YEAR IN REVIEW

Alaska Supreme Court and Court of Appeals Year in Review 1993

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I. INTRODUCTION

Year in Review contains brief summaries of selected decisions by the Alaska Supreme Court and the Alaska Court of Appeals. The primary purpose of this review is to familiarize practitioners with significant decisions handed down by these courts in 1993. The summaries focus on the substantive areas of law addressed, the statutes or common law principles interpreted, and the essence of each of the holdings. Space does not permit review of all cases decided by the courts this year, but the authors have attempted to highlight decisions signaling a departure from prior law or resolving issues of first impression. Attorneys are advised not to rely upon the information contained in this note without further reference to the cases cited.

The opinions have been grouped according to general subject matter rather than by the nature of the underlying claims. The cases have been divided into the following twelve areas of law: administrative, business, constitutional, criminal, employment, family, fish and game, native, procedure, property, tax and tort. In some instances, these categories have been further subdivided into more specific legal areas. The appendix lists the cases that were omitted from this year's review. Generally, these cases were omitted because they applied well-settled principles of law or involved narrow holdings of limited import.

II. ADMINISTRATIVE LAW

In 1993 the Alaska Supreme Court and the Alaska Court of Appeals decided a number of important administrative law cases. These cases are grouped into three categories: land and the environment, procedure and health care. In particular, the supreme court upheld two challenges to the sale of oil and gas leases because of insufficient impact determinations.

A. Land and the Environment

The Alaska Court of Appeals held in *State v. Lowrence*[1] that the statutes which established the Kenai River Special Management Area were not impermissibly vague.[2] The court of appeals

1. 858 P.2d 635 (Alaska Ct. App. 1993).

2. This case came before the court of appeals because several defendants convicted of violating park regulations challenged their convictions on the grounds that the Kenai River Area was not a park at all. *Id.* at 636.

concluded that the Kenai River Area is a state park and that normal state park regulations are applicable to it.

This case involved issues of statutory interpretation that were decided *de novo* by the court of appeals.[3] Under Alaska Statutes section 41.21.504(a), the Kenai River Area "is assigned to the Department of Natural Resources for control, maintenance and development."[4] Alaska Administrative Code title 11, section 12.340(11), defines a state park as "any land or water managed by the division [of parks and outdoor recreation of the Department of Natural Resources]."[5] The court of appeals concluded that, taken together, the two provisions meant that the Kenai River Area is a state park.[6]

The court also relied heavily on legislative intent in dismissing the defendant's assertion that state park regulations did not apply.[7] The court was convinced that the "legislature intended the Kenai River Area to be a state park and intended normal state park regulations to govern the River Area."[8]

In *Trustees for Alaska v. State Department of Natural Resources*,[9] the Alaska Supreme Court examined the sale of oil and gas leases in Camden Bay to determine if they were consistent with the standards of the Alaska Coastal Management Plan ("ACMP").[10] The Department of Natural Resources ("DNR") is responsible for monitoring these sales to ensure that they comply with applicable standards.[11] The Trustees specifically contended that DNR's determinations were without adequate support with respect to (1) geophysical hazards, (2) historic, prehistoric and archeological resources and (3) transportation and utilities.[12]

The Alaska Supreme Court addressed each of these arguments in turn. First, in resolving the geophysical hazards issue, the court noted two regulatory commands: (1) that "areas with known or substantially possible geophysical hazards be identified," and (2) that "development in such areas not be approved unless adequate protective measures have been provided."[13] The court rejected

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3. *Id.*
4. ALASKA STAT. § 41.21.504(a) (1993).
5. ALASKA ADMIN. CODE tit. 11, § 12.340(11) (Jan. 1994).
6. *Lowrence*, 858 P.2d at 636-37.
7. *Id.* at 637.
8. *Id.* at 638.
9. 851 P.2d 1340 (Alaska 1993).
10. These standards are set forth in ALASKA ADMIN. CODE tit. 6, § 80.010(b) (Jan. 1993).
11. *Trustees*, 851 P.2d at 1342.
12. *Id.* at 1342-43.
13. *Id.* at 1343.

the Trustees' claim that DNR should undertake seismic studies to identify special hazards prior to a sale.[14]

However, the court did conclude that "DNR's summary statement that the entire . . . area is a 'known geophysical hazard' does not satisfy regulatory requirements."[15] The effect of such a classification is to defer decisions about geophysical hazards until later stages in the development process. Such decisions would then be made on a site-by-site basis.[16] The court noted that this segmented assessment of environmental hazards created a greater risk that DNR would approve environmentally unsound permits.[17]

With respect to the Trustees' second argument, the one regarding archeological resources, the court focused on the agency's requirement to "identify areas of the coast which are important to the study, understanding or illustration of national, state or local history or prehistory."[18] The court concluded that to comply with the provision, DNR must, among other things, identify known archeological sites at the initial sale stage.[19] However, DNR was not required to conduct field studies at the initial sale stage to determine whether any unknown archeological sites existed.[20]

Finally, with respect to the Trustees' third argument, the court determined that there was no need to address the transportation routes and utility sites issue.[21] Companies generally do not establish transportation routes and utility sites until and unless a commercially exploitable discovery is made, so there is no need to conform plans to ACMP regulations at the time of the sale of leases.[22]

In *Trustees for Alaska v. State Department of Natural Resources*,[23] seven environmental groups challenged the State's sale of Oil and Gas Lease 55 ("Sale 55"), which permitted exploration and development in the Beaufort Sea.[24] The case arose after DNR issued a finding in 1988 that the benefits of the sale outweighed its possible adverse effects.[25] Specifically, the Trustees challenged DNR's failure to consider the risks of transporting oil from the

14. *Id.*
15. *Id.* at 1343-44.
16. *Id.* at 1344.
17. *Id.*
18. ALASKA ADMIN. CODE tit. 6, § 80.150 (Jan. 1993).
19. *Trustees*, 851 P.2d at 1346.
20. *Id.*
21. *Id.*
22. *Id.*
23. 865 P.2d 745 (Alaska 1993).
24. *Id.* at 746.
25. *Id.* at 747.

lease area, and the impact of oil operations on the Porcupine Caribou herd and on subsistence users of this herd.[26]

The Alaska Supreme Court considered the transportation question first, concluding that DNR "did not take a hard look at the issue in making its best interest determination."[27] Specifically, the court noted that no discussion occurred about the transportation of oil or what risks it would pose.[28] Likewise, the court deemed inadequate DNR's findings as to the impact of development on caribou.[29] The court stated that the simple conclusion that "offshore development cannot affect onshore caribou"[30] did not constitute a sufficient analysis.[31]

In *Earth Movers of Fairbanks v. Fairbanks North Star Borough*,[32] the Alaska Supreme Court addressed a third-party appeal that contested an award of extraction rights.[33] The superior court had ruled that Earth Movers had no standing to challenge a determination of the Department of Community Planning.[34] Earth Movers contended that it had standing because it would suffer economically via increased commercial competition if the extraction rights were granted.[35]

In the area of land-use law, Alaska Statutes section 29.40.060 limits standing to persons "aggrieved" by a decision.[36] The Borough, however, had an ordinance which granted standing to any person "adversely affected,"[37] a standard which could have been interpreted more broadly than "aggrievement." The Alaska Supreme Court resolved this potential conflict by concluding that in this context "adversely affected" had the same meaning as "aggrieved."[38] The court also held that the "aggrievement" requirement is not met by the threat of potential business competition.[39] The court reasoned that while Earth Movers may certainly have an interest in being free from competition, that consideration is

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26. *Id.*
27. *Id.* at 749.
28. *Id.*
29. *Id.* at 751.
30. *Id.*
31. *Id.* (citing Trustees for Alaska v. State Dep't of Natural Resources, 795 P.2d 805, 809 (Alaska 1990)).
32. 865 P.2d 741 (Alaska 1993).
33. *Id.* at 742.
34. *Id.* at 745.
35. *Id.* at 745.
36. ALASKA STAT. § 29.40.060 (1992).
37. *Earth Movers*, 865 P.2d at 743.
38. *Id.*
39. *Id.* at 744.

irrelevant in determining whether a party is "aggrieved" by a zoning decision.[40]

In *Stein v. Kelso*,[41] the Department of Environmental Conservation ("DEC") appointed an independent deciding officer to review the DEC's certification of certain permits issued by the Environmental Protection Agency ("EPA").[42] In approving the certification, the deciding officer limited the scope of the hearing to two issues: (1) whether the DEC followed proper certification procedures, and (2) whether the DEC properly determined that the permits assured compliance with state water quality standards.[43]

Six placer miners appealed the deciding officer's findings, arguing that the limited scope of the hearing deprived them of the opportunity to pursue a takings claim.[44] The miners sought to argue at the hearing that the permits set such stringent effluent limits that they effectively deprived the miners of their property without just compensation or due process of law.[45]

The Alaska Supreme Court rejected the miners' argument, noting that under federal law the DEC could not legally adjust the effluent standards contained in the permit to correspond with the wishes of the miners.[46] Accordingly, the deciding officer had no authority to order the DEC to do so.[47] Thus, it was within the deciding officer's discretion to limit the scope of the hearing to those issues on which he could actually provide relief.[48]

The miners also challenged the decision to award attorney's fees to the state. They claimed that they should have been deemed public interest litigants not liable for attorney's fees.[49] In *Anchorage Daily News v. Anchorage School District*,[50] the court listed four requirements for status as a public interest litigant:

(1) Is the case designed to effectuate strong public policies?
(2) If the plaintiff is successful, will many people benefit from the lawsuit?
(3) Can only a private party have been expected to bring suit on the issue?

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40. *Id.* at 745.
41. 846 P.2d 123 (Alaska 1993).
42. *Id.* at 125.
43. *Id.*
44. *Id.* at 126.
45. *Id.* at 125.
46. *Id.* at 126-27.
47. *Id.* at 127.
48. *Id.*
49. *Id.*
50. 803 P.2d 402 (Alaska 1990).

> (4) Would the litigant have economic motive to bring suit even if the action concerned only narrow issues which lacked general importance?[51]

The Alaska Supreme Court found that the miners' claims did not fall under any of the four categories, and, therefore, the relief sought by the miners was personal, not public.[52] Therefore, the court upheld the award of attorney's fees to the state.[53]

B. Procedure

Faipeas v. Municipality of Anchorage[54] involved a referendum on an ordinance prohibiting discrimination based on sexual orientation in public employment.[55] The municipal clerk determined that there was a sufficient number of signatures on the petition, certified it and prepared a referendum proposition for the municipal election which asked:

> Should AO [Anchorage Ordinance] 92-116(S), which adds sexual orientation to the list of protected classes for the purpose of public employment or municipal contractors, remain law?[56]

Petitioners appealed the clerk's certification and sought a stay of the election, so far as it pertained to the referendum.[57] On appeal, the Alaska Supreme Court granted the stay.[58]

The court decided two questions. First, the court looked at whether the petition fairly and accurately described the ordinance it sought to repeal[59] and determined that it did not.[60] The court then addressed the question of whether a referendum petition in an election, conducted by the Municipality of Anchorage, is required to fairly and accurately describe the ordinance it seeks to repeal.[61]

The majority noted that misleading petitions in elections conducted by the state were definitely not permitted.[62] However, for home rule municipalities (such as Anchorage), there was no specific requirement for impartiality.[63] Thus, the question was whether Anchorage Ordinance section 2.50.030(A), mandating that an

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51. *Id.* at 404.
52. *Stein*, 846 P.2d at 127.
53. *Id.*
54. 860 P.2d 1214 (Alaska 1993).
55. *Id.* at 1215.
56. *Id.*
57. *Id.*
58. *Id.* at 1216.
59. *Id.*
60. *Id.* at 1217.
61. *Id.* at 1216.
62. *Id.* at 1218.
63. *Id.*

ordinance be "described" in the petition, required a truthful and impartial description.[64]

The majority held that Anchorage law did require a fair and accurate description in the referendum petition.[65] The court further noted the screening purpose of the signature-gathering requirement, which prevents an ordinance from being placed on the ballot without a substantial showing of public support for the initiative.[66] The court reasoned that if a petition were to misconstrue an ordinance in a manner designed to cause opposition to the ordinance, the screening purpose of the signature requirement would be defeated.[67] The court concluded that the public interest in informed lawmaking mandated that the petition be fair and accurate.[68] Chief Justice Moore dissented, arguing that the majority improperly imposed state referendum requirements on Anchorage referendum procedures.[69]

Kleven v. Yukon-Koyukuk School District[70] involved a tenured educator who was given an unsatisfactory review by the school district's superintendent. As a result of this negative review, Kleven was reassigned to a lower-paying position in the district.[71] He immediately began pursuing grievances against the district.[72] A dispute arose as to what administrative grievance process Kleven had to follow.[73]

After making an attempt to go through administrative grievance procedures, Kleven filed suit against the district in superior court.[74] He moved for summary judgment on the issue of his entitlement to a contract for the 1990-91 school year on terms no less favorable than those he had enjoyed in the previous school year.[75] The district moved to convert the case into an administrative appeal and asserted that Kleven had failed to exhaust administrative remedies.[76]

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64. *Id.* at 1219.
65. *Id.*
66. *Id.* at 1219-20.
67. *Id.* at 1220.
68. *Id.* at 1221.
69. *Id.* (Moore, C.J., dissenting).
70. 853 P.2d 518 (Alaska 1993).
71. *Id.* at 520.
72. *Id.*
73. *Id.*
74. *Id.* at 521.
75. *Id.*
76. *Id.*

While the motions were pending, Kleven took a superintendent's position in another district.[77] Thereafter, the trial judge denied Kleven's summary judgment motion as moot and later dismissed Kleven's lawsuit with prejudice.[78] The judge ruled that the case was in fact an administrative appeal and that Kleven had failed to exhaust his administrative remedies.[79]

Kleven then brought a second lawsuit seeking to force the district to take action on a list of grievances regarding his prior employment with the district, including alleged safety violations.[80] The court found that Kleven lacked standing to pursue his grievances under both the interest-injury and the taxpayer-citizen analyses.[81]

The Alaska Supreme Court reversed the lower court with respect to the first lawsuit.[82] The court found that Kleven's claim was not moot[83] because he had already worked at the lower-paying job for several months before leaving the district. Thus, he did suffer an injury due to the unsatisfactory evaluation.[84]

The court further held that the first lawsuit should not have been dismissed for failure to exhaust administrative remedies.[85] The court noted that one of the reasons Kleven sought judicial review was to determine the proper administrative procedure.[86] Since no further exhaustion of administrative remedies is required when the form of the procedure itself is contested, the court concluded that the trial court abused its discretion when it dismissed the first lawsuit with prejudice.[87]

The supreme court affirmed the lower court's disposition of the second lawsuit.[88] The court agreed that Kleven had no standing under either the interest-injury or taxpayer-citizen theories.[89] Under the interest-injury theory, the court found that Kleven lacked a sufficient personal stake in the second case to warrant standing.[90] Since he was no longer employed by the district, he

77. *Id.*
78. *Id.* at 522.
79. *Id.*
80. *Id.*
81. *Id.*; *see infra* text accompanying notes 89-93.
82. *Id.* at 523.
83. *Id.*
84. *Id.*
85. *Id.* at 525.
86. *Id.*
87. *Id.*
88. *Id.*
89. *Id.* at 525-26.
90. *Id.* at 526.

was not subject to the grievance procedures nor threatened by the alleged safety violations.[91]

Moreover, Kleven lacked standing under the taxpayer-citizen theory. Under this theory, a party can be denied standing if there is a potential plaintiff who is more directly affected by the conduct in question and who has brought or is likely to bring suit.[92] Since the current employees of the district were more suitable advocates with respect to the issues involved, the court held that Kleven's lawsuit was properly dismissed based on his lack of standing.[93]

In *State v. Cosio*,[94] two illegal aliens challenged the validity of Alaska Administrative Code title 15, section 23.615(d),[95] which denied them eligibility for permanent fund dividends guaranteed by statute to state residents. The superior court found that the regulation was inconsistent with the statutory definition of "state resident."[96] The Alaska Supreme Court granted a petition to review this issue and also to determine whether the regulation was invalid under the Alaska equal rights provision, Article I, section 3 of the Alaska Constitution, or under the Fourteenth Amendment to the United States Constitution.[97]

The court held that the State "has the authority to promulgate a regulation excluding permanent fund dividend applicants who arguably fall within the statutory definition of eligible applicants."[98] Alaska Statutes section 43.23.095(8) defines a "state resident" as "an individual who is physically present in the state with the intent to remain permanently in the state."[99] Alaska Administrative Code title 15, section 23.615(d),[100] however, limits residency to those aliens who have been granted resident alien or refugee status, implicitly excluding illegal aliens.[101] The court found this extension to make "abundant sense" and to be "consistent with a public policy which regards it as unwise to reward illegality."[102] In so holding, the court accepted the State's proposition that an agency may, by regulation, refine and add meaning

91. *Id.*
92. *Id.*
93. *Id.*
94. 858 P.2d 621 (Alaska 1993).
95. ALASKA ADMIN. CODE tit. 15, § 23.615(d) (Oct. 1988).
96. *Cosio*, 858 P.2d at 623.
97. *Id.* at 626.
98. *Id.* at 625.
99. ALASKA STAT. § 43.23.095(8) (1990).
100. ALASKA ADMIN. CODE tit. 15, § 23.615(d) (Oct. 1988).
101. *Id.*
102. *Cosio*, 858 P.2d at 625.

to statutory language.[103] However, the court noted that any exclusion "must still be consistent with the statutory purpose and 'reasonable and not arbitrary.'"[104]

The Alaska Supreme Court then addressed the equal protection challenges and held that the eligibility of illegal aliens for economic benefits should be analyzed under the "rational basis" test, the most deferential standard of review.[105] The court concluded that the eligibility requirements for permanent fund dividends were "rationally related" to the "legitimate purposes underlying the permanent fund dividends."[106] These purposes included not rewarding illegal activity, encouraging persons to maintain their residence in Alaska, and increasing awareness and involvement by residents in the management and expenditure of the permanent fund.[107]

In a vigorous dissent, Justice Burke found no indication that the "legislature intended to commit the dividend eligibility of certain classes of immigrants to the department's discretion."[108] He argued that the Department of Revenue Commissioner had therefore exceeded his regulatory authority in excluding aliens who were not either refugees or resident aliens.[109] Additionally, Justice Burke maintained that the majority "seriously misrepresent[ed] federal immigration law"[110] in concluding that nonresident aliens could not "form the intent necessary to establish state residency."[111]

In *Manning v. Alaska Railroad Corp.*,[112] the court held that the thirty-day appeal deadline in Alaska Rule of Appellate Procedure 602(a)(2) will apply to the decision of an administrative agency only under a certain condition: when that agency has "clearly indicate[d] that its decision is a final order and that the claimant has thirty days to appeal."[113] Without these two criteria present, the court concluded that strict adherence to Rule 602(a)(2) would "work surprise or injustice."[114] In so holding, the court

103. *Id.* at 624-25.
104. *Id.* at 625 (quoting Kelly v. Zamarello, 486 P.2d 906, 911 (Alaska 1971)).
105. *Id.* at 627.
106. *Id.* at 629.
107. *Id.* at 627.
108. *Id.* at 632 (Burke, J., dissenting).
109. *Id.* at 632-33 (Burke, J., dissenting).
110. *Id.* at 633 (Burke, J., dissenting).
111. *Id.* at 634 (Burke, J., dissenting).
112. 853 P.2d 1120 (Alaska 1993).
113. *Id.* at 1124.
114. *Id.*

was choosing "to make explicit what [it] implied"[115] in *Owsichek v. State Guide Licensing & Control Board.*[116]

C. Health Care

In *State Department of Health & Social Services* v. *Hope Cottages, Inc.*,[117] the Alaska Supreme Court held that under the Alaska Medicaid payment statute,[118] the state was not required to compensate on a dollar-for-dollar basis a health facility for its workers' compensation premiums.[119] Alaska's Medicaid statutes were revised in 1988 to comply with the federal Boren Amendment,[120] which required states to make Medicaid payments that are "reasonable and adequate to meet the costs which must be incurred by efficiently and economically operated facilities."[121] Previously, federal law required states to reimburse all reasonable charges submitted by Medicaid providers. This amendment was enacted to promote cost-cutting and efficiency among Medicaid providers.[122]

The Alaska Supreme Court accepted the State's argument that only the overall rate paid to a facility must be fair, and that each component of a facility's costs need not be fairly compensated.[123] The court reasoned that such an approach was consistent with the statutory goals of flexibility and efficiency.[124] The Commission's compensation scheme was upheld because Hope Cottages had not presented evidence that the overall rate was unreasonable.[125]

Later in 1993, the supreme court decided another case that centered on the Boren Amendment and its interaction with Alaska's Medicaid payment statutes. In *State Department of Health & Social Services v. Alaska State Hospital and Nursing Home Ass'n. ("ASHNA"),*[126] the court held that the State had failed to comply with the Boren Amendment's findings requirement[127] in setting Medicaid payment rates. At issue in the case was Alaska Adminis-

115. *Id.*
116. 627 P.2d 616 (Alaska 1981).
117. 863 P.2d 246 (Alaska 1993).
118. ALASKA STAT. § 47.07.070(a) (1990).
119. *Hope Cottages*, 863 P.2d at 247.
120. 42 U.S.C. § 1396a(a)(13)(A) (1992).
121. *Id.*
122. *Hope Cottages*, 863 P.2d at 248.
123. *Id.*
124. *Id.* at 250.
125. *Id.* at 251.
126. 856 P.2d 755 (Alaska 1993).
127. 42 U.S.C. § 1396a(a)(13)(A) (1988).

trative Code title 7, section 43.685(g),[128] which established an emergency regulation that provided maximum limits on routine rates paid by Alaska to medical care providers under the Medicaid program. ASHNA successfully challenged the regulation on the grounds that it did not meet the procedural requirements of the Boren Amendment, which requires states to make findings and give assurances to the federal government that the rates they set are reasonable and adequate.[129]

The Alaska Supreme Court rejected a three-prong test established by the Tenth Circuit[130] to determine the adequacy of findings under the Boren Amendment because it was too restrictive. This test required states to determine and identify efficiently and economically operated hospitals as well as the costs incurred by those hospitals and then set payment rates sufficient to meet the costs of those hospitals.[131] Although it rejected this analysis, the supreme court still concluded that the state must make "concrete findings, based on studies of existing facilities, and use these studies to establish, with reference to either existing or hypothetical facilities, an objective benchmark of an efficiently and economically operated facility."[132]

III. BUSINESS LAW

Alaska Supreme Court decisions in the field of business law covered various areas in 1993. The court considered such issues as whether a party has a right to restitution if he contracts with an incompetent person, the proper interpretation of contractual time limitations, and the ability of a debtor-in-possession to retain individual rights under a settlement agreement. In other decisions, the court set out a test for establishing liability in a fraudulent conveyance scheme and decided whether partners owe a duty of good faith and fair dealing to assignees of partnership interests. Finally, the court examined the question of whether personal mortgage insurance is for the benefit of the mortgagor.

