YEAR IN REVIEW

Alaska Supreme Court and Court of Appeals Year in Review 1992

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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 the practitioner with cases decided in 1992, 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. The authors have attempted, however, 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 and import of holdings rather than by the nature of 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, such cases applied well-settled principles or involved narrow holdings of limited import.

II. ADMINISTRATIVE LAW

The Alaska Supreme Court heard several administrative law cases in 1992. The summaries have been divided into the following categories: allocation of administrative power; public utilities; regulation of land, construction and the environment; prison administration; regulation of motor vehicles; and procedural issues.

A. Allocation of Administrative Power

In *Sonneman v. Hickel*,[1] the Alaska Supreme Court reviewed a challenge that the statute creating the Alaska Marine Highway System Fund (Highway Fund) violates the Alaska Constitution.[2] The court held that Alaska Statutes section 19.65.080(b), limiting the

1. 836 P.2d 936 (Alaska 1992).

2. *Id.* at 937 (citing ALASKA CONST. art. IX, § 7; ALASKA STAT. §§ 19.65.050-100 (Supp. 1992)).

departmental power to appropriate funds for "capital improvements," did indeed violate Article IX, Section 7 of the Alaska Constitution, which provides that "[t]he proceeds of any state tax or license shall not be dedicated to any special purpose."[3]

Although the act does not specifically require the legislature to earmark funds for the Highway Fund, the act effectively prevents the legislature from spending that money elsewhere.[4] The court found that the act unconstitutionally restricts the authority of the executive branch to seek appropriations.[5] The court held that Article IX, Section 7 implies not only that the legislature retains authority to control appropriations from all sources, but that governmental departments can also *request* money from all sources. Thus, Alaska Statutes section 19.65.080(b), which expressly limits the Department of Transportation and Public Facilities' right to demand funds, violates the constitution.[6] The supreme court concluded that because Alaska statutory law contains a general severability clause creating a weak presumption in favor of severance,[7] the remaining portions of the statute shall continue to stand independently and completely without the offending section.[8]

In *Municipality of Anchorage v. Anchorage Police Department Employees Ass'n*,[9] the supreme court held that a municipality may constitutionally delegate limited interest arbitration powers to a labor arbitrator.[10] The Municipality of Anchorage sued to have its own ordinance declared unconstitutional before the Anchorage Police Department Employees Association could submit its collective bargaining agreement to binding interest arbitration.[11] In case of a failure to agree to a new contract before the expiration of the old police contract, the ordinance required the appointment of an arbitrator to render a binding decision on the parties.[12] The arbitrator would draft the final contract by selecting article by article

3. *Id.* at 938 (quoting ALASKA CONST. art. IX, § 7).
4. *Id.* at 939.
5. *Id.* at 940.
6. *Id.* (citing ALASKA STAT. § 19.65.080(b) (Supp. 1992)).
7. ALASKA STAT. § 01.10.030 (1990).
8. *Sonneman*, 836 P.2d at 940-41.
9. 839 P.2d 1080 (Alaska 1992).
10. *Id.* at 1090.
11. *Id.* at 1083.
12. *Id.* at 1082.

from the parties' last best offers in accordance with applicable law.[13]

The court held that the delegation of the Anchorage Assembly's power to an arbitrator was not unconstitutional *per se*, but noted that the court was "'less concerned with the labels placed on arbitrators as public or private, as politically accountable or independent, than . . . with the totality of the protection against arbitrariness provided in the statutory scheme.'"[14] The court held that in light of the detailed provisions that guide the arbitrator against making arbitrary decisions, the delegation of legislative power was constitutional.[15]

In *O'Callaghan v. State*,[16] the supreme court affirmed summary judgment against the plaintiff, Mike O'Callaghan, a candidate for governor on the Political Party ticket, who had claimed that Alaska Statutes section 15.25.110 prohibits the candidate of one party in a general election from resigning his nomination and reentering the ballot as candidate for a different political party. Jack Coghill, former candidate for lieutenant governor on the Republican ticket, reentered the race as a member of the Alaska Independence Party.

In this case of statutory interpretation, the court found that the statute was designed to keep an individual from reentering a general election on the same ticket.[17] Finding no legislative intent to prevent the unlikely event of someone switching parties on the ticket,[18] the court noted its policy favoring access to the ballot and reasoned that "it would be incongruous . . . to now stretch to find

13. *Id.*

14. *Id.* at 1084, 1085 (citation omitted) (quoting Town of Arlington v. Board of Conciliation and Arbitration, 352 N.E.2d 914, 920 (Mass. 1976)).

15. *Id.* at 1089. The court mentioned a number of standards limiting the power granted to the arbitrator. The arbitrator is selected from a list, with peremptory challenges available to both parties. The arbitrator can determine only relevant facts, including a number of factors expressly listed in the municipal code. The arbitrator cannot write his own provisions, but rather must assemble the final contract article by article from the last best offers of the parties. Finally, the arbitrator must issue decisions consonant with the applicable law and follow the procedural safeguards in the Voluntary Rules of Labor Arbitration published by the American Arbitration Association. *Id.* at 1086-88.

16. 826 P.2d 1132 (Alaska), *cert. denied*, 113 S. Ct. 176 (1992).

17. *Id.* at 1136.

18. *Id.* at 1135-37.

a prohibition against Coghill's candidacy when the election code does not clearly prohibit it."[19]

In *Alaska Public Employees Ass'n v. State*,[20] the supreme court affirmed an administrative decision that held job classifications and salary range assignments to be permissive rather than mandatory subjects of collective bargaining under Alaska's Public Employment Relations Act.[21] The supreme court agreed with the agency and the superior court that the merit principle remains the most important consideration implicated in job classification and pay plans.[22] The court rejected the unions' claim that the job classification duty statutorily imposed on the state constitutes a mandatory subject of collective bargaining.[23]

Unlike assigning actual dollar figures to a salary range for a specific class, which is a mandatory subject of collective bargaining, the court held that the assignment of salary ranges to individual job classes clearly should be a *permissive* subject of bargaining.[24] In making this determination, the court pointed to the "state's strong, specific, express mandate to act and the employees' more diffuse, general, limited entitlement to bargain," and the fact that collective bargaining representatives could still demand to bargain over the wage rates assigned to the salary ranges.[25]

Justice Compton, joined by Chief Justice Rabinowitz, dissented in part, asserting that because the power of job classification and reclassification allows the state to control the wages of employees, it should be the subject of mandatory bargaining.[26] Justice Compton found persuasive the unions' claim that collective bargaining over the assignment of job classifications to salary ranges does not undermine the merit system.[27]

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19. *Id.* at 1137.
20. 831 P.2d 1245 (Alaska 1992).
21. *Id.* at 1252.
22. *Id.* at 1248-49 (citing ALASKA CONST. art. XII, § 6).
23. *Id.* at 1249 (citing ALASKA STAT. §§ 23.40.250(8) (Supp. 1992), 23.40.070(2) (1990), 39.25.150(1) (Supp. 1992)).
24. *Id.* at 1252.
25. *Id.*
26. *Id.* at 1253-57 (Compton, J., dissenting).
27. *Id.* at 1256 (Compton, J., dissenting).

