sprucewood to do anything with the buildings now owned by another investment company.[101] The court also found that the superior court correctly granted summary judgment to AHFC on its breach of contract claims because, since both parties understood that the contract required demolition of the buildings, it was enforceable in accordance with that meaning.[102] The court upheld dismissal of Sprucewood's counterclaim for negligence in drafting, finding that the contract was not ambiguous.[103] Finally, the court upheld dismissal of Sprucewood's counterclaim for economic waste because the waste claim was rendered moot when the buildings were sold rather than demolished.[104]

97. *Id*. at 702.
98. *Id*. at 703.
99. 33 P.3d 1156 (Alaska 2001).
100. *Id.* at 1165.
101. *Id.* at 1161.
102. *Id.* at 1163.
103. *Id.* at 1165.
104. *Id.*

## IV. CIVIL PROCEDURE

### A. Costs and Attorney's Fees

In *Falconer v. Adams*,[105] the supreme court held that a co-defendant, Adams, was not entitled to draw his award of attorney's fees over a lien filed by Falconer's attorney.[106] In an auto collision case, the jury found that defendant Taylor-Welch was negligent and that co-defendant Adams was not negligent. The attorney for plaintiff Falconer filed a lien for $18,583, and the trial court awarded attorney's fees and costs to Adams against Falconer for $10,623.25. A judgment of $13,873 was entered against Taylor-Welch in favor of Falconer. Falconer argued that the attorney lien had priority over Adams' claim under A.S. 34.35.430(b). The court recognized that the language in that section seemed to refer to all parties in a proceeding, but noted that the section has been interpreted narrowly to apply only to the rights of the party paying the proceeds against which the lien is asserted.[107] The court concluded that section 34.35.430(b) refers only to each plaintiff's rights vis-à-vis each defendant's rights and therefore held that the attorney's lien has priority.[108]

In *Hodge v. Sorba*,[109] the supreme court affirmed the award of attorney's fees to Sorba.[110] Sorba was granted attorney's fees after the superior court entered a divorce decree and adjudicated child custody, support and property division. Because she had no income, Sorba's attorneys agreed to represent her in exchange for the attorney's fees, if any, awarded by the superior court. Hodge argued that Sorba's fee arrangement was a contingent fee arrangement, which denied the court the authority to award attorney's fees under Alaska Bar Rule 35(d). The supreme court held that the superior court had the authority to award attorney's fees under A.S. 25.24.140.[111] The underlying fee arrangement was not "contingent" because the arrangement turned on the financial resources of the parties rather than on successful prosecution of the issues.[112] The court also held that its decision in *Coleman v. Coleman*[113] suggested that an attorney's fee award in a domestic pro-

105. 20 P.3d 583 (Alaska 2001).
106. *Id.* at 584.
107. *Id.* at 585-86.
108. *Id.*
109. 31 P.3d 1273 (Alaska 2001).
110. *Id*. at 1273.
111. *Hodge*, 31 P.3d at 1275.
112. *Id.*
113. 968 P.2d 570, 573-74 (Alaska 1998).

ceeding will not turn on whether the proceeding is one for a divorce and, therefore, there was no prohibition against contingent attorney fee agreements in domestic matters.[114]

In *Matanuska Electric Ass'n v. Rewire The Board*,[115] the supreme court held that Rewire prevailed in the superior court as a public interest litigant and upheld the attorney's fee award and two counts of contempt against the Matanuska Electric Association ("MEA").[116] A group of MEA members called Rewire the Board ("Rewire") proposed a bylaw amendment and sued to recall all of MEA's directors. Because Rewire's allegations warranted a recall election, the superior court held it to be a prevailing party. The supreme court upheld Rewire's status as the prevailing party and as a public-interest litigant because "most of its members did not have a substantial economic interest in the litigation."[117] The court found that it was not "an abuse of discretion to award Rewire attorney's fees incurred in responding to MEA's petitions for review" because Rewire successfully opposed many of MEA's arguments on two appeals.[118] The court also overturned findings of contempt against MEA, for comments made in an unsolicited interview and for photographing picketers supporting Rewire, but affirmed contempt findings for MEA's publication of unofficial election results and a letter critical of Rewire as willful violations of the court's order.[119]

In *Shearer v. Mundt*,[120] the supreme court held that lay pro se litigants are not entitled to an award of attorney's fees.[121] Layperson Shearer successfully defended title to his land pro se and requested attorney's fees. The superior court rejected his claim, holding that "attorney's fees may not be awarded to lay litigants."[122] The supreme court affirmed, reasoning that "the purpose of Rule 82 attorney's fees is to compensate litigants for fees they incur through legal representation, not to compensate litigants for the economic detriment of litigating."[123] The court also rejected Shearer's claim that denying attorney's fees to lay pro se litigants violated his right to equal protection under the Alaska Constitution

114. *Hodge*, 31 P.3d at 1275-76.
115. 36 P.3d 685 (Alaska 2001).
116. *Id*. at 687.
117. *Id*. at 695-97.
118. *Id*. at 699.
119. *Id*. at 701-03.
120. 36 P.3d 1196 (Alaska 2001).
121. *Id*. at 1199.
122. *Id.* at 1197 (citing Alaska Fed. Sav. & Loan Ass'n v. Bernhardt, 794 P.2d 579, 581-82 (Alaska 1990)).
123. *Id*. at 1198.

because it treats attorneys and non-attorneys differently.[124] The court reasoned that attorneys and non-attorneys are not similarly situated and, therefore, are not subject to equal protection.[125]

In *United Services Automobile Ass'n v. Pruitt*,[126] the supreme court held that separate awards of attorney's fees in a bifurcated case were appropriate but that the amounts awarded were not justified because the court did not explain why it deviated from Alaska Rule of Civil Procedure 82(b)(1).[127] During arbitration of an insurance case, the case was split into the issues of coverage and damages. The trial court awarded attorney's fees for each part of the bifurcated case. United Services Automobile Association ("USAA") argued that the fees should have been awarded only with respect to coverage, in accordance with the memorializing order. The supreme court disagreed and reasoned that the trial court did not err because the USAA's attorney stated in oral argument that "the idea was. . .to award attorney's fees separately."[128] However, the supreme court held that the lower court erred in its deviation from the Rule 82(b)(1) fee schedule because it did not calculate the fees according to the schedule and did not adequately describe its reasons for deviating as required by Rule 82(b)(3).[129]

B. Miscellaneous

In *Baker v. Exxon Corp.*,[130] a case arising out of the 1989 Exxon Valdez oil spill, the Court of Appeals for the Ninth Circuit vacated the district court's order, finding that Exxon had standing to appeal the decision of the district court, that the district court erred in ruling that Exxon should not be allowed to share in the punitive damages and that there is no material difference between an assignment and a "cede back" agreement.[131] In July 1999, the district court granted final approval to the allocation plan for seafood processors included in the plaintiffs' class. The plan excluded some processors because they had settled with Exxon before certification of the mandatory punitive damages class by assigning part of their punitive damages claims to Exxon in exchange for money. Exxon filed suit to recover a portion of the punitive damages pursuant to its assignments. The district court held that Exxon should

124. *Id*. at 1199.
125. *Id*.
126. 38 P.3d 528 (Alaska 2001).
127. *Id*. at 530.
128. *Id*. at 532.
129. *Id.* at 533 (citing State v. Johnson, 958 P.2d 440, 446 (Alaska 1998)).
130. 239 F.3d 985 (9th Cir. 2001).
131. *Id*. at 987.

be prevented from sharing in the punitive damages. The Ninth Circuit found that Exxon had standing to appeal without intervening because Exxon was already a party to the suit, thereby falling within the rule that only parties can appeal adverse judgments.[132] The court found that public policy supports settlement of disputes and favors settlements where the plaintiffs assign their punitive damages awards to the defendant.[133] The court found that assignments are not materially different from "cede backs," which were permitted in *Icicle Seafoods, Inc. v. Baker*,[134] and that the settlements should stand.[135]

In *Botelho v. Griffin*,[136] the supreme court held that Attorney General Botelho could pursue a claim on behalf of, and without consent from, various charitable organizations against the Griffins for violating state gaming laws.[137] Botelho alleged that the Griffins failed to turn over the statutory minimum percentage of gaming proceeds to the charities and charged some charities excessive fees. The supreme court reversed the grant of summary judgment for the Griffins, reasoning that statutory and common law give the attorney general standing to bring suit to uphold state gaming laws, and that intervention by the attorney general is appropriate if the charities' trustees dismiss or compromise the charities' claims for less than the charities are due.[138]

In *Bradley v. State*,[139] the court of appeals held that a former law clerk may serve as an attorney in a case which was pending during his clerkship if he did not personally or substantially participate in the case or if all parties consent.[140] Plaintiff Bradley's appeal was pending during Maarten Vermaat's clerkship in the 1999-2000 term. Bradley did not object to Vermaat serving as the State's lawyer in his case and Vermaat submitted an affidavit stating that he had no contact with Bradley's case during his clerkship. The court decided that under Alaska Rule of Appellate Procedure 104, Vermaat should not serve as attorney for Alaska, but noted that the more recently adopted Rule 1.12 of the Rules of Professional Conduct is much narrower in its disqualification of law clerks.[141]

---

132. *Id*. at 987-88.
133. *Id*. at 988.
134. 229 F.3d 790 (9th Cir. 2000).
135. *Baker*, 239 F.3d at 988.
136. 25 P.3d 689 (Alaska 2001).
137. *Id.* at 691, 696.
138. *Id.* at 692-93.
139. 16 P.3d 187 (Alaska Ct. App. 2001).
140. *Id.* at 190.
141. *Id.* at 188-89.

The court adopted the language of Rule 1.12 as it applies to law clerks and established the procedure for former clerks to serve as attorneys in such cases, which involves submitting a motion and affidavit disclosing "all pertinent facts."[142]

In *Brown v. Lange*,[143] the supreme court held that pro se defendant Brown was not entitled to notice of default judgment against him and that Lange's attorney owed no independent professional duty to give such notice.[144] Lange, a passenger in a boat driven by Willis, sued Brown and Willis after their boats collided. After receiving the complaint, Brown called Lange's attorney and left a recorded message asking for the court date. The attorney's receptionist returned the call, informing Brown's mother that no court date had been set and that Brown needed to answer the complaint. Brown did not answer and default judgment was entered against him. Brown argued that the default judgment should be set aside because he "appeared" and was therefore entitled to service of the application for entry of default under Alaska Rule of Civil Procedure 55. The supreme court declined to find Brown's act of leaving the message as an "appearance" under the Rule.[145] Without this appearance, the clerk of court was permitted to enter a default judgment without requiring service of the application for default on the defendant.[146] The court also held that an attorney's professional obligation to contact known opposing counsel who had requested an extension and to inquire of his or her intentions before seeking default did not extend to a pro se defendant who merely made a single telephone call inquiring about a court date.[147]

In *Hallam v. Holland America Line, Inc.*,[148] the supreme court held that the superior court did not err in denying class certification to pro se litigant Hallam, but remanded the case for consideration of Hallam's conditional class certification motion.[149] Hallam filed a pro se complaint in superior court against Holland America for claims involving his employment contract and the Alaska Wage and Hour Act. Hallam's motion for class certification was denied because Hallam lacked counsel. Hallam's subsequent motion seeking certification of the class conditioned on Hallam's hiring an attorney was never decided. The district court granted summary

142. *Id.* at 190.
143. 21 P.3d 822 (Alaska 2001).
144. *Id.* at 826, 828.
145. *Id.* at 826.
146. *Id.*
147. *Id.* at 828.
148. 27 P.3d 751 (Alaska 2001).
149. *Id*. at 754.

judgment to Holland America. The supreme court found that while the denial of class certification with Hallam as a pro se litigant was not erroneous, the issue of conditional class certification must be considered on remand because the district court did not give the motion due consideration.[150]

In *Leisnoi v. United States*,[151] the Court of Appeals for the Ninth Circuit held that the district court had jurisdiction over an action under the Quiet Title Act,[152] because the United States claimed an interest in the property at issue in the form of reserve easements and because title between Leisnoi and the U.S. was disputed.[153] When a third party filed a *lis pendens* on behalf of the U.S. against Leisnoi Inc., an Alaska Native Village Corporation wishing to sell land, Leisnoi filed an action in district court to quiet title. The court of appeals found that the district court retained jurisdiction because the U.S. claimed reserved easements in Leisnoi's property and because the U.S.'s interests in title were asserted by a third party, clouding Leisnoi's title and resulting in a continuing dispute between the interests of Leisnoi and the U.S.[154]

In *Smith v. Cleary*,[155] the supreme court held that the superior court did not exceed its approval authority by requiring an Arizona private correctional facility to meet the standards outlined in a settlement agreement between the State and a class of prisoners, which addressed overcrowding in Alaska prisons.[156] The State and the prisoners' class entered into a settlement, which enumerated the rights of inmates, outlined population guidelines, detailed prison standards, established mechanisms for compliance and designated a judge to enforce the agreement. In response to superior court sanctions for overcrowding, the State contracted with a private detention facility in Arizona to house 206 Alaska inmates. The superior court conditioned its approval of the contract on the Arizona facility's compliance with the settlement agreement. The supreme court first found that the settlement agreement did not directly apply to the Arizona facility because neither party intended the provisions to cover such a facility.[157] However, because the agreement required the State to submit mitigation plans for court approval if the State sought to limit overcrowding and because the

150. *Id*. at 754.
151. 267 F.3d 1019 (9th Cir. 2001).
152. 28 U.S.C. § 2409(a) (1994).
153. *Leisnoi*, 267 F.3d at 1023.
154. *Id.*
155. 24 P.3d 1245 (Alaska 2001).
156. *Id.* at 1246.
157. *Id*. at 1249.

Arizona detention facility plan was intended to limit overcrowding, the court held that the superior court had discretion to require the Arizona facility to comply with the settlement agreement.[158]

## V. CONSTITUTIONAL LAW

In *Alaska Legislative Council v. Knowles*,[159] the supreme court held that the Governor's item veto power only permits the deletion or reduction of money appropriated and does not permit the Governor to increase or divert funds or strike descriptive language.[160] Governor Knowles invoked the Governor's item veto power and struck various parts of the 1997 appropriation bills passed by the Alaska legislature. The Alaska Legislative Council challenged five of these vetoes, arguing that they were invalid because they did not eliminate "items" and that Knowles had failed to adequately explain the vetoes. Knowles countered that the vetoed provisions were invalid because they violated the Alaska Constitution's confinement clause requiring that appropriation bills be confined to appropriations.[161] For purposes of the item veto power, the supreme court defined "item" as "a sum of money dedicated to a particular purpose."[162] The court held that although Knowles sufficiently explained each veto, all five were invalid because the vetoed provisions were not "items" subject to the Governor's item veto power.[163] In holding that three of the vetoed provisions violated the confinement clause,[164] the court approved a five-part non-exclusive test requiring that an appropriation not administer a program of expenditures, enact or amend law, or extend beyond the life of the appropriation and that the language be germane to the bill and be the minimum necessary to explain the legislature's intent.[165]

In *Anchorage Police Dep't Employees Ass'n v. Municipality of Anchorage*,[166] the court held that Anchorage's random drug testing program for police and fire department employees in safety-sensitive situations violated the Alaska Constitution.[167] Anchorage adopted a policy which provided for urinalysis of employees in the following circumstances: job application, after a traffic accident,

158. *Id.* at 1250-51.
159. 21 P.3d 367 (Alaska 2001).
160. *Id.* at 372-73.
161. *Id.* at 369; *see* ALASKA CONST. art. II, § 13.
162. *Id.* at 372.
163. *Id.* at 374-76.
164. *Id.* at 384.
165. *Id.* at 377.
166. 24 P.3d. 547 (Alaska 2001).
167. *Id.* at 549.

promotion, transfer, demotion and at random. Only employees in positions of "public safety" are subject to random testing and to promotion, demotion and transfer testing. The police and firefighters filed for declaratory and injunctive relief, arguing that suspicionless testing violated their constitutional rights. The superior court held that the policy was valid. On appeal, the supreme court concluded that urinalysis constitutes a search,[168] and that Anchorage's interest in ensuring public safety is sufficiently compelling to outweigh the intrusions on privacy when firefighters and police employees are subjected to suspicionless urine testing upon application for employment, promotion, demotion or transfer, or after a traffic accident.[169] However, the court held that the State's interest in public safety did not outweigh privacy interests in the case of indefinite random testing because random testing: (1) places increased demands on employees' reasonable expectations of privacy; (2) is more intrusive; and (3) has no logical nexus to any job-related occurrence.[170] In holding that the random testing program violated the Alaska Constitution, the court noted that there was no documented history of substance abuse problems by firefighters and police employees.[171]

In *Doe v. Otte*,[172] the Court of Appeals for the Ninth Circuit held that the ex post facto clause of the U.S. Constitution bars application of the Alaska Sex Offender Registration Act ("ASORA") to people who committed sex crimes before the Act was enacted.[173] The plaintiffs in *Doe* were convicted sex offenders who had completed their sentences. The ASORA "requires sex offender registration, with criminal penalties for failure to register, and it authorizes full disclosure of information about all offenders to the public."[174] In evaluating the plaintiffs' claim, the court noted that the ex post facto clause prohibits enactment of a law that inflicts a greater punishment than was available when the crime was committed.[175] The court examined first whether the legislature intended the statute to be punitive, and second, whether the statute is so punitive in effect that it should be considered punishment.[176]

168. *Id.* at 551.
169. *Id.* at 556-57 (applying Messerli v. State, 626 P.2d 81 (Alaska 1980)).
170. *Id*. at 558.
171. *Id.* at 559.
172. 259 F.3d 979 (9th Cir. 2001).
173. *Id.* at 982.
174. *Id.* at 984.
175. *Id.* at 984-85 (citing Calder v. Bull, 3 U.S. (3 Dall.) 386, 391 (1798)).
176. *Id.* at 985 (citing United States v. Ward, 448 U.S. 242, 248 (1980)).

The court found that the intent of the legislature was not punitive by applying seven factors:

> 1) whether the sanction involves an affirmative disability or restraint; 2) whether it has historically been regarded as a punishment; 3) whether it comes into play only on a finding of scienter; 4) whether its operation will promote the traditional aims of punishment—retribution and deterrence; 5) whether the behavior to which it applies is already a crime; 6) whether an alternative purpose to which it may rationally be connected is assignable to it; and 7) whether it appears excessive in relation to the alternative purpose assigned.[177]

The court held that because four of the factors were met, the statute must be considered punitive for ex post facto purposes, and remanded for further proceedings.[178]

In *Jacobus v. State*,[179] the district court of Alaska held that the State may constitutionally limit individual and corporate contributions to political parties for electing or nominating a candidate, but it may not restrict donations to political parties for other purposes or limit the volunteering of professional services.[180] The court found that while it is constitutional under A.S. 15.13.070(b)(2) for the State to restrict the amount an individual can contribute to a political party for the purpose of nominating or electing a candidate, the restriction of donations made for other purposes under sections 15.13.070(b)(2) and 15.30.400(3) is unconstitutional because it interferes with "the protected rights of speech and association."[181] The court found that restricting or limiting volunteer professional services under section 15.13.400(3)(B)(i) is unconstitutional because it is vague and overbearing, it impacts an individual's freedom of speech and association, and the State has not provided a compelling interest.[182] The court also found that section 15.13.074(f), limiting corporate contributions to political parties for nominating or electing a candidate, is constitutional.[183]

In *Rollins v. Ulmer*,[184] the supreme court held that the registration requirements under Alaska's medical marijuana law do not violate an individual's constitutional right to privacy.[185] The medical marijuana law requires authorized users to register with the

177. *Id.* at 986-87 (citing Kennedy v. Mendoza-Martinez, 372 U.S. 144 (1963)).
178. *Id.* at 993-94.
179. 182 F. Supp. 2d 881 (D. Alaska 2001).
180. *Id.* at 893.
181. *Id.* at 888-90, 893.
182. *Id*. at 890-92.
183. *Id*. at 893.
184. 15 P.3d 749 (Alaska 2001).
185. *Id.* at 754.

Department of Health and Social Services, which maintains a registry of such users. Rollins claimed that the registration requirements infringe upon the constitutional right to privacy, arguing that there is no guarantee that the government will comply with the law's confidentiality requirements and that the mere existence of the registry is burdensome because of the fear of stigmatization it causes. The supreme court found the law constitutional because the confidentiality provisions barring public access to the registry and limiting its use to authorized and narrowly specified purposes sufficiently protect the privacy of the information.[186] The court held Rollins' fear of mishandling of the registry to be unsubstantiated and his fear of stigmatization to be too incidental in its deterrent effect to establish a constitutional violation.[187]

In *Sampson v. State*,[188] two patients sought a declaratory judgment that Alaska's ban on assisted suicide violated their constitutional rights to privacy, liberty and equal protection,[189] but the supreme court upheld the statute. The court looked at the history of assisted suicide and determined that it was not a fundamental liberty or privacy interest.[190] Therefore, the State had to establish merely a "legitimate interest and a close and substantial relationship between its interest and the chosen means of advancing that interest."[191] The court determined that legitimate state interests are involved, such as protecting vulnerable Alaskans from undue influence.[192] Furthermore, the court rejected the equal protection claim using a sliding scale test based on the relative importance of the state and individual interests and the degree of closeness of the regulation to the interest.[193] The court held that the distinction between the withdrawal of life sustaining care and the active participation in suicide does not result in over- or under-inclusiveness.[194] The court also rejected the argument that the law violates equal protection because those patients capable of committing suicide unassisted are not subject to its chilling effect.[195]

---

186. *Id.* at 752-53 (citing Falcon v. Alaska Pub. Offices Comm'n, 570 P.2d 469, 479 (Alaska 1977)).

187. *Id.* at 753.

188. 31 P.3d 88 (Alaska 2001).

189. *Id.* at 90.

190. *Id.* at 91-94.

191. *Id.* at 91.

192. *Id.* at 95-96.

193. *Id.* at 98.

194. *Id.* at 98-99.

195. *Id.* at 99.

In *Sands v. Living Word Fellowship*,[196] the supreme court held that tort claims based on religious "shunning" are barred by the free exercise clauses of the U.S. and Alaska Constitutions.[197] Sands and his father, the pastor of Wasilla Ministries, assisted Jodi Hejl, a member of Living Word Fellowship, in running away from home. In response, Hejl's parents alleged that Wasilla Ministries was a cult, accused Sands of being a cult recruiter and obtained an injunction prohibiting Sands and Wasilla Ministries from having any further contact with the Hejl family. Living Word then sought to warn the Christian community about the dangerous practices of Wasilla Ministries and encouraged the community to "shun" its members. Following his suicide attempt, Sands sued Living Word and the Hejls for negligent infliction of emotional distress, intentional infliction of emotional distress and abuse of process. The superior court dismissed the entire case for failure to state a claim. The supreme court affirmed dismissal of Sands' abuse of process claims for failure to state the requisite "willful acts"[198] and held that Sands' tort claims were barred by the free exercise clauses of the U.S. and Alaska Constitutions because Living Word's conduct involved religion, was sincere and did not pose a threat to public safety, peace or order.[199] However, the supreme court held that the superior court erred in dismissing Sands' tort claims against the Hejls because Sands alleged that their conduct was not motivated by religion but by a desire to suppress Jodi Hejl's allegations of sexual abuse by her stepfather.[200]

In *State v. Planned Parenthood*,[201] the supreme court reversed the summary judgment decision of the superior court holding A.S. 18.16.020 unconstitutional.[202] Absent judicial waiver, section 18.16.020 requires parental consent for an abortion for any unemancipated, unmarried minor under the age of seventeen.[203] The court first determined that Planned Parenthood and two doctors who provide abortion services had standing to challenge the statute's constitutionality.[204] The court also held that the privacy clause of the Alaska Constitution creates a self-executing right to reproductive privacy and that minors have the same right of privacy as

196. 34 P.3d 955 (Alaska 2001).
197. *Id.* at 959.
198. *Id.* at 961.
199. *Id.* at 958-60.
200. *Id.* at 962.
201. 35 P.3d 30 (Alaska 2001).
202. *Id*. at 32.
203. *Id.*; ALASKA STAT. § 18.16.020 (Michie 2000).
204. *Planned Parenthood*, 35 P.3d at 34.

any other citizen; therefore "the state can constrain a minor's privacy only when necessary to further a compelling state interest and only if no less restrictive means exist."[205] Finally, the court held that the superior court erred in granting summary judgment for Planned Parenthood without hearing evidence of the State's asserted compelling interest.[206] The court therefore remanded for an evidentiary hearing.[207]

In *State, Dep't of Health and Social Services v. Planned Parenthood*,[208] the supreme court held that a Department of Health and Social Services ("DHSS") regulation that denied Medicaid assistance for medically necessary abortions except where there is a risk of dying or the pregnancy resulted from rape or incest violated equal protection under the Alaska Constitution.[209] The court recognized the right to reproductive freedom as a constitutional right and subjected the regulation to strict scrutiny.[210] Under this standard, the court ruled that once the State establishes a health care program for the poor, it may not selectively deny medical treatment to a poor woman merely because her health risk arises from pregnancy.[211] The court held that the regulation did not advance the State's purported interest in either the medical and public welfare interests in funding childbirth or the State's interest in minimizing health risks to the mother and child.[212]

In *State, Dep't of Revenue v. Andrade*,[213] the supreme court held that A.S. 42.23.005(a), which restricts alien eligibility for a permanent fund dividend ("PFD") to those aliens who are lawfully admitted for permanent residence in the United States, is constitutional.[214] After being denied dividends, the Andrade family brought suit, claiming that the denials violated both the U.S. and Alaska Constitutions. However, the supreme court held that under state law, the relevant language of the statute means that "an alien must be legally present in Alaska and be able to form the requisite intent to remain in Alaska."[215] Therefore, the statute does not discriminate between similarly situated aliens, but rather differenti-

205. *Id*. at 39-41.
206. *Id*. at 43-44.
207. *Id*. at 46.
208. 28 P.3d 904 (Alaska 2001).
209. *Id.* at 913.
210. *Id.* at 909.
211. *Id.* at 908.
212. *Id.* at 912-13.
213. 23 P.3d 58 (Alaska 2001).
214. *Id*. at 61, 80.
215. *Id*. at 80-81.

ates between restricted aliens who cannot form the necessary intent to remain in Alaska, and nonrestricted aliens who can form the necessary intent.[216] The court also found that the statute does not violate the supremacy clause because it is not a regulation of immigration, Congress has not preempted state power to regulate PFD eligibility, and the statute "does not stand as an obstacle . . . of the full purposes and objectives of Congress in regulating immigration."[217] Finally, the court held that the statute does not constitute national origin discrimination because eligibility stems from a person's status as a nonrestricted alien and is not based on "cultural characteristics, ancestry, or country of origin."[218]

## VI. CRIMINAL LAW

### A. Constitutional Protections

1. *Search and Seizure*. In *Albers v. State*,[219] the court of appeals held that "during an investigative stop. . . the police may order or force the detained person to open his hand only if the police have an articulable reason to suspect that the detained person is holding something that could endanger the police."[220] A police officer suspected that Albers and another individual were engaged in illegal drug activity and ordered both men to stand and put their hands against the wall. Albers did so, but kept his left hand closed. The officer ordered Albers to unclench his hand and, when he complied, a rock of crack cocaine dropped to the ground. Albers was indicted for possession of cocaine and asked the superior court to suppress the evidence of the cocaine, arguing that the police had conducted an illegal search. The motion was denied and Albers was convicted. On appeal, the court analogized the search to a "pat-down" search and held that it is "justified whenever the circumstances would warrant a reasonably prudent person in suspecting the detainee was armed or otherwise posed a threat to the officer."[221] Because the superior court did not expressly address the question of whether the officer had such a belief, the case was remanded for reconsideration of the motion to suppress.[222]

---

216. *Id*. at 78.
217. *Id*. at 76.
218. *Id*. at 74.
219. 38 P.3d 540 (Alaska Ct. App. 2001).
220. *Id.* at 541.
221. *Id*. at 542-43.
222. *Id*. at 543.

In *Cowles v. State*,[223] the supreme court held that a videotape showing Cowles, the University of Alaska box office manager, stealing cash from the ticket office was not obtained in violation of her constitutional rights and was admissible at trial.[224] After receiving a tip from one of Cowles's co-workers, University police installed a hidden video camera above her desk without obtaining a warrant. Cowles' desk was in an area of high public traffic. The camera showed Cowles taking money from the University cash bag and transferring it to her purse. Cowles was convicted of second-degree theft and, on appeal, argued that the surveillance was a violation of her right to be free from unreasonable searches guaranteed by the U.S. and Alaska Constitutions. To determine whether the monitoring was a search, the court employed the expectation of privacy test, which asks: (1) did the person harbor a subjective expectation of privacy; and (2) is that expectation one that society recognizes as reasonable?[225] The court found that Cowles' expectation of privacy was not reasonable considering the public nature of Cowles' office and that activities open to public observation are not generally protected.[226] The court rejected Cowles' argument that the location of the camera above her desk rather than at eye-level placed it in an area where she would not expect surveillance, stating that simply positioning the camera for optimum surveillance did not create an expectation of privacy where one did not previously exist.[227] The court also reasoned that the high-security nature of Cowles' job made her expectation of privacy less reasonable.[228] The court therefore held that Cowles did not have a reasonable expectation of privacy in her office and affirmed the decision of the court of appeals.[229]

In *Haskins v. Municipality of Anchorage*,[230] the court of appeals held that the entry of police officers into the basement of the Haskins' home without consent or justification for a protective search violated Haskins' rights under the search and seizure clauses

223. 23 P.3d 1168 (Alaska 2001).

224. *Id*. at 1169.

225. *Id.* at 1170. The expectation of privacy test under the Alaska Constitution is substantially the same as under the U.S. Constitution. *See* California v. Ciraola, 476 U.S. 207, 211 (1986); City & Borough of Juneau v. Quinto, 684 P.2d 127, 129 (Alaska 1984).

226. *Cowles*, 23 P.3d at 1171.

227. *Id.* at 1172.

228. *Id.* at 1173.

229. *Id.* at 1175.