In *CHI of Alaska, Inc. v. Employers Reinsurance Corp.*,[133] CHI's liability reinsurer agreed to defend CHI against the contract and negligence claims brought by an insured, but insisted on reserving its rights to disclaim coverage with respect to the insured's

128. ALASKA ADMIN. CODE tit. 7, § 43.685(g) (July 1993).

129. 42 U.S.C. § 1396a(a)(13)(A) (1988).

130. *AMISUB (PSL), Inc. v. Colo. Dep't of Social Servs.*, 879 F.2d 789 (10th Cir. 1989), *cert. denied*, 496 U.S. 935 (1990).

131. *Id.* at 796.

132. State Dep't of Health & Social Servs. v. Alaska State Hosp. & Nursing Home Ass'n, 856 P.2d 755, 763 (Alaska 1993).

133. 844 P.2d 1113 (Alaska 1993).

claim of intentional misconduct.[134] CHI objected, claiming the reservation of rights created a conflict of interest between CHI and its reinsurer.[135] CHI insisted on independent counsel paid for by its reinsurer and chosen by CHI.[136] The reinsurer offered a two-counsel scheme, in which it would choose counsel to defend the contract and negligence claims, while CHI could have its own attorney handle the intentional misconduct claim (not covered by the reinsurance policy) at the reinsurer's expense.[137]

The supreme court held the reinsurer's reservation of rights gave CHI the right to retain independent counsel. The court offered three rationales for its holding. First, if the loss which the reinsurer was defending was not covered under the reinsurance policy, the reinsurer may have offered only a token defense.[138] Second, if there were many theories of recovery, and at least one was not covered by the reinsurance policy, the reinsurer might have steered the plaintiff-insured toward the un-insured theory.[139] Third, the reinsurer might have gained access to privileged information, which it might have used later to its advantage in litigation with CHI concerning coverage.[140]

The court next held that the proposed two-counsel scheme did not satisfy CHI's right to independent counsel. The court noted that the two-counsel scheme did not deny the reinsurer's appointed counsel access to information in possession of CHI that might have been used against CHI in later coverage litigation.[141] Finally, the court held CHI should have unilaterally been able to select independent counsel subject to the implied covenant of good faith and fair dealing,[142] leaving the reinsurer responsible only for the reasonable costs of the defense.[143] Justice Moore dissented on this point, maintaining CHI's choice of counsel was subject to the reasonable approval of the reinsurer.[144] Justice Compton dissented from the entire opinion, citing the reinsurer's contract right to participate in selection of counsel.[145]

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134. *Id.* at 1114.
135. *Id.*
136. *Id.*
137. *Id.*
138. *Id.* at 1116.
139. *Id.*
140. *Id.*
141. *Id.*
142. *Id.* at 1121.
143. *Id.*
144. *Id.* at 1122 (Moore, J., dissenting and concurring).
145. *Id.* at 1130-31 (Compton, J., dissenting).

In *Pappert v. Sargent*,[146] the Alaska Supreme Court joined a number of jurisdictions in holding that when a party contracts with an incompetent person, in good faith and without actual or constructive knowledge of the other's condition, that party is entitled to restitution upon rescission of the contract.[147] Moreover, the court concluded that an incompetent individual's right to rescind such a contract may be defeated if the other party cannot be restored to his original position.[148] If a court determines, after a hearing, "that meaningful restitution is not possible, it should decline to void the transaction."[149]

Alaska Energy Authority v. Fairmont Insurance Co.[150] involved the interpretation of contractual time limitations. A performance bond issued by Fairmont to the Alaska Energy Authority ("AEA") included a limitation requiring AEA to bring suit under the bond within two years of the date that final payment was due to the contractor.[151] While the Alaska Supreme Court agreed that AEA did not bring suit within the time limitation, it nonetheless reversed the summary judgment rendered in favor of Fairmont by the superior court.[152]

The supreme court's reasoning was based on *Estes v. Alaska Insurance Guarantee Ass'n*,[153] which held that such contractual time limitations would not be enforced without some showing of prejudice to the insurer.[154] The court concluded that the purpose of time limitations was to protect an insurer from prejudice due to delay.[155] Therefore, if an insurer failed to demonstrate harm from a delay, and thereby adequate prejudice, it could not prevail on a motion for summary judgment.[156]

In the instant case, Fairmont did not make such a showing of prejudice.[157] The court found that Fairmont was not prejudiced by the delay because it was put on notice of a possible claim before the limitations period expired.[158]

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146. 847 P.2d 66 (Alaska 1993).
147. *Id.* at 70.
148. *Id.* (citing RESTATEMENT (SECOND) OF CONTRACTS § 15 cmt. f (1981)).
149. *Id.*
150. 845 P.2d 420 (Alaska 1993).
151. *Id.* at 421.
152. *Id.* at 422.
153. 774 P.2d 1315 (Alaska 1989).
154. *Id.* at 1320.
155. *Id.* at 1318.
156. *Id.* at 1320.
157. Alaska Energy Auth. v. Fairmont Ins. Co., 845 P.2d 420, 422-23 (Alaska 1993).
158. *Id.* at 423.

Wagner v. Key Bank of Alaska[159] involved a Chapter 11 bankruptcy proceeding. The debtor-in-possession, in a settlement agreement with one of the creditors, attempted to reserve rights as an individual.[160] After concluding that it had subject matter jurisdiction, the Alaska Supreme Court ruled that the debtor-in-possession did not have individual rights under the settlement agreement.[161]

The court's reasoning was two-fold. First, because a debtor-in-possession acts as a fiduciary on behalf of the estate and its creditors, he is not free to bargain in his individual capacity "without regard to the interests of the estate or the estate's creditors."[162] Second, even if an attempt to gain individual rights under the agreement was not a breach of fiduciary duty, the debtor-in-possession "acted improperly in failing to fully disclose his intentions and obtain express approval for his claimed individual rights when he went before [the bankruptcy judge] requesting approval for the proposed settlement."[163]

Summers v. Hagen[164] concerned an alleged fraudulent conveyance scheme between Summers (grantee of certain land) and Hagen's debtor (grantor).[165] The Alaska Supreme Court held that a creditor has a cause of action against a grantee of debtor's property when that grantee has participated in a fraudulent conveyance.[166] To prove liability for participation in a fraudulent conveyance scheme, the plaintiff must establish the following:

> (1) An unlawful agreement;
> (2) The specific intent of each participant in the scheme to hinder, delay and defraud a creditor of one who participated in the scheme;
> (3) Acts committed pursuant to the unlawful agreement;
> (4) Damages caused by the acts committed pursuant to the unlawful agreement.[167]

On the issue of Hagen's potential damages, the court held that a creditor's rights are not limited to the remedy of voiding the transfer, which is provided for under the Fraudulent Conveyances Act.[168] The plaintiff is not entitled to damages, however, if this

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159. 846 P.2d 112 (Alaska 1993).
160. *Id.* at 113.
161. *Id.*
162. *Id.* at 117.
163. *Id.*
164. 852 P.2d 1165 (Alaska 1993).
165. *Id.* at 1167.
166. *Id.* at 1169.
167. *Id.* at 1169-70.
168. *Id.* at 1170 (interpreting ALASKA STAT. § 34.40.010 (1990)). The act reads, in pertinent part, that a "conveyance . . . made with the intent to hinder, delay, or

remedy is adequate.[169] If voiding the transfer is inadequate, however, the plaintiff may collect damages equal to the lesser of the value of the property fraudulently transferred or the amount of the debt.[170] Exemplary damages and damages for emotional distress are not available.[171] Interest and attorney's fees are permitted only to the extent that they are authorized under Alaska Civil Rules 78(e) and 82.[172]

In *Bauer v. Blomfield Co./Holden Joint Venture*,[173] Bauer was assigned the Holdens' interest in the defendant partnership as security for a loan.[174] When the Holdens defaulted, Bauer gave notice to the partnership that he was to receive distributions payable to the Holdens.[175]

Eventually, the partners stopped making payments to Bauer. The income of the partnership was used instead to pay a "commission" to one of the partners without Bauer's consent.[176] Bauer brought suit, claiming that his assigned right to the Holdens' share of partnership income had been violated.[177]

A majority of the Alaska Supreme Court affirmed a dismissal of Bauer's claims, reasoning that as an assignee, Bauer was not a *de facto* partner.[178] Under Alaska Statutes section 32.05.220(a), an assignee is not entitled "'to interfere in the management or administration of the partnership business or affairs, or to require any information or account of partnership transactions or to inspect the partnership books.'"[179] Section 32.05.220(a) only entitles the assignee to "'receive the [partnership] profits to which the [Holdens] would otherwise be entitled.'"[180] Therefore, the court held that since the partners agreed to use the partnership income to pay the commission, the Holdens, and thus Bauer, were not entitled to receive distributions until that debt was paid in full.[181]

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defraud creditors . . . is void." ALASKA STAT. § 34.40.010 (1990).

169. *Summers*, 852 P.2d at 1170.
170. *Id.*
171. *Id.*
172. *Id.*
173. 849 P.2d 1365 (Alaska 1993).
174. *Id.* at 1366.
175. *Id.*
176. *Id.*
177. *Id.* at 1367.
178. *Id.*
179. *Id.* (quoting ALASKA STAT. § 32.05.220(a) (1993)).
180. *Id.* (quoting ALASKA STAT. § 32.05.220(a) (1993)).
181. *Id.*

The majority refused to hold that partners owe a duty of good faith and fair dealing to assignees of partnership interests.[182] In his dissenting opinion, Justice Matthews, joined by Chief Justice Rabinowitz, argued that the partners did have such a duty, and that this was the central issue in the case.[183] An opposite conclusion, Justice Matthews contended, would leave an assignee without a remedy to enforce his right, making his assignment worthless.[184]

In *Key Pacific Mortgage, Inc. v. Industrial Indemnity Co. of Alaska*,[185] two mortgagees purchased an Errors and Omissions ("E&O") insurance policy from Industrial Indemnity. The policy insured the mortgagees against losses resulting from a failure on their part to maintain other insurance policies due to errors or omissions.[186]

The primary issue in *Key Pacific* arose out of a mortgagor's default. Mortgagors are required to pay for private mortgage insurance ("PMI") to protect the mortgagee from a default by the mortgagor.[187] The mortgagee collects the premium for the PMI and pays the PMI carrier.[188] In the instant case, the mortgagees did not pay PMI premiums on two mortgage loans that later went into default.[189] The mortgagees suffered losses as a result of their failure to maintain PMI insurance, and submitted claims to Industrial Indemnity, which refused to pay for the losses.[190]

The relevant section of the E&O policy covered mortgagees for the loss of policies that were procured and maintained for the benefit of the mortgagor.[191] The issue was whether PMI was for the benefit of the mortgagor.[192] The mortgagees argued that mortgagors with PMI are required to make lower down payments and often are loaned money by PMI companies to pay a delinquency or help close a sale.[193] The Alaska Supreme Court found these benefits to the mortgagor to be incidental.[194] It held that such incidental benefits enjoyed by the mortgagor do not transform

182. *Id.* at 1367 n.2.
183. *Id.* at 1368 (Matthews, J., dissenting).
184. *Id.* (Matthews, J., dissenting).
185. 845 P.2d 1087 (Alaska 1993).
186. *Id.* at 1088.
187. *Id.*
188. *Id.*
189. *Id.* at 1089.
190. *Id.*
191. *Id.*
192. *Id.*
193. *Id.* at 1090.
194. *Id.*

PMI into insurance "for the benefit of" the mortgagor.[195] Rather, PMI insurance was for the benefit of the mortgagee.[196] Therefore, the E&O policy did not cover the lapse of PMI coverage.[197]

IV. CONSTITUTIONAL LAW

In 1993, the Alaska Supreme Court handed down decisions interpreting both the Alaska Constitution and the United States Constitution. While only two cases are included in this section, constitutional issues arise in other areas as well, including the sections summarizing administrative law and criminal law and procedure.

State v. Gonzalez[198] concerned the constitutionality of Alaska Statutes section 12.50.101,[199] which authorized prosecutors to compel testimony based on a grant of "use and derivative use" immunity.[200] The court addressed two issues: (1) the scope of the Alaska Constitution article I, section 9 privilege against self-incrimination; and (2) whether or not section 12.50.101 provides immunity commensurate with the protection of the constitutional privilege.[201]

The parties to this case agreed that the scope of article I, section 9 was set out in *E.L.L. v. State*,[202] which held that a witness may refuse to testify if there is a "real or substantial hazard of incrimination."[203] Such a hazard is present if the witness's answers "could support a conviction or might furnish a link in the chain of evidence leading to a conviction."[204]

The court reviewed the question of whether the grant of use and derivative use immunity removed the prohibited hazard of self-incrimination. The court acknowledged that, in theory, use and derivative use immunity should remove the danger.[205] In practice,

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195. *Id.*
196. *Id.*
197. *Id.*
198. 853 P.2d 526 (Alaska 1993).
199. ALASKA STAT. § 12.50.101 (1990).
200. *Gonzalez*, 853 P.2d at 528. Use and derivative use immunity allows prosecutors to try the witness for crimes referred to in the compelled testimony, but precludes the use of the compelled testimony itself in such prosecutions. This is in contrast to transactional immunity which protects the compelled witness from prosecution for the crime about which he/she must testify. *Id.*
201. *Id.* at 529.
202. 572 P.2d 786 (Alaska 1977).
203. *Id.* at 788.
204. *Id.*
205. *Gonzalez*, 853 P.2d at 530.

however, the court concluded that such immunity failed to do so.[206] First, there would be no way to prove whether the prosecution, either wittingly or unwittingly, used the compelled testimony against the witness.[207] It would be impossible to trace the path of the testimony through the government's offices from the time it was given to the time it was used against the witness.[208] In other words, there would be no way to tell how widely disseminated the testimony was within the prosecutor's office.[209] The court felt that any safeguards, such as isolating the prosecution team, could be flouted.[210] In a similar vein, the court noted that highly publicized compelled testimony could actually influence the testimony of other witnesses at the compelled witness's subsequent prosecution.[211]

Second, the court feared that compelled testimony could serve non-evidentiary uses for the prosecutors.[212] For example, the testimony could help them to, among other things, focus the investigation, decide whether to initiate prosecution, decide whether to plea bargain, interpret evidence and plan cross-examination.[213] The court found the possibility that the prosecution could gain such advantages to be unacceptable.[214] Therefore, because enforcing use and derivative use immunity was simply not practicable, the court held that section 12.50.101 was unconstitutional.[215]

In *Marshall v. Munro*,[216] Reverend Marshall sued Reverend Munro for defamation, tortious interference with a contract and breach of contract.[217] Marshall alleged that Munro, the Executive Presbyter of Marshall's former congregation, made derogatory statements about Marshall's qualifications as a pastor that led to the loss of a job Marshall had secured with a church in Tennessee.[218] The issue on appeal was whether civil courts were pre-

206. *Id.*
207. *Id.*
208. *Id.*
209. *Id.* at 531.
210. *Id.*
211. *Id.*
212. *Id.* at 531-32.
213. *Id.* at 532.
214. *Id.*
215. *Id.* at 533.
216. 845 P.2d 424 (Alaska 1993).
217. *Id.* at 425.
218. *Id.*

cluded under the First Amendment of the United States Constitution from deciding the case.[219]

The First Amendment prohibits civil courts from interfering in relationships between a church and its clergy or between various members of the clergy.[220] Both parties agreed that civil courts should abstain where a case concerned issues of ecclesiastical doctrine, faith, creed or internal discipline of an organized church.[221]

The Alaska Supreme Court first determined that it could not decide the breach of contract claim, as a resolution of this issue would have required an interpretation of the employment relationship between Marshall and Munro.[222] The court reasoned that since the First Amendment forbids courts to imply contractual duties on religious entities, Marshall was forced to look to administrative remedies within the church.[223]

However, the court held that it must decide the claims of defamation and interference with a contract.[224] The court agreed with Marshall that such claims did not touch upon church laws or policy because the claims merely involved secular legal and factual issues.[225]

The court was not persuaded, however, by Munro's argument that such claims concerned Marshall's qualifications as a pastor.[226] The court concluded that the defamation claim only related to whether Munro's statements were true or, if not true, were made with malice.[227] Furthermore, the interference with contract claim required only that "1) a contract existed; 2) Munro knew of and intended to interfere with the contract; 3) Munro did in fact interfere with the contract; and 4) Munro's interference caused Marshall's damages."[228] The court found that neither of the inquiries involved an ecclesiastical dispute or an internal discipline proceeding.[229] Therefore, the claims could be resolved without consideration of Munro's duties to the church and, consequently, were within a civil court's jurisdiction.[230]

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219. *Id.* at 426.
220. *Id.*
221. *Id.* at 427.
222. *Id.* at 428.
223. *Id.*
224. *Id.*
225. *Id.*
226. *Id.*
227. *Id.*
228. *Id.*
229. *Id.* at 429.
230. *Id.*

V. CRIMINAL LAW

The past year brought a wide variety of criminal law cases before the Alaska Court of Appeals and the Alaska Supreme Court. These diverse cases have been divided into two main categories, constitutional protections and general criminal law. These categories are further divided into more specific areas.