B. Public Utilities

In *Far North Sanitation, Inc. v. Alaska Public Utilities Commission*,[28] the supreme court reviewed an order issued by the Alaska Public Utilities Commission (APUC) revoking Far North's exemption from rate regulation and rendering the company's rates "interim" subject to refund pending a final rate determination.[29] Far North challenged this decision as illegal retroactive ratemaking.[30]

Noting the liberal construction provision found in Alaska Statutes section 42.05.141(a)(1), the supreme court stressed the statute's wording: "'a legally filed and effective tariff rate . . . may not be changed except in the manner provided for in this chapter.'"[31] The statute permits APUC to establish rates only after conducting an investigation and a hearing.[32] Although APUC merely reinstated the previous rate as the interim rate, it erred in failing to hold a hearing. The court held, however, that because Far North waived its rights by appealing the APUC decision directly before the agency, APUC's error was procedural rather than jurisdictional. A timely appeal allows the agency to correct its mistake by holding a hearing on the issue.[33] Addressing the agency's underlying scope of power, the court concluded that although authorities conflict on this issue, "the better view is that the APUC has implied authority to set interim rates."[34]

In *Cook Inlet Pipe Line Co. v. Alaska Public Utilities Commission*,[35] the supreme court considered whether APUC's methods for estimating rates for intrastate crude oil transportation tariffs violated federal statutory law and the federal and state constitutions. APUC calculated tariffs by the "original cost" method, whereas the Federal Energy Regulatory Commission (FERC), which regulates interstate tariffs, used a different method.[36] The state's rates proved to be substantially lower than the federal rates for the same time period.[37]

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28. 825 P.2d 867 (Alaska 1992).
29. *Id.* at 868.
30. *Id.* at 869.
31. *Id.* at 872 (omission in original) (quoting ALASKA STAT. § 42.05.371 (1989)).
32. *Id.* (citing ALASKA STAT. § 42.05.431(a) (Supp. 1992)).
33. *Id.* at 873.
34. *Id.*
35. 836 P.2d 343 (Alaska 1992).
36. *Id.* at 344.
37. *Id.*

The court reasoned that "'[i]t is not the theory, but the impact of the rate order which counts.'"[38] CIPL introduced little evidence that the net economic effect of the rate scheme was detrimental to the company and no evidence that any effect reached the constitutional level of a threat to the financial integrity of the company.[39] The court found without merit the claim that APUC's reduction of the rate base constituted an unconstitutional taking. In the supreme court's view, a "rate base" is a theoretical construct and not "property."[40]

CIPL also claimed that APUC's tariff orders are preempted by federal law. The supreme court noted that when the Alaska legislature delegated power to APUC, the Interstate Commerce Act governed the federal regulation of rates.[41] The United States Supreme Court has held, however, that the Interstate Commerce Act was not intended to intrude on the states' authority to regulate intrastate traffic.[42] Accordingly, the Alaska Supreme Court held that the Interstate Commerce Act did not authorize CIPL to disregard APUC and set its own intrastate rates at the interstate level.[43] The court noted that a provision in the Transportation Act of February 28, 1920 gives the FERC power, after a full administrative hearing, to adjust intrastate rates that result in an unjust discrimination against, or an undue burden on, interstate rates.[44] CIPL, however, expressly opted not to seek that remedy.[45]

In *Colville Environmental Services, Inc. v. North Slope Borough*,[46] North Slope Borough challenged APUC's authority to certify two waste disposal servicers in an overlapping area and to prevent the Borough from passing ordinances to interfere with the business of its new waste disposal competitor.[47] The Borough

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38. *Id.* at 349 (quoting Duquesne Light Co. v. Barasch, 488 U.S. 299, 314 (1989); Federal Power Comm'n v. Hope Natural Gas Co., 320 U.S. 591, 602 (1944)).

39. *Id.* at 350.

40. *Id.*

41. *Id.* (citing Interstate Commerce Act, 49 U.S.C.A. § 2 (West 1959)).

42. *Id.* (citing Simpson v. Shepard, 230 U.S. 352, 418 (1913)).

43. *Id.* at 350-51.

44. *Id.* at 351 (quoting the Transportation Act of Feb. 28, 1920, 49 U.S.C.A. § 13(4) (1959)).

45. *Id.* at 351 & n.8.

46. 831 P.2d 341 (Alaska 1992).

47. The Borough's challenge was deemed "belated" by the supreme court, since the Borough had been a party to the original hearing five years ago, but had not appealed the agency's decision to issue a certificate to Colville. *Id.* at 342.

argued that APUC had no jurisdiction to issue a certificate for garbage collection to Colville, claiming that pursuant to Alaska Statutes section 29.35.050, the Borough held exclusive power to monopolize collection services.[48] The superior court agreed with the Borough, refusing to give res judicata effect to APUC's orders granting competitive certificates.[49]

In examining the res judicata effect of APUC's decisions, the supreme court employed the three-prong test found in section twelve of the Restatement (Second) of Judgments as its guide.[50] First, the court held that APUC possesses liberally construed powers over its specific jurisdictional areas, its certification authority among them, and thus the granting of Colville's certificate did not constitute a manifest abuse of authority.[51] Addressing the second prong of section twelve, the court found it inapplicable because the Borough appeared as both an agency of government and the party that failed to file a timely appeal. The court reasoned that the Borough lost only that which "a private litigant normally loses when an adverse judgment is not appealed."[52] With regard to the third prong, the court found that APUC was capable of making an informed determination of its own jurisdiction.[53] The Commission staff possessed the requisite level of professional qualifications.[54]

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48. *Id.* at 345 (citing ALASKA STAT. 29.35.050 (1992)).

49. *Id.*

50. *Id.* at 345-46. The supreme court explained:

> [A] judgment does not have preclusive effect when:
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> "(1) The subject matter of the action was so plainly beyond the [adjudicative agency's] jurisdiction that its entertaining the action was a manifest abuse of authority; or
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> (2) Allowing the judgment to stand would substantially infringe the authority of another tribunal or agency of government; or
>
> (3) The judgment was rendered by [an adjudicative agency] lacking capability to make an adequately informed determination of a question concerning its own jurisdiction and as a matter of procedural fairness the party seeking to avoid the judgment should have opportunity belatedly to attack the [adjudicative agency's] subject matter jurisdiction."

Id. (alteration in original) (quoting RESTATEMENT (SECOND) OF JUDGMENTS § 12 (1982)).

51. *Id.* at 346-48.

52. *Id.* at 348.

53. *Id.* at 350.