230. 22 P.3d 31 (Alaska Ct. App. 2001).

of the U.S. and Alaska Constitutions.[231] Police officers knocked on the door of the Haskins residence because Haskins' vehicle was suspected in a hit-and-run accident that had just occurred. Mrs. Haskins invited the officers inside but told them to go upstairs while she went downstairs to get her husband. The officers followed her downstairs, arrested Haskins and, based on their observations of him and his vehicle, charged him with driving while intoxicated. Haskins moved to suppress all evidence from the officers' entry into his home, claiming it exceeded the scope of consent. The court of appeals reversed the district court's denial of Haskins' motion, finding that the officers' entry into the basement of the home could not be justified as a consensual search.[232] Although warrantless protective searches may sometimes be justified in the most serious situations, the court found that the facts of this case did not rise to such a level.[233]

In *State v. Joubert*,[234] the supreme court held that a police search of Joubert's pocket was a valid search incident to arrest.[235] After detaining Joubert on suspicion of auto theft, the police conducted a pat-down search. The officer felt something small and hard in Joubert's pocket, removed the item and found a rock of crack cocaine. Joubert was arrested for possession of cocaine with intent to deliver. At trial, Joubert moved to suppress the evidence of the cocaine, arguing that it was the result of an illegal search. The trial court allowed the evidence after determining that the officer could have reasonably believed that the unknown object was a weapon, but the court of appeals reversed. The supreme court reinstated Joubert's conviction, finding the search valid as a search incident to arrest in which the crime "fell into the category of crimes evidence of which can be concealed on the person."[236] Such searches are valid when the arrest is supported by probable cause, is not a pretext for the search, is for an offense for which evidence could be concealed on the suspect and when the search is "roughly contemporaneous" with the arrest.[237]

In *United States v. Sparks*,[238] the Court of Appeals for the Ninth Circuit affirmed the ruling that a search of Sparks' bag was not rendered unreasonable merely because the search was per-

231. *Id.* at 34.
232. *Id.*
233. *Id.*
234. 20 P.3d 1115 (Alaska 2001).
235. *Id*. at 1120-21
236. *Id*.
237. *Id*. at 1118.
238. 265 F.3d 825 (9th Cir. 2001).

formed by the civilian owner of the loaded guns stolen by Sparks.[239] The victim, Fox, suspected Sparks of stealing two of his handguns after he saw him hitch a ride from the spot where footprints from Fox's broken window ended. Fox and a police officer approached Sparks at a gas station. While searching Sparks, the officer told Fox to see if his guns were inside the car Sparks was riding in. Fox found his guns inside Sparks' bag. On these facts, the court of appeals concluded that the officer had probable cause to arrest Sparks and conduct a search.[240] Further, the court concluded that Fox's role in the search did not render the search unreasonable since Fox's role was strictly aiding the officer's efforts, the officer was in need of assistance in finding the guns quickly and Fox was limited to doing only what the police had authority to do.[241]

2. *Miscellaneous*. In *Bourdon v. State*,[242] the court of appeals held that A.S. 12.30.040(b) violated the equal protection clause of the Alaska Constitution.[243] Section 12.30.040(b) denies post-conviction bail to defendants convicted of class B or C felonies if they had prior convictions for first-degree stalking, sexual assault or sexual abuse of a minor.[244] The court of appeals held that section 12.30.040(b)(2) violates the equal protection clause because it does not deny bail in an "even-handed manner."[245] The statute treated those with prior felony convictions for sexual assault differently from those with current convictions.[246] Thus, a defendant with a prior conviction for a class B or C felony who was convicted of sexual assault would not be denied post-conviction bail, while a defendant with a prior conviction for sexual assault convicted of class B or C felony would be denied bail.[247]

In *Hertz v. State*,[248] the court of appeals held the transfer of an inmate to an out-of-state private correctional facility to be constitutional and within the authority of the Alaska Department of Corrections ("DOC").[249] Hertz petitioned for a writ of habeas corpus while serving a term for murder at the privately-owned Central

239. *Id.* at 832.
240. *Id.* at 830.
241. *Id*. at 831-832.
242. 28 P.3d 319 (Alaska Ct. App. 2001).
243. *Id*. at 323.
244. *Id*. at 320-32; ALASKA STAT. § 12.30.040(b)(2) (Michie 2000).
245. *Id.* at 323 (citing Griffith v. State, 641 P.2d 228, 234 (Alaska Ct. App. 1982)).
246. *Id.*
247. *Id.*
248. 22 P.3d 895 (Alaska Ct. App. 2001).
249. *Id*. at 897.

Arizona Detention Center ("CADC"). Hertz based his petition on a number of grounds, including the DOC's unconstitutional delegation of its incarceration power and the agency's waiver of jurisdiction over Hertz by sending him to Arizona. The court of appeals held that Alaska's delegation of the power of incarceration to a private facility is constitutional because Alaska law permits transfer of prisoners only when necessary to address prisoner health, security considerations or prison overcrowding, and the CADC must follow comprehensive Alaska prison management laws and DOC regulations.[250] The court also found that Alaska retained jurisdiction over Hertz because both the legislature and the DOC, in its contract with the CADC, clearly intended to retain jurisdiction over Alaska inmates serving sentences in out-of-state facilities.[251]

In *Ragsdale v. State*,[252] the court of appeals affirmed Ragsdale's conviction of second-degree assault for engaging in sexual penetration of a woman so intoxicated that she was either incapacitated or unaware of the penetration.[253] The court held that the definition of "incapacitated" under A.S. 11.41.420(a)(3) does not violate the Alaska Constitution's single subject clause because the statute deals with domestic violence, bail and access to records of the Violent Crimes Compensation Board, which have a common thread.[254] The court also held that the statutory definition of "incapacitated" meets the constitutional standard for definiteness and therefore rejected Ragsdale's vagueness challenge.[255] The court held that the jury did not have to agree on one or both of the alternative statutory definitions of "intoxicated."[256] Because a jury does not ordinarily have to agree on a single interpretation of the facts of a particular criminal episode, the trial court properly refused to instruct the jury that they must reach a unanimous conclusion about whether Ragsdale knew the woman was incapacitated or whether he knew she was unaware penetration was occurring.[257]

In *Sanford v. State*,[258] the court of appeals held that Alaska Rule of Criminal Procedure 6(n)(1) is constitutional and that a majority of the grand jurors originally sworn in and charged with

250. *Id.* at 903-04.
251. *Id.* at 900-01.
252. 23 P.3d 653 (Alaska Ct. App. 2001).
253. *Id*. at 655; *see* ALASKA STAT. § 11.41.420(a)(3) (Michie 2000).
254. *Id.* at 656.
255. *Id*. at 658.
256. *Id.* at 655.
257. *Id.* at 658.
258. 24 P.3d 1263 (Alaska Ct. App. 2001).

instructions is required for indictment.[259] Sanford was indicted by a grand jury for robbery, coercion and assault. The next day, with only twelve of the original fifteen grand jurors present, the grand jury voted to indict Sanford for attempted kidnapping. Sanford moved to dismiss the indictment, arguing that Rule 6(n)(1) required a majority of the initially sworn grand jurors. The State argued that Rule 6(n)(1) violated article I, § 8 of the Alaska Constitution, which provides that the "grand jury shall consist of at least twelve citizens, a majority of whom concurring may return an indictment."[260] The court of appeals held that the constitution was ambiguous on how many grand jurors must vote for indictment and that the supreme court had the authority to promulgate Rule 6(n)(1) to resolve the issue.[261] Therefore, the method specified in Rule 6(n)(1) for determining the number of votes necessary was constitutional, and the indictment against Sanford was dismissed.[262]

In *Wolfe v. State*,[263] the court of appeals held that Alaska's disorderly conduct statute[264] is not unconstitutionally overbroad.[265] Wolfe, a high school teacher, was convicted of disorderly conduct for shaking a student and pushing him against a desk. Wolfe claimed that the statute was overbroad and, therefore, unconstitutional because it allowed the State to prosecute and punish teachers for using "appropriate force to maintain discipline and protect students and staff."[266] The court held that the statute is not overbroad because it provides a defense of legal justification or excuse, which allows teachers, pursuant to school regulations, to use reasonable and appropriate non-deadly force to maintain order.[267]

## B. General Criminal Law

1. *Criminal Procedure*. In *Evans v. State*,[268] the court of appeals held that the trial judge improperly failed to redact the presentence report under Rule 32.2(a)(3) of the Alaska Rules of Criminal Procedure.[269] At Evans' sentencing hearing, he denied the

259. *Id.* at 1264.
260. ALASKA CONST. art. I, § 8; *Id*. 24 P.3d at 1265.
261. *Sanford*, 24 P.3d at 1266.
262. *Id*.
263. 24 P.3d 1252 (Alaska Ct. App. 2001).
264. ALASKA STAT. § 11.61.110(a)(6) (Michie 2000).
265. *Wolfe*, 24 P.3d at 1257-58.
266. *Id.* at 1257.
267. *Id*. at 1258.
268. 23 P.3d 650 (Alaska Ct. App. 2001).
269. *Id*. at 653.

accounts of his sexual abuse of a child and requested that the alleged offenses be struck from the report. The trial court judge refused, but noted Evans' denials on the report. The court of appeals held that the failure to remove the allegations in the pre-sentence report violated Rule 32.2(a)(3).[270] Upon Evans' denial, Rule 32.2(a)(3) required the judge to either resolve the truth of the allegations to preserve the pre-sentence report or to conclude that the allegations made no difference to the sentencing decision and strike them from the report. Because the trial judge only annotated the report after Evans denied the allegations, the court of appeals remanded the case for the court to comply with the requirements of Rule 32.2(a)(3).[271]

In *Fitts v. State*,[272] the court of appeals upheld Fitts' conviction for first-degree robbery.[273] Fitts and Gonzalez were convicted for robbing a cab driver at gunpoint. On appeal, Fitts asserted that the police had conducted an illegal search of his room at Gonzalez's house because Gonzalez's mother did not have the authority to consent to a search of a room for which he paid a monthly rent. The court rejected this argument because Gonzalez's mother did not have to have actual authority to consent to the search as long as the police reasonably believed she had the authority.[274]

In *Galimba v. Municipality of Anchorage*,[275] the court of appeals assumed, without deciding, that field sobriety tests were a form of *Terry*[276] search that require reasonable suspicion and that the police had reasonable suspicion to administer such tests to Galimba.[277] The police stopped Galimba after witnessing him making an illegal turn and driving erratically and arrested him for driving while intoxicated. Galimba moved to suppress the results of field sobriety tests, arguing that the tests were intrusive enough to constitute a search and were per se unreasonable when performed without a warrant. The court noted that breath tests are generally considered searches for constitutional purposes, but field sobriety tests are not, and that most courts that do consider field sobriety tests as searches treat them as a form of *Terry* stop requiring only reasonable suspicion.[278] Without deciding the constitu-

270. *Id.* at 652.
271. *Id.* at 653.
272. 25 P.3d 1130 (Alaska Ct. App. 2001).
273. *Id.* at 1131.
274. *Id.* at 1132-33.
275. 19 P.3d 609 (Alaska Ct. App. 2001).
276. Terry v. Ohio, 392 U.S. 1 (1968).
277. *Galimba*, 19 P.3d at 612.
278. *Id.* at 611-12.

tional issue, the court of appeals held that the record supported a finding of both probable cause and reasonable suspicion because Galimba committed a moving violation, drove erratically and admitted to consuming several drinks.[279]

In *Griffin v. State*,[280] the court of appeals upheld state criminal procedures allowing a court-appointed attorney to withdraw from frivolous post-conviction relief applications,[281] but required that a "no-merit certificate" include "a detailed explanation of why the attorney has concluded that the petitioner has no colorable grounds for post-conviction relief."[282] Griffin, an indigent, appealed dismissal of his application for post-conviction relief after his attorney filed a no-merit certificate. The court rejected Griffin's argument that it should adopt the rule in *Hertz v. State*,[283] which prohibited counsel for an indigent petitioner from withdrawing the petition for post-conviction relief even if the attorney has concluded it was frivolous.[284] The legislature had lawfully enacted the procedures, and the court argued it was "not at liberty to substitute another procedure simply because we believe it might be better."[285] However, the court remanded Griffin's case because the certification did not fully explain why the claims were frivolous.[286]

In *John v. State*,[287] the court of appeals overturned its prior decision in *Wilson v. State*[288] and held that when an Alaskan villager is charged with a felony, Alaska Rule of Criminal Procedure 18 requires that the presumptive trial site be in the city or town identified by the supreme court venue map as the felony trial site for that district.[289] John was charged with committing felonies in the village of Tetlin and his trial was scheduled in Fairbanks. Criminal Rule 18 requires establishment of venue districts and a venue map that identify a presumptive trial site where the jury pool represents a fair cross-section of the defendant's community. The interpretation of Rule 18 in *Wilson* directed the superior court to set a felony case for trial at the closest existing court with a resident superior

279. *Id*. at 612.
280. 18 P.3d 71 (Alaska Ct. App. 2001).
281. ALASKA R. CRIM. P. 35.1(e)-(f).
282. *Griffin*, 18 P.3d at 72.
283. 755 P.2d 406 (Alaska Ct. App. 1988).
284. *Griffin*, 18 P.3d at 75.
285. *Id.*
286. *Id.* at 77.
287. 35 P.3d 53 (Alaska Ct. App. 2001).
288. Memorandum Opinion and Judgment No. 1893 (Alaska App., October 11, 1989).
289. *John*, 35 P.3d at 59.

judge, either Fairbanks or Bethel. Finding the *Wilson* interpretation of Rule 18 inconsistent with public policy, the court of appeals overturned *Wilson*.[290] Instead, the court held that when a felony is committed within one of the twenty-five venue districts drawn by the supreme court, the trial site is presumed to be in the city or town identified as the felony trial site for that district.[291]

In *Pitka v. State*,[292] the court of appeals held that under Alaska Rule of Criminal Procedure 45(c)(1) (the section of Alaska's speedy trial rule governing additional charges filed after the initial complaint or indictment), separate offenses are considered part of the "same criminal episode" only if there is some nexus between the crimes more than their temporal proximity.[293] A state trooper responding to a domestic disturbance arrested Pitka and discovered cocaine on his person. Pitka was charged with criminal trespass and criminal mischief the day after the arrest but was not indicted for possession of cocaine until six months later. Pitka argued that all three offenses arose out of the "same criminal episode," and, therefore, the speedy trial "clock" ran from the time of the initial indictments, preventing the State from adding other charges at a later time. The court of appeals disagreed, finding that cocaine possession was not an element of and had "virtually no bearing" on the trespass and criminal mischief charges and, therefore, the charges could not be part of the "same criminal episode" even though they occurred simultaneously.[294]

In *Ritter v. State*,[295] the court of appeals found a *Cooksey*[296] plea invalid when the sole issue preserved for appeal was the sufficiency of the evidence at grand jury, even if the prosecution stipulated that it had no further evidence to present at trial.[297] The court also held that A.S. 11.41.420(a)(4), which prohibits a health care worker from engaging in sexual contact with a person unaware that a sexual act is being committed, applies when the patient fails to recognize that the contact is sexual in nature rather than part of legitimate treatment.[298] Ritter was charged with six counts of sexual

290. *Id*. at 57-59.

291. *Id*. at 59.

292. 19 P.3d 604 (Alaska Ct. App. 2001).

293. *Id.* at 607.

294. *Id.*

295. 16 P.3d 191 (Alaska Ct. App. 2001).

296. *See* Cooksey v. State, 524 P.2d 1251, 1255-57 (Alaska 1974) (holding that a defendant need not go to trial to preserve an appellate issue that is dispositive of the defendant's case).

297. *Ritter*, 16 P.3d at 196.

298. *Id.* at 198.

assault arising from sexual contact during massages given to female clients. Shortly before trial, Ritter entered a *Cooksey* plea, whereby he pled no contest to one count, the remaining five were dropped and the State agreed that Ritter could appeal. After sentencing and while his appeal was pending, Ritter filed a motion to withdraw his plea, arguing that even if both of the State's theories of prosecution were dismissed, the State would still be able to return to the grand jury with additional evidence and seek new indictments. Despite the State's assertions that it had no better evidence, the court agreed with Ritter and stated that an issue is dispositive for *Cooksey* pleas only if resolution of the issue in the defendant's favor would either legally preclude prosecution or leave the government with insufficient evidence to survive a motion for acquittal.[299] The plea was found invalid and Ritter was allowed to go to trial on the original indictments.[300]

In *State v. Euteneier*,[301] the court of appeals held that warrants may be issued for a search for evidence of the "violation" of consumption of alcohol by a minor.[302] Juneau police responded to a complaint of a loud party but were denied entry to the house. The police returned with a search warrant to look for evidence of consumption of alcohol by minors. Euteneier was charged with consuming alcohol as a minor, designated by the legislature as a "violation."[303] Euteneier asserted that the evidence seized should be quashed because search warrants can only be issued to investigate crimes, not violations. The court disagreed, finding that violations, like traffic infractions, were intended by the legislature to fall within a class of "quasi-criminal offenses" enforced by traditional criminal procedures, including search warrants.[304]

In *Tyler v. State*,[305] the court of appeals dismissed Tyler's appeal from his felony driving while intoxicated ("DWI") conviction[306] for lack of jurisdiction.[307] Tyler asserted that his two prior DWI convictions were invalid and, therefore, the charge in question should have been a misdemeanor rather than a felony. Tyler

299. *Id*. at 195.

300. *Id.* at 196.

301. 31 P.3d 111 (Alaska Ct. App. 2001).

302. *Id.* at 112.

303. *Id*.; ALASKA STAT. § 04.16.050 (Michie 2000).

304. *Euteneier*, 31 P.3d at 113.

305. 24 P.3d 1260 (Alaska Ct. App. 2001).

306. *See* ALASKA STAT. § 28.35.030(n) (Michie 2000) (defining a felony driving while intoxicated ("DWI") as being convicted of DWI after having been twice convicted of DWI and/or refusing a breath test within the preceding five years).

307. *Tyler*, 24 P.3d at 1263.

entered a *Cooksey* plea, which he hoped would allow him to plead no contest to the DWI charge while still preserving the issue of his prior convictions on appeal. The court of appeals pointed out two potential defects in Tyler's *Cooksey* plea. First, valid *Cooksey* pleas need the assent of the prosecution, lacking in this case.[308] Second, the issue Tyler was attempting to preserve on appeal was not dispositive of the felony charge against him.[309] Even if Tyler were successful in his challenge of his prior DWI convictions, the State would be entitled to re-prosecute Tyler for those crimes. If he were again convicted of the earlier DWIs, the felony conviction would still stand. As a result, Tyler's *Cooksey* plea was invalid and the court dismissed the case for lack of jurisdiction.[310]

2. *Evidence.* In *David v. State*,[311] the court of appeals found an impermissible inference under Alaska Rule of Evidence 512(a) in the trial judge's assertion that a defense expert's answer was "inconsistent" with his earlier assertion of a privilege to refuse to answer the question.[312] David was charged with sexually abusing his stepdaughter and called a psychologist in support of his defense that the police had encouraged his stepdaughter to invent false accusations. During voir dire examination the psychologist was asked about allegations of sexual abuse in his son's sealed psychiatric records. He asserted the psychotherapist-patient privilege and refused to answer. In the presence of the jury, he denied knowledge of any such records. The trial judge ordered the psychologist's answers during voir dire to be played for the jury as a prior inconsistent statement. The court of appeals held that the trial judge could have found the psychologist's answer inconsistent with his earlier assertion of privilege only if the judge assumed that the assertion of privilege essentially conceded that the answer to the question was unfavorable to the witness.[313] Alaska Rule of Evidence 512(a) provides that no such inference can be drawn from an assertion of privilege.[314]

In *Hess v. State*,[315] the supreme court held that when the prosecution introduces evidence of a prior sexual assault, the defendant may introduce evidence of acquittal to show reasonable doubt as to

308. *Id.* at 1262.
309. *Id*.
310. *Id*.
311. 28 P.3d 309 (Alaska Ct. App. 2001).
312. *Id.* at 315.
313. *Id.* at 313.
314. *Id*. at 313-14.
315. 20 P.3d 1121 (Alaska 2001).

his "propensity to disregard the new complainant's lack of consent."[316] Hess was convicted of first-degree sexual assault and kidnapping of H.W. At trial, Hess claimed consent, and the State offered evidence that Hess had previously sexually assaulted A.R. The trial court denied a limiting instruction to inform the jury that Hess had been acquitted in the previous case.[317] Alaska Rule of Evidence 404(b)(3) allows the prosecution to admit evidence of previous sexual assaults when a defendant raises the defense of consent. The supreme court found that evidence of the acquittal was relevant to whether Hess recklessly disregarded a companion's lack of consent.[318] The court found that this exclusion of probative evidence constituted prejudicial error and ordered a new trial.[319]

In *State v. Ward*,[320] the court of appeals held that when the State destroys or loses evidence in good faith, the sanction imposed depends on the degree of prejudice to the defendant.[321] Ward was charged with felony driving while intoxicated and taken in for a breath test. Ward chose to have his blood drawn for an independent test, and when he later sought the analysis, he was informed that the sample had been destroyed. The trial court found that this destruction interfered with Ward's rights and granted his motion to suppress his breath test results. The court of appeals vacated this ruling and remanded the case, holding that the court must "carefully examine the circumstances surrounding the state's violation of its duty of preservation," and that where the evidence has been destroyed in good faith, the appropriate sanction will depend on the degree of prejudice suffered.[322] Further, the court stated that the presumptive sanction is an "instruction telling the jury to assume that the missing evidence would have been favorable to Ward."[323]

3. *Sentencing*. In *Baker v. State*,[324] the court of appeals vacated Baker's sentence after determining that Alaska's breath test refusal statute[325] gave the trial judge discretion to impose a portion of Baker's sentence concurrently with a sentence for driving while intoxicated ("DWI").[326] Baker was convicted of felony refusal to

316. *Id*. at 1124.
317. *Id*.
318. *Id.* at 1125.
319. *Id*. at 1128-30.
320. 17 P.3d 87 (Alaska Ct. App. 2001).
321. *Id.* at 90.
322. *Id.* at 89-90.
323. *Id.* at 90.
324. 30 P.3d 118 (Alaska Ct. App. 2001).
325. ALASKA STAT. § 28.35.032 (Michie 2000).
326. *Baker*, 30 P.3d at 120.

submit to a breath test and felony DWI. The trial judge sentenced Baker to the three-year presumptive term for each offense. The breath test refusal statute states that "the sentence imposed . . . under this subsection shall run consecutively with any other sentence of imprisonment imposed."[327] The trial judge interpreted this provision to mean that Baker's sentence for breath test refusal had to run consecutively with his sentence for DWI.[328] The appeals court examined the legislative history and held that the phrase "this subsection" referred to the various mandatory minimum sentences set out in a subsection, rather than to any sentence imposed on a defendant convicted of felony breath test refusal.[329] Accordingly, the court of appeals concluded that after the 120-day mandatory minimum imposed by A.S. 28.35.032(p)(5), the trial court had discretion to impose all or a portion of Baker's remaining sentence concurrently with the DWI sentence.[330]

In *Buckwalter v. State*,[331] the court of appeals held that under Alaska's aggregation statute,[332] the State must prove a single course of conduct linking criminal acts in order to aggregate them to determine the degree of the offense.[333] Buckwalter was convicted of first-degree theft and scheme to defraud for stealing $26,000 of goods in the course of a year. The court of appeals held that in order to aggregate the thefts to meet the $25,000 threshold for first-degree theft, the jury must find a single course of conduct linking the distinct offenses, essentially that the defendant had engaged in a calculated series of thefts.[334] However, the court found that the failure to instruct the jury as such was harmless error because Buckwalter's conviction for engaging in a scheme to defraud necessarily included a finding that the thefts were part of a single source of conduct.[335] The court did find error in the use of the fact that Buckwalter knew his offense involved multiple victims to aggravate his presumptive sentence because under A.S. 12.55.155(e), a factor that is a necessary element of the present offense may not be used in aggravation.[336]

---

327. ALASKA STAT. § 28.35.032(p)(5).
328. *Baker*, 30 P.3d at 118.
329. *Id.* at 119-20.
330. *Id.* at 120.
331. 23 P.3d 81 (Alaska Ct. App. 2001).
332. ALASKA STAT. § 11.46.980(c) (Michie 2000).
333. *Buckwalter*, 23 P.3d at 85-86.
334. *Id*. at 85.
335. *Id*. at 86.
336. *Id*. at 88.

In *Hill v. State*,[337] the court of appeals held that a decision to grant a limited driver's license for work purposes under A.S. 28.15.201(a) does not constitute modification of a defendant's sentence within the meaning of Alaska Rule of Criminal Procedure 35(b).[338] Hill was convicted of manslaughter and had his driver's license revoked for life. Following his release, a three-judge panel denied his request for a limited license, finding it an untimely motion for sentence modification. The court of appeals vacated the ruling and remanded the case, holding that the power to grant a limited license was inherent in the original judgment revoking the defendant's license and that granting such a license would not constitute a sentence modification under Rule 35(b).[339]

In *Hill v. State*,[340] the court of appeals held that mandatory parole was lawful, that the Parole Board has the authority to govern the conduct of prisoners released on mandatory parole, and that a parolee who violates conditions set by the Board can be required to serve the time excused for good time credit.[341] After being released on mandatory parole, Hill's parole was revoked and he was sent back to prison to serve the days for which he had previously received good time credit. On appeal, Hill first argued that A.S. 33.20.040(a), allowing for mandatory parole for prisoners whose composite sentence exceeded two years, contradicted sections 33.20.010 and 33.20.030. The court of appeals disagreed because, for prisoners whose composite sentence exceeded two years, good time credit, while not leading to an unconditional discharge, still hastened a prisoner's release from prison by converting days in jail to days on parole.[342] Second, Hill argued that the Parole Board had no authority to revoke a parolee's good time credit because A.S. 33.20.050 only authorized forfeiture of a prisoner's good time for an offense committed in prison. The court of appeals distinguished section 33.20.050 as dealing only with the Department of Corrections' authority to take away good time credit before release and found the Parole Board's authority to revoke parole in section 33.16.220(i).[343] Third, Hill argued that revocation of a parolee's good time credit was an illegal increase in sentence because it subjected the parolee to state supervision for a longer period than contemplated by the sentencing court. The court held that although

337. 32 P.3d 10 (Alaska Ct. App. 2001).
338. *Id.* at 12.
339. *Id*.
340. 22 P.3d 24 (Alaska Ct. App. 2001).
341. *Id.* at 31.
342. *Id.* at 27.
343. *Id*.