A. Constitutional Protections

1. *Search and Seizure.* In *Eldridge v. State*,[231] Eldridge appealed the use of evidence obtained from a pat-down search,[232] which was conducted by probation officers who suspected Charles Smith, Eldridge's travelling companion, of possessing cocaine.[233] When the officers stopped Smith, they performed a pat-down search of Eldridge, which revealed a small amount of rock cocaine.[234] Eldridge was later convicted of misconduct involving a controlled substance in the third degree.[235]

On appeal, Eldridge claimed that the search was improper and that the evidence obtained from it should have been suppressed.[236] Although it was not absolutely clear, the trial court's basis for admitting the results of the search seemed to have been the "automatic companion" rule.[237] On appeal, the Alaska Court of Appeals held that this rule was not the proper standard in Alaska.[238] Rather, a case-by-case approach was to be employed, having as its fundamental inquiry whether an immediate investigation was required as a matter of practical necessity.[239] The court of appeals remanded the case so that the trial court could apply the appropriate test in determining whether the search was proper.[240]

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231. 848 P.2d 834 (Alaska Ct. App. 1993).
232. *Id.* at 835.
233. *Id.*
234. *Id.* at 836.
235. *Id.* at 835.
236. *Id.* at 836.
237. *Id.* at 837 (citing United States v. Berryhill, 445 F.2d 1189, 1193 (9th Cir. 1971)). The automatic companion rule states, "All companions of [an] arrestee within the immediate vicinity, capable of accomplishing a harmful assault on the officer, are constitutionally subjected to the cursory 'pat-down' reasonably necessary to assure that they are unarmed." *Id.*
238. *Id.* at 838.
239. *Id.* (citing State v. G.B., 769 P.2d 452, 456 (Alaska Ct. App. 1989)).
240. *Id.* at 838-39.

Johnson v. Johnson[241] involved a search and seizure by the Fairbanks police department.[242] The police, pursuant to a valid search warrant, seized drugs, drug paraphernalia, weapons and $44,850.[243] The money that was taken was not returned.[244] Upon action by the defendant, Johnson, the superior court determined that an "adoptive seizure"[245] by the DEA had deprived Johnson of title to his money.[246]

The Alaska Supreme Court reversed, stating that the federal forfeiture was void.[247] The court rejected the city's claim that the money was actually the property of the federal government and that by transferring the money to the DEA, the city was simply returning it to its proper owner.[248] The supreme court reasoned that the lower court was the first to obtain jurisdiction over the money.[249] Furthermore, the city's transfer of money to the DEA constituted conversion, as it violated state forfeiture law regarding the disposition of property held in connection with a criminal proceeding.[250] Accordingly, the court remanded with instructions that summary judgment be entered in Johnson's favor.[251]

In *Municipality of Anchorage v. Ray*,[252] the municipality of Anchorage appealed the suppression of results from an involuntary blood test.[253] Following a car accident, the police requested that Ray submit to a blood test for alcohol content.[254] Ray refused, and the blood was taken without his permission.[255] Consequently, the district court suppressed the results of the test.[256] Although Ray was charged under the Municipal Code, the parties to the appeal argued the case under equivalent state statutes,[257] includ-

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241. 849 P.2d 1361 (Alaska 1993).
242. *Id.* at 1362.
243. *Id.*
244. *Id.*
245. An adoptive seizure occurs when a local police department transfers seized property that may be subject to forfeiture pursuant to federal drug laws to the Drug Enforcement Agency ("DEA"). In other words, the DEA "adopts" the seizure.
246. *Johnson*, 849 P.2d at 1363.
247. *Id.* at 1362.
248. *Id.* at 1363.
249. *Id.* at 1364.
250. *Id.*
251. *Id.*
252. 854 P.2d 740 (Alaska Ct. App. 1993).
253. *Id.* at 743.
254. *Id.*
255. *Id.* at 742-43.
256. *Id.* at 743.
257. *Id.*

ing Alaska Statutes section 28.35.035.[258] Ray argued that the police were required to ask him to participate in a breath test before they could force him to submit to a blood test.[259] Ray admitted that on its face Alaska Statutes section 28.35.035(a) allows police to force suspected drunk drivers to submit to a chemical test of their blood whenever there is an injury or death involved in the situation.[260] However, Ray introduced evidence of the law's background in an attempt to overcome the presumption that a statute is interpreted according to its plain meaning.[261]

The Alaska Court of Appeals held that section 28.35.035(a) "authorizes the police to require a motorist to submit to a blood test even though there has been no prior attempt to obtain the motorist's consent to a breath test."[262]

Ray argued that this interpretation of section 28.35.035(a) would be a violation of his constitutional rights under the due process and search and seizure provisions of the United States and Alaska Constitutions.[263] Moreover, he contended that his rights under the privacy provision of the Alaska Constitution would be violated.[264] The court, relying heavily on United States Supreme Court precedent dealing with the issue of forced blood tests, found no constitutional violations and reversed the district court's suppression of the test results.[265]

2. *Miscellaneous.* In *Hays v. State*,[266] Hays challenged the reasonableness of the suspicion under which a state trooper stopped Hays' vehicle.[267] The trooper had stopped Hays' truck because it resembled the description of a vehicle involved in the

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258. ALASKA STAT. § 28.35.035 (Supp. 1993). Alaska Statutes section 28.35.035(a) states:

> If a person is under arrest for an offense arising out of acts alleged to have been committed while the person was operating a motor vehicle ... while intoxicated, and that arrest results from an accident that causes death or physical injury to another person, a chemical test may be administered without the consent of the person arrested to determine the amount of alcohol in that person's breath or blood.

Id.

259. *Ray*, 854 P.2d at 744.

260. *Id.*

261. *Id.* at 745-47.

262. *Id.*

263. *Id.* at 748.

264. *Id.*

265. *Id.* at 751.

266. 850 P.2d 651 (Alaska Ct. App. 1993).

267. *Id.* at 652.

theft of gasoline from a local service station.[268] Although it was eventually determined that the truck was not the same one involved in the crime, it was also discovered that Hays was driving with a revoked license, an offense with which he was eventually charged.[269]

Alaska law permits investigative stops when there is a "reasonable suspicion that imminent public danger exists or serious harm to persons or property has recently occurred."[270] Alaska uses a flexible approach in applying this standard.[271] A well-founded suspicion that a crime is occurring or has just occurred may justify a stop even though the offense is not particularly serious.[272] A more severe threat to public safety may justify a stop even after considerable time has passed.[273]

In Hays' case, the Alaska Court of Appeals found that a substantial amount of time had passed between the crime's occurrence and the stop of his vehicle.[274] Furthermore, there was little connection between Hays' vehicle and the truck involved in the gas theft, as the vehicles had different license plate numbers,[275] a fact realized by the trooper soon after the stop.[276] Finally, the court stated that the key inquiry in every case is whether "'a prompt investigation [was] required . . . as a matter of practical necessity.'"[277] The court found no practical necessity in the stop of Hays' vehicle because the alleged offense was minor in nature and considerable time had passed since the initial report of the theft.[278] Accordingly, the court held that the stop was improper.[279]

May v. State[280] involved an appeal by the defendant of his conviction on one count of first-degree burglary and one count of third-degree theft. May was apprehended after an informant told police officers that May and his son were going to commit a burglary.[281] Police officers searched May's car and found three

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268. *Id.*
269. *Id.*
270. *Id.* (citing Coleman v. State, 553 P.2d 40, 46 (Alaska 1976)).
271. *Id.* at 653.
272. *Id.*
273. *Id.*
274. *Id.*
275. *Id.*
276. *Id.*
277. *Id.* (quoting State v. G.B., 769 P.2d 452, 456 (Alaska Ct. App. 1989).
278. *Id.*
279. *Id.*
280. 856 P.2d 793 (Alaska Ct. App. 1993).
281. *Id.*

jewelry boxes identified as belonging to the owner of the house which May allegedly had burglarized.[282] An investigator questioned May until the suspect requested an attorney.[283] Shortly thereafter, however, May told officers that he wished to speak again with the investigator.[284] The investigator informed May that the conversation was going to be recorded and asked, "Do you want to have an attorney present first, or do you want to talk to me about something?"[285] May, without counsel present, confessed to the burglary.[286]

After conviction on burglary and theft charges, May appealed, arguing that the police had violated his right to counsel by continuing the discussion without his attorney present. In the alternative, May contended that the officers should have re-advised him of his *Miranda* rights.[287]

The Alaska Court of Appeals noted that the investigator had done nothing to discourage the defendant from exercising his right to counsel and had in fact established that the defendant wished to resume the conversation without an attorney present.[288] Under these facts, the court ruled that *Quick v. State*[289] controlled and that, therefore, the police were not required to re-advise the defendant of his *Miranda* rights or refrain from continuing their questioning after the defendant, having previously invoked his right to counsel, again commenced speaking to the officers.[290]

Flynn v. State[291] focused on the appeal of the admission of a police officer's testimony at trial.[292] In *Flynn*, the defendant was questioned by the police and confessed to penetrating a six-month-old child.[293] At the trial, where Flynn was convicted of one count of first-degree sexual abuse of a minor,[294] one of the officers who questioned Flynn stated, "In my experience, as to date, I have yet to have an innocent person confess."[295]

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282. *Id.*
283. *Id.* at 794.
284. *Id.*
285. *Id.*
286. *Id.*
287. *Id.*
288. *Id.*
289. 599 P.2d 712 (Alaska 1979).
290. *May*, 856 P.2d at 794.
291. 847 P.2d 1073 (Alaska Ct. App. 1993).
292. *Id.* at 1075.
293. *Id.*
294. *Id.* at 1074.
295. *Id.*

Flynn claimed that the officer's statement, in effect, allowed the officer to tell the jury, as an expert witness, that the confession was truthful.[296] The Alaska Court of Appeals agreed and reversed the conviction, finding that the statement unduly prejudiced the defendant by enabling the officer to act like a "human polygraph."[297]

The court also addressed Flynn's allegation that there was insufficient evidence to support his conviction because no evidence of his age was introduced at trial.[298] The court held that a jury can properly infer age from testimony relating to other issues at trial, and that the State need not present direct evidence of age.[299] The court found that the evidence of Flynn's drinking, the description of him as a "short statured man," and the references to him as a criminal suspect (as opposed to a juvenile delinquent) were enough to allow the jury to infer that he was more than sixteen years old.[300]

McKillop v. State[301] involved an appeal of an harassment conviction.[302] The defendant made anonymous phone calls to the Anchorage Abused Women's Aid in Crisis shelter and was convicted under Alaska Statutes section 11.61.120(a)(4).[303] McKillop claimed that his conviction was invalid for several reasons: (1) it was based on illegally seized evidence; (2) the jury was instructed incorrectly as to the meaning of the term "anonymous"; and (3) the harassment statute was unconstitutional.[304]

McKillop had been arrested at the motel from which he was making the phone calls.[305] When he came to the door in response to the police officers' knock, McKillop was both naked and drunk.[306] He first denied making the calls, but then admitted the

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296. *Id.*

297. *Id.* at 1076.

298. *Id.* To prove guilt of sexual abuse of a minor in the first degree under Alaska Statutes section 11.41.434(a)(1), the state must establish that the defendant was at least 16 years of age. ALASKA STAT. § 11.41.434(a)(1) (1989).

299. *Flynn*, 847 P.2d at 1076.

300. *Id.* at 1077.

301. 857 P.2d 358 (Alaska Ct. App. 1993).

302. *Id.* at 359.

303. *Id.* The text of Alaska Statutes section 11.61.120(a)(4) reads as follows: "A person commits the crime of harassment if, with intent to harass or annoy another person, that person . . . (4) makes an anonymous or obscene telephone call or a telephone call that threatens physical injury . . . ." ALASKA STAT. § 11.61.120(a)(4) (Supp. 1993).

304. *McKillop*, 857 P.2d at 359.

305. *Id.* at 360.

306. *Id.*

offense to the police.[307] At trial, the court denied McKillop's request to exclude an incriminating statement on the grounds that the evidence had been obtained as part of a warrantless search in violation of the Fourth Amendment of the United States Constitution.[308]

The Alaska Court of Appeals agreed with the trial court's denial, finding that the officers did not violate McKillop's Fourth Amendment rights when they entered his room because he was not "in custody" at the time.[309] The court found that it was reasonable to take the conversation inside due to the defendant's nudity.[310] Although McKillop did question the officers' authority to be there, the court of appeals found that he never asked the police to leave nor otherwise demonstrated that he wanted them to leave.[311] Therefore, it was not clearly erroneous to allow McKillop's statements to be admitted into evidence.[312]

The statute under which McKillop was sentenced requires that the phone calls be "anonymous."[313] In his second point of contention with the lower court's holding, McKillop argued that his phone calls to the shelter were not "anonymous" because he had divulged his telephone number and room number, inviting discovery of his identity.[314] The court of appeals found that the common meaning of "anonymous" centers on the withholding of one's name.[315] Thus, since McKillop gave no reason why the term "anonymous" should be interpreted in the non-standard way he suggested, the court of appeals held that the trial court did not abuse its discretion in refusing to follow McKillop's proposed definition.[316]

Lastly, McKillop argued that the statute prohibiting his conduct[317] was unconstitutionally broad and attached criminal penalties to free speech in violation of the First Amendment of the United States Constitution.[318] The court found that, when read in conjunction with the general definition of "intentionally" in

307. *Id.*
308. *Id.*
309. *Id.* at 360-61.
310. *Id.* at 361.
311. *Id.*
312. *Id.*
313. ALASKA STAT. § 11.61.120(a)(4) (Supp. 1993).
314. *McKillop*, 857 P.2d at 361.
315. *Id.* at 362.
316. *Id.*
317. *Id.*
318. *Id.*

another statute,[319] the provision under which McKillop was charged may potentially have been broad enough to infringe on an individual's right of free speech.[320] However, the court held that the statutory provision can be constitutionally valid when limited to a caller's speech that is devoid of any substantive information, and where the caller's sole intention is to annoy or harass the recipient.[321] Thus, when a court gives a jury instruction limiting the statutory interpretation in this way, the application is neither vague nor overbroad.[322] However, in *McKillop*, the trial court did not provide a proper jury instruction limiting the scope of the statute, instead instructing the jury that "[a] person may act intentionally with respect to causing a particular result even though causing that result was not the person's only objective."[323] The court held this instruction to be infirm because it allowed a jury to find McKillop guilty even if harassment were not his only intention. Therefore the conviction was reversed, and the case was remanded for a new trial.[324]

In *Miller v. State*,[325] the defendant filed a *pro se* application for post-conviction relief, alleging that his conviction was the result of ineffective assistance of counsel. Miller also filed an affidavit of indigency requesting that the court appoint counsel for him.[326] The superior court gave Miller notice that it was going to dismiss his application without appointing counsel unless the application was amended so that it made out a *prima facie* case for ineffective assistance of counsel.[327]

The Alaska Court of Appeals, citing *Donnelly v. State*,[328] reversed this decision.[329] In *Donnelly*, the Alaska Supreme Court determined that an indigent applicant for post-conviction relief is entitled to court-appointed counsel "at the time the initial application is filed."[330] Therefore, Miller was entitled to counsel in his pursuit of post-conviction relief.[331]

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319. ALASKA STAT. § 11.81.900(a)(1) (1989).
320. *McKillop*, 857 P.2d at 364.
321. *Id.*
322. *Id.* at 365.
323. *Id.*
324. *Id.* at 365-66.
325. 857 P.2d 1210 (Alaska Ct. App. 1993).
326. *Id.*
327. *Id.*
328. 516 P.2d 396 (Alaska 1973).
329. *Miller*, 857 P.2d at 1211.
330. *Donnelly*, 516 P.2d at 399.
331. *Miller*, 857 P.2d at 1211.

Haynes v. State[332] came before the Alaska Supreme Court after Haynes' license was revoked due to his arrest for driving while intoxicated.[333] At the time of arrest, Haynes' breath was tested with an "Intoximeter 3000," which produced a reading of .106 grams of alcohol per 210 liters of breath.[334] Although this level of intoxication is above the .10 level set by law, the Intoximeter 3000 has a .01 margin of error.[335]

If the margin had been applied in Haynes' favor, he would have been below the .10 limit and would not have lost his license.[336] The Alaska Supreme Court determined that because there was no indication that the legislature took the margin of error into consideration in setting the .10 level, the margin of error must be considered when determining whether someone is over the .10 level.[337]

The court further determined that due process requires the application of the .01 margin of error in the defendant's favor when determining whether his breath exceeded the statutory level.[338] Finally, the court ruled that extrinsic evidence of intoxication does not mitigate the inherent error found in the Intoximeter.[339] Therefore, the court reversed the revocation of Haynes' license.

Chief Justice Rabinowitz and Justice Matthews both dissented from the majority's opinion, asserting that it changed the statutorily determined level of .10 to .11.[340] The dissent noted that such a result was improper under the plain meaning rule used in interpreting Alaska statutes.[341]

B. General Criminal Law

1. *Evidence.* In *Shepard v. State*,[342] the defendant contended that the trial court erred when it prevented an expert witness from testifying for the defense.[343] Shepard had wanted to introduce two expert witnesses who would testify about post-traumatic stress disorder, a psychological condition Shepard claimed

332. 865 P.2d 753 (Alaska 1993).
333. *Id.* at 754.
334. *Id.*
335. *Id.*
336. *Id.*
337. *Id.* at 756.
338. *Id.*
339. *Id.*
340. *Id.* at 757 (Matthews, J., dissenting).
341. *Id.* at 761 (Matthews, J., dissenting).
342. 847 P.2d 75 (Alaska Ct. App. 1993).
343. *Id.* at 76.

to suffer from as a result of his participation in the war in Vietnam.[344] He claimed that post-traumatic stress disorder and not consciousness of guilt had led him to conceal the shooting for which he was on trial.[345]

The trial court excluded the testimony of one of the expert witnesses because the witness had never directly examined the defendant, and because the proposed testimony merely amounted to "questionable psychological profile evidence."[346] The Alaska Court of Appeals reversed, noting that evidence of a novel psychological profile, not yet generally accepted as valid, is not admissible in Alaska if it is used to show that a defendant would testify truthfully or act unlawfully simply because he fits that profile.[347] However, the court went on to hold that such psychological evidence is not barred if it merely establishes "that certain testimony is not necessarily untruthful or that certain conduct is not necessarily indicative of guilt."[348]

In this case, the Alaska Court of Appeals found that the questionable testimony was intended only to provide the jury with a more complete understanding of post-traumatic stress disorder.[349] Therefore, the witness' testimony was admissible.[350]

In *McGlauflin v. State*,[351] McGlauflin alleged that his conviction on several counts of first-degree sexual abuse of a minor and first-degree sexual assault was flawed because (1) he had never waived his right to a jury trial[352] and (2) the victim's testimony should have been suppressed as tainted because her memory had previously been enhanced through hypnosis.[353] On the first issue, the Alaska Court of Appeals found that a written waiver of a defendant's right to a jury trial was not required when an effective oral waiver was given.[354] However, the court found that despite the trial judge's direct questioning of McGlauflin, the waiver was ineffective because "the court did not seek to determine whether McGlauflin understood the right he was relinquishing or the consequences of his choice."[355] Therefore, a reversal of Mc-

344. *Id.* at 77.
345. *Id.*
346. *Id.* at 78.
347. *Id.* at 80.
348. *Id.* at 81.
349. *Id.*
350. *Id.*
351. 857 P.2d 366 (Alaska Ct. App. 1993).
352. *Id.* at 368.
353. *Id.* at 369.
354. *Id.* at 368 (citing Walker v. State, 578 P.2d 1388, 1390 (Alaska 1978)).
355. *Id.* at 369.

Glauflin's conviction was required.[356]

The court of appeals, however, still found it necessary to address the admissibility of testimony at trial given by a previously hypnotized victim.[357] The court looked to *Contreras v. State*[358] to resolve this issue.[359] In *Contreras*, the Alaska Supreme Court held that the process of being hypnotized was sufficiently likely to distort a witness' sincerity as to make the testimony inadmissible.[360] However, in *Contreras* the supreme court did not completely bar testimony of a previously hypnotized person. Rather, the witness, the supreme court held, may testify about facts he or she related prior to the hypnosis.[361]

The victim's testimony in *McGlauflin* was admissible[362] because it did not fall within the *Contreras* rule. The *Contreras* rule was intended to eliminate testimony based on false memories, which can be created when hypnosis is used to refresh or enhance a witness' memory. Unlike the hypnosis in *Contreras*, which was designed to enhance the witness' memory of the actual events at issue in the case, the hypnosis in the instant case only briefly touched on the sexual abuse. The primary purpose of the session was to improve the victim's self-confidence and work on her weight problem.[363] The hypnosis never probed the victim's memories of the allegedly abusive events.[364] As such, none of the dangers that *Contreras* sought to protect against were present.[365]

In *Nunn v. State*[366] Nunn appealed his conviction, for second-degree sexual abuse of a minor[367] on two grounds: (1) that the videotape of the police interview with the victim (J.A.B.) should not have been played for the jury[368] and (2) that the former assistant district attorney's testimony should have been excluded.[369]

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356. *Id.*
357. *Id.*
358. 718 P.2d 129 (Alaska 1986).
359. *McGlauflin*, 857 P.2d at 369-72.
360. *Contreras*, 718 P.2d at 139.
361. *Id.*
362. *McGlauflin*, 857 P.2d at 379.
363. *Id.* at 374.
364. *Id.* at 379.
365. *Id.*
366. 845 P.2d 435 (Alaska Ct. App. 1993).
367. *Id.* at 437.
368. *Id.* at 440.
369. *Id.* at 444.