54. *Id.*

Thus, Colville's certificate was valid and the superior court erred in refusing to accord res judicata effect to the Commissions's orders.[55]

C. Land, Construction and the Environment

In *Longwith v. State Department of Natural Resources*,[56] the supreme court agreed with the Trustees for Alaska and held that the Commissioner of the Department of Natural Resources abused her discretion in awarding agricultural preference rights to Longwith to rectify losses he sustained in the invalidated Potlach Ponds land lottery.[57] The Potlach Ponds land lottery had been enjoined and then later struck down, but to speed the administration of the lottery if upheld, "winners" were drawn, Longwith among them.[58] The "winners" could not participate in any further lotteries before agreeing to drop any potential claims to the Potlach Ponds land.[59] After the lottery was permanently enjoined, the Commissioner found that Longwith had suffered an "inequity," and she henceforth invoked her statutory power under Alaska Statutes section 38.05.035(b)(2).

The court held that the Commissioner erred in granting Longwith preference rights. First, the court concluded that "Longwith did not sustain an 'inequitable detriment' since the superior court, at the outset, ruled that the lottery 'winners' [were] determined only for purposes of administrative efficiency [and] did not acquire any rights or interests in any Potlatch Ponds parcels as a result of the invalidated lottery."[60] The court also noted that the decision to forego participation in future lotteries was within Longwith's control, since he chose to wait and see if his appeal would be successful in the face of the superior court ruling against him.[61]

In *Trustees for Alaska v. Gorsuch*,[62] the Trustees challenged decisions of the Commissioner of Natural Resources and the Department of Natural Resources that issued a surface coal mining and reclamation permit pursuant to the Alaska Surface Coal Mining

55. *Id.* at 351.
56. No. S-4476, 3903, 1992 WL 364207 (Alaska Dec. 11, 1992).
57. *Id.*, slip op. at 8-10, 13.
58. *Id.*, slip op. at 2-4 (citing State v. Weidner, 684 P.2d 103 (Alaska 1984)).
59. *Id.*, slip op. at 4.
60. *Id.*, slip op. at 13.
61. *Id.*
62. 835 P.2d 1239 (Alaska 1992).

Control and Reclamation Act (Alaska Mining Act).[63] The Trustees claimed that the Department of Natural Resources exceeded its discretion by failing to require that various off-site facilities (port facilities, solid waste disposal facilities, gravel pits and a housing facility with an air strip and access road) be covered under the permit issued to Diamond Shamrock-Chuitna Coal Joint Venture.

The supreme court first held that the legislature intended the Act to be construed in compliance with its federal counterpart, the Surface Mining Control and Reclamation Act of 1977 (Federal Mining Act).[64] The court further held that the Department's "decision to refrain from exercising jurisdiction over the disputed facilities lacked a reasonable basis," as the statutory definition of "surface coal mining operations" encompassed the facilities.[65] Under the agency's own regulations, a permit was required for many of the facilities at issue.[66]

The court, however, rejected the Trustees' second claim that the entire surface coal mining operation must be covered under a single Alaska Mining Act permit rather than under separate permits.[67] The court nevertheless concluded that "statutory language does support Trustees' related argument that [the agency] may not ignore cumulative effects of mining and related support facilities by unreasonably restricting its jurisdiction and disregarding the effect of activities outside that jurisdiction."[68] The supreme court remanded the case to the Department of Natural Resources to consider the cumulative environmental effects of the entire operation, including the off-site facilities.[69]

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63. *Id.* at 1241 (citing ALASKA STAT. §§ 27.21.010-.999 (1983)).

64. *Id.* at 1242 (citing 30 U.S.C. §§ 1201-1328 (1986)).

65. *Id.* at 1244 (citing ALASKA STAT. § 27.21.998(17) (1983)).

66. *Id.* at 1245 (citing ALASKA ADMIN. CODE tit. 11, §§ 90.155, 90.491 (Oct. 1988)).

67. *Id.* at 1246.

68. *Id.*

69. *Id.* at 1246-47. Chief Justice Rabinowitz, joined by Justice Matthews, dissented with respect to allowing separate permits to cover the single project, given the language of the Federal Mining Act, the Alaska Mining Act, and regulations written by the Department of Natural Resources. *Id.* at 1250 (citing Surface Mining Control and Reclamation Act of 1977 § 506(a), 30 U.S.C. § 1256(a) (1988); ALASKA STAT. §§ 27.21.060, 27.21.998(17) (1983); ALASKA ADMIN. CODE tit. 11, § 90.002(c) (Oct. 1988)) (Rabinowitz, C.J., dissenting). Rather than endorsing the "concept approval" approach put forth by the majority, Chief Justice Rabinowitz believed that the requirement to plan and design an operation for a single permit will affect analysis of "the operation's cumulative effect in a more careful and comprehensive

In *Homer Electric Ass'n v. Towsley*,[70] the supreme court construed Alaska Statutes section 18.60.670 to prohibit the placement of equipment within ten feet of power lines, rather than the mere placement of equipment whose parts *could potentially* move to within that distance.[71] The plaintiff, the estate of decedent Towsley, sued for wrongful death on the theory that the erection of a crane that could potentially extend into the ten-foot zone constituted negligence *per se*.[72]

The court rejected each of the plaintiff's three arguments: that the legislature did not intend to have the statute interpreted literally in light of a prior similar provision in the Alaska General Safety Code;[73] that a literal interpretation frustrates the purpose of the statute to promote public safety;[74] and that such a decision renders subsection two of the statute redundant.[75] In particular, while alleged superfluity of a statute can be persuasive, the court concluded that the argument was not strong enough to overcome the presumption of a literal interpretation.[76] The court also countered the superfluity argument with reference to another statutory provision governing the requisite accompanying warning signs which must be posted. Such signs are required to caution against operating equipment "within ten feet," and not against operating when equipment *might* come within that distance.[77] Justice Compton dissented, arguing that the majority erred in assuming the statute to have a single literal meaning, in ignoring the

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manner." *Id.* at 1251 (Rabinowitz, C.J., dissenting).

70. 841 P.2d 1042 (Alaska 1992).

71. *Id.* at 1047. Alaska Statutes section 18.60.670 provides that "[a] person . . . may not (1) place . . . machinery . . . that is capable of lateral, vertical, or swinging motion, within 10 feet of a high voltage overhead electrical line or conductor; (2) store, operate [or] erect . . . machinery . . . within 10 feet of a high voltage overhead electrical line or conductor." ALASKA STAT. § 18.60.670 (1991).

72. *Homer Electric*, 841 P.2d at 1043.

73. *Id.* at 1044 (citing 1969 Alaska General Safety Code, § 312-20 (prohibiting the erection of equipment "*when it is possible*" for any part to come within ten feet of high voltage lines) (repealed 1973)).

74. *Id.* The court recognized that while the plaintiff's interpretation increased safety, the court's literal view of the statute promoted greater safety than no such prohibition at all and allowed for efficiency. *Id.*

75. *Id.* at 1045. *See supra* note 71.