Hill may spend more total time under state supervision after having his parole revoked, the possibility was inherent in any criminal sentence exceeding two years by virtue of the statutes that created mandatory parole and authorized the Parole Board to revoke it.[344]

In *Jackson v. State*,[345] the court of appeals held that an inmate serving more than one sentence, one of which is partially consecutive, is entitled to good time credit and mandatory parole only after serving two-thirds of the aggregate sentence.[346] After Jackson's probation was revoked, he was ordered to serve his suspended time both concurrently and consecutively with his sentence for other offenses. After being released on parole, Jackson claimed that his sentence had been miscalculated and as a result, he served more time in prison than required. Jackson argued that the general rule that mandatory parole release dates are based on the total length of imprisonment rather than each sentence did not apply in his case because his sentences were not entirely consecutive.[347] The court disagreed, finding no precedent or policy that would preclude application of the rule to partially consecutive sentences like Jackson's.[348] Jackson also argued that A.S. 33.20.010 should allow for good time credit for concurrent sentences. Because the statute provides that good time is calculated based on "term of imprisonment" rather than on the term of sentence and because concurrent sentences do not increase the length of imprisonment, the court held that concurrent sentences should not be included when computing good time credit.[349]

In *Smith v. State*,[350] the court of appeals held that a first-time offender convicted of first-degree weapons misconduct is subject to a five-year presumptive term.[351] Smith pled no contest to discharging a firearm from a vehicle while the vehicle is in motion. The superior court concluded that the statutory seven-year presumptive term applied and sentenced Smith to a ten-year term with three years suspended. The court of appeals held that, despite the statutory language, sentencing a defendant convicted of first-degree weapons misconduct to seven years "would lead to unintended results."[352] The court found that the overlap between the

344. *Id.* at 29.
345. 31 P.3d 105 (Alaska Ct. App. 2001).
346. *Id.* at 109.
347. *Id.* at 108.
348. *Id.* at 109.
349. *Id.*
350. 28 P.3d 323 (Alaska Ct. App. 2001).
351. *Id.* at 324-25.
352. *Id* at 325.

first-degree weapons misconduct and manslaughter, which carries only a five-year presumptive term, would result in lesser sentences for defendants whose actions result in death.[353] The court vacated Smith's sentence on the grounds that the legislature could not have intended to create a system that imposes lesser sentences on individuals whose drive-by shootings result in death.[354]

4. *Miscellaneous*. In *Daniels v. State*,[355] the court of appeals held that the trial judge abused his discretion in disqualifying Daniels' attorney, Dieni, for a conflict of interest under Alaska Rule of Professional Conduct 1.9.[356] In Daniels' trial for murder, Dieni announced that in Daniels' defense he would suggest that someone else (Saganna) committed the murder. Ten years earlier, Dieni had represented Saganna in an assault charge. Although Dieni stated that he had no memory of the case, the State filed a motion to have him disqualified for a conflict of interest. Daniels waived whatever conflict of interest Dieni might have with Saganna, and Saganna stated upon consultation with independent counsel that she did not see a conflict of interest. The superior court disqualified Dieni, but the court of appeals reversed, finding no conflict of interest because the present and prior cases were not substantially related and because Dieni, Saganna and Saganna's attorney could not see any relevant information about Saganna that could be used by Dieni in violation of Rule 1.9.[357]

In *Greinier v. State*,[358] the court of appeals held that a defendant can be lawfully convicted of first-degree hindering prosecution even when the person who committed the underlying felony is not prosecuted, convicted of the felony, or convicted of a lesser offense.[359] Harris was living with Greinier despite court-imposed bail conditions forbidding contact with her. Harris committed felony assault on Greinier's daughter, and Greinier later lied to medical personnel and police regarding how the injury occurred. Greinier appealed her conviction for hindering prosecution, arguing that the evidence was insufficient to support a jury verdict and that her due process rights were violated. The court of appeals affirmed Greinier's conviction, holding that even though Harris was convicted of only misdemeanor assault, Greinier could still be convicted of fel-

353. *Id.*
354. *Id.* at 326.
355. 17 P.3d 75 (Alaska Ct. App. 2001).
356. *Id*. at 86-87.
357. *Id*. at 85-87.
358. 23 P.3d 1192 (Alaska Ct. App. 2001).
359. *Id.* at 1195.

ony-level hindering prosecution as long as Harris committed a "crime punishable as a felony."[360] The court of appeals also held that prosecuting Greinier did not violate her due process rights, despite the fact that if she had told the truth, she would have divulged information that could have led to her prosecution as an accomplice to Harris's crime of violation of his bail conditions.[361]

In *Hernandez v. State*,[362] the court of appeals remanded the case to the superior court to determine whether Hernandez's interpretation of the arresting officer's conduct was reasonable.[363] Hernandez was arrested for driving while intoxicated in the middle of the night and chose to exercise his right to an independent blood test. The arresting officer, Terland, informed him that only a hospital was open to perform the test and took Hernandez there. However, the receptionist incorrectly told Hernandez that the test would not be admissible in court and incorrectly explained why. Hernandez turned to Terland who shrugged his shoulders in response. Hernandez then decided to go to the police station for the breath test. If the State interferes with an arestee's constitutional right to obtain an independent blood test, the results of the breath test will be suppressed. The court of appeals held that although Terland was not directly responsible for the misinformation regarding the blood test, if Hernandez acted reasonably in interpreting Terland's conduct as confirmation of the receptionist's statements, then Hernandez's right to due process was violated, and the breath test should be suppressed.[364] The court of appeals remanded to determine whether Hernandez's interpretation of Terland's conduct was reasonable.[365]

In *Hurd v. State*,[366] the court of appeals held that a defendant may be convicted of kidnapping if "the defendant actually restrained the victim either temporally or spatially beyond what was necessary to commit the target assault."[367] Hurd held Schlotfeldt captive at his house for thirty to forty-five minutes and refused to let him leave until he signed documents absolving Hurd of his debt and conveying money and property to Hurd. Hurd was convicted of coercion, third-degree assault and kidnapping. Hurd appealed the kidnapping conviction, basing his argument on the court's

360. *Id.*
361. *Id.* at 1196.
362. 28 P.3d 315 (Alaska Ct. App. 2001).
363. *Id*. at 319.
364. *Id*. at 318.
365. *Id*. at 319.
366. 22 P.3d 12 (Alaska Ct. App. 2001).
367. *Id.* at 15.

holding in *Alam v. State*[368] that "when a defendant restrains a victim to facilitate the commission of another offense, [the] restraint will not constitute a kidnapping if it is merely 'incidental' to the commission of the other offense."[369] Hurd contended that he held Schlotfeldt only long enough to commit the target crime of coercion. The court of appeals agreed with Hurd that the jury was not properly instructed on the elements of the kidnapping charge and reversed his conviction.[370] However, the court concluded that the State's evidence, if believed, would support Hurd's conviction for kidnapping and upheld the kidnapping count of the indictment.[371] The court noted that coercion is not a crime "that inevitably involves restraint of the victim," and a jury must decide if the restraint was more than "incidental," thus constituting kidnapping.[372]

In *Hutchison v. State*,[373] the court of appeals held that extreme intoxication is a defense to a charge of "wilfully [sic] failing to appear" under the pre-September 2000 version of A.S. 12.30.060.[374] Hutchison missed his scheduled court hearing because he drank so much alcohol the night before that he passed out and did not wake up until the next afternoon. Although the pre-September 2000 version of section 12.30.060 required willfulness in order for a defendant to be convicted for failure to appear, the Alaska legislature had not defined "willful." The court of appeals found that "willful" conduct occurs when, "in the absence of some legally recognized justification or excuse, the defendant makes a deliberate decision to disobey a known obligation to appear in court."[375] In addition, the court of appeals held that "intoxication that incapacitates a defendant or that blots out a defendant's memory of the required court appearance" can be a defense to willfully failing to appear under the pre-September 2000 version of section 12.30.060.[376] Because the lower court found that Hutchison did not have the conscious goal to not appear in court, the court held that Hutchison did not act willfully and reversed his conviction.[377]

368. 776 P.2d 345 (Alaska Ct. App. 1989).
369. *Hurd*, 22 P.3d at 14.
370. *Id.*
371. *Id.* at 20.
372. *Id.* at 15, 18.
373. 27 P.3d 774 (Alaska Ct. App. 2001).
374. *Id.* at 782.
375. *Id.* at 778.
376. *Id.* at 782.
377. *Id.*

In *MacLeod v. State*,[378] the court of appeals reversed MacLeod's conviction for driving while intoxicated ("DWI").[379] After arresting MacLeod for DWI, the state trooper gave him the "off-record" advice that if a blood test and a breath test are administered contemporaneously, the blood test intoxication reading will be higher. The court of appeals held that a government officer having custody of a motorist arrested for DWI should not attempt to dissuade the motorist from invoking his or her right to an independent blood test.[380] As a result, MacLeod's breath test result was suppressed and his conviction reversed.[381]

In *Nunley v. State*,[382] the court of appeals held that the Alaska Sex Offender Registration Act ("ASORA") requires all sex offenders physically present in the state, even those who had been released from probation before the effective date of the ASORA, to register, and any person who fails to comply with this requirement is subject to criminal penalty under A.S. 11.56.840.[383] Former section 12.63.010 set out three deadlines for registration based on the sex offender's date of release from prison, date of conviction if not sentenced to prison or date of arrival within the state.[384] The defendants argued that because they were already present in the state and had been convicted and released from probation before the ASORA became effective in 1994, they did not fit into any of the groups of offenders set out in former section 12.63.010 and that even if the ASORA did apply to them, they were not provided with adequate notice that they had a duty to register. The court of appeals found that the legislature intended to exempt only one group of offenders from registration, those with only one sex offense conviction and who had been unconditionally discharged before July 1, 1984.[385] The court of appeals held that because the defendants did not fall into that group, they were criminally liable for their failure to register as sex offenders and that the ASORA provided sex offenders with sufficient notice of their duty to register.[386]

---

378. 28 P.3d 943 (Alaska Ct. App. 2001).

379. *Id.* at 945.

380. *Id*. at 944-45 (reiterating the holding from Lau v. State, 896 P.2d 825 (Alaska Ct. App. 1995)).

381. *Id*. at 945.

382. 26 P.3d 1113 (Alaska Ct. App. 2001).

383. *Id.* at 1115.

384. *Id.*

385. *Id.* at 1114-15.

386. *Id.*

In *Pease v. State*,[387] the court of appeals reversed Pease's conviction for possessing twenty-five or more marijuana plants in violation of A.S. 11.71.040(a)(3)(G).[388] Police found nineteen marijuana plants growing in Pease's home along with the remnants of thirty-three dead marijuana plants. At trial, the jury was instructed that the thirty-three remnants constituted marijuana plants for the purposes of assessing Pease's guilt. The court of appeals looked at the legislative history of the statute and found that the State must prove that a defendant simultaneously possessed twenty-five or more living marijuana plants to be in violation of the statute.[389] While the existence of marijuana remnants may provide circumstantial evidence that a defendant possessed twenty-five or more plants at some point in time, that issue was never presented for the jury to decide.[390] Because the jury was incorrectly instructed on an essential element of the crime, the court reversed the conviction.[391]

In *State v. Bonham*,[392] the court of appeals held that neither A.S. 12.20.10 nor the double jeopardy clause of the Alaska Constitution precluded Bonham's state prosecution for perjury and submitting misleading security filings, even after she pled guilty to federal charges of mail fraud and money laundering based upon the same criminal episode.[393] Bonham pled guilty to the federal charges after using the mail to further a pyramid scheme. Following this plea, an Alaska grand jury indicted her on the state charges. The court concluded the term "act" in section 12.20.10 meant something narrower than transaction or episode.[394] The court held that although the acts charged in the state indictment were part of the criminal scheme, submitting a false affidavit and misleading security filings were separate acts from those for which she was prosecuted on federal charges.[395] Finally, the court concluded that because the offenses of mail fraud, perjury and submitting misleading filings involve "significantly different societal interests," the state prosecution was not barred by the double jeopardy clause of the Alaska Constitution.[396]

---

387. 27 P.3d 788 (Alaska Ct. App. 2001).

388. *Id*. at 788. This section makes it a felony to possess "25 or more plants of the genus cannibus." ALASKA STAT. § 11.71.040 (a)(3)(G) (Michie 2000).

389. *Id*. at 791.

390. *Id*.

391. *Id*.

392. 28 P.3d 303 (Alaska Ct. App. 2001).

393. *Id.* at 308-10.

394. *Id*. at 307.

395. *Id*. at 307-08.

396. *Id*. at 308-09.

In *State v. Martin*,[397] the court of appeals reversed the dismissal of Martin's charge for failing to register according to the provisions of the Alaska Sex Offender Registration Act ("ASORA").[398] Martin pleaded no contest to incest in 1982. His conviction was set aside in 1988, after he had served five years of probation. The ASORA, enacted in 1994, requires sex offenders residing in Alaska, including those who were convicted in the ten years prior to 1994, to register with their local police agency. The court of appeals held that the Department of Public Safety acted within its lawful authority when it included persons whose convictions were subsequently set aside as those who had to register.[399] The court rejected Martin's arguments that the enforcement of the ASORA in his case would violate the terms of his plea agreement because plea agreements may be modified without violating due process.[400] The court also rejected Martin's argument that the Act violated the Equal Protection Clause because it required only those sex offenders who had been convicted in the ten years prior to 1994 to register and not all sex offenders convicted prior to 1994.[401]

In *State v. Saathoff*,[402] the supreme court held that the crime "theft by receiving" was not a continuing offense and that the five-year statute of limitations for such a crime prevented Saathoff from being convicted.[403] Saathoff purchased a rifle, apparently suspecting it was stolen property, in the summer of 1988. Nine years after the purchase, police discovered the stolen rifle at Saathoff's residence. A.S. 12.10.010 provides a five-year statute of limitations for theft by receiving.[404] However, the statute of limitations would have tolled if theft by receiving was a continuing offense.[405] Under A.S. 12.10.030, theft by receiving would be continuing only if a legislative purpose to make it so "plainly appears" in the language, structure or legislative history of sections 11.46.100 and 11.46.190(a).[406] The supreme court held that those factors indicated that theft by receiving is not a continuing offense, and therefore, the statute of limitations prevented Saathoff's conviction.[407]

---

397. 17 P.3d 72 (Alaska Ct. App. 2001).
398. *Id.* at 75.
399. *Id.* at 73 (citing State v. Otness, 986 P.2d 890 (Alaska Ct. App. 1999)).
400. *Id.* at 74.
401. *Id.*
402. 29 P.3d 236 (Alaska 2001).
403. *Id.* at 242.
404. *Id.* at 238; ALASKA STAT. § 12.10.010(2) (Michie 2000).
405. *Saathoff*, 29 P.3d at 238.
406. *Id.*; ALASKA STAT. § 12.10.030 (Michie 2000).
407. *Saathoff*, 29 P.3d at 242.

In *Strane v. State*,[408] the supreme court held that the mental state required for conviction for violating a domestic violence protective order under A.S. 11.56.740(a) is "knowingly." As a result, the lower court erred in holding that Strane's good faith belief that his conduct did not violate the protective order was irrelevant to his guilt or innocence.[409] The State argued that violation of a restraining order could not be excused because of the defendant's ignorance of its terms or his misunderstanding of their meaning. However, the court held the statute to be ambiguous and applied a more narrow "knowingly" culpable mental state.[410] Therefore, the State needed to show that the defendant knew his conduct violated the protection order or that the defendant was aware of a substantial probability that his conduct violated the order.[411] Additionally, because the culpable mental state was "knowingly," any honest mistake would have been a good defense to the charge.[412] The supreme court remanded the case and held that Strane could potentially defend against the charge that he violated the terms of a protective order based on his good faith mistake about the terms, even if that mistake was objectively unreasonable.[413]

In *Tenison v. State*,[414] the court of appeals affirmed Tenison's conviction for driving with an expired license and held that the Department of Motor Vehicles' ("DMV") wrongful refusal to renew her license did not constitute a defense.[415] Tenison's license expired in October 1998. She applied for renewal and was asked to provide her social security number in accordance with Alaska Statute section 28.15.061(b). For religious reasons, she refused, and her license was not renewed. She was later convicted for driving with an expired license and appealed, arguing that it was unconstitutional to require driver's license applicants to divulge their social security number, particularly when a person has religious reasons for refusing to do so. The supreme court held that as a general rule, people are not free to break the law by engaging in licensed activity without a license and then later defending that the government wrongfully refused to grant their earlier request for a license.[416] Tenison was obliged to challenge the DMV's refusal to renew her

408. 16 P.3d 745 (Alaska 2001).
409. *Id.* at 752.
410. *Id.*
411. *Id.* at 750-51.
412. *Id.* at 750.
413. *Id.* at 752.
414. 38 P.3d 535 (Alaska 2001).
415. *Id*. at 538.
416. *Id.*

license by pursuing an administrative appeal or a civil lawsuit.[417] The court rejected the argument that the statute was unconstitutional on its face, reasoning that Alaska's requirement of social security numbers was based on several valid state interests.[418]

## VII. EMPLOYMENT LAW

### A. Discrimination

In *Grant v. Anchorage Police Department*,[419] the supreme court held that although the superior court correctly found that Grant could not proceed on his contract-based claims because he had not exhausted his administrative remedies, it was error to apply collateral estoppel to preclude him from pursuing a disability discrimination claim.[420] Grant was terminated from the Anchorage Police Department because a gunshot wound prevented him from doing certain duties. Because Grant was a union member, his employment was governed by a collective bargaining agreement ("CBA"). After Grant was terminated, he did not file a grievance under his CBA, but later filed suit against the police department alleging breach of contract, wrongful termination and unlawful discrimination under A.S. 18.80.220(a)(1). The supreme court found against Grant on his contractually-based claims because the terms of the CBA required employees to exhaust their administrative remedies and file grievances before suing their employer.[421] The court disagreed that Grant was excused from filing a grievance because his interpretation of the contract would render one clause completely null, contravening the rule that all provisions of a contract should be found meaningful if possible.[422] Additionally, Grant had previously obtained disability benefits after showing that his injury prevented him from performing his duties, and the superior court concluded that this showing precluded his argument that he was discriminated against under A.S. 18.80.220(a)(1).[423] The supreme court disagreed, holding that whether Grant could perform his duties with reasonable accommodation by the police department had not yet been determined.[424]

---

417. *Id.* at 540.
418. *Id*. at 539.
419. 20 P.3d 553 (Alaska 2001).
420. *Id*. at 554.
421. *Id*. at 555.
422. *Id*. at 556.
423. *Id.* at 559.
424. *Id.* at 558.

B. Labor Law

In *Carlson v. United Academics*,[425] the Court of Appeals for the Ninth Circuit affirmed the finding that United Academics did not discriminate between individuals who merely objected to union dues and those who objected and wished to challenge the fee calculation.[426] In addition, the court held that United Academics did not violate the principles set forth in *Chicago Teacher's Union v. Hudson*[427] by permitting an impartial decision maker to raise the fee amount.[428] Carlson was a non-union professor at the University of Alaska represented by United Academics per the collective bargaining agreement with the University. Carlson brought suit following demands for dues, alleging that the demands violated *Hudson's* notice and procedural safeguards. The court ruled that the distinction between "objectors" and "challengers," which provided immediate reimbursement to non-members who merely objected to paying dues but placed the dues collected from those who objected and challenged the fee calculation into an escrow account, met the *Hudson* standards.[429] The court also validated the United Academics procedure by which an independent arbitrator is given the ability to increase or decrease the union fee, finding it safely within the bounds of *Hudson*.[430]

In *Whitesides v. U-Haul Co. of Alaska*,[431] the supreme court held that Whitesides could not be classified as an administrative employee exempt from overtime pay under the Alaska Wage and Hour Act.[432] U-Haul assigned Whitesides to work under the direction of another employee with a set schedule of hours and restricted business travel rights. The next day, when Whitesides reported to work fifteen minutes late, U-Haul suspended him for three days without pay. Whitesides was fired in July 1996 and sued U-Haul for unpaid overtime wages. U-Haul then decided to pay Whitesides for the three suspended days, stating that the pay "was inadvertently reduced."[433] Due to his suspension without pay, Whitesides argued at summary judgment that he did not meet the "paid on a salary or fee basis" requirement of the definition of an administrative employee under Alaska Administrative Code sec-

425. 265 F.3d 778 (9th Cir. 2001).
426. *Id*. at 783.
427. 475 U.S. 292 (1986).
428. *Carlson*, 265 F.3d at 785.
429. *Id.* at 784-85.
430. *Id.* at 785.
431. 16 P.3d 729 (Alaska 2001).
432. *Id.* at 729-30.
433. *Id.* at 731.

tion 15.910(a)(1) and, therefore, was not exempt from the requirement of overtime pay. The supreme court held that U-Haul could not retroactively take advantage of a statutory "window of correction" by correcting the withheld pay to meet the statutory definition of an administrative employee after the commencement of a lawsuit.[434] Additionally, the supreme court held that Whitesides was subject to direct supervision and, therefore, did not meet the "performs work only under general supervision" requirement of an administrative employee.[435] The supreme court vacated the judgment for U-Haul and remanded the case for further proceedings.

C. Workers' Compensation

In *Nickles v. Napolilli*,[436] the supreme court held that where breach of contract claims rely on duties created by the Alaska Workers' Compensation Act, the Act provides an adequate remedy for the breach of contract and does not permit a separate suit.[437] Nickles performed farm chores for the Napolillis in exchange for living in a cabin on their property. During the course of her chores, Nickles injured her arm, which later had to be amputated. Before trial, Nickles changed her claims of negligence to breach of contract, and the superior court granted the Napolillis' motion to dismiss or, alternatively, to refer the case to the Alaska Workers' Compensation Board. The supreme court held that this was not error because provisions of the Alaska Workers' Compensation Act "support the interpretation that a common law action under A.S. 23.30.055 is limited to tort claims for the underlying injury."[438] Therefore, "when an employer breaches its duty to provide workers' compensation benefits, the workers' compensation law only authorizes the employee to recover for personal injuries through a tort action."[439] Since Nickles abandoned her tort claims, the superior court did not err in granting the motion to dismiss. However, the supreme court affirmed the finding that Nickles was an employee of the Napolillis, and remanded the case to allow Nickles to pursue her claims before the Board.[440]

In *Parris-Eastlake v. State*,[441] the supreme court held that under A.S. 23.30.235(2), an employee is not barred from claiming benefits

434. *Id.* at 733-34.
435. *Id.* at 735 (citing ALASKA ADMIN. CODE tit. 8, § 15.910(a)(1) (2000)).
436. 29 P.3d 242 (Alaska 2001).
437. *Id.* at 254.
438. *Id.* at 249.
439. *Id.* at 249-50.
440. *Id.* at 254.
441. 26 P.3d 1099 (Alaska 2001).

if the claimed injury is addiction to drugs or alcohol.[442] Parris-Eastlake developed recurring headaches and neck and back pain while working as an assistant district attorney and was prescribed narcotic painkillers. At trial, she testified that eventually she began lying to her doctors to receive more drugs. She began having difficulty at work, resigned from her job and filed a workers' compensation claim. The Alaska Workers' Compensation Board denied her claim, and the superior court affirmed. On appeal, the supreme court reversed, holding that section 23.30.235(2) barred recovery for injuries that were proximately caused by drug use, but not if the injury claimed is the addiction itself.[443] The court reasoned that legislative history indicated that the phrase "under the influence" was akin to "intoxicated" and, therefore, Parris-Eastlake's claim was not barred because her actions were impaired not by being under the influence of drugs but rather because of her desire to use them.[444] The court remanded to determine whether her injuries were work-related.[445]

In *State, Dep't of Fish and Game v. Kacyon*,[446] the supreme court held that simply because a settlement allocation was court-approved did not mean it was not a "compromise with a third person" as defined in A.S. 23.30.015(h).[447] The court also held that section 23.30.015 applies to the total proceeds of global settlements reached by the deceased party's beneficiaries, making any subsequent allocations between those beneficiaries irrelevant to the calculation of the employer's continued workers' compensation liability.[448] Kacyon, the widow of a state-employed wildlife biologist killed in a plane crash during a moose survey, reached a wrongful-death settlement with the operator of the plane for the benefit of herself and the minor son of the deceased. The State argued that the settlement was a compromise with a third person made without the employer's written approval and attempted to invoke the forfeiture provision of section 23.30.015, which protects the employer against unreasonably low settlements that result in continued liability. The supreme court agreed and remanded the case to the Workers' Compensation Board with instructions to vacate its ruling that the State must continue to pay benefits to the son after the

442. *Id.* at 1101.
443. *Id.* at 1104.
444. *Id.* at 1103-04.
445. *Id.* at 1105.
446. 31 P.3d 1276 (Alaska 2001).
447. *Id*. at 1282.
448. *Id.* at 1283.

sum allocated to him from the global settlement is exhausted.[449] The court also held that for purposes of any calculations made under section 23.30.015 with regard to the son, the total amount of the global settlement, not merely the five percent allocated directly to the son, should be used.[450]

In *Temple v. Denali Princess Lodge*,[451] the supreme court held that a restaurant was not liable for workers' compensation for an assault on a waiter because the restaurant's failure to protect him did not constitute facilitation.[452] While waiting tables at the Denali Princess Lodge, Temple was punched in the jaw by his girlfriend's former boyfriend, Callahan. Callahan entered the Lodge, waited in a restricted area, confirmed Temple's identity with a Lodge employee and injured Temple. Temple claimed he was entitled to workers' compensation because the employer facilitated the attack. The Alaska Workers' Compensation Board denied compensation, and the superior court affirmed. The supreme court held that Temple did not prove his claim of a preliminary link between the injury and his employment by a preponderance of the evidence.[453] The court held that injuries resulting from an assault motivated by personal reasons, where the sole role of the employment is providing a location for the assailant to find the victim, are not compensable injuries arising out of employment.[454]

D. Miscellaneous

In *Bruns v. Municipality of Anchorage*,[455] the supreme court ruled that threats of retaliatory discharge may excuse the failure to exhaust administrative remedies prior to seeking judicial remedies, even where required by statute.[456] Bruns and Saathoff made several claims against the Municipality for back overtime pay under Anchorage Municipal Code section 3.30.129. The trial court granted summary judgment in favor of the Municipality, ruling that the plaintiffs had not exhausted their administrative remedies as required by section 3.30.129. The supreme court had previously held that a plaintiff who fails to exhaust administrative remedies may still seek judicial relief if the failure is excused.[457] The court

449. *Id.*
450. *Id.*
451. 21 P.3d 813 (Alaska 2001).
452. *Id.* at 822.
453. *Id.* at 816.
454. *Id.* at 818.
455. 32 P.3d 362 (Alaska 2001).
456. *Id.* at 370.
457. *Id.* (citing Eidelson v. Archer, 645 P.2d 171, 181 (Alaska 1982)).

ruled that threats of retaliatory discharge can excuse an employee's failure to exhaust administrative remedies and held that Bruns' and Saathoff's contention that threats of discharge prevented their utilization of available administrative remedies raised a question of material fact such that summary judgment was inappropriate.[458]

In *Petranovich v. Matanuska Electric Ass'n*,[459] the supreme court held that an employer was not liable for injuries incurred by an independent contractor as a result of routine risks on which the contract was silent.[460] Petranovich, an electrician, was seriously injured while working as an independent contractor for Matanuska Electric Association ("MEA"). The contract between the parties was silent with respect to the manner of performance of the procedure in the course of which the injury occurred. The superior court granted summary judgment for MEA because Petranovich was allowed to choose his own methods and MEA did not retain enough right of supervision over Petranovich; therefore, MEA was not responsible for Petranovich's acts or injuries.[461] In a *per curiam* opinion, the supreme court affirmed the grant of summary judgment for MEA.[462]

## VIII. FAMILY LAW

### A. Child Support

In *Beaudoin v. Beaudoin*,[463] the supreme court held that Michael Beaudoin was entitled to an evidentiary hearing on his claim that Georgia Beaudoin was voluntarily underemployed.[464] After their divorce, the Beaudoins originally agreed on a child custody agreement that gave Georgia sole custody of their children. Georgia did not look for employment outside the home during this time. Four years later, the parties made Michael the primary custodian, taking sole custody of one child and sharing custody of the other two on an alternating-week schedule. Michael sought an order to re-establish Georgia's child support obligation based on her earning capacity rather than her previous earnings history, claiming that since Georgia's obligations for child care had decreased, she should either obtain employment or be treated by the court as voluntarily

458. *Id* at 370-71.
459. 22 P.3d 451 (Alaska 2001).
460. *Id.* at 454-55.
461. *Id.* at 451-52.
462. *Id.* at 451.
463. 24 P.3d 523 (Alaska 2001).
464. *Id*. at 524.

underemployed. On appeal, the supreme court held that Michael had raised a material dispute regarding the issue of Georgia's voluntary underemployment sufficient to require an evidentiary hearing.[465] The court held that neither Alaska Rule of Civil Procedure 90.3 nor prior case law supported the superior court's finding that a "track record of employment and earnings" is a "critical element" in the absence of which there is "no baseline from which to measure the extent" to which Georgia was voluntarily underemployed.[466] The court vacated the superior court's 1998 child support order and remanded for entry of a modified order after an evidentiary hearing on Michael's case.[467]

In *Murphy v. Newlynn*,[468] the supreme court held that the preclusion provision contained in Alaska Rule of Civil Procedure 90.3(h)(3) can apply where the obligor parent has custody of one, but not all, of the children subject to a support order.[469] Murphy, obligated to pay child support for his two daughters, took custody of one of his daughters during her final high school academic year per an agreement with Newlynn, who did not seek child support during this period. When Newlynn again sought child support, the Child Support Enforcement Division calculated Murphy's arrears assuming a full obligation for the academic year that he had custody of one of his daughters. Murphy sought an exemption under Rule 90.3(h)(3), which provides that an obligor parent does not accrue child support obligations, when by agreement or acquiescence, the obligor exercises primary physical custody of the children for a period of nine months or more. Newlynn argued that the text and official commentary of the Rule both indicated the exemption only applies when the obligor has custody of all children under the support order. The supreme court held that Rule 90.03(h)(3) may apply in the situation where an obligor parent has custody of one, but not all, of the children subject to a support order.[470] Therefore, Murphy was still liable for child support arrears related to his noncustodial daughter, but requiring him to pay support for the custodial daughter would provide her no benefit and would provide an undeserved windfall for Newlynn.[471]

---

465. *Id*. at 527.
466. *Id*. at 528.
467. *Id*. at 530-31.
468. 34 P.3d 331 (Alaska 2001).
469. *Id.* at 336.
470. *Id.*
471. *Id.* at 335.

In *Spott v. Spott*,[472] the supreme court held that a parent may be assessed retroactive child support for children not previously included in support calculations and that such retroactive obligations should be based on actual rather than previously determined predicted income.[473] After Marvin and Cheryle Spott divorced in September 1995, their minor children, Ethan and Seth, resided with Cheryle. Marvin was ordered to pay child support but the master in charge of the case erroneously concluded that only Ethan resided with Cheryle and did not factor Seth into Marvin's support obligation. Because Marvin was unemployed at the time, the master based Marvin's adjusted income on his 1995 earnings of $39,252.33, which the master felt Marvin should be able to earn again. Marvin's actual adjusted income was $20,115.48. Cheryle was later awarded an additional amount per month for Seth for the time between December 1, 1995, and July 1, 1997. Marvin appealed, arguing that the supplemental award was a retroactive modification of child support in violation of Alaska Rule of Civil Procedure 90.3(h)(2). The supreme court ruled that the prohibition against retroactive modifications does not apply to cases where there is a child such as Seth for whom no support was awarded.[474] Marvin then argued that even if the award was valid, his support obligation should be based on actual income rather than the prospective income as determined by the master in 1995. The supreme court agreed and directed that child support for Seth be determined based on Marvin's actual income for the relevant period.[475]

B. Child Custody

In *B.B. v. D.D.*,[476] the supreme court held that the superior court had subject matter jurisdiction and did not abuse its discretion in modifying a custody order issued in Oregon.[477] An Oregon court granted B.B. custody in 1990. After relocating to the North Pole, B.B. and the children abruptly left in 1996, depriving D.D. of his visitation rights. D.D. found the children and B.B. in poor living conditions in Kasilof, and the superior court granted legal and primary custody of the children to D.D. On appeal, B.B. argued that the court lacked jurisdiction to modify an Oregon court order and that the court abused its discretion or made clearly erroneous findings of fact. The supreme court held that the superior court

472. 17 P.3d 52 (Alaska 2001).
473. *Id*. at 56.
474. *Id*. at 55.
475. *Id*. at 56.
476. 18 P.3d 1210 (Alaska 2001).
477. *Id.* at 1212, 1214.

had subject matter jurisdiction under both the state Uniform Child Custody Jurisdiction Act and the federal Parental Kidnapping Prevention Act.[478] Although federal law generally forbids state courts from modifying other state court's custody orders,[479] the court concluded the superior court had subject matter jurisdiction under the state custody law and that Oregon had lost jurisdiction because neither B.B. nor the children had lived in Oregon since 1991.[480]

In *In re C.R.H.*,[481] the supreme court held that section 1911(b) of the Indian Child Welfare Act ("ICWA")[482] authorizes transfer of jurisdiction to federally recognized tribes in Alaska tribal court regardless of Public Law 280.[483] The Department of Health and Social Services assumed emergency custody of an Indian child. The question in subsequent litigation was whether the Nikolai tribe could assume jurisdiction over the proceedings in light of the cases concerning Public Law 280. The supreme court held that tribal jurisdiction exists independently of Public Law 280 because section 1911(b) of the ICWA expressly approves the transfer of child custody proceedings to tribal courts,[484] unless the parents object, the tribe declines jurisdiction or good cause exists for denial of transfer.[485] Because the lower court did not inquire into good cause for denial, the court remanded for "transfer to the Nikolai tribal court unless the superior court finds good cause to deny transfer."[486]

In *John v. Baker*,[487] the supreme court reversed the determination that Baker was denied due process and remanded the case to the Northway Tribal Court for further child custody proceedings.[488] In a previous appeal,[489] the supreme court found that the Northway Tribal Court had jurisdiction to adjudicate the custody dispute. The case was remanded to the superior court to determine whether the tribal court's decision should be recognized under the comity doctrine. The record of the tribal court was lost, and the superior

478. *Id.* at 1212-13; 28 U.S.C. § 1738A (1994); ALASKA STAT. §§ 25.30.300-.390 (Michie 2000).