The videotape was admitted at trial because it contained prior inconsistent statements of J.A.B.[370] On the tape, J.A.B. accused Nunn of sexual abuse, but at trial she recanted and claimed that she had made up the accusations.[371] Nunn claimed that the tape was inadmissible because J.A.B. was already confronted with her prior inconsistent statements and admitted making them.[372]

The Alaska Court of Appeals upheld the admissibility of the videotape because it preserved the demeanor of J.A.B. during questioning.[373] Thus, it helped the jury to decide whether to believe J.A.B.'s trial testimony or her conflicting prior statements.[374] The court also held that the videotape could be admitted without requiring the prosecution to ask J.A.B. about each and every statement made on the tape.[375]

The court also upheld the admissibility of the former assistant district attorney's testimony.[376] The assistant district attorney had prepared the case against Nunn for presentation to the grand jury and had interviewed the victim shortly before she recanted.[377] The prosecutor sought to use the assistant district attorney as a witness at trial to prove the truthfulness of the victim's earlier allegations.[378] Nunn argued that such testimony was a violation of Disciplinary Rule 5-102(A),[379] which states that it is an ethical violation for a firm to represent an individual where a member of the firm will be called as a witness on behalf of the client.[380] The court rejected Nunn's argument, holding that the prosecutor's office was not like a normal law firm.[381] Furthermore, because of the non-attorney role that the former district attorney played in testifying at trial, the court held that "there was no violation of the ethical and litigation concerns underlying [Disciplinary Rule] 5-102(A)."[382]

March v. State[383] involved an appeal by a defendant of his conviction for flying into a hunting area and killing a bull moose on

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370. *Id.* at 440.
371. *Id.* at 439.
372. *Id.*
373. *Id.* at 441.
374. *Id.*
375. *Id.*
376. *Id.* at 446.
377. *Id.* at 445-46.
378. *Id.*
379. *Id.* at 444 (citing ALASKA CODE OF PROFESSIONAL RESPONSIBILITY DR 5-102(A) (1980)).
380. ALASKA CODE OF PROFESSIONAL RESPONSIBILITY DR 5-102(A) (1980).
381. *Nunn*, 845 P.2d at 445-46.
382. *Id.* at 446.
383. 859 P.2d 714 (Alaska Ct. App. 1993).

the same day.[384] March argued that the state violated his right to due process by failing to visit and gather evidence at the kill site, which March claimed would have shown that only his companion had shot the moose.[385]

The Alaska Court of Appeals found that March's argument misconstrued the State's duty to preserve evidence,[386] which attaches only after the State takes possession of evidence.[387] Here, the State never had possession of the evidence; therefore, the duty of preservation was never activated.[388]

The Alaska Court of Appeals held in *State v. McLaughlin*[389] that a trial court may not bar the State from presenting evidence of a necessary element of a crime even though the defendant has conceded to that element.[390] The case involved the possession of a concealable firearm by a previously convicted felon.[391] The defendant conceded the existence of a prior felony conviction, and, therefore, the trial court concluded that evidence of prior convictions would be inadmissible unless such evidence became relevant to specific issues arising during trial.[392] The State argued that precluding admission of evidence showing a necessary element of the crime (commission of a prior felony) would leave the jury with an inaccurate impression that the defendant was being prosecuted for permissible conduct (mere possession of a firearm).[393] The court of appeals balanced concerns of strict evidentiary relevance with the State's right to present the "legitimate moral force of [its] evidence."[394] The court adopted the State's reasoning, concluding that while the evidence had the potential to be prejudicial, there was "little basis to distrust the jury's ability to make proper use of necessary evidence, even when that evidence reveals previous wrongdoing by the accused."[395]

State v. Hazelwood[396] was an appeal from the conviction of Captain Joseph J. Hazelwood for grounding the *Exxon Valdez* and

384. *Id.* at 715.
385. *Id.* at 716.
386. *Id.*
387. *Id.*
388. *Id.*
389. 860 P.2d 1270 (Alaska Ct. App. 1993).
390. *Id.* at 1278.
391. *Id.* at 1271.
392. *Id.* at 1272.
393. *Id.* at 1274.
394. *Id.* at 1273 (quoting IX JOHN H. WIGMORE, EVIDENCE § 2591 (1981)).
395. *Id.* at 1277-78.
396. 866 P.2d 827 (Alaska 1993).

spilling eleven million gallons of oil into Prince William Sound.[397] Hazelwood had reported the grounding to the Coast Guard twenty minutes after it occurred.[398] At trial in superior court, Hazelwood moved to dismiss all charges against him, claiming that "all of the State's evidence was derived either directly or indirectly from his notification, and that its admission violated the immunity granted by 33 U.S.C. § 1321(b)(5)."[399]

Section 1321(b)(5), which sets forth the federal reporting requirement for oil and hazardous substances discharges, includes a grant of immunity from criminal prosecution based on the report.[400] Hazelwood had argued before the court of appeals "that by admitting evidence derived from this notification, the superior court violated this statutory grant of immunity."[401] The court of appeals agreed and overturned Hazelwood's conviction.

The State appealed, arguing that their evidence was admissible on either of two rationales: (1) that the State had demonstrated that it had an independent source for its evidence or (2) that the immunity provided by 33 U.S.C. section 1321 (b)(5)[402] was subject to an inevitable discovery exception.[403] First the State argued that the only part of the captain's statement eligible for protection from prosecution was the portion in which Hazelwood stated that the tanker "evidently [was] leaking some oil."[404] The State claimed that any additional information "was reported pursuant to the marine casualty statute,[405] and thus amounted to a source of evidence wholly independent of the immunized statement."[406]

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397. *Id.* at 828.

398. *Id.* Hazelwood stated, "Yeah, ah Valdez back, ah we've, should be on your radar there, we've fetched up ah hard aground, north of Goose Island, off Bligh Reef, and ah evidently leaking some oil and we're gonna be here for awhile and ah, if you want ah, so you're notified, over." *Id.*

399. *Id.*

400. The statute reads in relevant part: "Notification received pursuant to this paragraph or information obtained by the exploitation of such notification shall not be used against any such person in any criminal case, except a prosecution for perjury or for giving a false statement." 33 U.S.C. § 1321(b)(5) (1988) (amended 1990).

401. *Hazelwood*, 866 P.2d at 830.

402. 33 U.S.C. § 1321(b)(5) (1988) (amended 1990).

403. *Hazelwood*, 866 P.2d at 828. The inevitable discovery doctrine is an exception to the exclusionary rule. It allows for the admission of evidence which was obtained through a constitutional violation if that evidence would inevitably have been discovered lawfully. *Id.* at 832.

404. *Id.* at 830.

405. 46 U.S.C. § 6101 (1988) (requiring the reporting of a wide variety of marine casualties).

406. *Hazelwood*, 866 P.2d at 830 (citation omitted).

The Alaska Supreme Court disagreed, finding that federal law required an admissible statement to be "wholly independent" of the immunized statement.[407] Because the statement here was a single radio transmission and could not be divided in the way the State proposed, the supreme court affirmed this portion of the court of appeals' opinion.[408]

The State next contended that the inevitable discovery doctrine applied because it would have discovered and investigated the grounding even if Hazelwood had failed to report it.[409] In determining if such exceptions to the exclusionary rule are valid, the court balances the societal costs of excluding the evidence against the interest in immunizing statements from use in a prosecution.[410] The court found that the State's interest in encouraging parties to report such accidents would not be impaired by the adoption of the inevitable discovery exception. The court decided that the stiff penalties for failing to report a spill contained in 33 U.S.C. section 1321(b)(5) would encourage people to report such accidents even if the statute's grant of immunity might be undermined by the acceptance of this exception to the exclusionary rule.[411] Therefore, the balance weighed in favor of admission, and accordingly the court held that the inevitable discovery exception applied.[412]

2. *Criminal Procedure.* The issue in *Owen v. Matsumoto*[413] was whether the superior court had appellate jurisdiction over a Department of Corrections sentencing calculation. Owen, serving time for armed robbery, applied to the Department of Corrections ("DOC") for review of his sentence calculation.[414] The DOC rejected his claim, and Owen appealed his sentence calculation to the superior court, which dismissed for lack of jurisdiction.[415] The Alaska Supreme Court found no statutory provision conferring upon the superior court the power to review a Department of Corrections administrative decision.[416] Owen argued, however, that an exception was created whenever inmate disciplinary proceedings raised fundamental constitutional

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407. *Id.* at 831.
408. *Id.*
409. *Id.* at 831 n.7.
410. *Id.* at 833.
411. *Id.*
412. *Id.* at 834.
413. 859 P.2d 1308 (Alaska 1993).
414. *Id.*
415. *Id.*
416. *Id.* at 1309.

questions.[417] The court agreed that this was a valid exception, but found that the record of the administrative proceeding was inadequate for review.[418] Hence, the court affirmed the superior court's dismisal of Owen's appeal for lack of appellate jurisdiction and held that the proper procedure for review of Owen's claim was to request post-conviction relief under Criminal Rule 35.1.[419]

The Alaska Court of Appeals held in *Kolkman v. State*[420] that a trial court necessarily removes the voluntariness of the defendant's plea when it rejects a plea agreement.[421] Therefore, the trial court is required to give the defendant the opportunity to either withdraw or affirm the original plea of guilty or no contest.[422] In Kolkman's case, the trial court rejected the initial plea bargain because it called for the imposition of an illegal sentence.[423] However, the trial court never allowed Kolkman an opportunity to withdraw his plea personally in open court.[424] The trial court therefore violated Kolkman's right to make a voluntary and intelligent plea of guilty or no contest by leaving this choice to Kolkman's counsel.[425] Consequently, the amended plea agreement, entered into by Kolkman's counsel, was vacated.[426]

State v. Williams[427] dealt with the issue of collateral estoppel. In *Williams,* the trial court dismissed the defendant's first criminal indictment due to insufficient evidence.[428] The State then reconfigured the charges and succeeded in securing a second indictment from another grand jury.[429] The trial court concluded that substantially the same evidence had been presented to the first and second grand juries[430] and, therefore, collateral estoppel precluded the State from reopening the case.[431]

The Alaska Court of Appeals reversed, noting the three requirements for collateral estoppel: (1) that the issue decided previously must have been precisely the same as that presented in the current litigation; (2) that the previous litigation must have

417. *Id.*
418. *Id.*
419. *Id.* at 1309-10.
420. 857 P.2d 1202 (Alaska Ct. App. 1993).
421. *Id.* at 1209.
422. *Id.*
423. *Id.*
424. *Id.*
425. *Id.* (citing ALASKA R. CRIM. P. 11(c), (d)).
426. *Id.* at 1210.
427. 855 P.2d 1337 (Alaska Ct. App. 1993).
428. *Id.* at 1340.
429. *Id.*
430. *Id.* at 1341.
431. *Id.*

resulted in a final judgment on the merits; and (3) that there must be "mutuality" between the parties involved in the previous and current litigation.[432] The court held that the dismissal of the first indictment did not constitute a final judgment resolving, on the merits, the question of the sufficiency of evidence before the second grand jury.[433] The court explained that a contrary holding would put the collateral estoppel doctrine at odds with the prevailing rule which allows the state to seek reindictment following a dismissal for insufficient evidence.[434]

3. *Sentencing.* The appeal in *Christensen v. State*[435] arose when the defendant pleaded no contest to felony importation of alcoholic beverages into a dry community.[436] Christensen's sentence was suspended, and she was placed on probation for two years. The conditions of her probation were that she spend forty-five days in jail and then, if necessary, participate in residential alcohol treatment of unspecified duration.[437]

Only after Christensen's release from jail did the trial court finalize the sentence by setting a maximum length of residential treatment. Christensen appealed, claiming a violation of the constitutional guarantee against double jeopardy.[438]

The Alaska Court of Appeals agreed with Christensen and reversed the trial court's modification.[439] The court distinguished *Figueroa v. State*,[440] wherein modification was allowed because the trial court had inadvertently failed to specify the length of probation.[441] Specifically, the court noted that until the length of probation is set, a trial court's sentencing order lacks an essential element and can be modified.[442] In Christensen's case, however, the sentencing order contained all of the essential elements (total length of imprisonment, portion of this total to be suspended and length of the defendant's probation).[443] The only flaw lay in one of the probation conditions. The appellate court reiterated the

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432. *Id.* at 1342.
433. *Id.*
434. *Id.* at 1343.
435. 844 P.2d 557 (Alaska Ct. App. 1993).
436. *Id.*
437. *Id.* at 557-58. Such conditioning of probation is authorized, but the court must also specify a maximum length of residential treatment. ALASKA STAT. § 12.55.100(a)(6) (1990).
438. *Christensen*, 844 P.2d at 558.
439. *Id.*
440. 689 P.2d 512 (Alaska Ct. App. 1984).
441. *Id.* at 514.
442. *Christensen*, 844 P.2d at 559.
443. *Id.*

principle that a sentence should not be increased unless absolutely necessary to correct some illegality.[444] The flaw in Christensen's sentence could have been cured by striking the requirement of residential alcohol treatment.[445]

In *Wickham v. State*,[446] the issue on appeal was whether the use of Wickham's prior convictions, which should have been set aside under Alaska Statutes section 12.55.085, was proper for impeachment purposes.[447] Section 12.55.085 affords a sentencing court discretion to set aside a conviction if the person (1) received a suspended sentence and (2) successfully completed his subsequent probation.[448] Alaska Rule of Evidence 609 mandates that a prior conviction can be used for impeachment purposes even if it has been set aside, unless the set-aside procedure "required a substantial showing of rehabilitation."[449] The Alaska Court of Appeals held that under section 12.55.085, a successful completion of probation was a prima facie showing of rehabilitation.[450] By placing the burden on the State to show why the conviction should not be set aside, and by allowing the sentencing court to make the ultimate set-aside decision, section 12.55.085 does require "a substantial showing of rehabilitation."[451] Accordingly, the court concluded that a conviction set aside pursuant to section 12.55.085 may not be used for impeachment purposes.[452]

The State then argued that the convictions should still be available for impeachment purposes because they were not set aside before Wickham was tried on the instant charge.[453] The court disagreed, maintaining that Wickham should not be penalized merely because the prior convictions were not removed from his record in a timely fashion.[454]

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444. *Id.*

445. *Id.*

446. 844 P.2d 1140 (Alaska Ct. App. 1993).

447. *Id.* at 1141.

448. ALASKA STAT. § 12.55.085 (1992).

449. ALASKA R. EVID. 609.

450. *Wickham*, 844 P.2d at 1143.

451. *Id.* at 1144. The instant case arose following a remand in a prior decision in which the court of appeals ordered the superior court to conduct a hearing on whether Wickham's prior convictions should be set aside. Wickham v. State, 770 P.2d 757 (Alaska Ct. App. 1993). The superior court ruled that the convictions should be set aside, at which point the court of appeals, having retained jurisdiction over the appeal, considered the question at issue in this case. *Wickham*, 844 P.2d at 1141.

452. *Id.*

453. *Id.* at 1145.

454. *Id.* at 1146.

4. *Miscellaneous.* *Guertin v. State*[455] presented the issue of whether attempted second-degree sexual assault is a crime under Alaska law,[456] particularly under the rule enunciated in *Huitt v. State*.[457] The holding in *Huitt*, which involved an attempted murder charge, was premised on the idea that "attempt" requires proof of intent.[458] However, once intent to commit murder is established, the state has proven all of the requisite elements of attempted *first*-degree murder.[459] Therefore, the crime of attempted second-degree murder was found to be unnecessary because "anyone who engages in life-threatening conduct with the requisite culpable mental state for attempted murder (intent to kill) is necessarily guilty, not only of 'attempted second-degree murder,' but also of attempted first-degree murder."[460]

The *Guertin* court found that the reasoning in *Huitt* did not, however, preclude the existence of attempted second-degree sexual assault.[461] The court of appeals stated that the crime of sexual assault in the second-degree involves the defendant knowingly engaging in sexual contact with another person with reckless disregard for the other person's consent.[462] The court held that a person is guilty of attempt if he has the intent to commit the crime and takes a substantial step toward its commission.[463] The court found no legal or logical flaw, such as the one in *Huitt*, in asserting that a defendant had committed the crime of attempted second-degree sexual assault.[464] Therefore, the court of appeals ruled that the crime of attempted second-degree sexual assault exists in Alaska when, intending to engage in sexual contact with another person, without regard for that person's lack of consent, a person takes a substantial step toward accomplishing his goal.[465]

In *Hansen v. State*,[466] Hansen appealed his conviction for felony murder because it was neither charged in the indictment nor was it a lesser included offense.[467] The State claimed that in-

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455. 854 P.2d 1130 (Alaska Ct. App. 1993).
456. *Id.* at 1130-32.
457. 678 P.2d 415 (Alaska Ct. App. 1984) (holding that attempted second-degree murder is not a recognizable crime in Alaska).
458. *See* ALASKA STAT. § 11.31.100(a) (1992).
459. *Huitt*, 678 P.2d at 419.
460. *Guertin*, 854 P.2d at 1131.
461. *Id.* at 1132.
462. *Id.* at 1130 (citing ALASKA STAT. § 11.81.610(b) (1992)).
463. *Id.* at 1131 (citing ALASKA STAT. § 11.31.100(a) (1992)).
464. *Id.* at 1132.
465. *Id.*
466. 845 P.2d 449 (Alaska Ct. App. 1993).
467. *Id.* at 451.

structing the jury on felony murder was not error because "the elements of felony murder can be derived by combining selected elements of the [other] crimes charged in Hansen's indictment."[468]

The court of appeals disagreed with the State's argument, stating that it would not expand the doctrine of lesser included offenses to this extent.[469] The court ruled that allowing the court to mesh together disjointed elements of an indictment would stretch "to the breaking point the concept that an indictment must notify the defendant of the charges to be tried."[470]

In *Woodward v. State*,[471] the defendant contested his conviction for extortion,[472] asserting that the trial court erred by refusing to instruct the jury on Woodward's claim-of-right defense.[473] Woodward claimed that he was allowed to use threats to regain his own money,[474] just as a property owner is permitted to use force in defense of his property. Woodward also argued that his behavior was not extortion as defined in the applicable statute because his intended "victim" actually owed him money.[475] Therefore, Woodward had not "obtain[ed] the property of another," as required by the statute.[476]

The Alaska Court of Appeals rejected both arguments. First, the court held that the phrase "property of another" included the money of Woodward's victim since that victim had a possessory interest in the funds which Woodward demanded.[477] Addressing the defense of property analogy, the court acknowledged that this claim-of-right defense was embraced by the Model Penal Code.[478] However, the court also observed that recognition of the defense is clearly the minority view.[479] Moreover, the Alaska Legislature had expressly rejected any such defense when it adopted the Revised Code.[480]

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468. *Id.* at 452.
469. *Id.* at 453.
470. *Id.* at 453-54.
471. 855 P.2d 423 (Alaska Ct. App. 1993).
472. ALASKA STAT. § 11.41.520 (1992).
473. *Woodward*, 855 P.2d at 424.
474. *Id.*
475. Section 11.41.520(a)(1) reads in relevant part: "(a) A person commits the crime of extortion if the person obtains the property of another by threatening or suggesting that either that person or another may (1) inflict physical injury on anyone . . . ." ALASKA STAT. § 11.41.520(a)(1) (1992).
476. *Woodward*, 855 P.2d at 424.
477. *Id.* at 428.
478. *Id.* at 425.
479. *Id.* at 425-26.
480. *Id.*

In *Green v. State*,[481] the defendant appealed his conviction on burglary and theft charges. Green alleged that he should not have been prosecuted because the police had promised immunity from prosecution in exchange for return of the stolen property.[482] The defendant based his claim on the police's alleged assertion to him that "this is not a very serious crime. Just tell us where the wallet is, and you can catch your flight."[483]

The Alaska Court of Appeals, in upholding Green's conviction, examined the case law from several other jurisdictions and decided to "likewise hold that police officers, acting on their own, cannot enter into a binding immunity or non-prosecution agreement with a suspect or defendant."[484] However, the court also held that confessions acquired through these improper promises should not be allowed in as evidence at the trial.[485] In this case, however, the trial court had suppressed Green's confession; therefore, no error existed that would require further relief.[486]

Journey v. State[487] was a consolidated case that presented a single issue on appeal: under what circumstances may courts order criminal records expunged.[488] The court of appeals noted that in Alaska, no rule, statute or court ruling expressly bestows upon sentencing courts the power to expunge criminal records.[489] Therefore, this power, if it is within the court's capacity, must come from an inherent judicial authority.[490]

The court of appeals recognized that the states differ over whether there is an inherent judicial authority to expunge criminal records.[491] Some states completely deny that such power exists, while other states take a more flexible approach, weighing the defendant's constitutional right to privacy against the public's interest in being able to access public records.[492] The court of appeals noted, however, that in every state which has recognized such an inherent judicial authority, the power is to be used sparingly or only in "exceptional circumstances."[493] Finding it

481. 857 P.2d 1197 (Alaska Ct. App. 1993).
482. *Id.* at 1197.
483. *Id.* at 1198.
484. *Id.* at 1201.
485. *Id.*
486. *Id.*
487. 850 P.2d 663 (Alaska Ct. App. 1993).
488. *Id.*
489. *Id.* at 665.
490. *Id.*
491. *Id.*
492. *Id.* at 665-66.
493. *Id.* at 666.

unnecessary to determine whether Alaska would recognize such an inherent authority to expunge records, the court simply held that in neither of the consolidated cases before it were there "exceptional circumstances" that would justify expunging records.[494]

VI. EMPLOYMENT LAW

The Alaska Supreme Court decided a large number of employment law cases in 1993. They are divided into four main subsections: disability causation, disability/impairment determination, administration of disability claims and miscellaneous non-disability cases.