76. *Id.*

77. *Id.* at 1046 (quoting ALASKA STAT. § 18.60.675 (1991)).

resulting superfluity, and in not construing the statute to promote safety to the fullest.[78]

D. Prison Administration

In *Hays v. State*,[79] the supreme court reviewed a prisoner's claim of a due process violation ensuing from termination from his job in the prison library.[80] Hays relied on *Ferguson v. Department of Corrections*,[81] where the supreme court had previously held that prisoners have an "'enforceable interest in continued participation in rehabilitation programs'" under Alaska law.[82] The court distinguished *Ferguson*, holding that the state did not deny Hays all rehabilitative opportunities, but rather merely transferred him from one prison employment position to another.[83] Given the lack of an enforceable constitutional interest, the superior court did not err in dismissing Hays's administrative appeal for lack of subject matter jurisdiction.[84]

In *C.G.A. v. State*,[85] the supreme court held that federal law will preempt the state's attempt to make a mother use her minor son's social security survivor's benefits to support him while incarcerated.[86] C.G.A.'s mother had voluntarily relinquished her position as her son's payee, and a subsequent superior court order allowed the State of Alaska to apply to replace her.[87] The United States Supreme Court had previously held that federal social security law prevents attachment or garnishment by the state of those benefits which have already been paid.[88] However, in addressing C.G.A.'s claim to preserve his benefits, the supreme court concluded "that statutory authority exists for the state to be designated C.G.A.'s representative payee, and that, as payee, the

78. *Id.* at 1047 (Compton, J., dissenting).
79. 830 P.2d 783 (Alaska 1992).
80. *Id.* at 784.
81. 816 P.2d 134, 139 (Alaska 1991).
82. *Hays*, 830 P.2d at 785 (quoting Ferguson v. Department of Corrections, 816 P.2d 134, 139 (Alaska 1991)).
83. *Id.*
84. *Id.* (citing Hertz v. Carothers, 784 P.2d 659, 660 (Alaska 1990)).
85. 824 P.2d 1364 (Alaska 1992).
86. *Id.* at 1365, 1367.
87. *Id.* at 1365-66.
88. *Id.* at 1367 (citing 42 U.S.C. § 407(a) (1983); Bennett v. Arkansas, 485 U.S. 395 (1988)).

state can devote C.G.A.'s benefit funds to authorized expenditures."[89] The state may receive the money under Alaska Statutes section 47.10.230(b), but may only use the money as permitted by federal law.[90] The court referred the case to the Social Security Agency to decide whether the appropriation could be used to pay for incarceration.[91]

E. Motor Vehicles

In *Pruitt v. State Department of Public Safety*,[92] the supreme court considered a breathalyzer test refusal (BTR), for which the defendant was subject to criminal prosecution and possible revocation of his driver's license. The Division of Motor Vehicles revoked Pruitt's license, but a magistrate subsequently dismissed the BTR criminal charge.[93] The supreme court rejected Pruitt's claim of collateral estoppel, since no final order had been issued by the magistrate until after the administrative decision.[94]

The court also declined to fashion an administrative standard different from that applicable to the criminal BTR, which allows the driver to cure refusal under certain circumstances.[95] Adopting the factors articulated in *Lund v. Hjelle*,[96] the court held that subsequent consent could cure an initial refusal upon showing the following:

> that the subsequent consent occurred within a reasonable time after the prior first refusal; that the test administered following the subsequent consent will still be accurate; that the test will not result in any substantial expense or inconvenience to the police; and that the arrestee has been in continuous custody of the arresting officer and under observation for the entire time.[97]

The court then held that Pruitt's repeated refusal to submit to the test, his consent only after administering a breath spray containing alcohol, and his delaying tactics wasting the valuable time of law enforcement meant that Pruitt failed, even under the flexible rule,

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89. *Id.* at 1368.
90. *Id.* at 1368-69.
91. *Id.* at 1369-70.
92. 825 P.2d 887 (Alaska 1992).
93. *Id.* at 889.
94. *Id.* at 890.
95. *Id.* at 893-94 (citing Lively v. State, 804 P.2d 66 (Alaska Ct. App. 1991)).
96. 224 N.W.2d 552, 557 (N.D. 1974).
97. *Pruitt*, 825 P.2d at 894 (citing Lund v. Hjelle, 224 N.W.2d 552, 557 (N.D. 1974)).

to cure his refusal.[98] The court therefore affirmed the revocation of Pruitt's driver's license.[99]

F. Administrative Procedure

In *In the Matter of J.L.F. and K.W.F.*,[100] the supreme court held that the lower court lacked jurisdiction to consider the Department of Health and Social Service's petition to adjudicate J.L.F. and K.W.F. as children in need of aid (CINA) and to terminate their mother's parental rights. The jurisdictional statute requires not only a finding of the parent's inability to care for the child, but "that finding must also extend to any relatives who are in fact caring for or willing to assume care."[101] The court remanded the case to the superior court, however, to determine whether the same result would be reached under Alaska Statutes section 47.10.010(a)(2)(C), which authorizes a CINA adjudication if "'there is an imminent and substantial risk that the child will suffer harm.'"[102] The court also remanded for a finding as to whether the mother, who is developmentally disabled, received parenting instruction sufficiently geared to her special needs to allow her and her children to reunite.[103]

In *Fairbanks North Star Borough v. State*,[104] the supreme court affirmed the superior court's finding that Fairbanks North Star Borough's suit for trespass, inverse condemnation, quiet title, ejectment and rescission and restitution over the Department of Natural Resources's invocation of a Cooperative Easement Agreement was barred as an untimely appeal of an administrative determination.[105] The supreme court rejected this attempt to establish jurisdiction, reasoning that the assertion relied on broad constitutional provisions and that the Borough had been a party to

98. *Id.* at 894-95.
99. *Id.* at 895.
100. 828 P.2d 166 (Alaska 1992).
101. *Id.* at 170 (citing ALASKA STAT. § 47.10.010(a)(2)(A) (1990)). The court noted that "abandonment is evidence that no relative is willing or able to provide care." *Id.* at 170 n.9.
102. *Id.* at 170 (quoting ALASKA STAT. § 47.10.010(a)(2)(C) (1990)).
103. *Id.* at 171-72.
104. 826 P.2d 760 (Alaska 1992).
105. *Id.* at 761.

an administrative hearing from which it could have directly appealed.[106] The Borough attempted to differentiate the legal taking alleged in the administrative action from the physical intrusion in its condemnation claim and in the quiet title and ejectment claims. The court nevertheless viewed the condemnation claim as a direct challenge to the prior administrative decision. The court further reasoned that the quiet title and ejectment claims were attempts to do indirectly what the Borough could not do directly, that is, challenge an administrative decision that was no longer subject to appeal.[107]

III. BUSINESS LAW

In 1992, the Alaska Supreme Court decided several cases in business law involving the interpretation of contracts. The court addressed the issues of duty of care, the nature of professional services, the recoverability of bid costs, and the liability of personal guarantors. Additionally, the court considered a challenge by a limited partner to the validity of the partnership, whether a state treasury warrant is a negotiable instrument, and whether a plaintiff can be estopped from asserting lender liability claims.