479. *B.B.*, 18 P.3d at 1212; 28 U.S.C. § 1738A(f)(1)-(2) (1994).

480. *B.B.*, 18 P.3d at 1212.

481. 29 P.3d 849 (Alaska 2001).

482. 25 U.S.C. §§ 1901-1963 (2000).

483. *C.R.H.*, 29 P.3d at 854; Act of Aug. 15, 1953, Pub. L. No. 83-280, 67 Stat. 255, 589 (codified as amended at 18 U.S.C. § 1162, 25 U.S.C. §§ 1321-26, 28 U.S.C. § 1360).

484. *C.R.H.*, 29 P.3d at 852.

485. 25 U.S.C. § 1911(b) (2000).

486. *C.R.H.*, 29 P.3d at 854.

487. 30 P.3d 68 (Alaska 2001).

488. *Id*. at 78-79.

489. John v. Baker, 982 P.2d 738 (Alaska 1999).

court held that Baker was denied due process and denied comity to the tribal court's order. The supreme court found that loss of the record was not itself a due process violation.[490] However, Baker's claim that the mother's family exercised undue influence over the tribal court proceedings, if successful, would have been a violation, and the absence of a record made it impossible for the supreme court to judge the merits of that claim.[491] Because Baker did not allege or prove that the tribal court was incapable of fairly deciding future issues in the case, the supreme court ordered the case referred to the tribal court to decide upon custody arrangements.[492]

In *Moeller-Prokosch v. Prokosch*,[493] the supreme court held that when determining custody, trial courts do not have the authority to impose restrictions on the relocation of a parent.[494] In their divorce, Moeller-Prokosch and Prokosch both sought custody of their son. During the custody trial, Moeller-Prokosch requested legal and physical custody of her son and permission to relocate to Florida. The superior court determined that relocating to Florida would not be in the child's best interests and conditioned Moeller-Prokosch's primary physical custody of her son upon her maintaining a residence within sixty-five miles of Prokosch's residence in Alaska. On appeal, the supreme court reversed, holding that the trial court does not have the power to prevent a parent from moving or to restrict the region within which Moeller-Prokosch could live with her son.[495] When making a custody determination after one parent expresses an intent to relocate, the court must presume that the move will take place and then determine what custody arrangement is in the child's best interests under the criteria established by A.S. 25.24.150(c), which includes an inquiry into whether there are "legitimate reasons for the move."[496]

In *Ogden v. Ogden*,[497] the supreme court held that a court-appointed child custody investigator is ordinarily subject to disqualification upon a showing of either actual or apparent bias.[498] Julie Ogden filed for divorce after Douglas Ogden absconded with one of the couple's two children. Julie obtained an interim order giving her custody of both children and appointing an attorney,

490. *John*, 30 P.3d at 74.
491. *Id*.
492. *Id*. at 78-79.
493. 27 P.3d 314 (Alaska 2001).
494. *Id.* at 317.
495. *Id.*
496. *Id*. at 316.
497. 39 P.3d 513 (Alaska 2001).
498. *Id.* at 517, 519.

Bressers, to conduct a child custody investigation. Douglas challenged Bressers' ability to serve as custody investigator based on specific allegations of bias and Bressers' practice of advertising her services as a "Voice for Women and Children." The superior court found no evidence of actual bias warranting disqualification and granted Julie sole custody of both children. On appeal, the supreme court held that the Code of Judicial Conduct required that officers of the court, such as custody investigators, "avoid impropriety and the appearance of impropriety."[499] Because her advertisements cast serious doubt on her impartiality, the court held that the superior court erred in failing to disqualify Bressers.[500] However, because the court found no reasonable possibility that a report by a different custody investigator would have changed the superior court's custody decision, the superior court's failure to disqualify Bressers was deemed harmless error.[501]

In *West v. West*,[502] the supreme court held that a custody award cannot be based on the assumption that a divorced parent who remarries can provide a better home than an otherwise equally competent parent who remains single.[503] In deciding custody of Brian and Marlene West's son, Cody, the superior court found that both parents would "provide positive environments and living arrangements," that neither one was necessarily better than the other and that only physical distance and Cody's need to attend one school precluded shared physical custody. The superior court then awarded physical custody of Cody to Brian based on the high likelihood that he would remarry soon, providing the positive advantages of a two-parent household. Marlene appealed, arguing that it was improper for the court to award Brian custody based on his anticipated remarriage and that the court had failed to consider various factors operating in her favor. The supreme court agreed and held that "a presumptive preference for the two-parent setting is unwarranted."[504] Without case-specific evidence indicating that Cody's anticipated step-mother's in-home care would be superior to the care that Cody would receive from his extended family if living with Marlene, custody should not have been determined by an expressed preference for the advantages of a "two-parent

499. *Id.* at 516 (citing Alaska Code of Judicial Conduct Canon 2(A)).
500. *Id.* at 516-17.
501. *Id.* at 517.
502. 21 P.3d 838 (Alaska 2001).
503. *Id*. at 839.
504. *Id.* at 843.

household."[505] The supreme court vacated the order and remanded for a redetermination of custody based on Cody's best interests.

C. Adoption and Termination of Parental Rights

In *B.F. v. D.M.*,[506] the supreme court held that a father need not be convicted of sexual assault to lose his right to consent to adoption of a child conceived as a result of sexual assault.[507] B.F. appealed after the superior court granted adoption of his daughter without his consent. The court held that sufficient evidence showed that the child was conceived as a result of sexual assault.[508] The court then concluded that neither the plain language nor the legislative history of A.S. 25.23.180(c)(3) requires a parent to be convicted of sexual assault to lose his or her right to consent to adoption of a child, but only requires that the parent committed an act that fits the definition of sexual assault.[509] The court also held that section 25.23.180(c)(3) is constitutional because adoption proceedings are brought by private parties, not the state, the act of waiving parental rights is not a criminal penalty and the secrecy of adoption proceedings precludes the possibility of a father facing a criminal finding of the same charge.[510]

In *C.L. v. P.C.S.*,[511] the supreme court upheld the adoption of two children under the Indian Child Welfare Act ("ICWA")[512] despite the objections of the children's grandparents.[513] After L.G.'s parental rights to her daughters, J.G. and S.G., were terminated, the superior court awarded adoption of J.G. to one individual and adoption of S.G. to her second cousins. The maternal grandparents of the children had sought to adopt the girls and appealed the superior court's decision. The supreme court held that when determining whether good cause exists to deviate from the ICWA placement preferences, the three Bureau of Indian Affairs factors[514] are not exclusively controlling and a court may consider a broad

505. *Id.*

506. 15 P.3d 258 (Alaska 2001).

507. *Id.* at 264.

508. *Id*. at 260-61.

509. *Id.* at 264-65. In this case, the definition of sexual assault was supplied by Washington law because the alleged conduct occurred in Washington. *See* ALASKA STAT. § 25.23.180(c)(3) (Michie 2000).

510. *B.F.*, 15 P.3d at 266.

511. 17 P.3d 769 (Alaska 2001).

512. 25 U.S.C. §§ 1901-1963 (2000).

513. *C.L.*, 17 P.3d at 779.

514. Bureau of Indian Affairs Guidelines for State Courts, Indian Child Custody Proceedings, 44 Fed. Reg. 67,594 § F.3 (1979).

range of factors as long as the focus is on the child's best interests.[515] Regarding the adoption of S.G., the supreme court held that the ICWA does not set forth any order of preference among "extended family members"[516] seeking to become prospective adoptive parents; therefore, the court did not err by choosing the child's second cousins over her grandparents.[517] The supreme court also held that the decision not to grant the grandparents formal visitation rights to J.G. was not an abuse of discretion because her adoptive parent had demonstrated a willingness to maintain the relationship between J.G. and her grandparents and should have the discretion to determine the circumstances and frequency of such contacts.[518] The supreme court also held that the superior court did not abuse its discretion by not consolidating the adoption proceedings and that both adoptions were proper.[519]

In *C.W. v. State, Dep't of Health and Social Services*,[520] the supreme court held that the statutory duty of the Department of Health and Social Services ("DHSS") to make "reasonable efforts to provide family support services" was not available as a defense for a parent whose parental rights were terminated on grounds of abandonment.[521] C.W.'s parental rights were terminated after he had abandoned his son for three years and lost contact with all individuals involved in his son's Children in Need of Aid ("CINA") proceeding. C.W. argued that the State violated the CINA statute by failing to make reasonable efforts to reunite him with his son and violated the Americans with Disabilities Act ("ADA") by failing to provide alcohol treatment services that reasonably accommodated his allegedly substantial learning disability. Assuming that DHSS is required to make reasonable efforts to reunite a biological family when the parent has abandoned the child, the supreme court reasoned that DHSS had met that duty by communicating with the child's mother and checking criminal records in an attempt to locate C.W. during the three-year period of abandonment.[522] The supreme court also rejected C.W.'s ADA claim because the superior court terminated his parental rights based upon

515. *C.L.*, 17 P.3d at 775-76.
516. 25 U.S.C. § 1915(a) (2000).
517. *C.L.*, 17 P.3d at 777.
518. *Id.* at 777-78.
519. *Id*. at 772-77.
520. 23 P.3d 52 (Alaska 2001).
521. *Id.* at 55 (citing ALASKA STAT. § 47.10.086(a) (Michie 2000)).
522. *Id.*

an independent finding of abandonment and not on the ground that his drinking made him an unfit parent.[523]

In *E.H. v. State, Department of Health and Social Services*,[524] the supreme court upheld the denial of E.H.'s motion to dismiss for lack of jurisdiction and affirmed the termination of E.H.'s parental rights.[525] While the Department of Health and Social Services investigated reports of harm to E.H.'s two sons, E.H. took her sons to Edmonton, Alberta. The boys were returned to Alaska through the efforts of a Canadian child protective worker and an Alaskan social worker and placed in foster care. At a Child in Need of Aid ("CINA") hearing, the superior court found both boys in need of aid and sent them to live with their father. The superior court denied E.H.'s motions for dismissal for lack of jurisdiction and terminated E.H.'s parental rights. On appeal, the supreme court held that both former and current A.S. 47.10.010 establish that CINA statutes govern proceedings concerning Alaska residents who are minors regardless of whether the minor child is physically present in Alaska.[526] Under A.S. 01.10.055, the court determined that the boys retained their Alaska residency as required by the CINA statutes while they were in Canada because Alaska was their home state, there was no evidence that another state had jurisdiction over them and substantial evidence remained in Alaska as to the care, custody and protection of the boys.[527] The supreme court affirmed termination of E.H.'s parental rights.

In *N.A. v. State*, *Div. of Family and Youth Services*,[528] the supreme court held that the superior court did not violate N.A's due process rights by not holding a permanency hearing prior to the termination of parental rights trial and that it did not err in concluding that the State made active efforts to reunite N.A. with her children.[529] In April 1997, a social worker found N.A. intoxicated in violation of her probation. As a result, N.A. was placed in alcohol treatment and all of her children were placed in state custody. In 1998, N.A. was arrested again for intoxication in violation of her probation and was placed in multiple rehabilitation programs. After a hearing in October 1998, the Division of Family and Youth Services began implementing a permanency plan to terminate N.A.'s parental rights. N.A. relinquished parental rights to her two

523. *Id.* at 56.
524. 23 P.3d 1186 (Alaska 2001).
525. *Id*. at 1192.
526. *E.H.*, 26 P.3d at 1188.
527. *Id*. at 1190-92.
528. 19 P.3d 597
529. *Id*. at 601-02.

male children but not to her two female children. N.A.'s motion for a permanency hearing and continuation of the termination trial was denied, and N.A's parental rights to her daughters were terminated. On appeal, N.A. argued that the lack of an original permanency hearing or an annual review violated her due process rights. The supreme court disagreed, holding that the October 1998 hearing satisfied the permanency hearing requirements and that the failure to hold an annual review was not error because the fourteen months between the permanency hearings and termination trial was due to a continuance requested by N.A.[530] The supreme court also held that the State made active efforts to prevent breakup of the family, pointing to the multiple treatment programs provided to N.A.,[531] and affirmed termination of N.A's parental rights.

In *T.F. v. State, Dep't of Health & Social Services*,[532] the supreme court upheld the termination of S.M. and T.F.'s parental rights under Alaska law and the Indian Child Welfare Act.[533] S.M. gave birth to premature Indian twins who were developmentally damaged by prenatal cocaine exposure and may have been affected by fetal alcohol syndrome. The Department of Health and Social Services ("DHSS") immediately took custody of the twins. S.M. failed to enter drug rehabilitation until one month before trial and the father, T.F., was incarcerated and escaped from custody before DHSS could administer a paternity test. T.F. eventually took the paternity test, met with a social worker and visited with the twins. However, DHSS had already initiated termination proceedings and the superior court terminated parental rights before a case plan was finalized. The supreme court held that the superior court had not erred in finding that the children were in need of aid and that the parents had not remedied the conduct or conditions placing the children at a substantial risk of harm.[534] The court also held the State did not owe T.F. active efforts to prevent the breakup of an Indian family until paternity was established and that the State had made such efforts in this case.[535] The court concluded that the welfare of the children and the "totality of the circumstances" supported the superior court's termination of parental rights.[536]

530. *Id*.
531. *Id*. at 603.
532. 26 P.3d 1089 (Alaska 2001).
533. *Id.* at 1090.
534. *Id.* at 1093-94 (citing ALASKA STAT. § 47.10.011 (Michie 2000)).
535. *Id.* at 1094 (citing 25 U.S.C. § 1912(d) (2000)).
536. *Id.* at 1097.

D. Dissolution of Marriage and Distribution of Marital Property

In *Brandal v. Shangin*,[537] the supreme court affirmed the classification of Brandal's right to use property as marital property.[538] The court also held that simple interest should be used in calculating Brandal's equity in the marital property.[539] During their marriage, Brandal and Shangin acquired the right to use land in exchange for purchasing a mobile home for Brandal's grandmother. Brandal appealed the superior court's classification of the right to use his grandmother's land as a marital asset and the application of compound interest to Shangin's interest in that right. The supreme court found that the land was marital property because it was purchased during the marriage with marital money, the parties demonstrated an intent to treat it as marital property by living on the land during the fishing season and Brandal had not met his burden of showing that the property was separate.[540] However, the court held that absent a specific finding that compound interest is necessary to accurately measure the value of such an asset, simple interest should have been used in determining the value of Shangin's interest in the right to use the land.[541]

In *Leis v. Hustad*,[542] the supreme court held that the parties intended an escrow account to be marital property, despite Hustad being the sole title owner, and that the value of the 401(k) plan should have been calculated at the time of the trial, not at the time of separation.[543] The court also held that a loan from Leis' parents was a marital liability.[544] After Leis and Hustad began living together in 1981, Hustad kept the title to his previous residence solely under his name, but rented out the residence. After their marriage in 1982, the couple sold the residence, producing cash used for marital purposes and a receivable known as the "Muntean Escrow." Hustad argued that the Muntean Escrow account was separate property because it was the product of the sale of his house. The supreme court disagreed, finding that the parties intended the property to be marital property because the account was listed in both parties' names and the money was transferred to joint accounts.[545] Additionally, the court held that it was improper

537. 36 P.3d 1188 (Alaska 2001).
538. *Id*. at 1192.
539. *Id*. at 1194.
540. *Id.* at 1192.
541. *Id*. at 1193-94.
542. 22 P.3d 885 (Alaska 2001).
543. *Id*. at 886.
544. *Id*.
545. *Id.* at 887-88.

to value Hustad's 401(k) account at the time of separation rather than the time of trial because Hustad made no additional contributions to the account between the date of separation and the date of trial and showed no justification for deviating from the time-of-trial principle.[546] Lastly, the court held that a loan from Leis' parents was a marital liability because both parties signed the promissory note, demonstrating their intent to treat it as a marital obligation.[547]

In *Tolan v. Kimball*,[548] the supreme court affirmed an award to Kimball of one-half the net value of a home he shared with Tolan.[549] Kimball lived, unmarried, with Tolan from 1990 to 1997. Despite Kimball's weekly contributions of $200 and contribution to the downpayment and closing costs of the house, Tolan refused to put his name on the deed, explaining that she did not want his name on any of her credit or financial obligations. When Kimball and Tolan separated, Kimball sued and was awarded one-half of the home's net value. On appeal, the supreme court applied the rule that property accumulated during a period of cohabitation should be divided according to the parties' intent.[550] The court concluded that the superior court reasonably determined the parties' intent to share the house equally based on both parties' contributions to the downpayment and upkeep of the house.[551] Tolan's argument that Kimball was merely paying rent was unconvincing because Tolan never claimed these rent payments on her tax returns.[552] Tolan also argued that her refusal to add Kimball's name to the title indicated her intent not to share the property. The supreme court disagreed, citing Tolan's statement to a disinterested witness that Kimball was stupid for paying in cash and for having no proof that he was anything other than a tenant as proof that Tolan's refusal to put Kimball's name on the deed was a cunning, anticipatory design rather than an indicator of mutual intent.[553]

## IX. INSURANCE LAW

In *Curran v. Progressive Northwestern Insurance Co.*,[554] the supreme court held that a motorist must exhaust all underlying li-

546. *Id.* at 888-89.
547. *Id*. at 889.
548. 33 P.3d 1152 (Alaska 2001).
549. *Id.* at 1156.
550. *Id.* at 1154.
551. *Id.* at 1155.
552. *Id.*
553. *Id.* at 1156.
554. 29 P.3d 829 (Alaska 2001).

ability coverage before recovering under an Underinsured Motorist ("UIM") policy.[555] Curran was injured in a single-vehicle accident in which her husband was driving. She did not sue her husband or make a claim under his insurance policy, but instead offered the insurance company a credit in the amount of her husband's coverage while seeking recovery under both her and her husband's UIM coverage. In a separate claim, Barnhill was injured in a two-car collision. He settled with the other driver's insurance company for an amount less than his coverage limit and then sought UIM benefits from his insurance company. In both cases, the claims for UIM benefits were denied because the claimant had not exhausted the underlying policy limits, and the superior court granted summary judgment for the insurers. The supreme court held that A.S. 28.20.445 requires a UIM claimant to exhaust all underlying liability coverage before recovering under a UIM policy.[556] The court also held that a credit offered to a UIM insurer for the amount of the underlying coverage did not amount to a settlement exhausting the underlying coverage.[557] Because neither Curran nor Barnhill exhausted the underlying policy limits, the supreme court affirmed the judgment of the superior court.[558]

In *Farquhar v. Alaska Nat'l Insurance Co.*,[559] the supreme court held that Alaska National Insurance Company ("ANIC") was not liable for prejudgment interest in excess of its policy limit.[560] Farquhar was injured in a traffic accident with Industrial Boiler and Controls. Farquhar and Industrial's insurer, ANIC, settled for the policy limit of one million dollars, attorney's fees and the release of liability, and agreed to litigate the question of whether ANIC owed Farquhar prejudgment interest in excess of its policy limit. The supreme court established "two grounds for holding an insurer liable for prejudgment interest: (1) if the insurer contractually assumes liability by the terms of its policy with the insured, or (2) if public policy requires liability despite the language of the contract."[561] The court held that neither of these grounds applied and that ANIC was not liable for interest in excess of the policy limit.[562]

555. *Id.* at 838.
556. *Id.* at 831-34.
557. *Id.* at 835.
558. *Id.* at 838.
559. 20 P.3d 577 (Alaska 2001).
560. *Id.* at 578.
561. *Id.* (citing Guin v. Ha, 591 P.2d 1281 (Alaska 1979)).
562. *Id.* at 579-82.

In *Holderness v. State Farm Fire and Casualty Co.*,[563] the supreme court held that a personal umbrella policy qualifies as automobile liability insurance under Alaska's insurance code, thereby requiring the coverage to include prejudgment interest and attorney's fees.[564] The court also held that a business liability policy does not cover an executive officer on his commute to work.[565] Holderness was hit by motorist while driving to Anchorage to perform surgery. Holderness held both a personal automobile liability policy and a personal liability umbrella policy with State Farm. In addition, the Alaska Podiatry Associates ("APA"), of which Holderness was an executive officer, owned a State Farm business liability policy that covered Holderness with respect to his duties as an officer. The superior court held that the umbrella policy did not constitute automobile liability insurance and, therefore, State Farm did not owe Holderness any prejudgment interest or attorney's fees beyond the policy limit. The court further held that APA's policy did not cover Holderness' accident because he was not performing executive duties at the time. The supreme court reversed the first part of the ruling, finding that the umbrella policy qualified as automobile liability insurance because it did not specifically exclude coverage for liability stemming from the ownership or operation of an automobile.[566] The court affirmed the ruling that Holderness was not covered by the business liability policy because commuting to work did not fall under his officer's duties.[567]

In *Peter v. Schumacher Enterprises*,[568] the supreme court held that insurance agents have a common law duty to advise their customers about insurance coverage if a "special relationship" exists between the agent and the insured.[569] The court also held that customers can sue insurers who violate A.S. 21.89.020(c).[570] Peter's son was seriously injured by a motorist whose insurance coverage was much less than the Peters' expected damages. Peter had minimum coverage, but sued both the insurance agency from whom she purchased the insurance and the insurance carrier on grounds that the agency had a duty to recommend higher limit coverage and that the company had a duty to offer such coverage. The supreme court held that insurance agents do not have a general

563. 24 P.3d 1235 (Alaska 2001).
564. *Id.* at 1236.
565. *Id.*
566. *Id.* at 1239 (citing ALASKA STAT. § 21.89.020(a), (c) (Michie 2000)).
567. *Id.* at 1245.
568. 22 P.3d 481 (Alaska 2001).
569. *Id.* at 482-83.
570. *Id.*

duty to advise their clients of appropriate coverage unless a "special relationship" exists.[571] Such a relationship exists if an agent misrepresents the nature of the coverage, voluntarily assumes the responsibility for choosing a particular insurance policy, fails to respond appropriately to a request or inquiry about a particular type of coverage, or has a duty to clarify an ambiguous request.[572] The court also held that an implied private right of action exists where insurance companies violate Alaska law, which requires limits of up to one million dollars for underinsured motorist coverage.[573] Because issues of material fact existed as to both claims, the court remanded for further proceedings.[574]

In *Simmons v. Insurance Co. of North America*,[575] the supreme court held that when a business owner acquires insurance under a trade name, coverage under the policy extends to that individual as well as to the business.[576] Following a serious car accident, Simmons sought to recover underinsured motorist benefits under a policy issued to her father's business, Happy Puppy Enterprises. Because the policy did not specifically include her father as a named insured, Simmons sought to have the policy reformed to include the father as a named insured and thereby derive coverage as a family member. The superior court granted summary judgment for the insurance company, reasoning that because the policy extended coverage to insured individuals and their families, and Happy Puppy was a business and not an individual, the coverage would not extend to Simmons even if the policy were reformed to include her father. The supreme court distinguished the case from an instance where a corporation is the named insured[577] and held that where a policy names a partnership as the insured, "coverage extend[s] to the individuals comprising the partnership as well."[578] The court reversed the summary judgment order and remanded the case to determine if the policy should be reformed to include the father as a named insured and, if so, whether the policy should extend to Simmons as a family member.[579]

571. *Id.* at 485.
572. *Id.* at 486-87.
573. *Id.* at 489.
574. *Id.* at 483.
575. 17 P.3d 56 (Alaska 2001).
576. *Id.* at 58.
577. *Id.* at 62 n.30.
578. *Id.* at 61.
579. *Id.* at 64.

In *State Farm Mutual Insurance Co. v. Lawrence*,[580] the supreme court affirmed summary judgment for a family whose son was injured in an accident with an underinsured motorist.[581] State Farm appealed the ruling that the Lawrences' claims for negligent infliction of emotional distress qualified for the policy limits under their uninsured/underinsured motorist coverage ("UM/UIM") and that their UM/UIM coverage covered them for the punitive damages of an underinsured motorist. State Farm argued that the parents did not qualify for separate policy limits because their emotional distress claims were not bodily injury and were not suffered in the "same accident" as their son's accident. The supreme court held that State Farm waived both of these arguments because it failed to adequately raise them in the lower court proceedings.[582] The court also affirmed the ruling that the Lawrences' UM/UIM provision covers the punitive damages of an underinsured driver because the Lawrences' liability policies, which UM/UIM must mirror, covered them for their own punitive damages, the policies suggested that they cover such punitive damages and public policy did not forbid the result.[583]

In *Wing v. GEICO Ins. Co.*,[584] the supreme court upheld an arbitrator's award in an insurance dispute.[585] Wing, injured by an uninsured motorist, rejected GEICO's initial settlement offer. The arbitrators reduced their preliminary award of $33,557 to a final award of $14,987.70 after deducting expert fees and, presumably, offsets claimed by GEICO. The panel also declined to award attorney's fees to either party. On appeal, Wing argued that the arbitration panel exceeded its authority when it reduced the preliminary award without giving a complete explanation, deducted expert fees from the award and failed to award attorney's fees. The court rejected Wing's arguments because A.S. 09.43.120(a) does not permit judicial review of an arbitrator's award for failure to give a complete explanation and because the insurance policy governing the arbitration explicitly provided that each side would bear its own attorney's fees.[586] In addition, the court rejected Wing's argument with respect to expert fees because the argument relied on a

580. 26 P.3d 1074 (Alaska 2001).
581. *Id.* at 1075.
582. *Id.* at 1077.
583. *Id.* at 1079-81.
584. 17 P.3d 783 (Alaska 2001).
585. *Id.* at 785.
586. *Id.* at 786-87.

provision of the insurance policy that conflicted with A.S. 21.89.020(f)(1).[587]

## X. PROPERTY LAW

In *Foster v. State, Dep't of Transportation*,[588] the supreme court held that state courts lack jurisdiction to adjudicate the ownership or right to possession of Native allotment land.[589] In 1979, the U.S. Bureau of Land Management granted Foster's application for an allotment to a tract of land based on her claim of seasonal use and occupancy dating back to 1964. A 1983 survey revealed that parts of Foster's allotment were subject to easements that pre-dated her use and occupancy. In 1998, the U.S. issued Foster a certificate making her allotment subject to three separate rights-of-way. Foster sued the State for inverse condemnation and trespass, which the superior court dismissed for lack of subject matter jurisdiction. The supreme court affirmed, holding that federal courts have exclusive jurisdiction over questions involving the ownership or right to possession of property held in trust by the United States or subject to a restriction against alienation imposed by the United States.[590] The court also held that the superior court could award costs and attorney's fees under Alaska Rules of Civil Procedure 79 and 82, even though it lacked jurisdiction over Foster's claims.[591]

In *R & Y, Inc. v. Municipality of Anchorage*,[592] the supreme court affirmed the denial of relief in an inverse condemnation proceeding, holding that the superior court did not err in concluding that no compensable taking had occurred.[593] The appeal concerned R & Y's economic loss from the Municipality of Anchorage's ("MOA") 1990 decision to add a twenty-foot setback band to the existing eighty-foot setback band surrounding Blueberry Lake. The supreme court agreed with the trial court that the MOA's legitimate interest in protecting wetlands outweighed the minimal frustration of R & Y's investment-backed expectations for the property as a whole.[594] The supreme court rejected R & Y's argu-

587. *Id.* at 787-88. The statute provides, "an automobile liability insurance policy must provide that all expenses and fees, not including counsel fees or adjuster fees, incurred because of arbitration or mediation shall be paid as determined by the arbitrator." ALASKA STAT. § 21.89.020(f)(1) (Michie 2000).

588. 34 P.3d 1288 (Alaska 2001).

589. *Id.* at 1289.

590. *Id.* at 1290 (citing 28 U.S.C. § 1360(b) (1994)).

591. *Id.* at 1291-92.

592. 34 P.3d 289 (Alaska 2001).

593. *Id.* at 300.

594. *Id.* at 296.

ment that every economic loss due to government regulation must be compensated, and reasoned that, in addition to the factors outlined in *Anchorage v. Sandberg*,[595] courts must consider the principles of equitable distribution of public burden and benefit.[596] The court concluded that the setback restriction did not trigger compensation because it was part of a local and national wetlands preservation scheme that applied broadly to all landowners and benefited both the public generally and the landowners in particular.[597]

In *Safeway, Inc. v. State, Dep't of Transportation*,[598] the supreme court held that a municipality cannot vacate the State's interest in a highway right-of-way.[599] In 1959, owners of adjacent pieces of land conveyed land along their common boundary "as a permanent easement and right-of-way for use by the public as a public road," later called Becharof Street.[600] Becharof Street was included within the State's right-of-way on both the Highway Department's right-of-way map and on maps recorded with the State's declarations of taking. In 1983, over the objection of the Department of Transportation, Anchorage relinquished interests in the right-of-way covering Becharof Street. In 1996, Safeway, a lessor of one of the adjacent properties, filed suit to quiet title to Becharof Street after the State concluded it still possessed an easement over the property. The supreme court held that the State maintained an easement over Becharof Street because the State may accept land dedicated to the public "through a formal official action," and that the inclusion of Becharof Street on the highway construction right-of-way map was a "formal official action."[601] Once the State acquired the right in land for highway purposes, the right could only be vacated by the Department of Transportation.[602]

## XI. TORT LAW

In *Alpine Industries, Inc. v. Feyk*,[603] the supreme court held that Feyk had absolute official immunity for allegedly defamatory speech.[604] Feyk had prepared a public health bulletin issued by the

595. 861 P.2d 554 (Alaska 1993).
596. *R & Y*, 34 P.3d at 299-300.
597. *Id.* at 298.
598. 34 P.3d 336 (Alaska 2001).
599. *Id*. at 337.
600. *Id*.
601. *Id*. at 339-40 (quoting *State v. Fairbanks Lodge No. 1392*, 633 P.2d 1378, 1380 (Alaska 1981)).
602. *Id*. at 339 (interpreting ALASKA STAT. § 19.05.070(a) (Michie 2000)).
603. 22 P.3d 445 (Alaska 2001).
604. *Id.* at 450.