A. Disability Causation

Olsen Logging Co. v. Lawson[495] involved a worker who suffered two serious job-related injuries, one in 1969 and one in 1984, while working for different employers.[496] After the second injury, the Workers' Compensation Board ("Board") set aside the Compromise and Release ("C&R") between the employee and the first employer.[497] The Board determined that the employee was actually totally and permanently disabled after the first injury, which, mistakenly, was not reflected in the C&R.[498] Thus, the first employer was held responsible for all future permanent disability payments to the employee.[499] The superior court affirmed the Board's decision.[500]

The Alaska Supreme Court reversed, holding that "the power to modify *awards* for changed conditions or mistakes of fact expressed under [Alaska Statutes section 23.30.130] does not, however, extend to *settlements*."[501]

The court also found the Board in error for failing to apply the last injurious exposure rule to the 1984 injury.[502] According to the court, the Board's inquiry should have focused on the employee's most recent work injury when it considered his disability claim.[503] If the most recent injury caused, aggravated, accelerated or was in some way a substantial factor in the employee's current inability to work, then the Board should not find a lack of

494. *Id.*
495. 856 P.2d 1155 (Alaska 1993).
496. *Id.* at 1156.
497. *Id.*
498. *Id.* at 1157.
499. *Id.*
500. *Id.*
501. *Id.* at 1158; ALASKA STAT. § 23.30.130 (1990).
502. *Olsen*, 856 P.2d at 1161.
503. *Id.*

causation "merely because a prior injury might also suffice as a concurrent cause of the employee's current disability."[504] The case was remanded with orders to the Board to determine causation consistent with the court's opinion.[505]

Peek v. SKW/Clinton[506] involved the use of the last injurious exposure rule as a defense. An employee's widow brought suit against her husband's many employers, claiming that his death was caused by exposure to asbestos.[507] After ten of the former employers settled with the plaintiff, including the husband's last employer,[508] the Workers' Compensation Board dismissed the claim against the second-to-last employer, citing the last injurious exposure rule.[509]

In objecting to the dismissal, the employee's widow argued that the rule is meant to be a weapon for an employee, not a shield for an employer.[510] The court rejected her argument and held that where "the last employer was at one time properly before the adjudicating authority, but is later removed from the case by a voluntary act of the worker, the worker cannot avoid application of the last exposure rule."[511]

Childs v. Copper Valley Electric Ass'n[512] involved an employee who claimed that a chronic breathing disorder was caused by urethane smoke that he inhaled on the job.[513] The employee sued for temporary total disability benefits ("TTD"), permanent partial disability benefits ("PPD") and attorney's fees.[514] He also sought medical expenses (plus interest) that his employer, Copper Valley Electric Association ("CVEA"), had offered to pay for but did not.[515] Furthermore, he contended that CVEA owed him a penalty for failure to pay the medical expenses as promised.[516]

The court first concluded that CVEA successfully rebutted the presumption of compensability.[517] The court rejected the employee's argument that the medical experts had to offer alternative

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504. *Id.*
505. *Id.*
506. 855 P.2d 415 (Alaska 1993).
507. *Id.* at 416.
508. *Id.*
509. *Id.*
510. *Id.*
511. *Id.* at 418.
512. 860 P.2d 1184 (Alaska 1993).
513. *Id.* at 1186.
514. *Id.*
515. *Id.*
516. *Id.*
517. *Id.* at 1189.

explanations for his breathing disorder.[518] It was enough that the medical experts determined that the work-related smoke inhalation was most likely not a substantial cause.[519]

The court next rejected the employee's argument that CVEA had failed to meet the substantial evidence burden because one of its expert witnesses did not even examine him, but only studied his medical records.[520] The court noted that this witness' opinion did not stand alone.[521] Thus, the opinion of this witness, coupled with testimony from an expert witness who did examine the employee, constituted substantial evidence supporting the view that the injury was not work-related.[522]

The court also ruled that CVEA's voluntary payment of some of the employee's initial medical bills and TTD benefits did not equitably estop CVEA from denying further liability.[523] The court did not want to discourage employers from voluntarily helping injured workers.[524]

Finally, with respect to the unpaid medical expenses, since the offer of payment for such expenses was tantamount to a Board award, the court held that the employee was entitled to interest and attorney's fees on the promised, but unpaid, portion.[525] Moreover, the court interpreted the word "compensation" in Alaska Statutes sections 23.30.155(b) and (e) to include medical benefits.[526] Thus, the court held that CVEA should have been assessed a penalty (set forth in subsection (e)) of twenty percent of the promised, but unpaid, medical expenses.[527]

B. Disability/Impairment Determination

In *Rydwell v. Anchorage School District*,[528] the Alaska Supreme Court determined that the American Medical Association's *Guides to the Evaluation of Permanent Impairment* ("*Guides*"), which are statutorily required for determinations of permanent partial impairment compensation,[529] also control determinations of permanent impairment and eligibility for

518. *Id.*
519. *Id.*
520. *Id.*
521. *Id.*
522. *Id.* at 1189-90.
523. *Id.* at 1190.
524. *Id.*
525. *Id.*
526. *Id.* at 1192; ALASKA STAT. § 23.30.155 (1990).
527. *Childs*, 860 P.2d at 1192.
528. 864 P.2d 526 (Alaska 1993).
529. ALASKA STAT. § 23.30.190(b) (1990).

vocational rehabilitation.[530] The court held that section 23.30.190-(b) did govern such determinations under section 23.30.041(f)-(3).[531] The court's holding affirmed a reversal of the Alaska Workers' Compensation Board.[532]

An employee is not eligible for vocational rehabilitation benefits if "at the time of medical stability no permanent impairment is identified or expected."[533] In the present case, although the employee suffered from a measurable physical impairment,[534] the impairment translated into a zero permanent impairment rating under the AMA's *Guides*.[535] This was the crux of the case.

The court noted that section 23.30.041, which governs the award of vocational rehabilitation rights, does not define "permanent impairment."[536] The only other statutory section in which the term is found, section 23.30.190(b), prescribes the use of the AMA's *Guides* to determine a permanent partial impairment,[537] but does not indicate the Guides' applicability to the rest of the Workers' Compensation Act.[538]

Nonetheless, the court concluded that the legislature intended "permanent impairment" to mean the same thing in both code sections.[539] The court also found that its interpretation of "permanent impairment" in determinations of vocational rehabilitation eligibility would mesh with the overall workers' compensation benefit scheme intended by the legislature.[540] The court noted that if an impairment which registered zero under the AMA's *Guides* could nonetheless be termed a "permanent impairment," that would run contrary to the legislature's goals of predictability, objectivity and cost-reduction.[541]

Yahara v. Construction & Rigging, Inc.,[542] reaffirmed the propriety of the Board's reliance on a single physician's testimony to support its decision to award reemployment benefits under Alaska Statutes section 23.30.041.[543] Two physicians and an occupational

530. ALASKA STAT. § 23.30.041(f)(3) (1990).
531. *Rydwell*, 864 P.2d at 526.
532. *Id.* at 528.
533. ALASKA STAT. § 23.30.041(f)(3) (1990).
534. *Rydwell*, 864 P.2d at 529.
535. *Id.*
536. *Id.*
537. ALASKA STAT. § 23.30.190(b) (1990).
538. *Rydwell*, 864 P.2d at 529.
539. *Id.*
540. *Id.* at 529-30.
541. *Id.*
542. 851 P.2d 69 (Alaska 1993).
543. ALASKA STAT. § 23.30.041 (1990).

therapist offered conflicting testimony at the hearing.[544] One physician and the therapist believed that the employee could resume working at his old job.[545] The court disregarded the occupational therapist because she was not a physician, as required under section 23.30.041.[546] The court then affirmed the Board's decision to award benefits on the testimony of the contrariant physician.[547] The court noted that the Board's decision would always be affirmed when it elected one physician's opinion over another as long as the opinion constituted substantial evidence.[548] Since it was reasonable to infer that the contrariant physician relied on his own training, experience and knowledge of the employee's condition, it fulfilled the substantial evidence test.[549]

C. Administration of Disability Claims

Anchorage School District v. Hale[550] held that the Board's promulgation of a single standard of treatment frequency to apply to all ailments satisfied its statutory mandate to "'adopt regulations establishing standards for frequency of treatment.'"[551] Hale, an employee injured on the job, argued that the Board was required to set forth many frequency standards for varied job-related injuries.[552]

Looking to the legislative history, the court determined that while the legislature hoped that the Board would calculate different standards based on type of injury, it did not require the Board to do so.[553] Therefore, the court held that "the single standard regulation [was] not inconsistent with the statute."[554]

In *Wausau Insurance. Co. v. Van Biene*,[555] Mrs. Van Biene's husband was killed during the course and scope of his employment.[556] The employer's workers' compensation insurer, Wausau, indicated to Mrs. Van Biene (both orally and in writing) that her insurance benefits would be decreased if she was also receiving

544. *Yahara*, 851 P.2d at 71.
545. *Id.*
546. *Id.* at 73.
547. *Id.*
548. *Id.* at 72.
549. *Id.* at 73.
550. 857 P.2d 1186 (Alaska 1993).
551. ALASKA STAT. § 23.30.095(c) (1990).
552. *Anchorage Sch. Dist.*, 857 P.2d at 1189.
553. *Id.* at 1190-91.
554. *Id.* at 1191.
555. 847 P.2d 584 (Alaska 1993).
556. *Id.*

social security survivor benefits.[557] Mrs. Van Biene never responded to Wausau's subsequent request for information that would allow it to obtain data from the Social Security Administration.[558]

Three years later Mrs. Van Biene asked Wausau to send a summary of her insurance benefits to a mortgage company.[559] Wausau responded with a letter that did not mention either the possible social security offset or the right to be reimbursed by Mrs. Van Biene for past overpayments.[560]

One year later, Wausau repeatedly asked Mrs. Van Biene's attorney for information concerning the possible receipt of social security benefits.[561] After the attorney failed to respond,[562] Wausau finally subpoenaed the information from the Social Security Administration.[563]

The Social Security Administration verified that Mrs. Van Biene had been receiving social security benefits all along.[564] Wausau subsequently petitioned the Board to order that payments to Mrs. Van Biene be reduced to offset both her past and future social security benefits.[565] The Board ruled that Wausau, through inaction, had waived its rights to both past and future offsets.[566]

On appeal, the court concluded that the Board had the authority to invoke equitable principles to preclude a workers' compensation insurer from asserting statutory rights.[567] Nonetheless, the court reversed the Board's decision[568] on the ground that Wausau's behavior did not amount to an express or implied waiver of its rights to a setoff.[569] The court found it significant that Mrs. Van Biene was notified of the setoff possibility both orally and in writing and therefore could not have been prejudiced when Wausau finally took action.[570]

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557. *Id.* at 584-85.
558. *Id.* at 585.
559. *Id.*
560. *Id.*
561. *Id.* at 585-86.
562. *Id.*
563. *Id.*
564. *Id.*
565. *Id.*
566. *Id.*
567. *Id.* at 586-87.
568. *Id.* at 589.
569. *Id.*
570. *Id.*

D. Miscellaneous Non-Disability Cases

In *Kodiak Island Borough v. State*,[571] the Alaska Supreme Court invalidated the Kodiak Island Borough's 1980 resolution to opt out of the 1972 Public Employment Relations Act ("PERA").[572] The court based its rejection on the fact that the Borough did not resolve to reject PERA until after it discovered activity by its employees directed toward unionization.[573] The court rejected the Borough's attempt to distinguish *State v. City of Petersburg*,[574] holding instead that *Petersburg* invalidated any rejection of PERA which occurred after the local government became aware that its employees had begun substantial organizing activities.[575] Since the Borough opted out of PERA under those circumstances, the court invalidated the rejection.[576]

In *Breck v. State Department of Labor*,[577] the Alaska Supreme Court held that "corporate officers who exercise significant control over a corporation's finances may be held personally liable for the entire [employment security] contribution owed by the corporation" under the Alaska Employment Act.[578] Under the Act, employers must pay employment security contributions to the State based on the wages paid to employees.[579] Both the employer and the employee pay a portion of the contributions.[580]

The court noted that the Act does not distinguish between the employer and employee portions of the required contribution.[581] Instead, the whole amount due is collectible from the responsible corporate officers and employees.[582]

Moreover, the court did not find the Act's reach to be overly broad since it does not hold every officer or employee liable.[583] The only personally liable officers are those whose duty it is to see that the contributions are paid on behalf of the corporation.[584] As president, chief executive officer and principal shareholder of

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571. 853 P.2d 1111 (Alaska 1993).
572. *Id.* at 1111-12; ALASKA STAT. § 23.40.070-.260 (1990).
573. *Kodiak Island Borough*, 853 P.2d at 1112.
574. 538 P.2d 263 (Alaska 1975).
575. *Kodiak Island Borough*, 853 P.2d at 1114.
576. *Id.*
577. 862 P.2d 854 (Alaska 1993).
578. *Breck*, 862 P.2d at 855.
579. ALASKA STAT. § 23.20.165 (1990).
580. *Id.*
581. *Breck*, 862 P.2d at 856.
582. *Id.*
583. *Id.*
584. *Id.*

his corporation, Mr. Breck was found to satisfy the test.[585] The other litigant in this consolidated case, who was president, director and majority shareholder of his company, also met the test.[586]

VII. FAMILY LAW

In 1993, the Alaska Supreme Court decided many cases in the area of family law. These cases are divided according to their principal issues: child support and custody, paternity and property division.

A. Custody and Child Support

In *Wright v. Gregorio*,[587] the supreme court held that if a child resides with a parent for a period specified in writing then that parent has shared physical custody regardless of the status of legal custody.[588] The court determined that the trial court had failed to take this rule into account when computing child support obligations.[589] Shared custody formulas should have been used unless the trial court found that "either party presented clear and convincing evidence that the formula's application would have led to manifest injustice."[590] Because the lower court had not made specific factual findings as to the income of the parties involved and the resulting child support obligations, the lower court's decision was reversed and remanded.[591]

Eagley v. Eagley[592] addressed an appeal from the superior court's determination of income for the purpose of calculating child support.[593] Alaska Rule of Civil Procedure 90.3, which governs the calculation of adjusted income in child support determinations,[594] defines adjusted annual income as "'the parent's total income from all sources' minus specified items."[595] The court previously has held that such a broad definition gives the superior court discretion in determining whether amounts voluntarily deposited in deferred income compensation accounts should be

585. *Id.* at 857.
586. *Id.*
587. 855 P.2d 772 (Alaska 1993).
588. *Id.* at 773 (citing ALASKA R. CIV. P. 90.3(f) (period specified in writing must be at least 30% of the year)).
589. *Id.*
590. *Id.* at 774.
591. *Id.*
592. 849 P.2d 777 (Alaska 1993).
593. *Id.* at 778.
594. *Id.* at 779.
595. *Id.* (quoting ALASKA R. CIV. P. 90.3(a)).

included in calculating income.[596] The court also has held that "a child support award will not be overturned absent a finding of clear abuse of discretion."[597] Applying these standards, the Alaska Supreme Court held that the superior court did not err in including accrued but unpaid interest in its calculation of income.[598]

The court did hold that a deduction for straight-line depreciation of a business's real estate should be allowed, as long as the depreciation does not contain any acceleration.[599] This qualification was made in response to the rather liberal IRS rules allowing for inclusion of accelerated components in depreciation expenses.[600] Finally, the Alaska Supreme Court held that the superior court did not abuse its discretion in denying deduction of principal payments.[601]

In *T.M.C. v. S.A.C.*,[602] the supreme court upheld the trial court's *sua sponte* finding that a change of circumstances required the award of sole custody of the couple's daughter to the mother.[603] Soon after the divorce, the father sought modification of the trial court's custody order, alleging changed circumstances required an award of sole custody to him.[604] Instead of finding the changed circumstances alleged by the father, however, the court found some changed circumstances existed "with regard to the ability of the parents to communicate and make decisions together," and awarded sole custody to the mother.[605]

On appeal, the court examined whether a trial court, on its own motion, can find a change of circumstances in a child custody case.[606] The court held that "the trial court may decide [such] issues on its own motion, as long as a party has raised them and both sides have the opportunity to present full testimony."[607] The mother's brief included a changed circumstances argument, putting the father on notice that she would make the argument.[608] Furthermore, at the evidentiary hearing, the father was given full

596. *Id.* (citing Bergstrom v. Lindback, 779 P.2d 1235, 1237 (Alaska 1989)).
597. *Id.* at n. 1 (quoting Richmond v. Richmond, 779 P.2d 1211, 1216 (Alaska 1989)).
598. *Id.* at 780.
599. *Id.* at 781.
600. *Id.*
601. *Id.* at 782.
602. 858 P.2d 315 (Alaska 1993).
603. *Id.* at 316.
604. *Id.* at 316-17.
605. *Id.* at 317.
606. *Id.* at 318.
607. *Id.* at 318-19.
608. *Id.* at 319.

opportunity to present his evidence and argue the merits of the case.[609]

The court held in *In Re J.B.K and T.S.K.*[610] that a remarriage following some years of divorce renders previous periods of nonsupport irrelevant in determining whether there had been a forfeiture of parental rights.[611] The natural father had failed to provide support for two years after the first divorce.[612] Since that time, however, the couple reconciled, remarried and then subsequently divorced for a second time.[613] The court reasoned the remarriage should be treated as a "renewal of their rights and obligations as parents."[614] Therefore, "[d]isputes over custody and child support existing between the parties prior to the remarriage should be put to rest as well."[615]

The Alaska Supreme Court remanded the case on other grounds, however. The court held that the trial court erred in denying a hearing on the natural father's alleged abuse of his children.[616] In so holding, the supreme court rejected the father's claims that a Child in Need of Aid ("CINA") adjudication must precede adoption proceedings when parental rights are to be terminated under Alaska Statutes section 25.23.180(c)(1).[617]

In *F.T. v. State*,[618] the court reversed the trial court's order placing a child in the custody of the Department of Family Services ("DFYS").[619] First, the court noted that the State had confused "willingness to care" with "ability to satisfy needs."[620] A finding that the parents cannot solve all the problems of a child with severe emotional difficulties does not support a conclusion that there is no willingness to care for the child.[621]

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609. *Id.*

610. 865 P.2d 737 (Alaska 1993).