In *Bank of California v. First American Title Insurance Co.*,[108] the plaintiff agreed to provide a loan to a real estate development company for construction of a strip mall. The loan was secured by a deed of trust on the property.[109] At the request of the bank, Security Title & Trust Agent of Alaska issued a preliminary commitment for title insurance, which incorrectly stated that the developer owned a fee simple estate in the property.[110] When the loan was issued, First American Title Insurance Company issued a policy of title insurance on the property,[111] insuring the Bank of

106. *Id.* at 763-64 (citing Owsichek v. State, 627 P.2d 616 (Alaska 1981)).
107. *Id.* at 764.
108. 826 P.2d 1126 (Alaska 1992).
109. *Id.* at 1127.
110. *Id.* In fact, the president of the development company had quitclaimed part of his interest to his daughter. The deed was properly recorded. The president then deeded his remaining interest to the company, but the daughter did not. *Id.*
111. *Id.*

California against damage or loss should the title not be vested in fee simple.[112]

The development company defaulted on the loan and the bank discovered the company did not possess a fee simple in the property. The bank brought an action for breach of contract and misrepresentation against the two insurance companies. The bank claimed Security Title was liable for negligently misrepresenting the exclusive ownership of the property in its preliminary commitment, and First American was vicariously liable for the misrepresentation because Security Title had acted as First American's agent.[113]

In this first impression case, the supreme court held that a title company could be exposed to tort liability for misrepresentations made in a preliminary commitment of title insurance.[114] First, the court reasoned that providing preliminary title information is "an essential service to prospective buyers and lenders [who are] told what transactions must take place before they can receive clear title or an effective security."[115] Consequently, title insurance companies have a duty of care toward the customer.[116] However, the duty remains one of reasonable care and not that of guarantor.[117] Second, *Howarth v. Pfeifer*[118] established liability "for negligent misrepresentation 'where there is a duty, if one speaks at all, to give correct information.'"[119] Considering the *Howarth* factors,[120] the court concluded that a title insurance company has a duty "to

112. *Id.*
113. *Id.* at 1128.
114. *Id.* at 1129.
115. *Id.*
116. *Id.*
117. *Id.* at 1129 n.5.
118. 443 P.2d 39 (Alaska 1968).
119. *Bank of California*, 826 P.2d at 1129 (quoting *Howarth*, 443 P.2d at 42).
120. The factors were summarized in a later case and include: "(a) whether the defendant had knowledge, or its equivalent, that the information was desired for a serious purpose and that the plaintiff intended to rely upon it; (b) the foreseeability of harm; (c) the degree of certainty that plaintiff would suffer harm; (d) the directness of causation; and (e) the policy of preventing future harm." *Id.* (quoting Bevins v. Ballard, 655 P.2d 757, 760-61 (Alaska 1982)) (citing *Howarth*, 443 P.2d at 42).

accurately communicate the state of a title when issuing a preliminary commitment for title insurance."[121]

The court also dismissed Security Title's defense that a disclaimer excused liability, reasoning that the disclaimer did not clearly or explicitly state that Security Title would not be liable even if found negligent.[122] Moreover, the court discounted another clause in the contract which could have effectively stayed any action by the plaintiff until the defendant was given an opportunity to cure the problem. The court found the clause immaterial because the Bank's claim arose from the preliminary commitment rather than from the title insurance policy.[123]

Lakeside Mall, Ltd. v. Hill[124] addressed whether a limited partner (Neal) could raise various statutory filing defects to claim that the company was not properly formed as a limited partnership, consequently exposing the remaining limited partners to general partner liability.[125] In a foreclosure action, the bank filed against Neal as an original guarantor of the loan.[126] He, in turn, filed cross- and third-party claims against his partners, contending that the company had not been properly formed.[127]

The court cited *Betz v. Chena Hot Springs Group*[128] for the proposition that improper filing might affect the rights between limited partners and creditors, but generally not the rights between partners themselves.[129] The court found that Neal was a partner when a previous assumption agreement was signed, that he was a partner during the time he claimed the defects existed, and that the company did file the proper documents shortly after Neal left the partnership.[130] For these reasons, the court concluded that Neal was estopped as a matter of law from asserting his statutory defects claim.

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121. *Id.*
122. *Id.* at 1130.
123. *Id.* at 1131.
124. 826 P.2d 1137 (Alaska 1992).
125. *Id.* at 1138.
126. *Id* at 1139.
127. *Id.*
128. 657 P.2d 831 (Alaska 1982).
129. *Lakeside*, 826 P.2d at 1141.
130. *Id.* at 1142.

Dick Fischer Development No. 2, Inc., v. State Department of Administration[131] involved a contractor who sued the state to recover bid preparation costs and other damages when the state cancelled a large construction project for which Fischer had submitted a competitive bid.[132] The supreme court recognized that by seeking bids the state "impliedly contracts to give those bids fair and honest consideration" and moreover, that if the state's rejection is capricious or arbitrary, the bidder is entitled to bid preparation costs.[133] The court held, however, that the capricious or arbitrary benchmark was overcome by the reasons for rejection advanced by the state: (1) a lack of legislative support; (2) financing concerns; and (3) alleged impropriety in the bidding process.[134]

In *National Bank of Alaska v. Univentures 1231,*[135] the supreme court held that a state treasury warrant is a negotiable instrument under the Uniform Commercial Code (UCC) as enacted in Alaska.[136] The superior court held that the warrant was not a negotiable instrument governed by the UCC, and thus the National Bank of Alaska had taken the warrant subject to the state's defense that a stop payment order had been issued before the bank cashed it.[137] The supreme court reversed. The court found the warrant satisfied the statutory requirements for negotiability.[138] First, the warrant was signed by the governor.[139] Second, the warrant contained an unconditional promise to pay a specified sum.[140] Third, the warrant was payable within a specified time: no more than two years from the date of issue.[141] Finally, the warrant was made payable to the order of Univentures.[142] Thus, because the

131. 838 P.2d 263 (Alaska 1992).
132. *Id.* at 265.
133. *Id.* at 266 (citing King v. Alaska State Housing Auth., 633 P.2d 256 (Alaska 1981)).
134. *Id.* at 266-67.
135. 824 P.2d 1377 (Alaska 1992).
136. *Id.* at 1379.
137. *Id.* at 1378-79.
138. *Id.* at 1379. The requirements for negotiability are set out in Alaska Statutes section 45.03.104(a) (1986).
139. *Id.*
140. *Id.*
141. *Id.*
142. *Id.*

warrant satisfied the requisites of a negotiable instrument, NBA took the warrant free from the defenses presented by the state.