State Department of Health and Social Services warning against using ozone-generating devices in occupied spaces, specifically mentioning that a Minnesota court previously ruled that Alpine Industries had made false claims about the safety of its generators. Alpine sued Feyk for libel, tortious interference with business relationships and unfair trade practices. The supreme court held that absolute immunity was appropriate because of the importance of public health bulletins and the potential for increased frequency of lawsuits against authors of the bulletins.[605] The court recognized that Alpine had no other remedy, but determined that other factors weighed more heavily in finding absolute immunity.[606]

In *Angnabooguk v. State, Dep't of Natural Resources*,[607] the supreme court held that when the State chooses to take over firefighting operations, it assumes a duty to conduct those operations non-negligently and that all firefighting decisions are not necessarily discretionary planning decisions subject to immunity under the Alaska Tort Claims Act.[608] Landowners who suffered damage to their homes and property as a result of the Miller's Reach fire of 1996 sued the Alaska Department of Natural Resources, Division of Forestry, ("Forestry") claiming that the State's firefighting activities were conducted negligently. The superior court dismissed the suits on the basis of discretionary function immunity. The supreme court reversed, holding that Forestry owed the plaintiffs an actionable duty of care as a matter of public policy and that the Alaska Tort Claims Act[609] does not provide immunity for all firefighting decisions.[610] The court remanded the case to determine which actions taken by Forestry were discretionary and subject to immunity and which acts were operational and subject to liability.[611]

In *Choi v. Anvil*,[612] the supreme court held that plaintiffs allegedly injured in a car accident "were not required to present expert testimony to establish their claims."[613] Choi rear-ended a pickup truck driven by Anvil, with three passengers in each vehicle. Six of those involved filed suit against Choi, who admitted negligence in causing the collision. At trial on causation and damages, none of the plaintiffs offered expert evidence regarding the "causation,

605. *Id.* at 449.
606. *Id.* at 450.
607. 26 P.3d 447 (Alaska 2001).
608. *Id.* at 453, 458.
609. ALASKA STAT. § 09.50.250 (Michie 2000).
610. *Angnabooguk*, 26 P.3d at 453, 458-59.
611. *Id.* at 459.
612. 32 P.3d 1 (Alaska 2001).
613. *Id*. at 2.

permanence, or extent of their alleged injuries."[614] On appeal, Choi argued that the plaintiffs were required to present expert witnesses to establish causation. The supreme court disagreed, holding that expert witness testimony is necessary "only when the nature or character of a person's injuries require the special skill of an expert to help present the evidence to the trier of fact in a comprehensible format."[615] The alleged injuries in the instant case and their causation were easily understandable by a jury given the lay testimony.[616]

In *City of Seward v. Afognak Logging*, [617] the supreme court affirmed Seward's liability for damages to Afognak's bulldozer.[618] During a heavy rainfall, a City representative directed one of Afognak's bulldozer operators to cut a channel for floodwater but failed to tell him that the pavement had collapsed, a condition that the operator could not see. As a result, the bulldozer was bogged down and suffered extensive water damage. The supreme court found that Afognak presented sufficient evidence that the City owed a duty to warn Afognak of dangerous conditions even though Afognak, as an independent contractor, was not contractually bound to follow the City's instructions.[619] In addition, the court rejected both of the City's claims for immunity.[620] It found that state review of the City's compliance plan did not transform it from a statutory duty into "an agreement or contract" that would fall within a provision for immunity to cities acting under agreement or contract with the State to perform emergency response duties.[621] It also found that the City's actions were not budgetary in nature and did not qualify for immunity as protected planning decisions.[622]

In *Dore v. City of Fairbanks*,[623] the supreme court held that police did not have an actionable duty to arrest a suspect on an outstanding warrant or otherwise prevent harm to a possible crime victim.[624] Seven days after an arrest warrant was issued charging Dore with harassment of his ex-wife, Carmen, Dore killed Carmen and committed suicide. Three Dore children filed negligence actions against the City of Fairbanks. The supreme court found no

614. *Id*.
615. *Id*. at 3.
616. *Id*. at 4.
617. 31 P.3d 780 (Alaska 2001).
618. *Id.* at 781.
619. *Id.* at 784.
620. *Id.* at 785-86.
621. *Id.* at 785.
622. *Id.* at 786.
623. 31 P.3d 788 (Alaska 2001).
624. *Id*. at 796.

statutory duty to arrest and noted that later-enacted domestic violence laws suggest that public policy does not support such a duty.[625] In addition, the court found no actionable duty under the Restatement (Second) of Torts because the police would only have a duty to exercise reasonable care to prevent a third person from doing harm when the police took charge of a third person who they knew, or should have known, to be likely to cause bodily harm to others.[626] Because the police never took charge of Dore, the court held that the police had no tort duty to control him.[627]

In *Estate of Himsel v. Alaska*,[628] the supreme court declined to apply the doctrine of *Feres v. United States*[629] and remanded because genuine issues of material fact existed regarding whether the pilot was acting on behalf of the state as a "borrowed employee."[630] The plaintiffs brought suit against the State on behalf of family members who died in the crash of an Alaska Army National Guard plane.[631] The State argued that the court should apply the *Feres* doctrine, which provides sovereign immunity for tort claims involving the military. The court refused to apply the doctrine, reasoning that Alaska law was adequate to address the issue.[632] The court applied the planning/operational test to determine if the act in question was "discretionary" and therefore entitled to sovereign immunity.[633] The court found that the negligence alleged by the plaintiffs occurred during the execution, and not the planning of the trip, and therefore, immunity did not exist.[634] The court reversed and remanded the case because a question of material fact remained regarding the pilot's relationship to the State.[635] While the pilot was clearly a federal employee, evidence indicated that Alaska might have retained some control over the pilot, thereby making him a "borrowed employee" subject to liability.[636]

In *In re the Exxon Valdez*,[637] the Court of Appeals for the Ninth Circuit held a punitive damages award to be appropriate, but

625. *Id*. at 792 (citing ALASKA STAT. § 18.65.515(a)(1)-(4) (Michie 2000)).

626. *Id*. at 794 (citing RESTATEMENT (SECOND) OF TORTS §§ 314-15, 319 (1965)).

627. *Id*. at 796.

628. 36 P.3d 35 (Alaska 2001).

629. 340 U.S. 135 (1950).

630. *Himsel*, 36 P.3d at 43.

631. *Id*. at 37.

632. *Id*. at 39-40.

633. *Id*. at 40.

634. *Id*.

635. *Id*. at 43.

636. *Id*. at 42-43.

637. 270 F.3d 1215 (9th Cir. 2001).

excessive.[638] In consolidated actions against Exxon Corp. and Captain Hazelwood brought by plaintiffs affected by the Exxon Valdez oil spill, the jury awarded $287 million in compensatory damages and $5 billion in punitive damages against Exxon and $5,000 in punitive damages against Hazelwood. The defendants appealed, arguing that punitive damages were not allowed in the present case, that the award was excessive and that the compensatory damage award was not supported by the evidence. The plaintiffs cross-appealed the grant of summary judgment against various claimants who suffered purely economic injury. The court of appeals held that punitive damages were appropriate because (1) the prior civil and criminal penalties imposed on Exxon did not preclude a punitive damages award; (2) punitive damages are not disallowed in admiralty law; (3) the prior consent decree did not bar a subsequent award of punitive damages for injury to economic and property interests; and (4) neither the Trans-Alaska Pipeline Authorization Act[639] nor the Clean Water Act[640] preempted a private right of action for punitive or compensatory damages based on injuries to private economic or quasi-economic interests.[641] However, the court found that the $5 billion punitive damage award against Exxon was excessive and remanded for determination of a lower amount.[642] The plaintiffs argued that the district court erroneously granted summary judgment in favor of Exxon on certain entities' claims of economic injury unaccompanied by any physical injury to their property or person. The court of appeals found that federal admiralty law does not preempt Alaska's statute providing for strict liability for hazardous substances.[643] As a result, the court of appeals remanded the claims of those entities with valid claims under Alaska law, but not those with remote or speculative claims.[644]

In *Federal Deposit Insurance Corp. v. Laidlaw Transit, Inc.*,[645] the supreme court held that A.S. 46.03.822(a) creates a private cause of action for the owners of private property damaged by a release of hazardous substances; that a statute of limitations defense is available for such an action; that a contribution action under section 46.03.822(a) does not accrue for statute of limitations purposes until the direct action concludes; and that contamination

638. *Id.* at 1242-47.
639. 43 U.S.C. §§ 1651-56 (1994).
640. 33 U.S.C. §§ 1251-1387 (1994).
641. *Exxon Valdez*, 270 F.3d at 1225-31.
642. *Id.* at 1246-47.
643. *Id.* at 1252-53 (citing ALASKA STAT. § 46.03.822 (Michie 2000)).
644. *Id.* at 1253.
645. 21 P.3d 344 (Alaska 2001).

by a past owner or tenant cannot be characterized as a continuing trespass or nuisance for statute of limitations purposes.[646] As a receiver of a failed bank's assets, the Federal Deposit Insurance Corporation ("FDIC") acquired land contaminated by hazardous waste. To recover cleanup costs, the FDIC sued the former landowner and the owner's tenants under A.S. 46.03.822, which imposes strict liability on a joint and several basis for release of hazardous substances and allows responsible parties to sue for contribution. Finding several unresolved issues of Alaska law, the district court certified four questions to the supreme court. In finding a private cause of action under section 46.03.822(a), the supreme court held that a private cause of action was in the nature of the statute, was necessary to provide adequate remedies, did not conflict with existing remedies, promoted the statute's purpose, did not depart from previous applications of the statute and did not create an undue burden on the courts.[647] The court also held that the limiting language of section 46.03.822(a) does not preclude affirmative defenses such as the statute of limitations that have no inherent relation to the imposition of joint and several liability for release of hazardous substances.[648]

In *Hibbits v. Sides*,[649] the supreme court found that it was error to dismiss Hibbits' claim against Sides for intentional third-party spoliation.[650] Hibbits was involved in a motor vehicle accident with Vogus. Hibbits claimed that Sides, the first state trooper to arrive at the scene, knew that Vogus was under the influence of marijuana and knowingly removed him from the scene so that Vogus would not be tested for marijuana use. The supreme court held that because it recently recognized intentional third-party spoliation to be a tort, it was error to dismiss Hibbits' claim.[651] The court found that the case should not proceed until the underlying dispute between Hibbits and Vogus has been resolved and, therefore, Sides could move to stay the proceeding until resolution occurred.[652]

In *Joseph v. State*,[653] the supreme court held that the intentionality of a prisoner's suicide is not a complete defense to a wrongful

646. *Id.* at 356-57.

647. *Id.* at 348-49. (applying Alaska Marine Pilots v. Hendsch, 950 P.2d 98, 104-05 (Alaska 1997)).

648. *Id.* at 354.

649. 34 P.3d 327 (Alaska 2001).

650. *Id*. at 328.

651. *Id.* at 328-29 (citing Nichols v. State Farm Fire and Cas. Co., 6 P.3d 300 (Alaska 2000)).

652. *Id*. at 330.

653. 26 P.3d 459 (Alaska 2001).

death claim alleging that the jailer negligently failed to prevent the suicide.[654] The court also ruled that the use of a blanket preemption to remove those persons criminally charged from the list of prospective jurors did not constitute reversible error without evidence that a particular person was excluded from service or that using the blanket exemption led to an unrepresentative jury.[655] Joseph's son hung himself in his jail cell after his arrest for assault.[656] In Joseph's wrongful death action, the special verdict required the jury to return a verdict for the State if it found that Joseph's son died "as a result of his intentional actions."[657] On appeal, Joseph assigned error to the jury instructions and use of the blanket exemption. The supreme court, reasoning that a "duty to prevent someone from acting in a particular way logically cannot be defeated by the very action sought to be avoided,"[658] held that the fact that a prisoner's suicide was intentional does not defeat a claim that the jailer negligently failed to prevent the suicide.[659] As a result, the court reversed the judgment and remanded for a new trial.

In *Mitchell v. Heinrichs*,[660] the supreme court held that a cause of action for intentional infliction of emotional distress or an award of punitive damages for the killing of another's pet is proper only when the challenged conduct was so outrageous and extreme "as to go beyond all possible bounds of decency, and to be regarded as atrocious, and utterly intolerable in a civilized community."[661] The court held that a pet's actual value to the owner may sometimes be the proper measure of its value.[662] Heinrichs saw two dogs running near her livestock pen and believed the dogs were threatening her livestock. The dogs then turned to Heinrichs, who shot Mitchell's dog out of fear for her personal safety. The superior court concluded that Heinrichs' conduct did not "go beyond all bounds of decency" and did not warrant imposition of liability for intentional infliction of emotional distress or punitive damages. The supreme court affirmed, and held that even though sentimental or companionship value may not be included in the award of damages for the loss of a pet, the actual value of the pet to the owner, rather than

654. *Id.* at 477.
655. *Id.* at 465.
656. *Id.* at 462-63.
657. *Id.* at 465.
658. *Id.* at 476.
659. *Id.* at 477.
660. 27 P.3d 309 (Alaska 2001).
661. *Id.* at 311-12 (citing Hawks v. State, 908 P.2d 1013, 1016 (Alaska 1995)).
662. *Id.* at 313.

the fair market value, may be the proper measure of damages.[663] The case was remanded for determination of damages.

In *Moore v. Hartley Motors, Inc.*,[664] the supreme court held that a liability release form that fails to unequivocally express intent to release does not protect an individual or company from unnecessary dangers or unreasonable risk.[665] Moore signed a release of liability before participating in an ATV safety class offered by Hartley Motors Inc. ("Hartley"). Moore was injured when her ATV rolled over on the safety class course. She sued Hartley, alleging that the liability release was invalid for lack of consideration and void as against public policy, and that the course was inherently unsafe. The trial court granted summary judgment for Hartley. On appeal, the supreme court held that the court did not err in rejecting Moore's claim on the basis of lack of consideration or public policy,[666] but found error in the trial court's failure to consider the scope of the release. The court held that the release only applied to those risks of operating an ATV that were "obvious and necessary to the sport," and not to risks from an unnecessarily dangerous course.[667] Finding that a genuine question of fact existed as to whether Moore's injuries resulted from an unnecessarily unsafe course, the court held that summary judgment was inappropriate.[668]

In *Pauley v. Anchorage School District*,[669] the supreme court held that the school district and its official were entitled to qualified immunity for the decision to release a child to his mother prior to her court-scheduled visitation.[670] Pauley sued his son's school and its principal for negligence and intentional interference with custodial rights after his son was released into his mother's custody before her scheduled Christmas visitation, after which the mother failed to return the boy. The supreme court held that the principal's actions were entitled to qualified immunity.[671] The decision was discretionary and not malicious, corrupt, or made in bad faith because the principal contacted the father, examined the mother's court documents and the documents on file at the school, and discussed the legal ramifications with the police officer the mother

663. *Id.* at 312-13.
664. 36 P.3d 628 (Alaska 2001).
665. *Id.* at 633.
666. *Id.* at 631-32.
667. *Id.* at 633.
668. *Id.* at 634.
669. 31 P.3d 1284 (Alaska 2001).
670. *Id.* at 1285.
671. *Id.* at 1286.

brought with her.[672] As a result, the claims against the principal and school district were properly dismissed.

In *Robles v. Shoreside Petroleum, Inc.*,[673] the supreme court found error in the exclusion of evidence of Shoreside's knowledge of unsafe propane tanks because the evidence supported a potentially viable claim for failure to warn the victim of a propane tank accident.[674] Robles was injured while filling a Shoreside propane tank when its corroded bottom gave way and the tank exploded. Robles submitted evidence that Shoreside's employees regularly filled tanks that had not been inspected and recertified according to federal regulations. Based on this evidence, Robles claimed that Shoreside was negligent for filling uncertified tanks and failing to warn him that these tanks were in circulation. However, the superior court excluded the evidence and dismissed this claim. The supreme court reversed, holding that the evidence of Shoreside's illegal refilling practices should not have been excluded because a jury may have found that Shoreside had constructive knowledge of its dealers' exposure to heightened risk; therefore, Shoreside had a duty to alert Robles to the risk.[675] The case was remanded for retrial on the issue of negligent failure to warn.

In *Savage Arms, Inc. v. Western Auto Supply Co.*,[676] the supreme court held that "a corporation that purchases assets of the manufacturer of a rifle sold in Alaska [can] be held liable for personal injury caused in Alaska by a defect in the rifle."[677] Savage Industries, Inc. manufactured a defective rifle purchased by Western Auto Supply Company. The rifle was sold to a store in Maine and later resold to Taylor in Alaska. The defective rifle discharged and caused injury to Taylor's son. Savage Arms, Inc. purchased assets from Savage Industries in 1989. In 1990, Taylor sued Savage Industries and Western Auto, which settled with Taylor and sought indemnity from Savage Arms. The supreme court characterized successor liability as an issue of tort law and held that Alaska tort law applied.[678] Faced with an issue of first impression, the court held that the traditional "mere continuation" exception and the new "continuity of enterprise" exception to the rule of successor nonliability are available under Alaska law.[679] In accepting the new ex-

672. *Id.*
673. 29 P.3d 838 (Alaska 2001).
674. *Id*. at 840, 844.
675. *Id*. at 843-44.
676. 18 P.3d 49 (Alaska 2001).
677. *Id*. at 51.
678. *Id*. at 53.
679. *Id*. at 55.

ception, the court reasoned that "the posited negative effects on the overall economy are too indeterminate and speculative to outweigh the policy of compensating persons injured by product defects."[680] The court reversed summary judgment in favor of Western Auto and remanded because material factual disputes existed and because the uncertainty surrounding the successor liability issue inhibited the parties from effectively preparing their cases.[681]

In *Walden v. State, Dep't of Transportation*,[682] the supreme court affirmed the grant of partial summary judgment for the State.[683] Shawn Walden incurred brain injuries as a result of an accident in which his father, Mel, lost control of the car on a highway curve after hitting ice. Individually and as Shawn's legal representative, Shawn's mother filed suit alleging that the State Department of Transportation ("DOT") should have posted a warning sign on the curve and that DOT's negligent maintenance of the highway curve was a substantial factor in Mel's loss of control. The superior court found that DOT had no duty to post a sign and granted DOT partial summary judgment. On appeal, the supreme court upheld the grant of partial summary judgment because Shawn's mother failed to establish a duty on the part of DOT to place a warning sign at the curve.[684] The court relied on the Manual of Uniform Traffic Control Devices, which states that DOT "may" place a warning sign at such curves.[685] The court reasoned that the use of "may" does not rise to the level of a legal requirement to place a warning sign and, therefore, DOT did not breach any legal duty.[686]

In *Waldroup v. Lindman*,[687] the supreme court affirmed summary judgment for an insurer who was sued for tortious interference with a contractual relationship after it offered to defend a patient against a chiropractor when the chiropractor sued her for payment.[688] After an auto accident, Lindman sought chiropractic treatment from Dr. Waldroup. Lindman's insurer, Allstate, informed Waldroup that it would deny payment for a portion of her treatment received at Waldroup's rehabilitation clinic unless he submitted proof that the treatment was reasonable, necessary and accident-related. Allstate also informed Lindman that if her claim

680. *Id*. at 57.
681. *Id*. at 58.
682. 27 P.3d 297 (Alaska 2001).
683. *Id.* at 300.
684. *Id.* at 301.
685. *Id.* at 301-02.
686. *Id.* at 302.
687. 28 P.3d 293 (Alaska 2001).
688. *Id.* at 294-95.

was denied and Waldroup pursued her for payment, Allstate would defend her. The superior court dismissed Waldroup's interference with contractual relations claim against Allstate because it found that Allstate's interference was privileged. On appeal, the supreme court agreed that Allstate had a direct financial interest in the contractual relationship between Waldroup and Lindman.[689] The court rejected Waldroup's argument that Allstate's interference was not privileged because Allstate was exposed to potential loss by its offer to defend Lindman in any collection action filed against her.[690]

In *Wongittilin v. State*,[691] the supreme court held that the police did not owe a duty to arrest a man on an outstanding warrant and, therefore, were not liable in a civil tort action for the death caused by the man after issuance of the warrant.[692] An arrest warrant was issued for Jackson after he violated his probation. A police officer subsequently met with Jackson but did not arrest him because he believed the return flight to Nome from Savoonga was full. Three months later, Jackson struck and killed Wongittilin with his four-wheeler. On appeal from summary judgment for the State, the supreme court determined that the police had no duty to arrest Jackson on the outstanding warrant under statutes or case law.[693] The court concluded that A.S. 18.65.080 does not create a duty to arrest on an outstanding warrant and only imposes a duty on the police to assist other governmental departments but not a general duty to protect the public.[694] The court concluded that prior case law suggested that no duty existed without a special relationship, and that no such relationship existed without the police taking charge of the dangerous party.[695] Finding that no duty was created in statutes, case law or public policy, the court held that the police had no duty to arrest Jackson.

## XII. TRUSTS AND ESTATES

In *Enders v. Parker*,[696] the supreme court upheld denial of attorney's fees to Enders under A.S. 13.16.435, and to Parker under Alaska Rules of Civil Procedure 82(b) and 79(b).[697] In an action challenging admission of her stepfather's will into probate, Enders

689. *Id.* at 297-98.
690. *Id.* at 298.
691. 36 P.3d 678 (Alaska 2001).
692. *Id.* at 685.
693. *Id*. at 681.
694. *Id*. at 681-82.
695. *Id*. at 683-84.
696. 28 P.3d 280 (Alaska 2001).
697. *Id.* at 281-82.

was unsuccessful in establishing undue influence by Parker, her stepfather's companion. Enders appealed the denial of her claim for attorney's fees under section 13.16.435, which provides that in order to receive attorney's fees, a litigant must show that the probate proceeding was filed in good faith. The supreme court held that although the superior court did not expressly find that Enders acted in bad faith, the language and tone of the opinion clearly supported that conclusion, and the court found that Enders "failed to act in the estate's interest."[698] In addition, the court held that Parker could not recover attorney's fees under Rules 82(b) or 79(b) because the rules do not apply where a specific statutory scheme for attorney's fees exists.[699]

In *Helgason v. Merriman*,[700] the supreme court affirmed the decision to retain Merriman as the personal representative of Helgason's estate.[701] Helgason's will named Merriman as personal representative, but Helgason's sons, as heirs, sought Merriman's removal under A.S. 13.16.295, which provides for removal in the estate's best interests. Helgason's sons claimed that removal would be in the estate's best interests because of hostility and a conflict of interest between Merriman and the sons. The supreme court upheld the finding that there was no conflict of interest because Hegalson's sons failed to raise a "real issue" of a conflict of interest such that the personal representative would be potentially liable to the estate because of the existence of some cause of action against him.[702] The court likewise upheld the conclusion that no evidence of hostility existed between Merriman and the plaintiffs.[703]

*Heather M. Bell**

698. *Id.* at 284.
699. *Id.* at 286.
700. 36 P.3d 703 (Alaska 2001).
701. *Id.* at 710.
702. *Id.* at 706, 709-10.
703. *Id.* at 710.

* The Editor wishes to thank Jennifer Tomsen, Erin Foley, David Kim and the authors of *The 2001 Year in Review*: Erin Abood, Jason Bliss, Joseph Davies, Tillman Finley, Matthew Kane, Kurt Lunkenheimer, David Miscia, Jaclyn Moyer, Leah Russin, Emily Schilling, Joshua Simko, Jacquelyn Sumer and Jason Veloso.

# APPENDIX

## CASES OMITTED FROM 2001 YEAR IN REVIEW

### ADMINISTRATIVE LAW

In *Alvarez v. Ketchikan Gateway Borough*,[704] the supreme court held that the Board of Equalization's failure to make substantial factual findings was harmless error when the reasoning behind the Board's decision was apparent.[705] Alvarez appealed the assessments of three parcels of land to the Board of Equalization, arguing that the assessment for two parcels should have been based on the best offer that she was able to obtain when they were on the market and that the third assessment was based on incorrect factual findings made by the borough assessor. The Board upheld the assessments and Alvarez appealed, arguing that the Board did not make factual findings sufficient to allow it to conduct judicial review. The supreme court pointed out that the standard for sufficiency of a board's findings of fact is "whether the record sufficiently reflects the basis for the [board's] decision so as to enable meaningful judicial review."[706] The supreme court upheld the Board's ruling and found that the failure of the Board to make findings of fact was harmless because the decision made clear how the Board resolved the conflicting theories of the case and addressed all issues in dispute.[707]

In *Anderson v. State, Department of Revenue*,[708] the supreme court affirmed the denial of Anderson's application for a permanent fund dividend, finding sufficient evidence that Anderson failed to overcome the presumption of non-residency and that the Department did not misinterpret its own regulations.[709] Although Anderson left Alaska in 1991, he remained registered to vote, held an Alaska driver's license, owned no real property in another state, and paid no residence taxes in his new location. Between 1991 and 1997, Anderson and his family made three trips to Alaska, spending a total of seven days in the state. In that same period, Anderson accumulated 205 days of personal leave time. Anderson filed

704. 28 P.3d 935 (Alaska 2001).
705. *Id.* at 940.
706. *Id.*
707. *Id.* at 942.
708. 26 P.3d 1106 (Alaska 2001).
709. *Id.* at 1108.

for a permanent fund dividend for 1997 but the Department denied his application, finding that Anderson had not established residency. In affirming the superior court, the supreme court noted Anderson's infrequent and short trips to Alaska, his choice to use only a small percentage of his leave to visit Alaska, his inability to control his residency due to a military career, his choice to vote absentee in Alaska only once, his decision to accept a transfer knowing it would weaken his chances of an Alaskan assignment and the short duration of his adult residency in comparison to his absence.[710] Although the evidence could also support a finding that Anderson overcame the presumption of non-residency, the court held that it is obligated to affirm the decision of the Department when it chooses between two alternatives which are both supported by substantial evidence.[711] The court also found that in giving some regulatory factors more weight than others, the Department did not arbitrarily interpret its own regulation.[712]

In *Baker v. University of Alaska*,[713] the supreme court held that Alaska Rule of Appellate Procedure 604(b)(1)(B)(iv) grants courts broad discretion to grant relief to appellants from the requirement that they prepay the costs of preparing an administrative transcript and record for appeal upon a showing of good cause.[714] Baker, a non-tenured professor, brought suit after the University of Alaska, Fairbanks ("UAF") gave him notice of non-retention and rejected his grievance. Baker prevailed in his suit, which was remanded to UAF for the determination of damages, and then appealed UAF's denial of damages beyond lost salary, retirement, benefits and expenses. Baker sought an indigency exception to the requirement that he prepay the costs of preparing the administrative record for the appeal. The superior court denied his motion and dismissed his appeal for lack of prosecution. The supreme court first pointed out that Appellate Rule 604(b)(1)(B)(iv) does not restrict the court from relaxing the advance payment requirement, and allows the court to deviate from ordinary procedure upon a showing of good cause.[715] The court then concluded that Baker showed substantial hardship considering his illegal termination, the fact that UAF's conduct had increased his litigation costs and attorney's fees, his

710. *Id.* at 1110.
711. *Id.* at 1111.
712. *Id.* at 1112.
713. 22 P.3d 440 (Alaska 2001).
714. *Id.* at 442-43.
715. *Id.* at 442.

existing debt and UAF's ability as an employer to recover preparation costs in the future.[716]

In *Brown v. State*,[717] the supreme court held that a hearing officer may not deny an in-person hearing in driver's license revocation proceedings that involve issues of the licensee's credibility.[718] Arrested after a breath test showed his blood-alcohol level to be above the legal limit, Brown declined an independent chemical test of his blood and the arresting officer revoked his driver's license. Brown claimed that he declined the independent test only because the handcuffs in which he had been placed were hurting him and he sought an administrative hearing to review the revocation. The hearing officer denied Brown's request that the hearing be held in person and conducted a telephone hearing instead, ultimately upholding the revocation of Brown's license. The supreme court ruled that because the case involved issues of fact as to whether Brown waived his right to an independent blood test, Brown's credibility was at issue.[719] Following its decision in *Whitesides v. State*,[720] the court ruled that when the licensee's credibility is at issue, the hearing officer may not deny a request for an in-person hearing.[721]

In *Edwardsen v. Department of Interior*,[722] the Court of Appeals for the Ninth Circuit held that the Mineral Management Services' ("MMS") Environmental Impact Statement ("EIS") for the Northstar oil and gas development project had "reasonably documented" the project's environmental impacts.[723] BP Exploration acquired the rights to federal and state leases for the Northstar project and sought approval to begin producing oil by expanding an artificial gravel island, drilling wells on federal portions of the reservoir and constructing pipelines. The Army Corps of Engineers determined that the issuance of construction permits constituted a "major Federal action" under the National Environmental Protection Act and required an EIS. The MMS adopted the EIS and later approved the Northstar development plan. Six Alaska Natives and Greenpeace sued, challenging the adequacy of the final EIS. The court held that the MMS took the required "hard look" in the EIS at both the direct and indirect impacts of the proj-

716. *Id.* at 443.
717. 20 P.3d 586 (Alaska 2001).
718. *Id.* at 588.
719. *Id.*
720. 20 P.3d 1130 (Alaska 2001).
721. *Brown,* 20 P.3d at 588.
722. 268 F.3d 781 (9th Cir. 2001).
723. *Id.* at 791.

ect,[724] and that the EIS analysis adequately considered the cumulative impacts of the project, including impacts on lakes, rivers, wildlife, air quality and wetlands.[725] Therefore, the court declined to review the approval of the project.