611. *Id.* at 738. This issue became the subject of litigation when the mother's new husband brought adoption proceedings for custody of his step-children. Under Alaska Statutes section 25.23.050 (a)(2), a parent's consent to adoption is not required if the parent significantly fails for at least one year to provide care and support for the child. This one-year period need not be the year immediately preceding the adoption petition. *See In re* J.J.J., 178 P.2d 948 (Alaska 1986).

612. *In re J.B.K.*, 865 P.2d at 737.

613. *Id.*

614. *Id.* at 739.

615. *Id.*

616. *Id.* at 740.

617. *Id.* The provision authorizes the court to terminate parental rights in adoption proceedings on grounds including child abuse.

618. 862 P.2d 857 (Alaska 1993).

619. *Id.* at 859.

620. *Id.* at 861.

621. *Id.*

The court also reversed the trial court's finding that there would be "imminent and substantial harm" if the child were placed with the father.[622] The trial court's conclusion was based on judicial notice of previous domestic violence restraining orders.[623] Unlike a fact proven at trial, the court reasoned, a fact alleged in a restraining order is subject to reasonable dispute.[624] Thus, it was error for the court to take judicial notice of the orders for the purpose of proving a history of violence.[625]

B. Paternity

In *Smith v. Smith,*[626] the supreme court adopted the long-standing common law rule that a child born to a married woman is presumed to be the offspring of her husband.[627] The court also ruled that the superior court's failure to indicate the standard of proof it required to rebut the presumption of paternity mandated remand for a determination of whether the husband overcame the presumptions of paternity.[628]

In *Wright v. Black,*[629] Wright claimed he was given inadequate notice that his motion for paternity testing would be considered at the child support hearing.[630] Such inadequate notice, he asserted, violated his constitutional right to due process of law under the Alaska Constitution.[631] The court acknowledged that Wright was not told until the hearing began that paternity would be addressed.[632] The court found, however, that Wright failed to preserve his right to appeal since he failed to object at the hearing when the Divorce Master asked if anyone had a problem with addressing both issues.[633] The court held that "even a *pro se* litigant must make some attempt to assert his or her rights."[634]

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622. *Id.* at 862.
623. *Id.* at 863.
624. *Id.* at 863-64.
625. *Id.* at 864.
626. 845 P.2d 1090 (Alaska 1993).
627. *Id.* at 1092.
628. *Smith,* 845 P.2d at 1092-93. The scientific presumption found in Alaska Statutes section 25.20.050(d) also implicated the husband. ALASKA STAT. § 25.20.-050(d) (1991) ("A scientifically accepted procedure that establishes a probability of parentage at 95 percent or higher creates a presumption of parentage that may be rebutted only by clear and convincing evidence.").
629. 856 P.2d 477 (Alaska 1993).
630. *Id.* at 478.
631. *Id.*
632. *Id.* at 480.
633. *Id.*
634. *Id.*

Moreover, the court dismissed Wright's claims that he should not have been estopped from denying paternity.[635] For determinations of the applicability of equitable estoppel, the court adopted the standards set forth in *Clevenger v. Clevenger,* a California case.[636] As the *Clevenger* standards were met in this case, the court held that estoppel was appropriate.[637]

C. Property Division

The Alaska Supreme Court in *Olson v. Olson*[638] held that loss of employment after entry of a divorce decree did not constitute sufficient grounds for modifying the decree under Alaska Rules of Civil Procedure 60(b)(1), (2), (5), and/or (6).[639] The court first ruled that termination of employment, although unexpected, did not constitute surprise under the meaning of Rule 60(b)(1), which covers only events that occur prior to the entry of judgment.[640] The court likewise denied the Rule 60(b)(2) motion because "newly discovered evidence" must "relate to facts which were in existence at the time of the trial."[641] The court denied the Rule 60(b)(5) motion because other components of the property settlement prevented the sudden termination of employment from placing the appellant in "an inferior economic position" to his ex-spouse or making the distribution of assets "any more inequitable than [they] already [were]."[642] Finally, the supreme court concluded that it would not grant a Rule 60(b)(6) motion without evidence that the underlying assumptions of the dissolution agreement had been destroyed, as required by *Clauson v. Clauson.*[643]

In *Keffer v. Keffer,*[644] the court held that a dissolution agreement excluding "[i]income earned outside of primary place of

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635. *Id.* at 481 (citing cases from Florida, Michigan and Montana).

636. *Id.* at 481 (citing Clevenger v. Clevenger, 11 Cal. Rptr. 707 (Cal. Ct. App. 1961)). The standards for equitable estoppel are as follows:

> (1) [r]epresentation (direct or implied) of husband to child that he is the father; (2) husband intended his representation to be accepted and acted on by the child; (3) child relied on the representation and treated husband as father and gave his love and affection to husband; and (4) child was ignorant of the true facts.

Clevenger, 11 Cal Rptr. at 714.

637. *Wright,* 856 P.2d at 481.

638. 856 P.2d 482 (Alaska 1993).

639. *Id.*

640. *Id.* at 484.

641. *Id.* (quoting Patrick v. Sedwick, 413 P.2d 169, 177 (Alaska 1966)).

642. *Id.* at 485.

643. *Id.* (citing Clauson v. Clauson, 831 P.2d 1257 (Alaska 1992)).

644. 852 P.2d 394 (Alaska 1993).

employment" does not include retirement benefits.[645] The appellant accepted an early retirement opportunity and ceased support payments;[646] the superior court reasoned that such a "voluntary retirement" did not exempt appellant from paying support.[647]

The supreme court reversed, concluding that its power was limited by the term "primary place of employment."[648] The court dismissed concerns about the breadth of the appellant's control over the payments by noting his control remained limited by the implied covenant of good faith and fair dealing.[649] Since the appellant's acceptance of early retirement did not constitute bad faith, the court held there was no obligation to continue support payments.[650]

In *Root v. Root*,[651] the supreme court held that a non-vested pension is marital property subject to division.[652] The court stated that the best approach is to insist that the parties come forward with evidence detailing the present value of those benefits.[653] If the pension does vest, then the value at the time of the divorce can be divided.[654]

VIII. FISH AND GAME LAW

In 1993, the Alaska Court of Appeals and the Alaska Supreme Court decided three cases concerning fish and game law. The first case addressed the consequences of ambiguous orders; the second addressed several issues concerning fines; and the third dealt with the transferability of fishing permits. Each will be discussed in turn.

In *State v. Martushev*,[655] the Alaska Court of Appeals upheld an emergency order issued by the Department of Fish and Game against a due process claim of vagueness. The emergency order had authorized a temporary extension of a weekly fishing period in a limited area for a limited time.[656] Boundaries had been set out

645. *Id.* at 398.
646. *Id.* at 396.
647. *Id.* at 398.
648. *Id.*
649. *Id.*
650. *Id.* at 398-99.
651. 851 P.2d 67 (Alaska 1993).
652. *Id.* at 68.
653. *Id.* at 69.
654. *Id.*
655. 846 P.2d 144 (Alaska Ct. App. 1993).
656. *Id.* at 146.

in the order in reference to a man-made landmark.[657] A commercial fisherman who was charged with fishing outside of a regulated area argued the order was void for vagueness since it did not specify the actual latitude of the boundary.[658]

The court rejected the challenge, holding that the defendant failed to meet the burden of proof.[659] It was not enough to show that the order could have been better defined. Rather, the defendant affirmatively must have shown that "he did not know and could not have learned, through reasonable inquiry, the location of [the boundary]."[660] The fisherman failed to meet the burden because he could not show (1) that the latitude of the manmade object was unpublished, (2) that he made reasonable efforts to determine the object's location, and (3) that he subjectively and reasonably believed his conduct was legal.[661] According to the court, the regulated nature of commercial fishing imposed a special duty on commercial fishermen to comply with the regulations.[662]

In *McNabb v. State*,[663] the court of appeals rejected the plaintiff's charge that the ordered forfeiture amount was exorbitant.[664] McNabb was charged with violating a law prohibiting the use of non-pelagic trawl gear within the waters of King Crab Registration Area M.[665] Pursuant to Alaska Statutes section 16.05.723(a),[666] the sentencing court ordered him to pay a forfeiture of $39,758.40, an amount equal to the fair market value of all the fish on board his boat on the day of the alleged violation.[667]

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657. *Id.*
658. *Id.* at 148.
659. *Id.*
660. *Id.* at 150.
661. *Id.*
662. *Id.*
663. 860 P.2d 1294 (Alaska Ct. App. 1993).
664. *Id.* at 1297.
665. *Id.* at 1296.
666. The subsection 16.05.723(a) reads, in pertinent part, as follows:

> The court shall order forfeiture of any fish, or its fair market value, taken or retained as a result of the commission of the violation. . . . For purposes of this subsection, it is a rebuttable presumption that all fish found on board a fishing vessel used in or in aid of a violation, or found at the fishing site, were taken or retained in violation of [Alaska Statutes sections] 16.05.440-16.05.690 or a commercial fisheries regulation of the Board of Fisheries or the department, and it is the defendant's burden to show by a preponderance of the evidence that fish on board or at the site were lawfully taken and retained.

ALASKA STAT. § 16.05.723(a) (1992).
667. *McNabb*, 860 P.2d at 1296.

Although McNabb received $39,758.40 for fish caught on four separate tows that day, he was convicted only for the fourth tow, as charges regarding the first three tows had been dismissed.[668] The court of appeals reversed this result, finding Alaska Statutes section 16.05.723(a) to be ambiguous and construing the section to provide for forfeiture only of fish taken or retained as a result of the acts for which McNabb was convicted.[669]

In addition to the forfeiture, the sentencing court imposed a fine of $39,758.40 pursuant to section 16.05.723(b),[670] of which the court suspended $20,000.00.[671] McNabb contended the additional fine was improper because it exceeded the value of the fish taken in the tow for which he was convicted.[672] The court of appeals disagreed, finding the rule under subsection (a) and subsection (b) to differ. It held that the size of the fine imposed under subsection (b) did not depend on the amount of fish taken as a result of the crime.[673] Rather, the subsection imposes a fine based on the value of all fish found aboard a vessel, whether or not they were taken illegally.[674]

Moreover, the court held the fine imposed against McNabb was not grossly disproportionate to the crime, and, as such, not violative of the United States or Alaska constitutions.[675] The court of appeals did remand the case to determine the appropriate forfeiture amount in light of the former Alaska Statutes section 12.55.035(a),[676] however, as the sentencing court had failed to "take into account the financial resources of the defendant."[677] In *Pavone v. Pavone*,[678] the Alaska Supreme Court declared unenforceable an oral promise to transfer a fishing permit. Under Alaska Statutes section 16.43.150(g)(2), "an entry permit may not be . . . transferred with any retained right of repossession or foreclosure, or on any condition requiring a subsequent transfer."[679] The court noted that when legislation explicitly states

668. *Id.* at 1296-97.
669. *Id.*
670. Under subsection 16.05.723(b), a court may impose "a fine equal to the gross value of the fish found on board . . . at the time of the violation." ALASKA STAT. § 16.05.723(b) (1992).
671. *McNabb*, 860 P.2d at 1296.
672. *Id.* at 1298.
673. *Id.*
674. *Id.*
675. *Id.* at 1299.
676. *Id.*
677. *Id.*; ALASKA STAT. § 12.55.035(a) (1990).
678. 860 P.2d 1228 (Alaska 1993).
679. ALASKA STAT. § 16.43.150(g)(2) (1990).

that a particular type of promise is unenforceable, then the party seeking to enforce the promise will have no judicial recourse.[680]

IX. NATIVE LAW

The 1993 Alaska Supreme Court cases turning on the interpretation of Native Law implicated the Indian Child Welfare Act.

K.N. v. State[681] clarified the burden of proof requirements for termination of parental rights over a Native child. The DFYS must prove, among other things:

> by a preponderance of the evidence that the party requesting the termination of parental rights has shown that active efforts have been made to provide remedial services and rehabilitative programs designed to prevent the break-up of the Indian family and that these efforts have proved unsuccessful.[682]

K.N. argued the Indian Child Welfare Act ("ICWA")[683] preempts the CINA rule and requires DFYS to prove *beyond a reasonable doubt* that active remedial efforts had been unsuccessful.[684] K.N. argued precedent from other jurisdictions and "the fundamental purpose of ICWA—to prevent the breakup of Indian families"—compelled the higher burden of proof.[685] The Alaska Supreme Court was unpersuaded, however, and concluded the plain language of the statute and relevant legislative history required only an affirmative showing by a preponderance of the evidence that active efforts by the State to keep the family together failed.[686] The court held that the State had satisfied such a burden.[687]

In *In re F.H.*,[688] the Native Village of Noatak and DFYS opposed the adoption of a Native child by a non-Native couple.[689] The ICWA provides that unless there is good cause to the contrary, "preference shall be given . . . to a placement with (1) a member of the child's extended family; (2) other members of the Indian child's tribe; or (3) other Indian families."[690]

The court found four factors which constituted good cause to deviate from the ICWA preferences. First, the biological mother

680. *Pavone*, 860 P.2d at 1231-32.
681. 856 P.2d 468 (Alaska 1993).
682. C.I.N.A. R. P. 18(c)(2); 25 U.S.C. § 1912(d) (1983) (emphasis added).
683. 25 U.S.C. § 1912(d) (1978).
684. *K.N. v. State*, 856 P.2d at 475.
685. *Id.* at 476.
686. *Id.*
687. *Id.* at 477.
688. 851 P.2d 1361 (Alaska 1993).
689. *Id.* at 1362.
690. 25 U.S.C. § 1915(a) (1983).

preferred that the non-Native couple adopt F.H.[691] The court noted that the ICWA and guidelines put forth by the Bureau of Indian Affairs both indicate that parental preference may be considered by courts.[692] Second, there was a bond developing between the prospective mother and F.H.[693] Third, the child's situation would be uncertain if the adoption were denied.[694] Fourth, the adoption by the non-Native couple would be an open one where the biological mother could more easily visit the child.[695]

X. PROCEDURE

Alaska Courts often face procedural questions intermixed with substantive issues as cases rise to the appellate level. The past year was no exception. A strong strand of procedural issues can be distinguished in the cases that follow, however. The case summaries are divided into four categories: attorney's fees, statute of limitations, discovery and miscellaneous.

A. Attorney's Fees

In *Singh v. State Farm Mutual Automobile Insurance Co.*,[696] the Alaska Supreme Court clarified the standards under which attorney's fees should be awarded to a civil rights litigant who settles the lawsuit before trial. The 1976 Civil Rights Attorney's Fees Awards Act, which governs the award of attorney's fees, reads in relevant part: "the court, in its discretion, may allow the prevailing party, other than the United States, a reasonable attorney's fee as part of the costs."[697]

The court held that a plaintiff who enters into a settlement agreement must meet two requirements to prove that he is the "prevailing party." First, "the plaintiff's suit must have *caused* the plaintiff's achievement of his desired goal in the litigation."[698] This requirement was easily met in this case, since the plaintiff's suit resulted in a settlement for money damages.[699] Second, "the claim forming the basis of section 1988 fees must not 'lack

691. *F.H.*, 851 P.2d at 1364-65.
692. *Id.* at 1364.
693. *Id.* at 1365.
694. *Id.*
695. *Id.*
696. 860 P.2d 1193 (Alaska 1993).
697. 42 U.S.C. § 1988 (Supp. 1992).
698. *Singh*, 860 P.2d at 1198.
699. *Id.*

colorable merit.'"[700] The plaintiff alleged racial discrimination in violation of 42 U.S.C. section 1981 in State Farm's refusal to pursue a fair settlement earlier.[701] Section 1981 reads in pertinent part: "All persons within the jurisdiction of the United States shall have the same right in every State and Territory to make and enforce contracts."[702] Since it is well established that a settlement agreement is a contract, the court concluded the plaintiff pled a colorable section 1981 claim.[703]

The court then examined the reasonableness of the attorney's fees. Singh had settled for $17,501 and claimed $31,920 in attorney's fees.[704] The superior court reduced the amount of fees.[705] The supreme court concluded the overall complexity of civil rights litigation and the degree of success achieved by Singh's attorney justified his attorney's fees claim.[706] Since awarding full attorney's fees is the norm under section 1988 if they are reasonable, the court found that the superior court abused its discretion by not awarding the full amount.[707] The court also rejected State Farm's argument that awarded fees could not be greater than settlement damages.[708]

B. Statute of Limitations

In *Hernandez-Robaina v. State*,[709] the plaintiff, who was originally from Cuba and under the supervision of the Immigration and Naturalization Service, had been held in federal custody because of a damaging psychiatric evaluation written while he was in state custody on trespassing charges.[710] Hernandez wished to sue the State of Alaska, the municipality of Anchorage, and the psychiatrist for his improper detention, but the defendants moved to dismiss on the grounds that the statute of limitations had run and on sovereign immunity.[711] The plaintiff argued his inability to understand

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700. *Id.* (quoting Hennigan v. Ouachita Parish Sch. Bd., 749 F.2d 1148, 1152-53 (5th Cir. 1985)).

701. *Id.*

702. 42 U.S.C. § 1981 (1988).

703. *Singh*, 860 P.2d at 1199.

704. *Id.* at 1196-97.

705. *Id.* at 1197.

706. *Id.* at 1200-01.

707. *Id.*

708. *Id.* at 1202 (citing City of Riverside v. Riveria, 477 U.S. 561, 575 (1986) (upholding an award of $245,456.25 in attorney's fees where the damages award was only $33,350)).

709. 849 P.2d 783 (Alaska 1993).

710. *Id.* at 783.

711. *Id.* at 784.

English made him incompetent, tolling the statute of limitations.[712] On appeal, the supreme court held that the statute of limitations was not tolled, reasoning it should be suspended on incompetency grounds only when a plaintiff is unable to understand his legal rights.[713] The court ruled that the incompetency exception concerned a person's mental *capacity* to understand, not his *actual* understanding of, his rights, and therefore the exception should not apply if the petitioner could have understood his rights once properly communicated to him.[714]

C. Discovery

In *McNett v. Alyeska Pipeline Service Co.*,[715] the Alaska Supreme Court affirmed the trial court's refusal to allow a deposition prior to the filing of an action.[716] McNett filed a petition to depose a witness under Alaska Rule of Civil Procedure 27(a)[717] before she filed an action.[718] McNett stated that she needed more information before she could bring an action for breach of contract and wrongful termination.[719] The trial court refused McNett's petition and awarded attorney's fees to Alyeska.[720]

In affirming the trial court, the supreme court considered authorities on the equivalent federal rule,[721] which hold that the discovery rule is not to be used to determine whether a cause of action exists.[722] The party wishing to conduct discovery before filing an action must show that it expects to bring a lawsuit but is unable to do so until he has gained more facts.[723]

The court found that McNett failed to show specific reasons for her inability to bring an action at the time of her discovery

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712. *Id.* at 783.

713. *Id.* at 785; ALASKA STAT. § 09.10.140(a)(2) (1992) (tolls statute of limitations for persons "incompetent by reason of mental illness or mental disability").

714. *Hernandez*, 849 P.2d at 784-85.

715. 856 P.2d 1165 (Alaska 1993).

716. *Id.* at 1166.

717. Rule 27 states that before an action is brought, "[a] person who desires to perpetuate . . . testimony . . . of another person regarding any matter that may properly be the subject of an action or proceeding in any court of the state, may file a verified petition in the superior court." ALASKA R. CIV. P. 27(a).

718. *McNett*, 856 P.2d at 1166.

719. *Id.*

720. *Id.*

721. The court decided such analysis was proper since the state rule was based on the federal rule. *Id.* at 1168 n.2 (citing Fenner v. Bassett, 412 P.2d 318, 321 (Alaska 1966)).

722. *Id.* at 1168 (citing In Re Boland, 79 F.R.D. 665, 668 (D.D.C. 1978)).