In *American Motorists Insurance Co. v. Republic Insurance Co.*,[143] the supreme court addressed whether an architect's bid for a contract is included within the meaning of "professional services" covered by a professional liability insurance policy.[144] When a competitor filed a complaint against ECI/Hyer for negligent misrepresentation, fraudulent misrepresentation, defamation, injurious falsehood, and business disparagement in connection with a successful contract bid, ECI/Hyer was insured by the defendant against claims for negligence arising out of the "'rendering or failing to render professional services.'"[145] The defendant refused, however, to defend the architectural firm in the lawsuit. Rather, the plaintiff successfully defended ECI/Hyer and subsequently sought the defendant's pro rata share of the defense costs.[146]

The supreme court concluded that an architect's bid does constitute a professional service.[147] Because the proposal included a lengthy, detailed, specialized report, the court found that only an architect employing his skills, knowledge and labor could have prepared the bid.[148] The court rejected the defendant's attempts to distinguish between the "preparation" and the "rendering" of professional services, reasoning that the insurance company could have explicitly excluded bid preparation and submission from the policy.[149] Moreover, the court concluded settled law provides for interpreting ambiguous terms in insurance policies in favor of coverage.[150]

In *Beck v. Haines Terminal & Highway Co.*,[151] a dispute arose as to the extent of a general manager's liability for the debts of his employer under a personal guaranty agreement. Beck's employer sought to secure credit with the defendant and Beck had his

143. 830 P.2d 785 (Alaska 1992).
144. *Id.* at 786.
145. *Id.* at 786-87 (quoting the insurance policy).
146. *Id.*
147. *Id.*
148. *Id.* at 788.
149. *Id.*
150. *Id.*
151. 843 P.2d 1229 (Alaska 1992).

bookkeeper complete the two-page application.[152] Without reading the document, Beck penned his signature, followed by the designation "General Manager" on both pages.[153] The first page was the application for a line of credit, but the second was a "Joint Personal Guaranty," making the signor liable should the corporation default.[154] When the company did default, the creditor secured judgment against Beck as guarantor for $139,162.26.[155] Beck argued the personal guaranty should not be enforced on two grounds: first, the creditor neither requested nor relied on the guaranty in extending credit to his employer; and second, the signing of the agreement with the designation "General Manager" evidenced his intent to enter the agreement in his corporate capacity, not as an individual.[156] The supreme court found Beck's reliance argument unsupported by the case law.[157] According to the court, compelling a creditor to prove reliance serves no valid purpose and would be unduly burdensome.[158]

The court had not previously rendered a decision as to "whether a signature followed by a corporate designation on a personal guaranty creates an ambiguity, necessitating consideration of extrinsic evidence."[159] While noting a split of authority in other jurisdictions, the court adopted the approach used in the Tenth Circuit, holding that when an agreement clearly professes to hold the individual liable, a corporate designation such as "General Manager" will not excuse the individual from personal liability.[160]

In *Wright v. State*,[161] the court held that a lender's liability claims were barred by the doctrine of quasi estoppel when the plaintiff failed to disclose those claims during bankruptcy proceedings.[162] In August 1987, the state sued Wright to collect for defaulted loans relating to his participation in the Point MacKenzie

152. *Id.* at 1230.
153. *Id.*
154. *Id.*
155. *Id.*
156. *Id.* at 1230-31.
157. *Id.* at 1231.
158. *Id.*
159. *Id.*
160. *Id.*
161. 824 P.2d 718 (Alaska 1992).
162. *Id.* at 722.

Agricultural Project, but those proceedings were stayed when Wright filed a Chapter 11 bankruptcy petition.[163] Wright was unable, however, to work out a satisfactory reorganization plan with the state and his other creditors.[164] The bankruptcy court subsequently discharged Wright's debts following Chapter 7 liquidation proceedings.[165]

During the pendency of his bankruptcy proceedings, Wright had filed a lender liability suit, alleging numerous misrepresentations and breaches by the state. Wright's request for relief included cancellation of his indebtedness to the state and monetary damages.[166]

Affirming the superior court dismissal of the plaintiff's lender liability claims, the supreme court noted the "unconscionable inconsistency" in allowing Wright to discharge his debts to the state and other creditors during bankruptcy while retaining a right to later pursue damages against the state.[167] After the state filed its claims against Wright, he petitioned for Chapter 11 bankruptcy proceedings. If not for the bankruptcy petition, Wright would have been required to file his lender liability claims against the state as compulsory counterclaims under Alaska Civil Rule 13(a).[168] The court reasoned that allowing Wright to recover damages after his debts had been discharged would be inequitable as such damages could have accrued to the benefit of the creditors instead of Wright.[169]

IV. CONSTITUTIONAL LAW

In 1992, the Alaska Supreme Court and the Alaska Court of Appeals decided cases in several areas of constitutional law. The decisions are divided into four categories: equal protection, due process, privilege against self-incrimination, and right to counsel. Overlap may exist between some of these categories and the section

163. *Id.* at 719-20.
164. *Id.* at 720.
165. *Id.*
166. *Id.*
167. *Id.* at 722.
168. *Id.*
169. *Id.*

summarizing cases on constitutional protections in the criminal law.[170]

A. Equal Protection

In *Allam v. State*,[171] the court of appeals denied an equal protection challenge to former Alaska Statutes section 11.71.060(a)(3). The statute provides that a person older than eighteen could possess up to four ounces of marijuana without committing a crime, while persons under seventeen would fall under the juvenile system.[172] The defendant argued the statute effectively placed eighteen year-olds in a class by themselves, since only eighteen year-olds could be criminally prosecuted for possessing small amounts of marijuana. The court noted the Alaska legislature specifically allowed for statutory exceptions to exist in the law when it changed the age of majority to eighteen years: "There is no legal requirement that the same age of majority apply to all activities and circumstances."[173] Since neither a fundamental right nor a suspect classification were involved, the court turned to the question of whether the legislation was rationally related to furthering a legitimate state interest.

The court of appeals found that although the defendant was treated as a minor for purposes of marijuana regulation, this was not inconsistent with his being prosecuted as an adult rather than a juvenile.[174] The "policies underlying [Alaska's] juvenile justice statutes are sufficiently distinct from the policies underlying the laws regulating alcohol and drug use that the Alaska constitution does not require the legislature to use the same age limit for both purposes."[175] Thus, eighteen year-olds can be prosecuted as adults who have not yet reached the legal age for marijuana possession.

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170. *See infra* part V (A).
171. 830 P.2d 435 (Alaska Ct. App. 1992).
172. ALASKA STAT. § 47.10.010(a)(1) (1990).
173. *Allam*, 830 P.2d at 437-38; *see* ALASKA STAT. § 25.20.010 (1990).
174. *Allam*, 830 P.2d at 440.
175. *Id.* at 440-41.