In *Estate of Basargin v. State*,[726] the supreme court affirmed the decision of the Commercial Fisheries Entry Commission ("CFEC"), which denied Basargin a commercial fisheries entry permit.[727] Basargin's estate argued that Barsargin was denied meaningful hearings and that the CFEC improperly denied Basargin points for "unavoidable circumstances," his vessel and gear claims, and his economic dependence claims. The supreme court concluded that Basargin was given a meaningful opportunity to present his case consistent with due process concerns.[728] The court also concluded that cultural barriers and Basargin's English language limitations did not entitle him to "unavoidable circumstances" points.[729] The court determined that even if Basargin had been granted the points he sought for his vessel and gear investments, he would not have accumulated enough points, and therefore, any miscalculation by the CFEC for this category was harmless error.[730] Finally, the court found that substantial evidence showed that Basargin was not entitled to economic dependence points.[731]

In *Leuthe v. State*,[732] the supreme court held that the denial of a tardy application for a commercial fisheries entry permit was proper where the applicant was unable to show that he had been misadvised.[733] Leuthe filed an application for an entry permit after the deadline had passed. The superior court affirmed the Commercial Fisheries Entry Commission's decision to deny his application. For consideration after the deadline, an applicant must establish that he had been misadvised about his eligibility for an entry permit and must prove that he spoke to a fisheries agent before the deadline, that he received bad advice from the agent, and

724. *Id.* at 786 (quoting Okanogan Highlands Alliance v. Williams, 236 F.3d 468, 473 (9th Cir. 2000)).

725. *Id.* at 789-90.

726. 31 P.3d 796 (Alaska 2001).

727. *Id.* at 797-98.

728. *Id.* at 797-800.

729. *Id.* at 797-98.

730. *Id.*

731. *Id.*

732. 20 P.3d 547 (Alaska 2001).

733. *Id.* at 548.

that the bad advice caused him to miss the deadline.[734] The supreme court affirmed the denial of Leuthe's application because Leuthe was unable to show that the advice he received was erroneous.[735]

In *Lopez v. Public Employees' Retirement System*,[736] the supreme court held that the Public Employees' Retirement Board ("Board") was correct in finding that Lopez had not established that "a condition or hazard undergone in the course of her employment was a substantial factor in causing her disability."[737] Lopez was a resident aide at the State's Harborview Developmental Center, where she injured her back while lifting a resident. Following the injury, Lopez never returned to work and she later applied for occupational disability benefits. The Board denied Lopez occupational benefits but awarded her non-occupational disability benefits due to her inability to work as a resident aide and the lack of alternate employment opportunities with Harborview. The supreme court affirmed, holding that the Board applied the correct legal standard in concluding that the sole cause of Lopez' disability was an arthritic hip and that the occupational injury to her back was not a substantial factor in her disability.[738]

In *Yoon v. Alaska Real Estate Commission*,[739] the supreme court affirmed the decision of the Real Estate Commission against Yoon for promissory fraud.[740] Moore sought to purchase commercial real estate and retained Yoon as her agent. To induce Moore to buy a mall with serious roof problems, Yoon promised to take care of the roofing repairs at his own expense. When Yoon billed Moore for repairs totaling more than $20,000, Moore filed a claim with the Alaska Real Estate Commission. The Commission found that Yoon had committed promissory fraud and awarded Moore $10,000. On appeal, the supreme court found substantial evidence of the elements of promissory fraud: (1) a promise; (2) intention not to keep the promise; (3) intention to induce reliance; (4) justifiable reliance; and (5) damages.[741] Moore's testimony showed that Yoon had made oral promises and did not intend to keep those promises because he later claimed that he never made any guaran-

734. *Id.* at 549.
735. *Id.* at 550-51.
736. 20 P.3d 568 (Alaska 2001).
737. *Id.* at 570.
738. *Id.* at 573.
739. 17 P.3d 779 (Alaska 2001).
740. *Id.* at 783.
741. *Id.* at 782.

tees in writing.[742] The evidence also showed that Yoon intended to induce reliance on his promises because he was also acting as the agent for the mall, he recommended an inspector with whom he had previously worked, and agreed to act as property manager without compensation.[743] The court found Moore's reliance on Yoon's promises to be justifiable because Moore was inexperienced, she testified that the promises "led her to close" and she received other assistance from Yoon in the course of buying the mall.[744]

## BUSINESS LAW

In *Bennett v. Artus*,[745] the supreme court affirmed the superior court's judgment for costs of remodeling a condominium in favor of Bennett, a client with whom Artus, a lawyer, had a romantic relationship.[746] During their relationship, Bennett and Artus remodeled a condominium that Bennett bought on Artus' behalf and Artus performed other legal services for Bennett. Bennett later sued Artus, claiming he had defaulted on loans and failed to pay her for the remodeling. Artus counterclaimed for amounts Bennett allegedly owed him for legal services and the remodeling. The supreme court held that the superior court did not clearly err in applying the principle of unjust enrichment to credit Artus for the value of the benefits conferred on Bennett during the condominium remodeling.[747] The court also held that it was not error to find that payments Bennett made to Artus were reimbursements for legal services, rather than loans Artus was obligated to repay,[748] and that Artus was entitled under unjust enrichment to keep these amounts.[749]

In *Garrison v. Dixon*,[750] the supreme court upheld an award of attorney's fees and costs after an unfair trade practice action was prosecuted in bad faith in order to gain an advantage over a business competitor.[751] The Garrisons filed suit against Dixon, a real estate agent working for a competitor, under the Alaska Unfair Trade Practices and Consumer Protection Act in response to sev-

742. *Id.* at 782-83.
743. *Id.* at 783.
744. *Id.*
745. 20 P.3d 560 (Alaska 2001).
746. *Id.* at 561.
747. *Id.* at 563-65.
748. *Id.* at 566.
749. *Id.* at 566-67.
750. 19 P.3d 1229 (Alaska 2001).
751. *Id.* at 1230.

eral ads in which Dixon referred to herself as a "buyer's agent" and warned of the differences between a buyer's agent and a buyer's agency. The Garrisons moved to dismiss their individual claims after two and a half years of pretrial motions because they "were never real parties in interest;" the trial court granted the motion, awarding final judgment to Dixon, and later granted summary judgment to Dixon on the remaining claims. The supreme court rejected the Garrisons' argument that the trial court erred in entering final judgment against them before the final resolution of the other claims because their argument was moot.[752] The court upheld the award of attorney's fees against the Garrisons, although it disagreed with the trial court's conclusion that an award of attorney's fees depends on the number of non-prevailing parties.[753] However, because the Garrisons filed their claim in bad faith and pursued it for two and a half years before filing a motion to dismiss, and because an award of reasonable attorney's fees was appropriate under the Unfair Trade Practices Act, the court affirmed the decision to enhance the attorney's fees awarded against the Garrisons.[754]

In *Krossa v. All Alaskan Seafoods, Inc.*,[755] the supreme court held that an independent contractor ratified an invalid contract after he learned the meaning of the contractual terms, failed to act thereafter, and signed onto a new term under the same agreement.[756] As part of an initial deal with a Russian company, All Alaskan Seafoods, Inc. ("AAS") developed an unusual and complicated formula for paying its crab catcher vessel crews. AAS explained its payment system verbally, but failed to ensure that all individual contractors understood the formula. Krossa was hired later in the season and the compensation system was not adequately explained to him. However, after the first crab delivery, Krossa learned the meaning of AAS's terms, continued with the trip and later signed on for a second term under the same contract. Krossa later sued for breach of the first contract. On appeal, the supreme court held that although the written agreement Krossa signed did not constitute a valid contract because the plain language was ambiguous and the parties understood the agreement differently, the parties formed a valid contract when Krossa learned of and implicitly accepted the terms.[757] The court reasoned that if a party "knows or has reason to know" of the mistake, and

752. *Id.* at 1232.
753. *Id.* at 1233.
754. *Id.* at 1233-34.
755. 32 P.3d 398 (Alaska 2001).
756. *Id.* at 406.
757. *Id.* at 405-06.

he manifests to the other party an intention to affirm, then the party loses the ability to avoid the contract.[758]

In *Meidinger v. Koniag, Inc.*,[759] the supreme court held that proxy solicitation statements made by candidates for Koniag's board of directors were materially false as a matter of law and affirmed summary judgment for Koniag.[760] The Meidinger slate sought election to Koniag's board of directors and solicited proxies urging voters to reject a proposition that would allegedly grant the current board members "irrevocable delegation" and the ability to appoint themselves as trustees to a new settlement trust. Koniag sued, alleging that the proxy statements were false and misleading. The supreme court found the false statements of the proxy statements to be material as a matter of law because the misrepresentations were so obviously important to an investor that reasonable minds could not differ on the question of materiality.[761]

## CIVIL PROCEDURE

In *Bartek v. State, Department of Natural Resources*,[762] the supreme court held that lower courts can determine that no evidentiary hearing or discovery is required before deciding on class certification.[763] A group of landowners brought suit against the State Department of Natural Resources, Division of Forestry ("Forestry") for negligent firefighting after a fire caused damage to their property. The action was later converted into a class action. The supreme court held that the superior court has the discretion to determine whether an evidentiary hearing or discovery is necessary to resolve factual disputes before it grants class certification.[764] However, the court remanded the case to determine whether the two sets of requirements for certification were met.[765]

In *Bradley v. Bradley*,[766] the supreme court reaffirmed the established rule that executions may not issue on partial judgments until they become final.[767] Bradley appealed the issuance of writs of execution on a money judgment entered against him because all the claims and counterclaims had not yet been adjudicated. The

758. *Id.*
759. 31 P.3d 77 (Alaska 2001).
760. *Id.* at 81.
761. *Id.* at 83-84.
762. 31 P.3d 100 (Alaska 2001).
763. *Id.* at 101.
764. *Id.* at 103.
765. *Id.* at 104; ALASKA R. CIV. P. 23.
766. 32 P.3d 372 (Alaska 2001).
767. *Id.*

court found that the judgment was not final and had not been certified pursuant to Alaska Rule of Civil Procedure 54(b) and, therefore, execution could not ensue.[768]

In *Gamble v. Northshore Partnership*,[769] the supreme court held that because Northshore's defense of an action to reform an easement could be regarded as an enforcement action, the provision in the easement regarding attorney's fees in enforcement actions was applicable.[770] The Gambles requested reformation of a recorded easement, which was denied by the trial court. The easement contained a provision that granted the prevailing party in a suit to enforce the easement reasonable attorney's fees and costs. The supreme court held that the fact that Northshore's defense could have been expressed as a counterclaim demonstrated that there is slight difference between a suit and a defense to a suit.[771] As a result, Northshore's defense came within the easement agreement provisions, and Northshore, as the prevailing party, was entitled to full attorney's fees.[772]

In *Hebert v. Honest Bingo*,[773] the supreme court held that Hebert's pleadings in her personal injury lawsuit raised triable issues of fact as to whether an amended complaint related back to a timely initial complaint.[774] Hebert was struck on the head by a falling bingo box at a bingo hall operated by Honest Bingo. Hebert filed suit against Honest Bingo one day before the applicable statute of limitations ran out and named four "John Doe" defendants because she did not know the exact structure of the bingo operation. Ten months later, Hebert learned that Fairbanks Drama Association ("FDA") was one of the three business entities that comprise Honest Bingo and added FDA to the complaint. FDA refused participate in settlement negotiations and ultimately filed a successful motion for judgment on the pleadings, contending that Hebert's amended complaint was barred by the statute of limitations. The court held that because factual questions existed as to whether Hebert's amended complaint related back to the initial timely complaint filed against Honest Bingo, FDA was not entitled to judgment on the pleadings.[775]

---

768. *Id.*
769. 28 P.3d 286 (Alaska 2001).
770. *Id*. at 289.
771. *Id.*
772. *Id*. at 289-90.
773. 18 P.3d 43 (Alaska 2001).
774. *Id.* at 45.
775. *Id.* at 49.

In *Johnson v. State*,[776] the court of appeals held that an attorney representing an indigent defendant whose claims on appeal were allegedly frivolous could not withdraw without providing adequate arguments supporting his allegations.[777] When the Office of Public Advocacy filed an appeal on Johnson's behalf, Johnson's attorney sought permission to withdraw due to the frivolous nature of the issues on appeal. The supreme court concluded that an attorney representing an indigent defendant may not withdraw unless there is a reasonable assurance that the appeal presents only frivolous issues as determined by the both the attorney and the court.[778] Therefore, the court ordered the attorney to submit an amended brief which adequately presented the frivolous issues within forty-five days so that the court could discharge its duty of verifying the arguments.[779]

In *Kellis v. Crites*,[780] the supreme court held that an award of attorney's fees pursuant to Alaska Rule of Civil Procedure 68 and A.S. 09.30.065 applies only from the date when an offer of judgement is made.[781] After Crites, a defendant in a personal injury action, made a $250 pretrial offer that was rejected by Kellis, the jury returned a verdict in Crites' favor. The trial court subsequently awarded Crites full attorney's fees and costs, even though Crites asked for only seventy five percent of attorney's fees. The supreme court vacated the attorney's fees award and remanded for recalculation because the award violated A.S. 09.30.065(a), which provides that the offeree shall pay 75 percent of the offeror's reasonable attorneys fees if the offer was made no later than 60 days after the disclosures required by the Alaska Rules of Civil Procedure.[782] In addition, because the cost bill was ambiguous, the court vacated and remanded the costs so that the cost bill and Kellis' objections to the bill could be considered by the clerk of court.[783]

In *McDowell v. State*,[784] the supreme court upheld the dismissal of an action against the State for trespass under the doctrine of res judicata because the court had previously dismissed a trespass claim arising from the same event.[785] The McDowells sued the

776. 24 P.3d 1267 (Alaska Ct. App. 2001).
777. *Id.* at 1268.
778. *Id.* at 1267.
779. *Id.* at 1268.
780. 20 P.3d 1112 (Alaska 2001).
781. *Id.* at 1114.
782. *Id.* at 1115.
783. *Id.*
784. 23 P.3d 1165 (Alaska 2001).
785. *Id.*

State in 1993, alleging trespass, negligence and nuisance resulting from petroleum contamination on their property. The superior court granted the State's motion for summary judgment, dismissing the negligence, nuisance and trespass claims under the doctrine of discretionary immunity. The McDowells filed a new complaint in 1998, alleging that the state had failed to clean up the contamination. The second complaint was based on a theory of landowner liability, which the McDowells had not advanced in their original opposition to the State's summary judgment motion because the McDowells' original complaint treated the State as a regulatory agency rather than as a landowner. The supreme court upheld the lower court's dismissal of the new complaint under the doctrine of res judicata because the McDowells' second complaint arose out of the same set of operative facts as their first complaint, and that theory should have been advanced as part of the first action.[786]

In *MAPCO Express, Inc. v. Faulk*,[787] the supreme court affirmed the superior court's finding of liability on a trespass claim, but reversed and remanded the award of compensatory and punitive damages because portions of the compensatory damages were clearly erroneous and the award of punitive damages required further consideration and findings.[788] The superior court held MAPCO liable for trespass for snow melt that ran onto and damaged Faulk's property and the supreme court affirmed.[789] However, because some of Faulk's costs may have included double billing, the court remanded the award of compensatory damages for further clarification.[790] Finally, because the trial court's award of punitive damages was not based on a finding supported by evidence in the record, and because the trial court increased the amount of punitive damages without explanation, the supreme court reversed and remanded the award of punitive damages for further consideration and findings.[791]

In *Municipality of Anchorage v. Anderson*,[792] the supreme court held that an award of attorney's fees was a non-final order entered by an intermediate court of appeal and was not subject to appeal under Alaska Rule of Appellate Procedure 202.[793] Anderson was injured on the job and did not attend an employer re-

786. *Id.* at 1166-67.
787. 24 P.3d 531 (Alaska 2001).
788. *Id.* at 547.
789. *Id.* at 537.
790. *Id.* at 544.
791. *Id.* at 547.
792. 37 P.3d 420 (Alaska 2001).
793. *Id.* at 420-21.

quested physical capacity exam because he erroneously believed that he was not required to attend the exam if it was not conducted by a physician. As a result, he was denied benefits by the Workers' Compensation Board. The superior court concluded that an employer can require an employee to take the examination with a non-physician specialist, but that Anderson's failure to comply did not constitute a "refusal to submit" because the statute was ambiguous as to the requirement. Therefore, the superior court awarded Anderson attorney's fees and costs, and remanded the matter for further proceedings. The supreme court dismissed the Municipality's appeal as improper because the attorney's fee award was part of a case that was remanded to the Workers' Compensation Board and, therefore, was a non-final order that could not be appealed.[794]

In *Sengupta v. University of Alaska*,[795] the supreme court held that the superior court did not err in granting summary judgment for the University of Alaska.[796] Sengupta, a professor at the University of Alaska, Fairbanks, was terminated after he brought grievances against the University. Sengupta filed a complaint against the University alleging that his free speech, due process and equal protection rights had been violated. He also alleged that his right to be free from employment discrimination had been violated. On appeal, the supreme court held that the superior court had applied the proper standards of review and did not err in granting summary judgment against Sengupta, denying Sengupta's motion for reconsideration, and awarding the University of Alaska, Fairbanks attorney's fees.[797]

In *Ulmer v. Alaska Restaurant & Beverage Ass'n*,[798] the supreme court dismissed as moot lieutenant governor Ulmer's appeal from the superior court's ruling that an initiative petition was defective.[799] In 1999, Ulmer certified and prepared an initiative petition to increase the statutory excise tax on various alcoholic beverages. The Alaska Restaurant & Beverage Association challenged the petition, claiming it was unconstitutional and defective because it did not include the amount of the tax increase and that it implied that the tax increase covered a group not included in the statute. The superior court ruled that the petition was constitutional, but that the failure to include the amount of the increase made it defec-

794. *Id.* at 421.
795. 21 P.3d 1240 (Alaska 2001).
796. *Id.* at 1248.
797. *Id.* at 1254-55, 1257, 1259, 1260, 1262.
798. 33 P.3d 773 (Alaska 2001).
799. *Id*. at 774.

tive. The sponsors of the initiative then failed to file the petition with the lieutenant governor in a timely fashion, effectively killing the initiative. Nevertheless, Ulmer appealed the decision of the superior court. The supreme court determined that the question presented on appeal was moot because the initiative was dead, there was no further controversy and there was no relief available to the State even if it prevailed.[800] Although Ulmer argued that if the State prevailed, it might be able to collect attorney's fees, the court pointed out that the State never asked for such fees so it could not argue that it may have a right to such fees.[801] The supreme court also declined to apply the public interest exception to the mootness doctrine, reasoning that a decision would not have any doctrinal value and that any future similar questions could be handled in a timely fashion so as to not hinder the election process.[802]

In *Zok v. Collins*,[803] the supreme court held that the superior court improperly granted summary judgment against Zok as to his malpractice claims which did not require the testimony of an expert witness.[804] Zok sued Collins, his former attorney, for malpractice. The superior court denied Zok's motion for partial summary judgment because expert witnesses were required to prove malpractice and Zok had not offered any expert testimony. The supreme court held that Collins was entitled to summary judgment only for those claims that required expert testimony, but that some of Zok's claims were clear enough for the jury to understand and did not require expert testimony and, therefore, as to those claims, summary judgment was inappropriate.[805]

## CONSTITUTIONAL LAW

In *Brandon v. Corrections Corp. of America*,[806] the supreme court held that the prisoner filing fee statute is constitutional and that the superior court properly denied Brandon's motion to waive the filing fee, but erred in dismissing Brandon's claim.[807] Brandon, a state prisoner, sued to recover surcharges applied to his commissary purchases. He requested a filing fee exemption and submitted a motion to waive the filing fee. Although it did not specifically

800. *Id*. at 776.
801. *Id*. at 777.
802. *Id*. at 777-79.
803. 18 P.3d 39 (Alaska 2001).
804. *Id.* at 40.
805. *Id.* at 42-43.
806. 28 P.3d 269 (Alaska 2001).
807. *Id*. at 271.

rule on the motion to waive the fee, the superior court ordered Brandon to pay a reduced fee. After Brandon received an extension to pay the fee, his case was dismissed for failing to pay the fee before the extension expired. Brandon appealed, claiming that the court erred in dismissing his case, that the filing fee should have been waived entirely and that the prisoner filing fee statute is unconstitutional. The supreme court held that the prisoner filing fee statute is constitutional, even though it sometimes requires indigent prisoners to pay a filing fee, because indigent prisoners and indigent non-prisoners are in fundamentally different situations because the State completely supports a prisoner's basic needs.[808] Although the court held that Brandon's case was prematurely dismissed, it concluded that the reduction of the filing fee was an implicit denial of Brandon's motion to waive the filing fee entirely and that the superior court did not err in denying the motion.[809]

In *Brause v. State, Department of Health & Social Services*,[810] the supreme court held that a declaratory judgment claim by a same-sex couple denied benefits available to married couples was not ripe for adjudication.[811] Brause and Dugan challenged the State's refusal to grant them a marriage license and the state and federal constitutionality of A.S. 25.05.013(b), which provides that a "same-sex-relationship may not be recognized by the state as being entitled to the benefits of marriage."[812] The adoption of article I, section 25 of the Alaska Constitution mooted the complaint with respect to the State's refusal to grant them a marriage license because as a matter of constitutional law "a marriage may exist only between one man and one woman."[813] On appeal, the supreme court held that Brause and Dugan failed to assert that they had been, or will be, denied rights that are available to married partners.[814] The court noted that the claim was a case of first impression in Alaska and cautioned that ruling on the constitutionality of a statute before the issues are concretely framed increases the risk of erroneous decisions.[815]

808. *Id*. at 276.
809. *Id*. at 274.
810. 21 P.3d 357 (Alaska 2001).
811. *Id.* at 357-58.
812. *Id.* at 358.
813. *Id.*
814. *Id.* at 360.
815. *Id.*

## CRIMINAL LAW

In *Avila v. State*,[816] the court of appeals affirmed Avila's conviction for attempted second-degree controlled substance misconduct but vacated his conviction for solicitation of second-degree controlled substance misconduct.[817] Avila, a prisoner, was the target of a police "sting" operation attempting to catch him distributing heroin within the prison. The police used another inmate who owed Avila money as an informant in the operation. The informant arranged for a police officer posing as his friend on the outside to provide Avila's girlfriend with money in return for discharging his debt, with the understanding that the girlfriend would use the money to purchase heroin and deliver it to Avila. The "sting" operation ended when Avila's girlfriend refused to deliver the drugs to the prison, and Avila was arrested and convicted of the charges in question. The court of appeals found that there was enough evidence to allow a reasonable person to believe that Avila intended to deliver at least some portion of the heroin to another person.[818] Avila argued that he could not be convicted of the attempt charge because his only actions were telephone calls, which were nothing more than solicitations for the delivery of heroin for personal use. The court of appeals noted that Avila could be convicted of attempt if either he or his girlfriend took a "substantial step" toward the commission of the intended crime.[819] The court then decided that the girlfriend's search for a heroin supplier amounted to such a "substantial step."[820] Finally, Avila argued that his two convictions must merge because they are based on "conduct designed to . . . culminate in [the] commission of the same crime."[821] The court of appeals agreed, and directed the superior court to vacate his conviction for solicitation.[822]

In *Baker v. State*,[823] the court of appeals held that the evidence presented at trial was sufficient to convict Baker of interference with official proceedings and first-degree witness tampering and that the trial judge did not commit plain error when he failed to instruct the jury on the meaning of the word "threaten."[824] Baker was violating his probation by sitting in a car with a handgun inside

816. 22 P.3d 890 (Alaska Ct. App. 2001).
817. *Id*. at 895.
818. *Id*. at 892.
819. *Id*. at 893.
820. *Id*. at 894.
821. *Id*. (quoting ALASKA STAT. § 11.31.140(b) Michie (2000)).
822. *Id*.
823. 22 P.3d 493 (Alaska Ct. App. 2001).
824. *Id*. at 497-98.

when a police officer drove by and noticed him. Baker encouraged his passenger, Nesmith, to tell the police that she had been driving the car. Instead, Nesmith told the police about Baker's request and the presence of the gun. Following the incident, Baker repeatedly telephoned Nesmith asking her what she had told the authorities and what she was going to tell them, and urged her to say that he had not been driving the car. Baker also implied that he was surveiling her home by telling her what she was doing at an exact moment. The court of appeals upheld Baker's conviction because A.S. 11.81.900(b)(60) broadly defines "threat" to include any menace, no matter how it may be communicated, and not merely express manifestations of intent to harm another.[825] The court reasoned that a jury could reasonably find that Baker intended the calls, surveillance and statement at the scene to communicate a "threat" to Nesmith.[826] The court found that the trial judge did not commit clear error by not instructing the jury on the definition of "threaten" because there was no reasonable probability that the jury made its determination based on a faulty theory.[827]

In *Baum v. State*,[828] the court of appeals held that the forfeiture of an airplane worth $40,000 for a big-game guiding offense did not violate the excessive fines clause of the Eighth Amendment of the U.S. Constitution.[829] Baum was convicted of possessing and transporting unlawfully taken game and, as part of his sentence, he was forced to forfeit the plane used in the hunt. The plane belonged to Baum's brother, Raymond, who asked the court for a remission of the forfeiture because he had nothing to do with his brother's violation. Although Raymond valued the plane at $40,000, the court of appeals found that the fine was not excessive because the amount of the fine was within the penalty for a second or subsequent offense under Alaska law.[830] The court also upheld the denial of Raymond's request for remission of the forfeiture because the record clearly supported the finding that Raymond was not an innocent and negligent owner of the plane.[831]

In *Brockway v. State*,[832] the court of appeals held that Brockway could not collaterally attack a prior conviction as part of the sentencing proceedings in his present case but "must pursue a peti-

825. *Id.* at 497.
826. *Id*.
827. *Id.* at 498.
828. 24 P.3d 577 (Alaska Ct. App. 2001).
829. *Id*. at 582.
830. *Id.* at 579-80.
831. *Id*. at 580-81.
832. 37 P.3d 427 (Alaska Ct. App. 2001).

tion for post-conviction relief" because he did not claim he was completely deprived of counsel.[833] Three years after Brockway pled no contest to third-degree assault, he was arrested again and pled no contest to third-degree weapons misconduct. Brockway reached a plea agreement for a composite sentence of no more than three years and was sentenced to a term of thirty-two months. On appeal, Brockway claimed that his prior convictions were erroneous because the trial court did not comply with Rule 11 of the Alaska Rules of Criminal Procedure and that his sentence was excessive. The court of appeals held that a defendant can collaterally attack a prior conviction only if he "was completely denied the right to counsel in the prior proceeding."[834] Therefore, Brockway could not challenge his prior convictions in the current proceeding because he did not claim to be deprived of counsel. In addition, the court referred Brockway's claim of excessiveness to the supreme court because the sentence imposed was consistent with the plea agreement and, therefore, the court lacked jurisdiction.[835]

In *Edwards v. State*,[836] the court of appeals held that Edwards did not violate his probation, which restricted him from living with females under sixteen years of age, by spending time with eight-year old daughter, and upheld a modification of the terms of his probation.[837] Evidence showed Edwards spent a substantial amount of unsupervised time one evening with his daughter at his ex-wife's residence. Edwards later lied and attempted to induce his children to conceal his conduct. The court of appeals held that Edwards' conduct did not constitute "living with" his ex-wife and daughter at that residence and did not violate the probation order.[838] However, the court upheld the superior court's modification of Edwards' probation, which imposed stricter limitations on his contact with minors, because Edwards' unsupervised contact with his daughter, his perjury and his attempts to induce his children to conceal his conduct were significant reasons to amend the conditions of his probation.[839]

In *Fine v. State*,[840] the court of appeals vacated Fine's composite sentence of nine years imprisonment for criminally negligent homicide, assault in the third degree and driving while intoxi-

833. *Id.* at 429-30.
834. *Id.*
835. *Id.* at 430-31.
836. 34 P.3d 962 (Alaska Ct. App. 2001).
837. *Id.* at 970.
838. *Id*. at 964.
839. *Id.* at 969.
840. 22 P.3d 20 (Alaska Ct. App. 2001).

cated.[841] The court also vacated the lower court's decision to revoke Fine's driver's license for life.[842] In order to impose a sentence greater than the statutory maximum of five years and to revoke Fine's driver's license for life, the lower court must have found that the greater sentence and lifetime revocation of his driver's license were necessary to protect the public.[843] The court of appeals concluded that Fine's sentence was not necessary to protect the public and was therefore excessive because the record did not support the trial judge's conclusion that Fine was a chronic alcohol abuser and because Fine did not have a prior history of driving while intoxicated.[844]

In *Haynes v. State*,[845] the court of appeals held that Alaska courts have the authority to award restitution to the State for "drug buy money" as part of Haynes' sentence.[846] The court held that the State is a "victim or other person injured by the offense" within the meaning of A.S. 12.55.015(a)(5) and 12.55.045(a) and, therefore, may be awarded restitution for the money used by an undercover officer to buy drugs.[847] The court relied primarily on the Alaska Supreme Court's holding in *Gonzales v. State*,[848] that the State was an "aggrieved party" under A.S. 12.55.100(a)(2) and could be awarded restitution for drug buy money as a condition of probation.[849]

In *Heaps v. State*,[850] the court of appeals affirmed Heaps' convictions of first-degree and fourth-degree assault.[851] Heaps had assaulted Stevens, with whom he lived, while he was awaiting trial for misdemeanor assault stemming from a previous altercation with Stevens. On appeal, Heaps argued that the trial court erred by excluding evidence showing Stevens' propensity for violence, refusing to instruct the jury on a potential justification for the previous assault and failing to instruct the jury, *sua sponte*, on potential lesser included offenses. The court of appeals first held the trial court did not abuse its discretion in restricting Heaps' direct examination and admitting only two photographs of a prior incident where Stevens

841. *Id.* at 24.
842. *Id.*
843. *Id.* at 22.
844. *Id.* at 23-24.
845. 15 P.3d 1088 (Alaska Ct. App. 2001).
846. *Id.* at 1091.
847. *Id.*
848. 608 P.2d 23 (Alaska 1980).
849. *Haynes*, 15 P.3d at 1090-91.
850. 30 P.3d 109 (Alaska Ct. App. 2001).
851. *Id.* at 117.