723. *Id.*

petition.[724] Furthermore, the court rejected McNett's claim that the state rule should be interpreted in light of Alaska's unique location.[725] The court held McNett's relocating outside of Alaska did not invoke state discovery procedures analogous to federal procedures used when a witness is preparing to leave the United States.[726]

In *Heppinstall v. Darnall Kemna & Co., Inc.*,[727] the supreme court reversed the trial court's ruling that it lacked the jurisdiction to enforce post-judgment discovery. Because the defendant neither filed a stay on appeal nor presented a bond required to suspend the trial court's judgment,[728] the trial court could compel discovery in supervising the execution of judgment under Alaska Rule of Civil Procedure 69(a).[729] Moreover, the supreme court found that Alaska's Civil Rule 37 makes no pre- or post-judgment distinctions in allowing a trial court to compel discovery.[730] The court reasoned if such distinctions were permitted, it would make discovery under Civil Rule 69(a) hollow.[731]

D. Miscellaneous

In *Christiansen v. Melinda*,[732] the Alaska Supreme Court held that power of attorney does not authorize an agent to bring a *pro se* civil action for the principal he represents.[733] Christiansen filed suit against the State and the Deputy Clerk of Court for refusing to honor his power of attorney and failing to file the earlier civil action.[734] The superior court dismissed the action against the

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724. *Id.* at 1169.
725. *Id.*
726. *Id.* at 1168.
727. 851 P.2d 78 (Alaska 1993).
728. *Id.* at 79.
729. *Id.* at 80; ALASKA R. CIV. P. 69(a) (execution of discovery).
730. *Heppinstall*, 851 P.2d at 80; ALASKA R. CIV. P. 37 (order of discovery).
731. *Heppinstall*, 851 P.2d at 80.
732. 857 P.2d 345 (Alaska 1993).
733. *Id.* at 345-46.
734. *Christiansen*, 857 P.2d at 346. Christiansen filed the suit under Alaska Statutes section 13.26.353(c), which provides:

> A third party shall honor the terms of a properly executed statutory form power of attorney. A third party who fails to honor a properly executed statutory form power of attorney may be liable in a civil action to the principal, the attorney-in-fact, or the principal's heirs, assigns or estate for a civil penalty not to exceed $1,000, plus the actual damages, costs, and fees associated with the failure to comply with the statutory form power of attorney. The civil action shall be the exclusive remedy at law for damages.

ALASKA STAT. § 13.26.353(c) (1992).

State.[735] The supreme court affirmed, stating that only licensed attorneys can practice law; therefore an unlicensed agent cannot bring a *pro se* action unless he is already a licensed attorney-at-law.[736]

XI. PROPERTY LAW

In 1993, Alaska courts decided a wide variety of property law cases ranging from a number of cases dealing with takings of property to adverse possession.

A. Takings

In *Zerbetz v. Municipality of Anchorage*,[737] the Alaska Supreme Court ruled that the designation of property as "conservation wetlands" by the Municipality of Anchorage did not constitute a regulatory taking and that ample evidence supported the jury's determination that the construction of the North Klatt Road Extension by the Municipality did not result in a physical invasion of the property.[738]

The property owner argued that the superior court improperly bifurcated its suit into a regulatory takings claim and a physical takings claim, as opposed to a single "cumulative" taking.[739] The supreme court found the bifurcation proper because the water invasion caused by the road extension was completely unrelated to the "conservation wetlands" designation.[740] The supreme court also determined there was no concrete evidence that the owner was deprived of the economic advantages of ownership by the designation of its property as conservation wetlands.[741] The property could still be developed under the Anchorage Coastal Management Plan.[742] The owner's reliance on tax assessments to show diminished value also was misplaced, as the court deemed such assessments to be unreliable and as bearing no relationship to fair market value.[743]

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735. *Christiansen*, 857 P.2d at 346.

736. *Id* at 348. The court stated that the definition of "practice of law" in Alaska Statutes section 08.08.210(a) encompasses in-court representation as found in this case. *Id.* at 347.

737. 856 P.2d 777 (Alaska 1993).

738. *Id.* at 778.

739. *Id.* at 782.

740. *Id.*

741. *Id.* at 783.

742. *Id.*

743. *Id.*

In *Anchorage v. Sandberg*,[744] the supreme court ruled that certain actions taken by the Municipality of Anchorage did not amount to a taking of the plaintiff's property by inverse condemnation. The municipality originally had assessed the plaintiffs' property with districts that would provide water and sewage necessary to develop the area.[745] The municipality later purchased the land bordering the plaintiff's property on three sides, rendering the districting plan economically unadvantageous.[746]

The court noted that *State Department of Natural Resources v. Arctic Slope Regional Corp.*[747] established three factors to be considered in determining whether governmental action amounts to a taking. First, the court considered the character of the governmental action involved.[748] The court found the case involved neither a physical invasion nor a regulation constraining the plaintiff's use of the property.[749] "Instead, it involves a series of municipal decisions which, indirectly, have rendered [the] development plans economically infeasible."[750]

Second, the court considered whether the government action produced a severe economic impact. The court recognized that "it has now become economically infeasible for [Sandberg] to develop its land in part due to the municipality's change of plans."[751] Due to the lack of any "*direct* restrictions" on Sandberg's property, however, the court could not find a taking from this condition alone.[752]

Third, the court turned to the reasonableness of the plaintiff's expectations in developing the land and whether they should be constitutionally protected.[753] The court reasoned Sandberg's purchase of the land was "not evidence of reasonable investment-backed expectation, but rather, a business gamble."[754] The court also reasoned the government had a legitimate interest in promoting its financial stability, allowing the government to change its position "for fiscal reasons after improvement districts are approved."[755]

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744. 861 P.2d 554 (Alaska 1993).
745. *Id.* at 555.
746. *Id.* at 556.
747. 834 P.2d 134 (Alaska 1991).
748. *Sandberg*, 861 P.2d at 557-58.
749. *Id.* at 558.
750. *Id.*
751. *Id.* at 559.
752. *Id.*
753. *Id.*
754. *Id.* at 560.
755. *Id.* at 561.

City of Kenai v. Burnett[756] also involved an inverse condemnation action. The supreme court held that a right of first refusal does not rise to the constructive possession of property required for a taking to exist.[757] The action was brought against the city for its taking of a segment of road, known as the Candlelight Extension, for the construction of a public golf course.[758] The lower court determined that the taking occurred on the date the first lots on the proposed golf course were leased, and that damages should be calculated based on that date.[759] At that point, however, the lessor only had a right of first refusal on the lot which contained the Candlelight Extension.[760] The supreme court held that "the taking occurred when it became clear that Candlelight Extension was *slated for destruction*[,]" and remanded the case for determination of that date.[761]

The court also examined the method by which the damages were calculated. The damages were determined according to a before-and-after fair market valuation of the remaining property.[762] The city argued an instruction should have been given on the "cost to cure" damage remedy.[763] The supreme court saw "no reason why an alternative 'cost to cure' instruction need be given in the absence of a showing by the city that 'fair market value' is an inaccurate measure of the losses suffered by the Burnetts."[764]

Additionally, the supreme court remanded on the issue of the "before" fair market value of the property, which should have reflected the enhanced value provided by the planned golf course.[765] The Burnetts also were awarded damages for the profits they would have recognized if they had been able to develop their property.[766] The supreme court held these profit projections were too speculative, and therefore "the Burnetts are not entitled to compensation for lost profits as a matter of law."[767]

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756. 860 P.2d 1233 (Alaska 1993).
757. *Id.* at 1240.
758. *Id.* at 1235-36.
759. *Id.* at 1237-38.
760. *Id.* at 1240.
761. *Id.* at 1240-41 (emphasis added).
762. *Id.* at 1241.
763. *Id.* at 1241-42.
764. *Id.* at 1242.
765. *Id.* at 1242-43.
766. *Id.* at 1244.
767. *Id.*

B. Miscellaneous

In *Mogg v. National Bank of Alaska*,[768] the court held that res judicata did not bar the junior lienholder's contract, tort and punitive damages counterclaims on remand of a foreclosure action.[769] Because the judgment in the original trial dealt only with the validity of a dragnet clause,[770] the supreme court determined all issues were not litigated to finality and therefore res judicata did not apply.[771] In so holding, the court adopted the Florida rationale that "'[t]he law-of-the-case doctrine was meant to apply to matters litigated to finality, not matters that remain essentially unresolved due to the erroneous ruling of a lower court.'"[772]

The court further reasoned that the superior court had not abused its discretion by granting a motion to amend a complaint with counterclaims since occurrences during the appeal made remedies sought no longer available.[773] The court also held that under Civil Rule 15(c), the junior lienholder's amendment of counterclaims related back to the original answer filed by the lienholder.[774] Finally, the court held the junior lienholder made a prima facie showing of fraud, causing the abrogation of the creditor bank's attorney-client privilege by demonstrating the bank agreed to hold a worthless deed of trust for the junior lienholder.[775]

Vinson v. Hamilton[776] held that the district court abused its discretion in denying Vinson's motion for a continuance in a forcible entry and detainer proceeding on the ground that Vinson could put forth no defense of retaliatory eviction as a month-to-month tenant.[777] The court maintained that any other result would frustrate public policy, as tenants would be afraid to assert their rights for fear of eviction.[778]

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768. 846 P.2d 806 (Alaska 1993).
769. *Id.* at 810.
770. *Lundgren v. Nat'l Bank of Alaska*, 756 P.2d 270 (Alaska 1987).
771. *Mogg*, 846 P.2d at 811.
772. *Id.* at 810 (quoting Wells Fargo v. Sunshine Sec. & Detective Agency, 575 So. 2d 179 (Fla. 1991)).
773. *Id.* at 812.
774. *Id.* at 814.
775. *Id.* at 814-15.
776. 854 P.2d 733 (Alaska 1993).
777. *Id.* at 736 (citing ALASKA STAT. §§.34.03.31(a), (b) (1990)).
778. *Id.*

The court also found Vinson's claim that the lease was for one year, not month-to-month, to be a valid defense.[779] The court noted that Vinson had shown good faith through his willingness to post an undertaking as required by Alaska Rule of Civil Procedure 85,[780] and that he had acted diligently in his efforts to obtain assistance of counsel and to prepare for trial.[781] Therefore, the supreme court held that the district court abused its discretion in denying Vinson a continuance.[782]

In addressing the issue of Vinson's right to a jury trial, the court held that there is no right to a jury trial when a party seeks only equitable relief such as that sought here—an order of eviction.[783] Justices Rabinowitz and Compton dissented on this point. Relying heavily on the United States Supreme Court decision in *Pernell v. Southall Realty*,[784] they argued that the action involved in *Vinson* had a legal, not equitable, background.[785] The dissenters also argued that the majority did not dispute that the action brought by Hamilton performs the "same essential function" as an action for ejectment.[786]

City of Hydaburg v. Hydaburg Cooperative Ass'n[787] arose when Hydaburg Fisheries obtained and proceeded to execute a foreclosure judgment against Hydaburg Cooperative Association ("HCA").[788] The Economic Development Administration ("EDA") and the city claimed interests in the property of HCA and attempted to block the execution and establish the superiority

779. *Id.*

780. A judge cannot grant a continuance of more than two days unless the moving party provides an undertaking equal to the rent that will accrue during the proceedings. ALASKA R. CIV. P. 85(a)(3).

781. *Vinson*, 854 P.2d at 736.

782. *Id.*

783. *Id.* at 738.

784. 416 U.S. 363 (1974) (holding that despite being a statutory creation, a forcible entry and detainer action is a legal one similar to a common-law ejectment action).

785. *Vinson*, 854 P.2d at 738 (Rabinowitz, J., dissenting in part and concurring in part).

786. *Id.* at 739 (Rabinowitz, J., dissenting in part and concurring in part).

787. 858 P.2d 1131 (Alaska 1993).

788. *Id.* at 1132.

of their claims.[789] The lower court ruled against them for lack of standing.

The Alaska Supreme Court held the superior court erred in ruling the city lacked standing.[790] The city possessed legal title to the lands on which the plant stood and, upon expiration of the lease, owned title to the plant itself,[791] giving the city equitable and legal interests in the property.[792]

In *Hayes v. A.J. Associates, Inc.*,[793] Hayes, a lessee of mining rights, staked a claim to the mineral estate upon discovering a reservation of mineral rights to the state in the patent. A.J. Associates, the surface owner and lessor, sought ejectment. Hayes counterclaimed to recover royalties paid under the lease, alleging fraud.[794] The superior court granted summary judgment to A.J. Associates, concluding that Hayes's location was void ab initio because he failed to locate in good faith.[795]

The Alaska Supreme Court first rejected Hayes's argument that he could not be prevented from using the property for mining purposes because mining is commerce under the public trust doctrine.[796] The court reasoned that "commerce" in this sense refers only to trade and transportation of goods over navigable waters, not to mining.[797] The court also found mining to be a permanent depletion of non-renewable resources and therefore not a "public use" affected by the public trust doctrine.[798]

The court found the lower court had erred, however, in barring Hayes's claims because he had acted in bad faith.[799] The court reasoned the good faith doctrine should be applied only when parties are asserting competing mineral claims, since the good faith

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789. *Id.* The EDA had awarded a grant to the HCA to pay for the installation of a cold storage facility in a fish processing plant. *Id.* at 1133. One condition of EDA's grant was that all transfers of interest in the plant must be approved by the EDA. Subsequently, the HCA found itself in need of more funds and was forced to enter into a deal with Hydaburg Fisheries. The EDA refused to approve the deal and demanded full repayment of the grant. Hydaburg Fisheries then sued to recover its investment. *Id.*

790. *Id.* at 1135-36.

791. *Id.* at 1135. The lease expressly provided that "permanent buildings and utilities on expiration, termination, or cancellation of this lease shall become the property of the City." *Id.* at 1137.

792. *Id.* at 1136-37.

793. 846 P.2d 131 (Alaska 1993).

794. *Id.* at 131.

795. *Id.*

796. *Id.* at 133.

797. *Id.*

798. *Id.*

799. *Id.* at 134.

doctrine usually is used to defeat claims of subsequent locators who behave fraudulently.[800] Accordingly, the court reversed and remanded the case for a more complete discussion of Hayes's rights in light of his staking and recording the mineral claims.[801]

XII. TAX LAW

In 1993, the Alaska Supreme Court dealt with a number of tax issues. The issues ranged from calculation of interest deductions, to fair market valuation, to taxes on pull-tab sales.

In *State Department of Revenue v. Atlantic Richfield Co.*,[802] Atlantic Richfield Company ("ARCO") claimed interest deductions on its tax returns from 1978 to 1981 for pipeline construction expenses related to the Trans Alaska Pipeline System ("TAPS").[803] The deductions were for debt incurred by its subsidiary, ARCO Pipe Line Company ("APLC").[804] Pursuant to Alaska Statutes section 43.21.030(a), "those portions of interest . . . expense attributable to the pipeline transportation of oil in the state" are subtracted from income from oil and gas pipeline transportation.[805] The Alaska Administrative Code ("AAC") further provides that operating expenses for an oil pipeline include "accruals to third parties . . . for uncapitalized interest on capital borrowed to acquire, construct, or enlarge the facilities of the pipeline."[806] To calculate ARCO's allowable interest deduction, the Department of Revenue ("DOR") multiplied ARCO's interest expenses (which ARCO claimed in total) by the ratio of TAPS assets to total ARCO assets, thus decreasing ARCO's allowable interest deduction.[807]

The court agreed with ARCO that the use of such an apportionment formula was contrary to the plain language of the AAC.[808] Since it was undisputed that the principal was borrowed from a third party, and that the funds were used to require, construct, or enlarge TAPS, ARCO was entitled to the full claimed deduction.[809]

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800. *Id.*
801. *Id.* at 135.
802. 858 P.2d 307 (Alaska 1993).
803. *Id.* at 308.
804. *Id.*
805. ALASKA STAT. § 43.21.030(a) (repealed effective Jan. 1, 1982).
806. ALASKA ADMIN. CODE tit. 15, § 21.350(b)(1) (Oct. 1988). The regulation was amended and recodified in 1985, and the amended regulation applies to the tax years in question. *Atlantic Richfield*, 858 P.2d at 308 n.1.
807. *Atlantic Richfield*, 858 P.2d at 309.
808. *Id.* at 310.
809. *Id.*

The court also determined that the benefit ARCO received by *internally* transferring and refining price-controlled Alaska North Slope ("ANS") oil qualified as taxable income.[810] ANS oil was unique as it was price-controlled, yet not subject to an entitlements burden.[811] The relevant statute read in pertinent part: "Gross income . . . shall be the gross value at the point of production of oil or gas produced from a lease or property in the state."[812] The court agreed with DOR that the value of the oil was not earned by the refinery, as the refinery "merely released the value already present in the oil."[813]

The court also rejected ARCO's argument that the tax should not be on the market value of the oil, but only on an amount equal to the statutory ceiling price.[814] ARCO relied on the Administrative Code's regulation that "in no event may the value . . . exceed the ceiling price."[815] The court noted, however, that ARCO realized income equal to the market price not the ceiling price. Therefore, taxes to be paid by ARCO on that income should likewise not be limited by the ceiling price.[816]

In *North Star Alaska Housing Corp. v. Fairbanks North Star Borough Board of Equalization*,[817] the court rejected North Star's claim that it was not treated equally compared to other similarly situated properties in the Fairbanks North Star Borough,[818] finding there was "a reasonable basis to support the finding that [the property in question] was isolated from the forces for which the economic obsolescence reduction account."[819] The plaintiff leased land from the federal government, on which it constructed and operated housing facilities. The federal government rented this housing from North Star, which in turn paid property tax on its

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810. *Id.* at 311 (citing ALASKA STAT. § 43.21.020(b) (repealed effective Jan. 1, 1982)).

811. *Id.* Price control regulations set maximum prices that could be charged for the oil at the wellhead in order to keep domestic oil acquisition costs low. Thus, refiners of domestic oil had a competitive advantage over refiners of foreign oil. To address this, the federal government promulgated the entitlements program, which required a refiner who processed domestic (price-controlled) oil to pay an entitlements penalty. *Id.* at 310-11.

812. ALASKA STAT. § 43.21.020(b) (repealed effective Jan. 1, 1982).

813. *Atlantic Richfield*, 858 P.2d at 312.

814. *Id.* The oil was valued under Alaska Administrative Code title 15, section 12.120, which was amended in and recodified in 1985. The original regulation applied to the tax years in question. *Id.* at 308 n.2.

815. *Id.*

816. *Id.* at 313.

817. 844 P.2d 1109 (Alaska 1993).

818. *Id.* at 1110.

819. *Id.* at 1111.

interest in the property.[820] The 1988 assessor refused to reduce the replacement cost of the property by an economic obsolescence factor[821] since North Star was receiving market rents and its net operating income exceeded its adjusted replacement costs.[822]

In reaching its conclusion, the court relied on the following factors: (1) the property enjoyed one hundred percent occupancy from a high quality tenant (the federal government); (2) it was the only property financed and designed specifically for its high quality tenant; (3) since the property was devoted to military use, it would not be subject to the effects of market forces; and (4) the property would not have to compete in the civilian rental market and be subject to its economic downturns (unless Congress failed to appropriate money for the project).[823]

In *Saunders Properties v. Municipality of Anchorage*,[824] the court ruled that the one-year statutory limitation on refunding tax overpayments does not apply to overpayments due to the municipality's error. The Anchorage Municipal Assessor's Office accidentally included in its assessment of plaintiff's land certain property taken by the municipality for a right-of-way.[825] Hence, from 1981 to 1988, the property in question was overtaxed.[826] In 1989, the Assessor's Office discovered its error and adjusted the 1989 tax assessment.[827] Subsequently, the property owner asked for a refund of the excess taxes paid.[828] Pursuant to Alaska Statutes section 29.45.500(b),[829] the Assessor's Office agreed to refund the 1988 overpayment, but refused to refund any overpayments in the earlier years, citing the one-year time limit in subsection (b).[830] The Assessor's Office suggested, however, that

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820. *Id.* at 1110.

821. The economic obsolescence factor reflects the impact of supply and demand within the market.

822. *North Star*, 844 P.2d at 1110.

823. *Id.*

824. 846 P.2d 135 (Alaska 1993).

825. *Id.* at 137.

826. *Id.*

827. *Id.*

828. *Id.*

829. Subsection b reads as follows:

> If, in payment of taxes legally imposed, a remittance by a Taxpayer through error or otherwise exceeds the amount due, and the municipality, on audit of the account in question, is satisfied that this is the case, the municipality shall refund the excess to the taxpayer with interest at eight percent from the date of payment. A claim for refund filed one year after the due date of the tax is forever barred.

ALASKA STAT. § 29.45.500(b) (1992).