B. Due Process

In *Carvalho v. Carvalho*,[176] the court considered whether a father's exclusion from a telephonic hearing conducted to determine his past due child support obligation violated his due process rights. Although the defendant did not physically attend the hearing or file a Civil Rule 99 motion to attend telephonically, the court of appeals nevertheless held that the trial court abused its discretion in not allowing him to testify.[177] The outcome of the case rested on contested facts that the defendant may have been able to counter.[178] Because the hearing represented the defendant's sole opportunity to present evidence, the defendant had a due process right to be heard.[179]

In *Burnor v. State*,[180] several defendants appealed class C felony convictions for selling alcohol in Kotzebue. The community had voted to ban the sale of alcohol beverages in a local option election.[181] Alaska Statutes section 04.16.200 classifies the sale of alcohol without a license or permit as a class A misdemeanor unless a local option election prohibits the introduction of new or existing alcohol licenses into the community,[182] in which case it is a class C felony.[183] Burnor challenged the difference between penalty provisions, claiming that it violated equal protection and due process guarantees. The court of appeals stated that the legislature could rationally decide to punish the unauthorized sale of alcohol in communities that had affirmatively chosen to ban all alcohol sale more severely than in communities where some alcohol sales were permitted.[184]

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176. 838 P.2d 259 (Alaska 1992).
177. *Id.* at 262.
178. *Id.* at 263.
179. *Id.*
180. 829 P.2d 837 (Alaska Ct. App. 1992).
181. *Id.* at 839.
182. ALASKA STAT. § 04.16.200(a) (1988).
183. ALASKA STAT. § 04.16.200(b) (1988).
184. *Burnor*, 829 P.2d at 839-40. The court also rejected Burnor's claims that (1) criminalizing the sale of alcohol as a class C felony constitutes cruel and unusual punishment, and (2) Alaska Statutes section 04.16.200(b) violates due process by failing to give adequate notice of its proscribed conduct and corresponding penalties. *Id.* at 841-42.

In *Shetters v. State*,[185] the court of appeals confronted another challenge to the constitutionality of local option elections.[186] Shetters first contested Alaska Statutes section 04.11.496, under which a Kiana local election had prohibited the sale and importation of alcohol in its community.[187] He argued that the statute must be read to prohibit the importation of alcohol meant for sale but not that for personal possession.[188] The court rejected this argument, referring to the plain language of the statute which forbids an individual to "'knowingly send, transport, or bring an alcoholic beverage into the municipality or established village . . . .'"[189] In response to Shetters' claim that the local option election constitutes an unconstitutional delegation of legislative power,[190] the court reasoned "[i]t is not an unconstitutional delegation of legislative power to grant local communities the choice of whether to adopt the state law."[191]

In *Sun v. State*,[192] the plaintiff challenged the constitutionality of Alaska Statutes section 09.17.030, which denies recovery for personal injuries incurred while in the act of committing a felony.[193] Sun claimed that the statute authorizes the execution of any criminal by the police with no recourse for the family, constituting a violation of due process under Alaska's constitution.[194] Since excessive use of force by a police officer remains subject to criminal

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185. 832 P.2d 181 (Alaska Ct. App. 1992).
186. *Id.*
187. *Id.* at 182.
188. *Id.*
189. *Id.* at 182-83 (quoting ALASKA STAT. § 04.11.496(b) (1986)).
190. *Id.* at 184 (relying on ALASKA CONST. art. I, § 7, art. II, §§ 14-15, art. XI, §§ 1-4, 6-7).
191. *Id.*
192. 830 P.2d 772 (Alaska 1992).
193. Alaska Statutes section 09.17.030 provides:

> A person who suffers personal injury or death may not recover damages for the personal injury or death if the injuries or death occurred while the person was engaged in the commission of a felony, the person has been convicted of a felony, including conviction based upon a guilty plea or plea of nolo contendere, and the felony substantially contributed to the injury or death. This section does not affect a right of action under 42 U.S.C. 1983.

ALASKA STAT. § 09.17.030 (Supp. 1992).
194. *Sun*, 830 P.2d at 775.

prosecution,[195] the supreme court upheld the constitutionality of Alaska Statutes section 09.17.030. The statute does not alter the substantive law of arrest, and because significant sanctions exist to redress the violation of this law of arrest, the court found no deprivation of Sun's due process rights.[196]

In re A.S.W. and E.W.[197] held a child's videotaped testimony about sexual abuse by her father admissible at a Child in Need of Aid (CINA) proceeding.[198] A state trooper and a social worker conducted and videotaped a one-hour interview with the child during which she was asked open-ended, non-leading questions.[199] There was, however, no cross-examination, and the child was not specifically asked whether she had been coached.[200] The trial court excused the child from testifying in person, ruling the videotape admissible under the hearsay exception of Alaska Rule of Evidence 804(b)(5).[201] At the CINA proceeding, the father denied all allegations of abuse and claimed that the use of the videotape violated not only the aforementioned rule of evidence but also the constitutional right to confront one's accuser.[202]

The court found that the purpose of a CINA hearing is to determine whether a child's well-being is jeopardized, not whether conduct constituting child abuse under the law has occurred.[203] The father faced neither criminal punishment nor civil liability as a result of the CINA proceeding.[204] Moreover, judges and not juries are the triers of fact in CINA proceedings and are more capable of weighing the evidence.[205] Thus, the supreme court held "in the adjudicatory phase of a CINA proceeding, the alleged abuser's due process right to examine the child is adequately protected by the

195. *Id.*
196. *Id.*
197. 834 P.2d 801 (Alaska 1992).
198. *Id.* at 805.
199. *Id.*
200. *Id.*
201. *Id.*
202. *Id.* at 803-05.
203. *Id.* at 806.
204. *Id.*
205. *Id.*

unavailability and reliability requirements of Evidence Rule 804."[206]

In *Kiester v. Humana Hospital Alaska, Inc.*,[207] the plaintiff challenged the hospital's denial of surgical privileges. The supreme court reasoned that hospitals should be allowed substantial discretion to determine competency requirements, but due process dictates that they not base the grant or denial of privileges on vague and ambiguous standards, but rather on objective criteria.[208] The court concluded that due process demands that a denied applicant must be notified "of the specific criteria which were determinative in the denial and how the applicant failed to meet the hospital's expectations with regard to the criteria."[209] Consequently, the defendant should have noted the specific deficiencies in the plaintiff's training, education, and demonstrated competence.[210] The oral evaluations needed to express more than just a negative opinion by explaining how the plaintiff did not meet the standards set by the hospital.[211] The supreme court remanded the application to the hospital for reconsideration.[212] The court denied the plaintiff's claim for damages, however, and distinguished this case from one where a surgeon who was granted permanent staff privileges had them improperly revoked. In that case, the surgeon clearly had a compensable "property right."[213]

C. Self-Incrimination

In *State v. Gonzalez*,[214] the court of appeals held that Alaska's witness immunity statute violates the state's constitutional privilege against self incrimination.[215] Alaska Statutes section 12.50.101(a) provides that "no testimony or other information compelled under . . . order, or information directly or indirectly derived from that