had wrecked their house.[852] The court of appeals reasoned that even when evidence of a victim's character or past bad acts is relevant, the trial judge can limit the amount of evidence introduced as long as the substance of the defendant's claim is communicated to the jury.[853] Second, the court of appeals held the trial court reasonably declined to include Heaps' proposed jury instruction informing the jury that although Heaps was not on trial for the previous assault, he had a potential justification of self-defense of property for that assault.[854] Lastly, the court of appeals held that reasonable judges could differ on whether Alaska Rule of Criminal Procedure 30(b) obligated judges to instruct the jury on lesser included offenses in the absence of a request from either party and, therefore, the trial court did not err in omitting such an instruction.[855]

In *Hunt v. State*,[856] the court of appeals held that it did not have jurisdiction to hear a sentencing appeal unless the sentence exceeded two years.[857] Hunt pled no contest to fourth-degree controlled substance misconduct, a class C felony, and was sentenced to a presumptive term of two years imprisonment because he had a prior felony conviction. Hunt appealed, arguing that the trial court should have adjusted his sentence downward because the trial judge found a mitigating factor in that Hunt's offense involved a small quantity of the controlled substance. The court of appeals dismissed the appeal for lack of jurisdiction because A.S. 12.55.120(a) allows felony offenders to appeal sentences only if the sentence involved a term or aggregate terms exceeding two years of unsuspended incarceration.[858]

In *Lewandowski v. State*,[859] the court of appeals affirmed the superior court's finding that Lewandowski's crime of first-degree robbery did not qualify for a mitigating sentencing factor.[860] Lewandowski was convicted of first-degree robbery for robbing a grocery store with an accomplice while armed with a pellet gun. For first-time felons convicted of such a class A felony, there is a presumptive prison sentence of five years. Lewandowski proposed as a mitigating factor that his conduct was among the least serious

852. *Id.* at 111.
853. *Id.* at 112.
854. *Id.* at 113.
855. *Id.* at 116.
856. 18 P.3d 69 (Alaska Ct. App. 2001).
857. *Id.* at 70.
858. *Id*.
859. 18 P.3d 1220 (Alaska Ct. App. 2001).
860. *Id.* at 1223.

conduct included in the offense, emphasizing his youth, the inoperability of his gun and the fact that his accomplice was the only one hurt in the offense. The superior court judge rejected the mitigating factor, concluding Lewandowski's offense was not among the least serious offenses because he had acted with an accomplice rather than alone, they had planned the robbery and armed themselves with the pellet gun and knives and there was a scuffle in the course of the robbery. The court of appeals found that the judge did not clearly err in rejecting the mitigating factor and upheld the ruling, because although the facts of the case could support a "least serious finding," the conclusions were supported by the record.[861]

In *McGill v. State*,[862] the court of appeals affirmed McGill's conviction for first-degree sexual assault, holding that the lower court did not abuse its discretion when it allowed evidence showing McGill's prior bad acts and did not commit plain error when it gave a jury instruction that consent to sexual penetration could be withdrawn after initial penetration.[863] At McGill's trial, evidence relating to his prior sexual assault on his girlfriend was admitted. The court of appeals affirmed use of this evidence because Alaska Rule of Evidence 404(b)(3) permits such evidence where the defendant's defense is that the alleged victim consented.[864] Second, the court of appeals upheld the jury instruction that even if consent was given with respect to the initial sexual penetration, the victim could subsequently withdraw consent.[865] The court found that giving the instruction was not plain error because the three cases relied on by McGill were not persuasive nor well-reasoned and because Alaska's first-degree sexual assault statute was broad in the conduct it proscribed.[866]

In *Macsurak v. Municipality of Anchorage*,[867] the court of appeals held that police officers properly relied on the statements of an apartment manager that Macsurak was intoxicated and trespassing when they entered his apartment.[868] The police were called to an apartment complex to investigate a complaint of a drunk and disorderly person. When they arrived, the apartment manager informed the police that Macsurak had been evicted and returned to the apartment for unknown reasons. Upon approaching the

861. *Id.*
862. 18 P.3d 77 (Alaska Ct. App. 2001).
863. *Id.* at 80.
864. *Id.*
865. *Id.* at 82.
866. *Id.* at 84 (citing ALASKA STAT. § 11.41.410 (Michie 2000)).
867. 16 P.3d 753 (Alaska Ct. App. 2001).
868. *Id.* at 754.

apartment, which was empty and had a pickup truck parked out front packed with personal belongings, the officers heard noises coming from inside. The supreme court determined that the officers legally entered the apartment if they reasonably believed that the defendant had no right to occupy the premises.[869] The court then held that the officers could rely on the statement of the apartment manager that the defendant had been evicted, as well as their observations about the apartment and truck, and therefore they reasonably concluded that the defendant had been recently evicted and was now trespassing.[870]

In *Malutin v. State*,[871] the court of appeals held that Alaska Rule of Appellate Procedure 209(b)(5) should be construed to mean that "only defendants who succeed in having their convictions reversed are exempt from paying attorney's fees."[872] Malutin was convicted of attempted first-degree sexual abuse of a minor. Malutin did not challenge his conviction, but attacked the decision requiring him to pay restitution to the victim. He also argued that all information relating to his prior court-ordered psychological evaluation should have been excised from the pre-sentence report. Malutin prevailed on both points and objected to the judgment against him of attorney's fees, arguing that Rule 209(b)(5) exempts those who win an issue on appeal, even if the conviction is not reversed. The court of appeals disagreed with Malutin, because the plain language of Rule 209(b)(5) directs the clerk to enter judgment for attorney's fees "unless the defendant's conviction was reversed by the appellate court" and "[d]espite Malutin's victory on appeal, he remain[ed] convicted."[873]

In *Miller v. State*,[874] the court of appeals held that Miller could not be convicted on the basis of statements he made to the police that were induced by an implied promise that he would not be prosecuted for accidentally starting a fire.[875] A vacant warehouse, where Miller had been residing without permission, burned and was extensively damaged, and a witness placed him there at the time of the fire. Although the police had questioned Miller freely before, they did not inform him that he was free to go when they questioned him a second time. After being told that if he had started the fire by accident it "was not that big a thing" and it

869. *Id*.
870. *Id*. at 755.
871. 27 P.3d 792 (Alaska Ct. App. 2001).
872. *Id*. at 793.
873. *Id.*
874. 18 P.3d 696 (Alaska Ct. App. 2001).
875. *Id*. at 701.

would be "an over and done deal," Miller admitted that he had set fire to a block of insulation but thought he had fully extinguished it. Miller was then arrested for arson. The statements Miller made prior to his arrest were admitted at trial, and he was convicted. The court of appeals held that the statements were involuntary and therefore inadmissible because, due to the charges presented, a jury could have reasonably found him to be at fault based on his account.[876] As a result, Miller's conviction was overturned.[877]

In *Moses v. State*,[878] the court of appeals affirmed the superior court's ruling that A.S. 12.25.150(b) was not violated, that the State was not collaterally estopped from asserting that it had complied with the statute, that police are not required to videotape breath test refusals and that Moses waived his right to an independent test.[879] An Alaska State trooper stopped Moses' vehicle and arrested him for driving while intoxicated ("DWI"). The trooper allowed Moses to call his wife from the scene before transporting him to the police station. Upon his arrival at the police station, Moses said he wanted to call his wife again but gave no indication that he wanted his wife to call an attorney. Moses then refused to provide a breath sample, and his refusal was audiotaped but not videotaped. The court found that because Moses had an opportunity to make a phone call to his wife after his arrest and prior to taking the breath test, there was no violation of section 12.25.150(b), which allows a prisoner to call an attorney, relative or friend.[880] The court also held that collateral estoppel did not apply in this case because the issue before the Department of Motor Vehicles hearing officer—whether to revoke Moses' license for refusing a breath test—was not identical to the issue before the district court—whether the statute had been violated.[881] Furthermore, the issue was never actually litigated at the license revocation hearing, a requirement for collateral estoppel.[882] The court held that police have no duty to videotape DWI processing and that Moses did not provide any concrete explanation as to how a videotape would have aided him.[883] Finally, the court concluded that

876. *Id*.
877. *Id*.
878. 32 P.3d 1079 (Alaska Ct. App. 2001).
879. *Id.* at 1081-82.
880. *Id.* at 1081 (interpreting ALASKA STAT. § 12.25.150(b) (Michie 2000)).
881. *Id.* at 1082.
882. *Id.*
883. *Id.*

Moses' testimony proved that he made a knowing and intelligent waiver of his right to obtain an independent breath test.[884]

In *Peters v. State*,[885] the court of appeals held that admitting into evidence a DNA profile match absent "evidence that properly interprets the significance" of the match was erroneous because it was potentially misleading.[886] While prosecuting Peters for sexual assault, the State introduced evidence of a match between the DNA profile of skin cells found under Peters' fingernails and the DNA profile of the victim. However, there was no evidence of the likelihood of the randomness of such a match. Because the jury might have been misled regarding the weight and significance of the match, the court concluded that it was error to admit the match into evidence, but that the error was harmless.[887] First, the court determined that the jury was properly instructed regarding the weight of the DNA profile match absent interpretive evidence.[888] Second, the court found that the match was not particularly probative in this case because the identity of the defendant was undisputed and the existence of the victim's skin cells under Peters' fingernails could be explained through actions other than sexual assault.[889] Finally, the court noted that the State's other evidence was strong.[890]

In *State v. Brueggeman*,[891] the court of appeals expressed its disapproval of the lenient sentence given to Brueggeman by the superior court.[892] Brueggeman engaged in multiple acts of fraud and perjury, including inducing a mentally challenged friend to pose as him for a DNA test in order to avoid paying child support. The superior court found Brueggeman guilty of the class B felony of perjury, his first felonious offense, and sentenced him to only 500 hours of community service under the sentencing guidelines set forth in *State v. Jackson*.[893] The court of appeals disagreed with the lower court's application of these sentencing guidelines.[894] Under the *Jackson* guidelines, Brueggeman's suspended sentence with no jail time was a "probationary" sentence that can be imposed only if

884. *Id.*
885. 18 P.3d 1224 (Alaska Ct. App. 2001).
886. *Id*. at 1225, 1227.
887. *Id*. at 1228.
888. *Id*.
889. *Id*.
890. *Id*.
891. 24 P.3d 583 (Alaska Ct. App. 2001).
892. *Id.* at 584.
893. 776 P.2d 320, 326-27 (Alaska Ct. App. 1989).
894. *Brueggeman*, 24 P.3d at 587.

"Brueggeman's case was 'significantly mitigated in terms of both the offender and the offense.'"[895] Although reluctantly accepting the lower court judge's characterization of Brueggeman as a mitigated offender, the court of appeals found that the judge did not find the offense to be significantly mitigated.[896] The court of appeals affirmed the sentencing guidelines of *Jackson* and found that Brueggeman's probationary sentence conflicted with those guidelines.[897] However, because the defendant did not appeal the sentence as too excessive, the court of appeals was not authorized to increase the sentence.[898]

In *State v. Martin*,[899] the court of appeals certified the question to the Alaska Supreme Court: "What is the relationship between the supreme court's jurisdiction and the trial court's jurisdiction when an untimely petition for hearing is accepted for filing, or when such a petition is later granted?"[900] In 1982, Martin received a suspended sentence for charges of incest, for which he later completed probation and had the conviction set aside. In 1998, a regulation was passed that redefined "sex offenders" to include those whose convictions had been set aside, such as Martin. Martin was then charged with failure to register as a sex offender in two previous years. The court of appeals reversed the district court's dismissal and reinstated charges against Martin. On July 20, 2001, the supreme court agreed to hear Martin's case. The State appealed the district court's decision but then wished to dismiss the appeal, arguing that the district court's decision was void because, since the supreme court granted hearing, the district court retroactively lost its jurisdiction.[901] The court certified the question to the supreme court, reasoning that it probably did not have jurisdiction over the matter and the issue was of "substantial public interest."[902]

In *Tall v. State*,[903] the court of appeals held that the lower court did not err by not giving advance notice of the court's proposed dismissal of Tall's post-conviction relief application.[904] Tall claimed that under Alaska Rule of Criminal Procedure 35.1, he was entitled to advance notice of the judge's decision to dismiss his post-

895. *Id.* (citing *Jackson*, 776 P.2d at 327).
896. *Id*. at 588.
897. *Id.* at 590-591.
898. *Id.* at 584 n.1.
899. 33 P.3d 495 (Alaska Ct. App. 2001).
900. *Id.* at 498.
901. *Id*.
902. *Id*.
903. 25 P.3d 704 (Alaska Ct. App. 2001).
904. *Id*. at 706.

conviction relief application. However, in this case, the State filed the motion to dismiss and, therefore, Rule 35.1(f)(3) governed the decision, not Rule 35.1(f)(2), the subsection upon which Tall relied.[905] Because the judge granted the State's motion to dismiss and did not summarily dismiss the case himself, Tall did not have to be given advance notice in order to respond because the reasons for dismissal were in the motion.[906]

In *Wurthmann v. State*,[907] the court of appeals held that a live-in boyfriend who had spent seven years as the primary caretaker of his girlfriend's child was in a "position of authority" over her for purposes of third-degree sexual abuse as required under A.S. 11.41.438.[908] Wurthmann moved in with the child's mother when the child was ten years old and "assumed the role of [the child's] stepfather."[909] Despite allegations of earlier abuse, Wurthmann admitted to only a consensual sexual relationship after the child turned seventeen, but he was convicted of first, second and third-degree sexual abuse. Wurthmann appealed the trial court's refusal to grant a judgment of acquittal on the third-degree sexual abuse charge on the grounds that he did not occupy a "position of authority" over the child as required by the statute. On appeal, the court affirmed Wurthmann's conviction for third-degree sexual abuse, holding that the legislature intended "position of authority" to include adults who exercise undue influence over a child and that "a live-in boyfriend who assumes the position of a stepfather has additional influence by virtue of his status as a person of special trust in the child's life."[910]

## EMPLOYMENT LAW

In *Barios v. Brooks Range Supply, Inc.*,[911] the supreme court affirmed the denial of Barios' claim for overtime pay and held that the exclusion of one of Barios' witnesses was not an abuse of discretion.[912] Three months after Barios' employment with Brooks Range Supply ended, she sued the company claiming that she was not compensated for overtime. Where an employer does not keep records of hours worked by employees, as in this case, the employee need only produce evidence to create a "just and reason-

905. *Id*. at 707.
906. *Id*.
907. 27 P.3d 762 (Alaska Ct. App. 2001).
908. *Id.* at 766.
909. *Id.* at 763.
910. *Id.* at 764-65.
911. 26 P.3d 1082 (Alaska 2001).
912. *Id.* at 1089.

able" inference to support her claim for overtime pay. Then, the burden of proof shifts to the defendant to produce specific evidence regarding the amount of work performed by the employee or to negate the inference drawn from the employee's evidence. The superior court found that Barios had met her burden, but that Brooks had subsequently met its higher burden by producing testimony of witnesses that Barios continually arrived late to work, that Barios missed several days of work to care for her husband, that there was not enough work available to require anyone to work overtime and that Barios usually went home early or on time. The supreme court found that the lower court did not err in finding that this was sufficient evidence to meet Brooks' burden of proof.[913] In addition, the court held that the superior court did not abuse its discretion in excluding Barios' expert witness because the witness was only going to testify as to what the end result of the case should be and such testimony is inappropriate where the court is required to make such a determination.[914]

In *Collins v. Arctic Builders, Inc.*,[915] the supreme court vacated the superior court's decision to dismiss Collins' claim for workers' compensation benefits and remanded the case for factual determinations.[916] Collins was diagnosed with chronic asbestos pleuritis on November 3, 1990, and filed for benefits with the Alaska Workers' Compensation Board on May 21, 1993. The superior court dismissed Collins' claim on the grounds that he failed to file a timely notice of injury under A.S. 23.30.100(a) and that Collins was barred by the two-year statute of limitations under A.S. 23.30.105(a), which had begun to run on November 3, 1990. Collins argued that he attempted to file his claim before the statute of limitations had run, but that the clerk at the state workers' compensation office told him he had to file with a federal agency, and Collins' paperwork was apparently lost. If Collins had made this attempt within two years of November 3, 1990, he would be allowed to argue that he was excused from his failure to give timely notice of injury under A.S. 23.30.100(d).[917] Because the superior court made no determination as to whether Collins attempted to file his claim in 1991, the supreme court vacated the dismissal and remanded the case for factual determinations on his attempted filing.[918]

---

913. *Id.* at 1087.
914. *Id.* at 1088.
915. 31 P.3d 1286 (Alaska 2001).
916. *Id.* at 1287-88.
917. *Id* at 1290.
918. *Id.* at 1291.

In *Finch v. Greatland Foods, Inc.*,[919] the supreme court reversed summary judgment against Finch on his claims of constructive discharge and breach of the covenant of good faith and fair dealing, but affirmed summary judgment against him on his claim of intentional infliction of emotional distress.[920] Finch brought a claim against his employer, Bob's Distribution Company, Inc. After the parties settled the suit, Finch claimed that Bob's engaged in a pattern of harassment and retaliation designed to force his resignation and filed suit alleging breach of the covenant of good faith and fair dealing, retaliation and constructive discharge, and intentional infliction of emotional distress. The superior court granted Bob's motion for summary judgment on all claims. The supreme court held that there were genuine issues of material fact as to whether Bob's constructively discharged Finch and breached the covenant of good faith and fair dealing.[921] The supreme court also found that genuine issues of material fact existed as to whether or not Bob's actions were authorized under the parties' settlement agreement.[922] However, the court affirmed the superior court's grant of summary judgment in favor of Bob's on the intentional infliction of emotional distress claim because the record revealed no more than "insults, indignities, threats, annoyances [and] petty oppressions."[923]

In *Gillum v. L & J Enterprises, Inc.*,[924] the supreme court held that the superior court did not err in finding that a falling door did not cause Gillum's disability, in finding Gillum comparatively negligent or in disregarding the testimony of his expert witness.[925] Gillum suffered two separate industrial accidents when he was struck on the head by a falling warehouse door and, fifteen days later, suffered another head injury when he fell from his semi-trailer. The supreme court upheld the decision of the lower court, finding that the special master simply rejected Gillum's trial theory that the initial accident caused the second fall and additional injuries.[926] The court also declined to find error in the special master's finding Gillum comparatively negligent and disregarding the testimony of Gillum's expert witness.[927] Because the special master

919. 21 P.3d 1282 (Alaska 2001).
920. *Id*. at 1283.
921. *Id*. at 1284.
922. *Id*. at 1287-89.
923. *Id*. at 1286.
924. 29 P.3d 266 (Alaska 2001).
925. *Id.* at 267.
926. *Id*. at 269.
927. *Id.* at 269-70.

found that the testimony of Gillum's expert witness was based on assumptions that did not comport with the evidence on record, it properly chose not to rely on the expert's testimony.[928]

In *Goodman v. Fairbanks North Star Borough School District*,[929] the supreme court found that the time at which Goodman knew or should have known that his employer would not accommodate his disability was a question of material fact and reversed the grant of summary judgment in favor of the school district.[930] Goodman sued Fairbanks North Star Borough and the school district alleging discrimination based on disability under A.S. 18.80.220(a)(1). The lower court granted the defendants' motion for summary judgment, holding that Goodman had failed to file his claim within the two-year statute of limitations. The supreme court reversed, noting that the date when Goodman discovered or should have discovered the school district would not accommodate his disability is a question of fact not ordinarily determined by the lower court on a motion for summary judgment.[931] The supreme court found that the record supported the inference that Goodman did not receive unequivocal notice that the school district was refusing to accommodate him until his application for disability retirement was accepted in late February 1996, placing his February 18, 1998 claim within the statute of limitations.[932]

In *Lincoln v. Interior Regional Housing Authority*,[933] the supreme court reversed the superior court's grant of summary judgment as to Lincoln's claims against her former employer for violating the Alaska Whistleblower Act, breach of implied covenant of good faith and fair dealing and intentional infliction of emotional distress.[934] Lincoln was employed by the Interior Regional Housing Authority ("Authority"), an organization established to address housing shortages in interior Alaska. Lincoln cooperated with the United States Department of Housing and Urban Development during an investigation of her employer, even though her boss allegedly instructed her not to cooperate. Shortly after her cooperation, Lincoln was laid off, but was told that she would be "recalled as soon as fiscally possible."[935] Lincoln was not recalled when a position similar to her old job opened up and was not hired

928. *Id.* at 270.
929. 39 P.3d 1118 (Alaska 2001).
930. *Id.* at 1120-21.
931. *Id.* at 1120.
932. *Id.* at 1120-21.
933. 30 P.3d 582 (Alaska 2001).
934. *Id*. at 584.
935. *Id*.

for another position that subsequently opened up. The supreme court found that Lincoln raised inferences showing that Authority's reasons for firing her were pretextual and that genuine issues of material fact existed on this point and, therefore, the court reversed the grant of summary judgment as to Lincoln's Whistleblower and covenant of good faith and fair dealing claims.[936] The supreme court also determined that wrongful discharges can lead to intentional infliction of emotional distress claims, and because the superior court did not make a threshold decision as to whether Authority's conduct was sufficiently outrageous to support the claim, the court reversed and remanded the claim to the superior court.[937]

In *Municipality of Anchorage v. Robertson*,[938] the supreme court held that a municipal worker can claim workers' compensation for an injury sustained while crossing the street between the city parking lot and his actual place of work because the parking garage was part of the Municipality of Anchorage's premises.[939] The court reasoned that because the Municipality provided the garage parking to Robertson, benefited from the parking and indirectly owned the garage, Robertson had already reached his place of work when he was injured.[940] Therefore, the "going and coming" rule did not apply, and he was erroneously denied benefits.[941]

In *Rhines v. State*,[942] the supreme court held that Rhines was not eligible for occupational disability benefits under A.S. 39.35.410(a) because she was not terminated because of her disability and her injuries were not serious enough to be considered a total and permanent occupational disability.[943] In February 1993, Rhines filed an occupational injury report due to pain in her wrists and hands resulting from computer use. She did not return to work after March 16, 1993. In May 1993, Rhines was notified that her department was being reorganized and her position would be eliminated at the end of July 1993. The Public Employees' Retirement Board denied Rhines' claim for occupational disability benefits and the superior court affirmed. The supreme court concluded that it was the reorganization of Rhines' department, and

936. *Id*. at 586-88.
937. *Id*. at 589.
938. 35 P.3d 12 (Alaska 2001).
939. *Id.* at 12.
940. *Id.*
941. *Id.*
942. 30 P.3d 621 (Alaska 2001).
943. *Id.* at 630.

not her injuries, that severed her ties with her employer.[944] The court also concluded that Rhines' injury was not a total and permanent occupational disability as defined in A.S. 39.35.680(26) because she suffered from tendonitis, but not carpal tunnel syndrome or other serious nerve damage.[945] As a result, the court affirmed the superior court's decision denying Rhines' claim for occupational disability benefits.

## FAMILY LAW

In *Barrett v. Alguire*,[946] the supreme court held that a custodial parent's move out-of-state constitutes a material change of circumstances as a matter of law, and that the superior court did not err in holding a custody hearing and granting custody to Alguire.[947] Barrett was awarded primary physical custody of the couple's two sons after the dissolution of their marriage. When Barrett moved his sons to Washington, Alguire petitioned for custody modification. The superior court ruled that Barrett's move was a material change of circumstances meriting a custody hearing, and ultimately awarded custody to Alguire upon finding that such an award was in the best interests of the children. On appeal, the supreme court held that the hearing was appropriate because Barrett's move constituted a material change of circumstances as a matter of law,[948] and declined to find error in the best-interests determination because the superior court properly applied the applicable statutory provisions of A.S. 25.24.150(c).[949]

In *C.J. v. State, Department of Health and Social Services*,[950] the supreme court reversed the superior court's decision under the Indian Child Welfare Act ("ICWA"), which terminated the parental rights of a non-Indian father.[951] C.J.'s biological children were taken into state custody and placed in foster care after their Indian mother was arrested and charged with child abuse and neglect. The Division of Family and Youth Services ("DFYS") relied on social workers in Florida, where C.J. was living, to determine whether he was willing and able to care for his children. At trial, the superior court terminated C.J.'s parental rights based solely on testimony of an expert who had never spoken with C.J. or the chil-

944. *Id.* at 626.
945. *Id.* at 628.
946. 35 P.3d 1 (Alaska 2001).
947. *Id.* at 11-12.
948. *Id.* at 11.
949. *Id.* at 15-16.
950. 18 P.3d 1214 (Alaska 2001).
951. *C.J.*, 18 P.3d at 1220.

dren and a DFYS social worker who testified only to second-hand information from Florida placement officials as to C.J.'s inability to care for the children. The supreme court held that this evidence did not meet the heightened requirements of the ICWA[952] because it did not show, beyond a reasonable doubt, that placement with C.J. was likely to result in serious emotional or physical damage to the children or that the State had engaged in active efforts to prevent the breakup of the family.[953]

In *D.D. v. L.A.H.*,[954] the supreme court held that the trial court abused its discretion by failing to conduct an evidentiary hearing before entering an order in an opposed custody modification hearing.[955] When D.D. (Danielle) and L.A.H. (Leif) divorced in September 1996, they negotiated a custody agreement giving Leif custody of their son, Travis, for seven of the twelve months of the year while Danielle went to school. Danielle moved back to Alaska in December 1996 and the parties agreed to split custody. Subsequently, Danielle filed motions to modify child custody and to appoint a child custody investigator. The superior court denied Danielle's motion and granted Leif custody during the school year without giving Danielle visitation rights. The judge also denied Danielle's motion to appoint an investigator, finding that there was sufficient information to make such a determination. Danielle appealed, arguing that she had a constitutional due process right to be heard prior to the issuance of a custody order. The supreme court agreed, holding that an evidentiary hearing is required before an opposed motion to modify custody can be granted.[956] Therefore, the supreme court reversed the judgment of the superior court and remanded the case.

In *Elliott v. Settje*,[957] the supreme court held that the "stability and continuity" factor is not decisive in child custody cases and that courts are not required to follow a guardian ad litem's ("GAL") recommendation.[958] The superior court granted Elliott and Settje joint physical custody of their child, Kessa. Elliott appealed, arguing that the stability and continuity offered by one primary care giver should have compelled the superior court to award her primary physical custody. The supreme court disagreed, holding that trial courts should have substantial discretion to analyze the stabil-

952. 25 U.S.C. § 1912 (2000).
953. *C.J.*, 18 P.3d at 1219.
954. 27 P.3d 757 (Alaska 2001).
955. *Id.* at 758.
956. *Id.* at 760.
957. 27 P.3d 317 (Alaska 2001).
958. *Id.* at 321-22 (quoting ALASKA STAT. § 25.24.150(c)(5) (Michie 2000)).

ity and continuity factor, but are not required to give that factor special weight when other factors are equal.[959] Because the superior court considered Kessa's young age and her strong interest in establishing ties with each parent, the court did not abuse its discretion in awarding joint physical custody.[960] The supreme court also held that courts are not required to follow a GAL's recommendation, but that the superior court's decision was consistent with the GAL's report and testimony in any event.[961]

In *Goliver v. McAllister*,[962] the supreme court reversed the grant of summary judgment for the McAllisters because a material issue of fact existed as to whether Goliver's motion was time barred.[963] Goliver sought to set aside the adoption of her son by her parents, the McAllisters. Without conducting an evidentiary hearing, the superior court found that Goliver's motion was time-barred by A.S. 25.23.140(b), which requires that all appeals and challenges of adoption decrees be brought within one year's time. The supreme court found that an unresolved issue of material fact existed regarding whether the McAllisters had "taken custody" of the child and if so, whether they took custody more than one year prior to Goliver's motion.[964] Accordingly, the supreme court vacated the superior court's denial of Goliver's motion and remanded the case for an evidentiary hearing.

In *Green v. Green*,[965] the supreme court upheld the trial court's division of the Greens' marital assets, but required additional findings on the valuation and distribution of the parties' cash assets.[966] The Greens owned and operated a flight-seeing and air taxi service during their marriage. Gary Green asserted that the trial court erred in including the couple's cabin site and two airplanes in the marital estate. The supreme court affirmed, concluding that the lower court had not erred in finding that Gary Green had intended to transmute the property he owned prior to the marriage into marital property.[967] The court held that the Greens' actions, including the use of property as their residence, the maintenance of property by both parties, the placement of title in joint ownership and the use of the non-titled owner's credit to improve the prop-

959. *Id.* at 321.
960. *Id.* at 322.
961. *Id.*
962. 34 P.3d 324 (Alaska 2001).
963. *Id.* at 325.
964. *Id.* at 326.
965. 29 P.3d 854 (Alaska 2001).
966. *Id*. at 856.
967. *Id*. at 857-59.

erty, indicated Gary's intent to treat the cabin as marital property.[968] However, the court remanded the issue of valuation of cash assets because the trial court failed to enter required findings as to why the Greens' marital cash assets were valued as of the time of separation rather than the time of trial.[969]

In *Hanson v. Hanson*,[970] the supreme court affirmed the lower court's ruling that Judges Reese and Hensley did not abuse their discretion in denying William Hanson's motion to recuse Judge Reese.[971] During a hearing to modify custody of the Hansons' daughter, William filed a motion to recuse Judge Reese from the hearing. Judge Reese stated to William that "what you have convinced me of is that you really hate women, you're very judgmental, that you're absolutely insensitive to different cultures."[972] Both Judges Reese and Hensley denied Hanson's motion. Judge Reese decided that the two parties should continue to split custody of the child with Yelana Hanson maintaining primary physical custody. On appeal, the supreme court found that the motion to recuse was properly denied because Judge Reese was still able to give a fair and impartial decision and because his comments were based on knowledge and opinion acquired during the proceedings and were necessary to the completion of the judge's task.[973]

In *J.H. v. State, Department of Health and Social Services*,[974] the supreme court affirmed the termination of J.H.'s parental rights because the record clearly showed that the Department of Health and Social Services had made reasonable efforts to reunite mother and child.[975] J.H. appealed the termination of her parental rights, arguing that the State had not made reasonable efforts to reunite her with her daughter and that State was estopped from terminating her parental rights because the Department changed its goal from reunification to termination. The supreme court held that the evidence supported the findings that the Department made reasonable efforts to reunify the family and that termination was in the child's best interests.[976] The court also held that the doctrine of equitable estoppel did not preclude termination because J.H. failed to show that she was prejudiced by the Department's change of po-

968. *Id.* at 858.
969. *Id.* at 859.
970. 36 P.3d 1181 (Alaska 2001).
971. *Id*. at 1188.
972. *Id*. at 1183.
973. *Id*. at 1184, 1186.
974. 30 P.3d 79.
975. *Id*. at 86-87.
976. *Id.*

sition and because the public interest would be prejudiced if the Department's actions could comprise the child's best interests.[977] As a result, the court held that J.H.'s rights were properly terminated.