830. *Saunders*, 846 P.2d at 137.

the Anchorage Assembly might have authority to make the refund under subsection (c).[831]

The court ruled that the one-year limit should apply only to overpayments resulting from taxpayer error and not to overpayments due to the municipality's error.[832] According to the court, subsection (c) gives the Assembly discretionary authority to correct the municipality's clerical errors and refund resulting overpayments without a limitations period.[833] The court also ruled that the Assembly's decision to grant a refund was not subject to mayoral veto because it was a quasi-judicial action.[834] By refunding the earlier overpayments, the municipality incurred a judgment debt, not an obligation that arose in the course of doing business as a municipality. As with any adverse judgment against the municipality, the mayor cannot veto it.[835]

In *Dilley v. Ketchikan Gateway Borough*,[836] the court held that, as intangible personal property, pull-tabs[837] were not subject to the Borough's sales tax ordinance as currently promulgated.[838] The pull-tabs operator had paid sales taxes on the net proceeds of such sales (gross proceeds less prizes awarded), but refused to pay sales taxes assessed on the gross proceeds.[839] The operator also argued the pull-tabs were not subject to the Borough's sales tax ordinance as written.[840]

The court rejected the Borough's argument that pull-tab games are "amusement services" subject to taxation. Rather, it found that the sale of pull-tabs constituted a sale of intangible property, not

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831. *Id.* Subsection c reads as follows: "The governing body may correct manifest clerical errors at anytime." ALASKA STAT. § 29.45.500(c) (1992).

832. *Saunders*, 846 P.2d at 138-39.

833. *Id.* at 139 (reasoning that concerns of fairness outweighed the municipality's interest in administrative convenience).

834. *Id.* at 140.

835. *Id.*

836. 855 P.2d 1335 (Alaska 1993).

837. *Id.* A "pull-tab games" is defined as:

> a game of chance where a card, the face of which is covered to conceal a number, symbol, or sets of symbols, is purchased by the participant and where a prized is awarded for a card containing certain numbers or symbols designated in advance and at random.

ALASKA STAT. § 05.15.210(28) (Supp. 1992).

838. *Dilley*, 855 P.2d at 1337. Under Ketchikan Gateway Borough's relevant code section, a 1.5% sales tax is levied on all retail sales and services in the Borough. KETCHIKAN GATEWAY BOROUGH, ALASKA CODE § 45.20.010. The code defines a retail sale as "any nonexempt sale of services, rentals or tangible personal property made to a buyer who intends to use the item purchased for his own personal use." *Id.* § 45.20.005.

839. *Dilley*, 855 P.2d at 1336.

840. *Id.*

a provision of services.[841] Specifically, according to the court, a pull-tab represented a contractual right to receive payment of prize money upon purchase of a winning card and, as such, fell outside the Borough's tax ordinance.[842] The court indicated, however, that the ordinance could be amended to cover pull-tab sales, as a state ordinance does.[843]

XIII. TORT LAW

In 1993, the Alaska Supreme Court decided a wide variety of tort issues including many in the areas of professional and strict liability.

A. Professional Liability

Deal v. Kearney[844] addressed two major issues arising out of a claim of negligent administration of emergency medical care. As part of a settlement between the patient, Kearney, and the hospital, Lutheran Hospitals & Homes Society of America, Inc. ("LHHS"), Kearney released LHHS, Dr. Deal and other health care providers from liability. In return, LHHS assigned to Kearney its rights to indemnity, equitable subrogation and contribution against Dr. Deal.[845]

The supreme court first ruled that the assignment of claims was proper. The assignment did not violate public policy against champerty and maintenance since Kearney was not a stranger to the litigation.[846] The court also accepted Kearney's argument that the "injury" involved was not a "personal injury," but rather an incurrence of a monetary obligation and thus not subject to the general rule on non-assignability.[847]

The court next held that immunity from liability under Alaska's "Good Samaritan" statute cannot be invoked when there is a pre-existing duty to provide care.[848] A pre-existing duty exists for physicians who have a particular employment duty to aid the patient at the hospital.[849] Dr. Deal contended that he had no such pre-existing duty since he received no compensation and was

841. *Id.*
842. *Id.* at 1337.
843. *Id.* at 1336 (noting that Alaska Statutes section 05.15.184 provides for a 3% tax on gross revenues less prizes awarded).
844. 851 P.2d 1353 (Alaska 1993).
845. *Id.* at 1354.
846. *Id.* at 1355.
847. *Id.* at 1356.
848. *Id.* at 1358 (citing ALASKA STAT. §09.65.090(a) (1990)).
849. *Id.*

called in originally in an advisory capacity.[850] The "question of expectation of compensation" does not constitute a *per se* rule; rather the "essential issue is whether the individual has undertaken a responsibility."[851] Because genuine issues of fact remained, the court upheld the denial of summary judgment in favor of Dr. Deal and remanded the case to the lower court to determine if there was a pre-existing duty.[852]

In *Pedersen v. Flannery*,[853] the court held that the two-year statute of limitations was applicable to a suit for injuries allegedly caused by medical malpractice.[854] The court rejected Pedersen's claim for breach of implied contract based on the grounds that Pedersen failed to allege the doctors promised either a specific result or a greater duty of care, and the non-economic nature of his claimed injuries.[855]

In a case of first impression, the court in *Korman v. Mallin*[856] addressed the scope of disclosure required by the "informed consent" doctrine under Alaska law.[857] The patient, Korman, alleged she had not been informed that painful and unsightly scarring was a potential consequence of breast reduction surgery.[858] The court concluded that the modern view should apply in Alaska, holding that "the scope of disclosure required . . . must be measured by what a reasonable patient would need to know in order to make an informed and intelligent decision about the proposed treatment."[859]

Although Dr. Mallin had provided Korman with pamphlets and videos on the surgery, as well as detailed consent forms, the court concluded "merely identifying a risk does not necessarily provide a patient with the information necessary for an informed decision."[860] Instead, the doctor must explain in "lay terms the nature and severity of the risk and the likelihood of its occur-

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850. *Id.* at 1358-60.

851. *Id.* at 1358.

852. *Id.* at 1360-61.

853. 863 P.2d 856 (Alaska 1993).

854. *Id.* at 858. Under Alaska Statutes section 09.10.050, an action "upon a contract or liability, express or implied," must be brought within six years. Under section 09.10.070, an action "for any injury to the person . . . not arising on contract" must be brought within two years. *Id.* at 857.

855. *Id.*

856. 858 P.2d 1145 (Alaska 1993).

857. *Id.* at 1146.

858. *Id.*

859. *Id.* at 1149 (citing ALASKA STAT § 09.55.556(a) (1990)).

860. *Id.* at 1150.

rence."[861] Moreover, a doctor's duty of disclosure is expanded further when a patient requests additional information.[862] The court remanded for a factual determination as to whether the doctor's explanation "was adequate to allow a reasonable patient to make an informed and intelligent decision whether to undergo the procedure."[863]

In *Shaw v. State Dep't of Administration*,[864] the court addressed two issues arising out of a legal malpractice case. The court first held that prejudgment interest in claims of legal malpractice in criminal cases begin to accrue when all the essential elements of an action have occurred.[865] Because post-conviction relief is an essential element of legal malpractice in criminal cases, Shaw's cause of action did not accrue until August 15, 1986, when his prior conviction was set aside as constitutionally defective.[866] Thus, Shaw's cause of action was subject to Alaska Statutes section 09.30.070, which provides that unless otherwise agreed upon by the parties:

> prejudgment interest accrues from the day process is served on the defendant or the day the defendant received written notification that an injury has occurred and that a claim may be brought against the defendant for that injury, whichever is earlier.[867]

The court then held the former criminal defendant's actual innocence or guilt is relevant in a subsequent malpractice claim against his attorney.[868] The court so concluded because public policy prevents recovery by a criminal for the consequences of his acts—consequences including his imprisonment.[869] The attorney bears the burden of proving the plaintiff's guilt.[870]

Justice Compton did not find such a burden significant, and in a lengthy dissent argued that the "burdens imposed on [a plaintiff], coupled with the advantages given former defense attorneys, virtually forecloses [sic] attorney malpractice suits arising out of criminal representation."[871] As a consequence of the majority's holding, plaintiffs are now required to prove that a conviction has been set aside, that there was a duty owed, a breach of that duty,

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861. *Id.*
862. *Id.* at 1150-51.
863. *Id.* at 1151.
864. 861 P.2d 566 (Alaska 1993).
865. *Id.* at 569.
866. *Id.*
867. ALASKA STAT. § 09.30.070 (Supp. 1993) (applying to all causes of action that accrued after June 11, 1986).
868. *Shaw*, 861 P.2d at 571.
869. *Id.* at 571-72.
870. *Id.* at 572.
871. *Id.* at 574 (Compton, J., dissenting).

causation and damages.[872] As to causation, the plaintiff must prove that a jury would not have found him guilty beyond a reasonable doubt, and in so doing the plaintiff is limited by criminal evidentiary rules.[873] In an affirmative defense, however, the attorney need only prove by a preponderance of the evidence that the plaintiff was "actually guilty" and can use any available evidence as proof, including coerced confessions or confidential communications.[874] Justice Compton concluded such a result cannot be justified by any public policy or case law.[875]

In *Dep't of Natural Resources v. Transamerica Premier Ins. Co.*,[876] the court reviewed actions arising from substantial cost overruns during the construction of an arts education facility at Big Delta State Historical Park.[877] Transamerica, the contractor's surety, appealed a grant of summary judgment in favor of the State on a tort action for business destruction. The State also appealed, questioning the lower court's remand to the administrative forum for a hearing on contract damages.[878]

The Alaska Supreme Court first decided Transamerica's claim, holding Transamerica had no basis on which to assert claims in tort.[879] Transamerica claimed the State's close involvement with the project meant it should be treated not only as an owner, but as a design professional as well.[880] If so, there would exist a duty in tort to "exercise reasonable care, or the ordinary skill of the profession," such that a contractor could sue for economic losses arising from professional malpractice.[881] The Alaska Supreme Court rejected this theory, holding the State "did not assume a design professional's duties simply because it reviewed the plans before putting them out for bid or because it assigned an inspector to the construction site."[882]

The Alaska Supreme Court also reasoned that to treat owners as design professionals would negate the contractual allocation of risk. Thus, even if the owner were negligent in the performance of his duties, the "contractor's action for the owner's breach is in

872. *Id.* at 573 (Compton, J., dissenting).
873. *Id.* at 574 (Compton, J., dissenting).
874. *Id.* (Compton, J., dissenting).
875. *Id.* (Compton, J., dissenting).
876. 856 P.2d 766 (Alaska 1993).
877. *Id.* at 769.
878. *Id.* at 771-72.
879. *Id.* at 774.
880. *Id.* at 772.
881. *Id.* at 772.
882. *Id.* at 773.

contract, not tort."[883] The court also refused to extend to other types of arm's length transactions the insurance contract doctrine of allowing breach of the implied covenant of good faith and fair dealing to create a tort action.[884]

B. Strict Liability

In *Pratt & Whitney Canada, Inc. v. Sheehan*,[885] the appellants ("PWC") asked the Alaska Supreme Court to overrule *Northern Power & Engineering Corp. v. Caterpillar Tractor Co.*[886] and declare purely economic loss to be noncompensable in a tort action for strict products liability.[887] PWC based its appeal on the United States Supreme Court's severe criticism of *Northern Power* in *East River Steamship Corp. v. Transamerica Delaval, Inc.*[888] Since the Alaska Supreme Court is not bound to follow the United States Supreme Court on issues of state common law, however, PWC presented several reasons why the state court should prefer the *East River* rule.

The first argument, that "pure economic loss does not implicate the safety rationale of torts," was rejected flatly by the Alaska Supreme Court.[889] According to the court, a product is no less dangerous simply because its failure did not reach its "potential for harm by causing personal injury."[890] The court also rejected PWC's second argument, that such an intermediate position on strict liability is too indeterminate.[891] The court declared that "any gain in certainty from a per se rule is bought at too high a price: decreased safety and consumer protection."[892] The court also disagreed that *East River* better navigates the area between contract and tort law, holding that a restriction of tort remedies would further disadvantage consumers who already lack equal bargaining power.[893]

In affirming *Northern Power*, the court declared strict liability in Alaska is based on the principle that contract law is concerned

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883. *Id.*
884. *Id.* at 774.
885. 852 P.2d 1173 (Alaska 1993).
886. 623 P.2d 324 (Alaska 1981).
887. *Pratt & Whitney*, 852 P.2d at 1175.
888. 476 U.S. 858 (1986).
889. *Pratt & Whitney*, 852 P.2d at 1179.
890. *Id.* (quoting Oklahoma Gas & Elec. Co. v. McGraw-Edison Co., 834 P.2d 980, 985 (Okla. 1992) (Opala, C.J., dissenting)).
891. *Id.* at 1180.
892. *Id.* (citing Washington Power Co. v. Graybar Elec. Co., 774 P.2d 1199 (Wash. 1989)).
893. *Id.* at 1180.

with economic expectations while the tort doctrine of strict liability is concerned with safety.[894] Strict product liability is applicable when a "defective product creates a situation potentially dangerous to persons or other property . . . even though the damage is confined to the product itself."[895]

C. Other Causes of Action

Borg-Warner Corp. v. Avco Corp.[896] established that, unlike "intentional" tortfeasors, "willful and wanton" tortfeasors have a right to contribution from the other parties involved in the manufacture of a plane involved in a fatal crash.[897] Borg-Warner manufactured the airplane carburetor, which the trial court determined to be the cause of the crash.[898]

The court noted that the Alaska legislature had specifically deleted the term "wilfully or wantonly" from the uniform act from which the controlling statutes was drawn.[899] Furthermore, the court reasoned such an expansive reading of "intentional" would be incompatible with comparative negligence principles introduced into Alaska with the adoption of the Tort Reform Act in 1986.[900]

The court also ruled that the trial court properly applied collateral estoppel principles before a final judgment was entered.[901] The lower court issued a memorandum decision, but Borg-Warner and the pilot's estate settled before entry of judgment.[902] The Alaska Supreme Court clarified the meaning of final judgment, holding "appealability is not a necessary prerequisite to 'finality' for the purpose of collateral estoppel."[903] Rather, the test is simply whether the issue has been "fully litigated."[904] Finding this issue "fully litigated," the court held Borg-Warner was precluded from re-litigating the nature of its conduct.[905] The trial court's findings of relative fault between Borg-Warner and the

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894. *Id.* at 1177-78.
895. *Id.* at 1177 (quoting *Northern Power*, 623 P.2d at 329).
896. 850 P.2d 628 (Alaska 1993).
897. *Id.* at 631. Alaska Statutes section 09.16.010(c) provides: "[t]here is no right of contribution in favor of any tortfeasor who has intentionally caused or contributed to the injury or wrongful death." ALASKA STAT. § 09.16.010(c) (1983).
898. *Borg-Warner*, 850 P.2d at 630.
899. *Id.* at 633.
900. *Id.*
901. *Id.* at 634.
902. *Id.*
903. *Id.* at 635.
904. *Id.*
905. *Id.*

joined third-parties, however, could not be considered final, because the issue was not "properly before the court in the . . . trial."[906]

Mulvihill v. Union Oil Co. of California ("Unocal")[907] arose out of a drunk-driving accident which claimed the lives of three people, including the intoxicated driver, Tony LeMay.[908] The plaintiffs brought suit against the social host and LeMay's employer, Unocal, and Brad Frates, who drove the intoxicated Lemay home earlier that evening.[909] The superior court granted summary judgment in favor of both defendants.[910]

The Alaska Supreme Court also declined to hold Unocal liable under the doctrine of respondeat superior.[911] The court concluded "it would be unwise and unfair to create what amounts to an exception to [the statute] by holding employers to a different liability standard than other social hosts."[912] Because the other respondent, Frates, agreed to drive the intoxicated LeMay home, the court analyzed his actions as a "volunteer."[913] The court concluded that driving LeMay home and waiting until he opened his apartment door was sufficient to discharge Frates's duties.[914] Specifically, the court concluded Frates had no additional duty of ensuring LeMay did not drink more after arriving at home.[915] The court reasoned that to impose such a duty would be poor public policy, discouraging the practice of utilizing designated drivers.[916]

D. Damages

In *Hughes v. Harrelson*,[917] the court held that public policy considerations compelled the court to ignore the provisions of an insurance contract limiting prejudgment interest.[918] Both the Motor Vehicle Responsibility Act and the Mandatory Motor

906. *Id.* at 636.
907. 859 P.2d 1310 (Alaska 1993).
908. *Id.* at 1312.
909. *Id.*
910. *Id.*
911. *Id.*
912. *Id.* at 1313. Under this statute, one who does not own a liquor license cannot be held liable for injuries resulting from the intoxication of a person to whom they served alcohol. ALASKA STAT. § 04.21.020 (1986).
913. *Mulvihill*, 859 P.2d at 1313.
914. *Id.* at 1314.
915. *Id.*
916. *Id.*
917. 844 P.2d 1106 (Alaska 1993).
918. *Id.* at 1108.

Vehicle Insurance Act require vehicle owners to obtain liability insurance for injuries to other parties.[919] The purpose of these statutes is to protect innocent victims of vehicle accidents from financial loss.[920] The court reasoned that this purpose would be "subverted if the 'innocent victim' is deprived of the prejudgment benefits of an award."[921]

Grow v. Ruggles[922] arose out of a car accident in which Grow was found to be entirely at fault.[923] In a special verdict, the jury awarded Ruggles the exact amount of medical expenses she requested and monetary damages for past and future income.[924] They did not award her anything for pain, suffering and loss of enjoyment of life, however, and Ruggles filed a motion for a new trial, which was denied.[925]

The court agreed with Grow that Ruggles waived her right to complain about the verdict's consistency by failing to resubmit the issue to the jury before the jury was discharged.[926] The court rejected Ruggles's argument that the waiver rule was inapplicable because the jury was polled following the verdict.[927] According to the court, polling only clarifies the vote of each individual juror; it does not require each juror to re-examine the issues.[928] Since the waiver rule is designed to promote efficiency and preclude jury

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919. Alaska Statutes section 28.20.440(b) reads in relevant part:

> (b) The owner's policy of liability insurance must . . .
>
> (2) insure the person named . . . against loss from liability imposed by law for damages arising out of the ownership, maintenance, or use of the vehicle . . ., subject to limits exclusive of interests and costs, with respect to each vehicle, as follows: $50,000 because of bodily injury to or death of one person in any one accident. . . .

ALASKA STAT. § 28.20.440(b) (1989).

Alaska Statutes section 28.22.101(d) reads in relevant part:

> (d) A motor vehicle liability policy must provide coverage in the United States or Canada, subject to limits exclusive of interest and costs, with respect to each vehicle, as follows:
>
> (1) $50,000 because of bodily injury to or death of one person in one accident . . . .

ALASKA STAT. § 28.22.101(d) (1989).

920. *Hughes*, 844 P.2d at 1107.

921. *Id.*

922. 860 P.2d 1225 (Alaska 1993).

923. *Id.* at 1226.

924. *Id.*

925. *Id.*

926. *Id.*

927. *Id.* at 1227.

928. *Id.*

shopping, a litigant must ask the jurors to re-examine their decision.

David S. Hagy
Gary Kenneth Milligan
James Benjamin Trachtman

APPENDIX

CASES OMITTED FROM 1993 YEAR IN REVIEW

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Linstad v. Sitka Sch. Dist., 863 P.2d 838 (Alaska 1993).
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Wheeler v. State, 863 P.2d 858 (Alaska Ct. App. 1993).
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Dayhoff v. Temsco Helicopter, Inc., 848 P.2d 1367 (Alaska 1993).
Johnson v. Pub. Employers Retirement Bd., 848 P.2d 263 (Alaska 1993).
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Calhoun v. State, Dept. of Trans. & Public Facilities, 857 P.2d 1121 (Alaska 1993).
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Hillman v. Nationwide Mut. Fire Ins. Co., 855 P.2d 1321 (Alaska 1993).
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Willis v. Wetco, Inc., 853 P.2d 533 (Alaska 1993).

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In re McCoy, 844 P.2d 1131 (Alaska 1993).
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South Anchorage Concerned Coalition, Inc. v.Coffey, 862 P.2d 168 (Alaska 1993).
Valleys Borough Support Comm. v. Local Boundary Comm'n, 863 P.2d 232 (Alaska 1993).
Wassink v. Hawkins, 859 P.2d 712 (Alaska 1993).
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Hildebrandt v. City of Fairbanks, 863 P.2d 240 (Alaska 1993).
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Vincent v. Fairbanks Memorial Hosp., 862 P.2d 847 (Alaska 1993).