In *J.J. v. State, Department of Health and Social Services*,[978] the supreme court held that where a doctor received her information on the case by reading an incomplete case file and did not meet or speak with a parent, her children or the parent's counselors, or make a substantial inquiry into the parent's activities, the testimonial evidence did not establish beyond a reasonable doubt the parental unfitness required to terminate parental rights under the Indian Child Welfare Act ("ICWA.")[979] After being convicted of child neglect, J.J.'s social worker from the Division of Family and Youth Services ("DFYS") arranged for J.J. to be evaluated at Alaska North Addictions Recovery Center ("ANARC") in April 1998, and created a written case plan. J.J. was admitted to ANARC again in May 1999, and learned that DFYS had petitioned to terminate her parental rights. The superior court terminated J.J.'s parental rights, finding that she had abandoned her children and that it was in the children's best interest to be placed in an adoptive home. The supreme court reversed, finding that the expert testimony did not consider J.J.'s completion of the ANARC treatment program and her continued sobriety, and that without supplemental information, "a reasonable fact finder could [not] conclude without reasonable doubt that placement of the children with J.J. would likely cause them serious damage."[980] Accordingly, the court reversed and remanded the case for further proceedings.

In *J.L.P. v. V.L.A.*,[981] the supreme court upheld the denial of J.L.P.'s motion for modification of custody.[982] The motion was filed two weeks after the trial court awarded J.L.P. custody of his son, but left the mother with primary physical custody of their daughter. The supreme court found that the motion was a de facto motion for reconsideration of the custody question raised in the initial proceeding.[983] Before granting a motion to modify custody, the noncustodial parent must demonstrate changed circumstances and the modification must be in the child's best interests.[984] Because J.L.P.

977. *Id.* at 88.
978. 38 P.3d 7 (Alaska 2001).
979. *Id*. at 10-11.
980. *Id.*
981. 30 P.3d 590 (Alaska 2001).
982. *Id.* at 594.
983. *Id.* at 595.
984. *Id.*

did not establish a prima facie case of changed circumstances, the denial of his motion without such a hearing was appropriate.[985]

In *J.M.R. v. S.T.R.*,[986] the supreme court held that a domestic violence petition is an inappropriate proceeding for a non-parent to litigate custody and visitation issues.[987] The appellant grandmother alleged that her son and daughter-in-law were unfit parents and sought custody of her grandchildren. The supreme court held that parental rights are better adjudicated in a full-blown custody proceeding, rather than the expedited process required by a domestic violence petition.[988] The court therefore rejected the appellant's claim that the word "petitioner" in A.S. 18.66.100 required the trial court to allow her to litigate her custody claim in her domestic violence petition.[989]

In *Maxwell v. Maxwell*,[990] the supreme court held that the allegations of an abusive environment made by Gary Maxwell were insufficient to modify a custody agreement.[991] Gary Maxwell filed a motion to modify custody claiming that his two children were in an abusive environment. His motion was based on two incidents in which his former wife, Laurie Maxwell, sent one of his children, on short notice, from her home in Ketchikan to stay with him in Anchorage for a short period of time. On review of the superior court's denial of Maxwell's motion, the supreme court held that he had failed to establish that a change in circumstances had occurred—one of the two conditions to be satisfied before a motion to modify custody is granted.[992] The supreme court also held that the trial court did not err in preferring a custody investigator's findings over Mr. Maxwell's "factually unsupported speculation."[993]

In *Meier v. Cloud*,[994] the supreme court held that the superior court did not abuse its discretion by failing to appoint a custody investigator because the need for a "timely decision" outweighed any additional benefit that would have been gained through a formal custody investigation.[995] Meier and Cloud were ex-spouses sharing custody of their son, Tyler, when Cloud moved for a modification

985. *Id.*
986. 15 P.3d 253 (Alaska 2001).
987. *Id.* at 257.
988. *Id.* at 256-57.
989. *Id.*
990. 37 P.3d 424 (Alaska 2001).
991. *Id.* at 426.
992. *Id.* at 425-26.
993. *Id.* at 426.
994. 34 P.3d 1274 (Alaska 2001).
995. *Id*. at 1277.

of the custody arrangement in the hopes of moving Tyler to Seattle by the start of the upcoming school year. Meier opposed the motion and requested a court-appointed child custody investigator, but the parties were unable to agree on the scope and choice of the investigator. The superior court finally ruled that a child custody report was unnecessary. After the court awarded primary custody to Cloud, Meier appealed, arguing that the court erred in declining to appoint a custody investigator. The supreme court disagreed, reasoning that a child custody report is only meant to assist the trial court and the decision not to appoint an investigator was not an abuse of discretion because an investigation would have been time consuming and there was no indication that a report would have been helpful in this case.[996] The court also held that the superior court did not abuse its discretion in awarding primary custody to Cloud because its decision was appropriately considered and balanced all relevant statutory factors.[997]

In *M.W. v. State, Department of Health and Social Services*,[998] the supreme court affirmed the termination of Mark W.'s parental rights to his daughter, Michelle.[999] The Department of Health and Social Services took Michelle from her mother after she was born with cocaine in her bloodstream. The Department social worker met with Mark to discuss Michelle's care, but his refusal to cooperate led the Department to place Michelle in foster care. After Mark failed to follow up on his case plan for receiving custody of Michelle and failed to set up any visitations with her, the Department petitioned to terminate Mark's parental rights, which the superior court granted. The supreme court held the lower court had correctly applied the statutory requirements for parental termination in finding that (1) Michelle was in need of aid because her parents had abandoned her, were unwilling to provide for her care and engaged in conduct that placed her at substantial risk of harm; (2) Mark's failure to resolve the abandonment within one year was unreasonable; (3) the Department's placement of Michelle in foster care and repeated attempts to contact Mark, even though he did not receive a written copy of the case plan, constituted reasonable efforts provide family services; and (4) it was in Michelle's best interest to remain in her foster home because she had bonded with her foster parents.[1000]

---

996. *Id*.
997. *Id*. at 1278-79.
998. 20 P.3d 1141 (Alaska 2001).
999. *Id.* at 1142.
1000. *Id.* at 1144-47 (citing ALASKA STAT. § 47.10.088(a) (Michie 2000)).

In *Platz v. Aramburo*,[1001] the supreme court vacated the order granting custody to Aramburo and remanded the case to the superior court for an evidentiary hearing on the child's best interests pursuant to A.S. 25.24.150(c).[1002] Platz and Aramburo had a daughter, Rebecca, and separated shortly after Rebecca's birth. According to Aramburo, Platz did not allow him to have any contact with Rebecca. In response, Aramburo filed a petition to attempt to restore contact and visitation with Rebecca. Platz did not respond to Aramburo's petition or any of Aramburo's subsequent motions. After a default hearing, the court awarded custody to Aramburo and Platz appealed. The supreme court held that the trial court had properly asserted jurisdiction and did not err when it did not dismiss the case on the basis of forum non conveniens because not enough information showed that Alaska was an inconvenient forum under A.S. 25.30.060.[1003] However, the court held that the trial court did not properly take into account all the factors required in determining the child's best interest under A.S. 25.24.150(c) when it ordered a change in custody.[1004] The supreme court vacated the order and remanded the case for an evidentiary hearing as to the child's best interests.[1005]

In *Routh v. Andreassen*,[1006] the supreme court held that a court may not "impute income to a child support obligor" if the court did not conduct a hearing when there is a genuine factual dispute as to the income of the obligor and the obligor did not withhold any financial information.[1007] Andreassen and Routh divorced and Andreassen was granted primary custody of their son. Andreassen moved to have Routh document his income in order to modify his child support payments. After Routh produced documents, Andreassen moved to have her child support increased, and Routh filed a cross-motion to have it decreased. The superior court referred the motion to a standing master, who, after recognizing a discrepancy in Routh's documents regarding his income, recommended to the superior court that the support be raised. The superior court adopted the standing master's recommendation, and Routh appealed. The supreme court found that because there was a genuine issue of material fact as to Routh's exact income, it was error for the superior court to raise Routh's child support obliga-

1001. 17 P.3d 65 (Alaska 2001).
1002. *Id*. at 66.
1003. *Id*. at 69-70.
1004. *Id.* at 70-71.
1005. *Id*. at 71.
1006. 19 P.3d 593 (Alaska 2001).
1007. *Id.* at 594.

tion without a hearing when Routh had been forthcoming in producing documents regarding his income.[1008] Therefore, the supreme court reversed and remanded the case for further proceedings.

In *Sloane v. Sloane*,[1009] the supreme court held that the superior court's valuation of certain items in a divorce was not clearly erroneous, its division of marital property was not clearly unjust and its awards of interest and attorney's fees were legally correct.[1010] Sally Sloane appealed the division of marital property that resulted from her divorce from George Sloane. First, the supreme court held the superior court did not commit clear error in valuing a $25,000 note payable to George at only ten dollars because it was unlikely the note would ever be repaid.[1011] Second, the court held that the superior court did not abuse its discretion in awarding only fifty-seven percent of the marital property to Sally because the lower court had properly considered factors such as the relative age of the parties, the health of the parties and future medical needs.[1012] Third, the court found no statutory basis for Sally's request to delay the divorce decree for three years so she could continue health insurance as a spouse under her former husband's coverage.[1013] Fourth, the court ruled that Sally's concern about post-judgment interest was moot because George subsequently paid the amount owned to Sally as ordered by the superior court.[1014] Finally, the court held that additional awards of attorney's fees to Sally were not required because her award of fifty-seven percent of the marital property put the two parties in comparable economic situations, and it would not make sense, after leveling the playing field, to hold one party liable for the other party's litigation choices and expenses.[1015]

In *Wright v. Wright*,[1016] the supreme court held that child support orders can only be modified according to Alaska Rule of Civil Procedure 90.3, and that a modification could be effective no earlier than the date of the filing of a motion under that rule.[1017] Mark Wright filed a "Motion to Retroactively Modify Child Support," arguing that a previous order was erroneous. Tracy Wright opposed the motion, arguing that retroactive modification of child

1008. *Id.* at 595-96.
1009. 18 P.3 60 (Alaska 2001).
1010. *Id.* at 69.
1011. *Id.* at 65.
1012. *Id.* at 65-67.
1013. *Id.* at 67.
1014. *Id.* at 68.
1015. *Id.* at 68-69.
1016. 22 P.3d 875 (Alaska 2001).
1017. *Id*. at 879.

support is prohibited under Rule 90.3(h) and federal law. The supreme court agreed, and affirmed the lower court's denial of retroactive modification.[1018] The court also held that the previous child support order could not be set aside under Alaska Rule of Civil Procedure 60(b) because Mark's argument for relief was based on mistake, inadvertence, surprise or excusable neglect, and was proper, but time-barred.[1019]

## INSURANCE LAW

In *Shaw v. State Farm Mutual Automobile Insurance Co.*,[1020] the supreme court held that because there was a material issue of fact relating to how a truck was used during a shooting, granting summary judgment in favor of State Farm was erroneous.[1021] Shaw was shot by Murphy, who then shot himself. Because Shaw's injuries exceeded the limits of Murphy's insurance policy, she sued her insurance company, State Farm, to recover under the uninsured/underinsured clause of her policy. Shaw claimed that Murphy used his truck to block Shaw's car and keep her from driving away, while State Farm asserted that Murphy was merely lying in wait in his truck. In order for Shaw to be covered under the underinsured portion of her policy, the injuries must have been caused by an accident that arose out of the use of the truck. Although the court refused to proffer an exact test for what may be considered "use" of the truck in the crime, it held that the determination depends upon the facts of the case.[1022] Because those facts were in dispute, the court reversed the summary judgment in favor of State Farm and remanded the case for further proceedings.

## PROPERTY LAW

In *Beaux v. Jacob*,[1023] the supreme court held that the superior court did not err in finding that the sellers of a home violated the Residential Real Property Transfers Act.[1024] However, the court reversed the damage award because it exceeded the cost of putting the purchaser's home in the condition represented by the disclosure form.[1025] In addition, the court remanded for a recalculation of

1018. *Id*. at 878.
1019. *Id*. at 879-80.
1020. 19 P.3d 588 (Alaska 2001).
1021. *Id*. at 593.
1022. *Id*. at 590.
1023. 30 P.3d 90 (Alaska 2001).
1024. *Id.* at 94-95.
1025. *Id.* at 97-98.

prejudgment interest, distinguishing between damages for economic loss and for harm to property.[1026] Beaux sold a home he had built to the Jacobs. On the property transfer disclosure form, Beaux indicated that there were no water problems in the basement but that "Sump Pumps must be maintained and used." The Jacobs used the automatic sump pump but did not use the deep sump. Consequently, water infiltrated the Jacob's basement and soaked the carpet on multiple occasions. The supreme court held that Beaux failed to use reasonable care in answering the disclosure form questions, finding substantial evidence in the record to support a conclusion that the disclosure form was ambiguous and did not adequately disclose the need to use the deep sump to avoid water infiltration.[1027] The court reversed the damages award, holding that the Jacobs should have been awarded the cost of installing a permanent pump in the deep sump, not the cost of a new perimeter drain system, because the Jacobs did not expect to purchase a house with such a system.[1028] Additionally, the court held that prejudgment interest must be recalculated because A.S. 09.30.070(b) applies only to actions for personal injury, death or damages to property, not to purely economic loss claims.[1029]

In *Cabana v. Kenai Peninsula Borough*,[1030] the supreme court held that a land classification decision is not a quasi-judicial proceeding and, therefore, the dismissal of Cabana's appeal was proper because the court lacked jurisdiction.[1031] Cabana challenged the Borough's decision to classify a piece of land as "light industrial," arguing that the Borough failed to comply with various procedural and statutory requirements. The supreme court held that the classification of municipal land involves a legislative rather than a quasi-judicial proceeding because the classification of public land does not immediately and directly affect the rights of a particular, private landowner.[1032] Because review by appeal is only allowed for decisions of legislative bodies where the decision is quasi-judicial, the superior court correctly dismissed the case for lack of jurisdiction.[1033]

---

1026. *Id.* at 100-01.
1027. *Id.* at 95.
1028. *Id.* at 97-98.
1029. *Id*. at 100-01.
1030. 21 P.3d 833 (Alaska 2001).
1031. *Id*. at 836.
1032. *Id*. at 835-36.
1033. *Id*.

In *Griswold v. City of Homer*,[1034] the supreme court affirmed a grant of summary judgment against Griswold, who had challenged the legality of a zoning ordinance.[1035] In 1998, the City of Homer passed a zoning ordinance that permitted a certain area to be used for businesses that sold and repaired automobiles. In an earlier case,[1036] Griswold successfully challenged the legality of a similar ordinance, arguing that one of the council members had a conflict of interest. After the new ordinance was passed, Griswold filed suit again, arguing that the ordinance amounted to illegal spot zoning. The superior court ruled that Griswold's spot zoning claim was precluded by the decision in *Griswold I*, and granted summary judgment against him on all of his claims. The supreme court affirmed the decision on Griswold's spot zoning claim without deciding whether the suit was precluded under the doctrine of collateral estoppel because Griswold had failed to demonstrate that material differences existed between this case and the precedent established in *Griswold I*.[1037]

In *John v. United States*,[1038] the *en banc* Court of Appeals for the Ninth Circuit affirmed the district court's ruling in a per curiam opinion.[1039] The district court opinion was the result of a remand from an earlier Ninth Circuit three judge panel, which had interpreted the term "title" to limit federal protection of subsistence fishing under the Alaska National Interest Lands Conservation Act ("ANILCA").[1040]

In *Vezey v. Green*,[1041] the supreme court held that Green had adversely possessed the land in question to the north, east and south areas of the property, but remanded the case to determine whether Green adversely possessed the land to the west of the property.[1042] Through an unrecorded oral gift, Green received a parcel of land. Green built a house on the land, developed certain parts of it and was the recognized owner by several people. Over ten years later, Vezey purchased part of the land, which included some of the land that Green was supposedly given by gift. Green claimed that she owned the land by adverse possession, and the su-

---

1034. 34 P.3d 1280 (Alaska 2001) (hereinafter *Griswold II*).
1035. *Id*. at 1288.
1036. Griswold v. City of Homer, 925 P.2d 1015 (Alaska 1996) (hereinafter *Griswold I*).
1037. *Griswold II*, at 1284.
1038. 247 F.3d 1032 (9th Cir. 2001).
1039. *Id.* at 1033.
1040. *Id.* at 1034.
1041. 35 P.3d 14 (Alaska 2001).
1042. *Id*. at 28.

preme court agreed because Green had adversely possessed the land for more then ten years, continually and exclusively used the land as an average owner would, placed the recorded owners on notice of her adverse possession and possessed the land as hostile against the recorded owners.[1043] However, the court only found proof that Green adversely possessed the land to the east, north and south of the property in question and remanded the case to determine if she owned the land to the west through adverse possession.[1044]

## TORT LAW

In *Bierria v. Dickinson Manufacturing Co.*,[1045] the supreme court held that the superior court did not err when it excluded evidence about other boat fires and admitted evidence of experimental tests conducted on the allegedly defective stove.[1046] Bierria sued Dickinson Manufacturing after his boat caught fire and sank, alleging that the stove manufactured by Dickinson was defective and caused the fire. The jury concluded that the stove was defective, but that it was not defective when it left Dickinson's possession. On appeal, Bierria argued that the trial court erred when it excluded evidence of other boat fires related to Dickinson stoves and admitted Dickinson's expert testimony relating to tests of Dickinson's stoves. The supreme court held that the causes of the other fires Bierria wanted to introduce into evidence were different enough from Bierria's case and, therefore, the judge did not abuse his discretion in excluding the evidence.[1047] The court also held that it was not an abuse of discretion to admit Dickinson's expert testimony because there was no evidence suggesting that the expert's tests "were likely to be distorted by the circumstances under which they were conducted."[1048]

In *Glamann v. Kirk*,[1049] the supreme court found no error in the superior court's decisions to admit evidence of malingering, give an aggravating-cause jury instruction, deny the motion for a new trial and disallow Glamann's wife's wage loss claim.[1050] Glamann's stopped truck was rear-ended by Kirk, causing Glamann's truck to collide with another vehicle. Glamann filed suit against Kirk for

1043. *Id*. at 21-23.
1044. *Id*. at 28.
1045. 36 P.3d 654 (Alaska 2001).
1046. *Id.* at 659.
1047. *Id.* at 657-58.
1048. *Id.* at 658-59.
1049. 29 P.3d 255 (Alaska 2001).
1050. *Id.* at 257.

her negligent failure to stop. Although Kirk admitted fault in causing the accident, she disputed the extent of her liability for the injuries. On appeal, the supreme court affirmed the trial court's ruling. First, it held that evidence of malingering was not unfairly prejudicial, was directly relevant to credibility and causation determinations and was neither confusing nor misleading.[1051] Second, the aggravating-cause jury instruction was not erroneous because it properly stated and clarified the law and allocated the burden of proof.[1052] Third, Glamann's motion for a new trial was properly denied because there was sufficient evidentiary support for the verdict and there was no evidence that the special verdict caused prejudice.[1053] Fourth, there was no legal basis to support a claim for lost wages by Glamann's wife.[1054]

In *L.C.H. v. T.S.*,[1055] the supreme court held that T.S.'s testimony of prior sexual abuse was admissible as testimony based on personal knowledge and that admission of expert testimony on profiles of child sexual abuse victims was proper as rebuttal testimony.[1056] Tabitha S. filed suit against Lance H., alleging sexual abuse and intentional infliction of emotional distress. At trial, Tabitha testified about a number of instances of inappropriate sexual conduct by Lance and others and referenced four years of diaries detailing her belief that she had been sexually assaulted. On appeal, Lance argued that Tabitha's testimony should not have been admitted because it was unreliable and that the court erred in admitting expert testimony about the typical behavior or profile of victims of childhood sexual abuse. The supreme court held that the superior court correctly rejected Lance's objections to Tabitha's testimony on grounds it constituted "recovered memory."[1057] The court also held that sufficient evidence existed that Tabitha had personal knowledge of the abuse but did not appreciate the consequences of the actions, and that her testimony was not unfairly prejudicial.[1058] The court also held that the expert testimony on child sexual abuse profiles satisfied the admissibility requirements for expert testimony and that the expert testimony was properly

1051. *Id.* at 260.
1052. *Id.* at 261-62.
1053. *Id.* at 262-64.
1054. *Id.* at 265.
1055. 28 P.3d 915 (Alaska 2001).
1056. *Id*. at 918.
1057. *Id*.
1058. *Id*. at 920-21 (citing State v. Coon, 974 P.2d 386 (Alaska 1999)).

admitted to rebut Lance's claim that Tabitha had fabricated the allegations of abuse.[1059]

In *Loncar v. Gray*,[1060] the supreme court affirmed the superior court's evidentiary decisions and its denial of a new trial.[1061] Loncar was involved in a car accident with Gray in which Gray admitted liability, but disputed the damages attributable to the accident. The jury awarded Loncar only half of the past medical expenses that she entered into evidence. On appeal, Loncar first argued that the trial court erred in admitting testimony regarding her prior medical history. The supreme court disagreed because Loncar opened the door to issues surrounding her prior medical history by asking her neuropsychologist questions about her prior ongoing symptoms and treatment.[1062] Second, Loncar appealed the trial court's exclusion of evidence regarding her Medicare and Medicaid benefits. The supreme court affirmed the trial court's decision to exclude the Medicaid evidence as part of pain and suffering damages because it opened the door to a potentially large body of evidence that would be more confusing to the jury than probative.[1063] The supreme court also affirmed the trial court's decision to exclude the evidence for double recovery purposes because Loncar did not object to the jury instruction telling the jury to award the full amount of necessary medical expenses regardless of who actually paid the bill.[1064] Third, the supreme court overruled Loncar's claim that the trial court erred in excluding evidence of her ex-husband's bias from previous divorce proceedings because the trial court had, in fact, never excluded the evidence.[1065] Fourth, the supreme court affirmed the trial court's decision to admit all of the medical records of testifying physicians and the records they relied upon, reasoning that the records of doctors who did not testify fall within the business records exception to the hearsay rule and that if Loncar wished to question the doctors, she could have called them to the stand.[1066] Finally, the denial of Loncar's motion for a new trial was affirmed because the jury had an evidentiary basis to doubt both the causation and the extent of Loncar's claimed injury.[1067]

---

1059. *Id.* at 923-24.
1060. 28 P.3d 928 (Alaska 2001).
1061. *Id.* at 935.
1062. *Id.* at 931.
1063. *Id.* at 933.
1064. *Id.*
1065. *Id.* at 934.
1066. *Id.* at 934-35.
1067. *Id.* at 935.

In *Lybrand v. Trask*,[1068] the supreme court held that the trial court did not abuse its discretion in determining that Trask's conduct was not "sufficiently 'outrageous' to support" a claim of intentional infliction of emotional distress.[1069] During construction on the Lybrand home, debris entered the Trask property. Unable to resolve the ensuing conflict, Trask painted various biblical passages and a message to George Lybrand on the roof of her home. George Lybrand then sought an injunction to have the lettering removed. In an amended complaint, Elizabeth Lybrand also claimed intentional infliction of emotional distress damages. The superior court held that although Lybrand had indeed suffered emotional distress as a result of Trask's intentional conduct, that conduct was not outrageous enough to support a claim for intentional infliction of emotional distress. The supreme court agreed, distinguishing the case from cases "involv[ing] multiple, concerted efforts to seriously damage the well-being and reputation of the plaintiff."[1070] The court also determined that the alleged violation of a sign ordinance had no bearing on whether Trask's conduct was outrageous.[1071]

In *Lynden, Inc. v. Walker*,[1072] the supreme court affirmed the denial of Lynden's motion for summary judgment because there was a factual dispute as to whether Lynden breached its duty to load its materials in a way that permitted them to be unloaded safely.[1073] Walker was permanently injured while unloading pipe saddles from a truck loaded by Lynden. Walker sued Lynden for negligence, claiming that Lynden's failure to secure the loose pipe saddles to pallets caused his accident. The superior court found that Lynden had a duty to load the pipes safely under the Restatement (Second) of Torts.[1074] The supreme court questioned the superior court's rationale under the Restatement, but found that a duty was imposed on Lynden after considering the seven factors used to determine whether a duty should attach to particular conduct.[1075] Because Walker established a factual dispute as to whether

1068. 31 P.3d 801 (Alaska 2001).

1069. *Id*. at 802.

1070. *Id*. at 804.

1071. *Id.* at 805.

1072. 30 P.3d 609 (Alaska 2001).

1073. *Id.* at 611.

1074. *Id.* at 613 (citing RESTATEMENT (SECOND) OF TORTS §§ 391-93 (1965)).

1075. *Walker*, 30 P.3d at 614-16 (citing D.S.W. v. Fairbanks North Star Borough School Dist., 628 P.2d 554, 555 (Alaska 1997)). The seven factors are: (1) the foreseeability of harm to the plaintiff; (2) the degree of certainty that the plaintiff suffered injury; (3) the closeness of the connection between the defendant's conduct

Lynden breached its duty to load the pipe saddles so that they could be safely unloaded, the supreme court affirmed the denial of Lynden's motions for summary judgment and judgment notwithstanding the verdict.[1076]

In *Sopko v. Dowell Schlumberger, Inc.*,[1077] the supreme court upheld a grant of summary judgment for Dowell Schlumberger ("Schlumberger") because Sopko's claim was barred by the statute of limitations.[1078] In 1996, Sopko sued his former employer, Schlumberger, alleging exposure to toxic chemicals. Schlumberger filed a motion for summary judgment, arguing that Sopko's claims were barred by the statute of limitations. The superior court granted the motion and, on appeal, Sopko argued that the discovery rule, which provides that the statute of limitations does not begin to run until the prospective plaintiff "discovers, or reasonably should discover, the existence of all elements of his cause of action," should preclude the entry of summary judgment against him.[1079] The supreme court determined that Sopko reasonably should have discovered both his injury and its causation no later than September 20, 1990, nearly six years before he filed suit.[1080] The court also rejected Sopko's contention that his case should be viewed as a latent injury because Sopko began suffering symptoms almost immediately.[1081] Furthermore, the court held that the statute of limitations could not be put off until the plaintiff learns the full extent of his damages.[1082]

## TRUSTS AND ESTATES

In *Critell v. Bingo*,[1083] the supreme court affirmed the superior court's finding that Houssien's will was invalid, but vacated and remanded the court's award of attorneys fees.[1084] Houssien died leaving behind an estate worth approximately $1.59 million. Crit-

---

and the injury suffered; (4) the moral blame attached to the defendant's conduct; (5) the policy of preventing future harm; (6) the extent of the burden to the defendant and consequences to the community of imposing a duty to exercise care with resulting liability for breach; and (7) the availability, cost, and prevalence of insurance for the risk involved.

1076. *Id.* at 617.
1077. 21 P.3d 1265 (Alaska 2001).
1078. *Id*. at 1267.
1079. *Id*. at 1270.
1080. *Id*. at 1271.
1081. *Id*.
1082. *Id*. at 1272.
1083. 36 P.3d 634 (Alaska 2001).
1084. *Id*. at 643-44.

tell, a friend of Houssien, petitioned the court to appoint him personal representative of her estate and to accept a will she executed in 1995 for informal probate. Houssien's sisters challenged Crittell's petition. At trial, the sisters sought to establish that the will was a fraud because Houssien lacked testamentary capacity when she signed the will and because she acted out of undue influence as a result of Crittell's and his wife's fraudulent conduct. The supreme court found that the record supported the conclusion that Hussien lacked sufficient mental capacity to understand the nature of her testamentary act.[1085] Furthermore, the court held there was no clear error in the superior court's finding of undue influence because the evidence supported the six factors used to determine the presence of undue influence arising from fraud.[1086] On the issue of attorneys fees, the court found the superior court's award under Alaska Rule of Civil Procedure 68(b)(2) to be in conflict with the plain language of the rule and, therefore, in plain error.[1087]

In *Riddell v. Edwards*,[1088] the supreme court affirmed the superior court's decision denying a motion for jury trial in a probate proceeding and affirmed the court's finding that a decedent's will was invalid for lack of testamentary capacity.[1089] Lillie M. Rahm-Riddell ("Lillie") executed a will in 1992 that gave half of her estate to her brother, Irvin Edwards. She met Robert Riddell in 1993 and, in the remaining four years of her life, she executed two additional wills in 1994 and 1997. Both wills were prepared by Riddell and the 1997 version, drafted almost eight months before she died, expressly disinherited her brother, daughter and grandchildren. During the time that Lillie was married to Riddell, a domestic violence petition was filed against him on her behalf and he was ordered to avoid contact with her. Notwithstanding the order, Riddell found Lillie in an assisted living home in Washington, removed her from the home and refused to tell anyone where she was until her death in 1997. Edwards and Riddell filed competing requests to probate the 1992 will and the 1997 will, respectively. The supreme court affirmed the trial court's denial of Riddell's motion for jury trial because the Alaska Constitution preserves a jury trial only for those causes of action which are legal, not equitable, in nature, and probate matters are equitable.[1090] The supreme court also held that the superior court did not err in declaring the 1997 will

1085. *Id.* at 641.
1086. *Id.* at 642 (citing Estate of Reddaway, 329 P.2d 886, 891-93 (Or. 1958)).
1087. *Id.* at 643.
1088. 32 P.3d 4 (Alaska 2001).
1089. *Id.* at 5.
1090. *Id.* at 7-8.

invalid due to a lack of testamentary capacity and undue influence because substantial evidence existed that Lillie was incompetent at the time she executed the 1997 will.[1091]

1091. *Id.* at 10.