206. *Id.*
207. 843 P.2d 1219 (Alaska 1992).
208. *Id.* at 1233.
209. *Id.* at 1225.
210. *Id.* at 1233.
211. *Id.* at 1226.
212. *Id.* at 1228.
213. *Id.*
214. 825 P.2d 920 (Alaska Ct. App. 1992).
215. *Id.* at 936.

testimony or other information, may be used against the witness in a criminal case."[216] In affirming the superior court order, the court found this "use and derivative use" standard of immunity violates article I, section 9 of the Alaska constitution, which requires "transactional immunity"[217] be granted to protect an individual's privilege against self-incrimination.[218]

The court reasoned that the similarity between the Alaska provision and that of the federal constitution, and the status of the federal law in 1956 when the Alaska constitution was ratified, mandated the higher standard.[219] Although federal law now recognizes use and derivative use immunity as equivalent to the self-incrimination privilege, the Alaska delegates must have consciously selected to implement transactional immunity.[220] Noting the court's historical trend has been toward a broadening of individual rights under Alaska's constitution, the court found that the state had failed to offer any compelling arguments to support a narrower interpretation of the provision.[221]

D. Right to Counsel

In *Adams v. State*,[222] the court of appeals reversed the defendant's assault conviction, concluding that his waiver of counsel resulted in a due process violation.[223] Two psychiatrists who examined the defendant concluded that he was partially delusional.[224] The trial judge, however, permitted him to waive counsel and proceed pro se, relying on one doctor's characterization of the delusions as limited to the facts of the case but not affecting the ability to defend himself.[225] After the defendant was found guilty and sentenced, appointed counsel contended that Adams lacked the

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216. ALASKA STAT. § 12.50.101(a) (1990).

217. "Transactional immunity" gives immunity to witnesses from prosecution for offenses to which their compelled testimony relates. BLACK'S LAW DICTIONARY 751 (6th ed. 1990).

218. *Gonzalez*, 825 P.2d at 935.

219. *Id.* at 929.

220. *See id.* at 930.

221. *Id.* at 936.

222. 829 P.2d 1201 (Alaska Ct. App. 1992).

223. *Id.* at 1206.

224. *Id.* at 1203-04.

225. *Id.* at 1204.

minimum competency necessary to present his own defense and was thus unable to validly waive the right to counsel.[226]

The court of appeals extended the current *Faretta-McCracken*[227] test and held defendants whose paranoid delusions affect their perception of the evidence and impair the ability to appreciate the extent of their own disability cannot conduct their own defense.[228] In a concurring opinion, Chief Judge Bryner emphasized that the articulated test for waiver of procedural rights does not create a differing standard from that for determining competency to proceed.[229] He understood the rationale underlying the majority opinion to be that Adams did not make a knowing and intelligent waiver because his decision to waive counsel was affected by his mental illness.[230]

In *Carr v. State*,[231] the court of appeals considered whether the prosection obtained statements made by the defendant over the telephone to his wife in violation of his privilege against self-incrimination and his right to counsel.[232] An Alaska State Trooper contacted the defendant's wife and requested her cooperation in gaining information from Carr, who was suspected of sexually molesting the wife's child from a previous relationship.[233] The wife agreed and placed a telephone call to Carr, which was recorded pursuant to a valid warrant.[234] Carr admitted to sexually abusing the child.[235] The state trooper met with Carr and obtained further admissions from the defendant following the administration of

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226. *Id.* at 1205.

227. Faretta v. California, 422 U.S. 806, 821 (1975); McCracken v. State, 518 P.2d 85, 91 (Alaska 1974). The court construed these cases to hold that the average criminal defendant must be allowed self-representation if the trial court makes a careful inquiry in which it determines that: (1) the defendant understands his right to counsel, (2) the defendant is determined to forego that right, and (3) the defendant can conduct his defense without being unusually disruptive. *Adams*, 829 P.2d at 1205; *see* Burks v. State, 748 P.2d 1178 (Alaska Ct. App. 1988).

228. *Adams*, 829 P.2d at 1206.

229. *Id.* at 1207.

230. *Id.*

231. 840 P.2d 1000 (Alaska Ct. App. 1992).

232. *Id.*

233. *Id.* at 1002.

234. *Id.*

235. *Id.*

Miranda warnings.[236] Carr subsequently moved to suppress these statements.[237]

Carr initially claimed the telephone conversation was a custodial interrogation, which should have been preceded by a reading of his *Miranda* rights.[238] The court of appeals recognized Carr's incriminating statements to his wife were the fruits of a police interrogation, as her call was intended to elicit such statements for the benefit of the state police.[239] The court nevertheless held that this call did not rise to the level of a "custodial interrogation" for the purposes of *Miranda*.[240] The telephone interrogation did not involve formal questioning or a personal confrontation with a police officer, the defendant was free to accept, reject, and break off the conversation at any time, and the defendant's incarceration arose from a wholly unrelated crime.[241] Under these circumstances, the court found no possibility that the incriminating statements resulted from the coercive "'interaction of custody and official interrogation.'"[242]

Carr also contended that the state violated his right to counsel under the Alaska constitution[243] during both the telephone call and subsequent personal interview.[244] As a party in a separate CINA proceeding related to a child abuse investigation, he claimed he was entitled to have his court-appointed attorney for the child custody proceedings present for purposes of the criminal investigation as well.[245] The court of appeals rejected his argument for several reasons. First, the right to counsel does not attach until the state takes some adversarial action that transforms the suspect into an "accused" in a criminal prosecution.[246] In the present case, the court found that the defendant's incriminating statements were procured during the early stages of the investigation; no charges had

236. *Id.*
237. *Id.*
238. *Id.* at 1003.
239. *Id.*
240. *Id.*
241. *Id.* at 1004.
242. *Id.* (quoting Illinois v. Perkins, 496 U.S. 292, 297 (1990)).
243. *See* ALASKA CONST. art. I, § 11.
244. *Carr*, 840 P.2d at 1005.
245. *Id.*
246. *Id.*

yet been filed.[247] The CINA proceeding, moreover, was not sufficiently connected with the current child abuse investigation.[248] The custody proceedings began months before the criminal investigation, the allegations of molestation were not litigated in the CINA case, and in the CINA case the defendant had no parental rights over the allegedly abused child because he was not her natural father.[249]

V. CRIMINAL LAW

The Alaska Court of Appeals considered a great number of criminal law cases in 1992. The decisions are separated into the categories of constitutional protections and general criminal law, with further specifity in each. Some overlap in subject matter exists between this section and the section summarizing cases in general constitutional law.[250]

A. Constitutional Protections

1. *Search and Seizure.* In *Beauvois v. State*,[251] the defendant was convicted of robbery in the first degree after a police officer conducted an investigative stop of the car in which defendant was riding.[252] At trial Beauvois moved to suppress all evidence gleaned from the investigative stop, arguing that it was unlawful because the officer had no information to link the car or its occupants to the recent robbery.[253] On appeal, the court affirmed the conviction, recognizing the "authority of the police to conduct investigative stops of potential witnesses to a recent criminal occurrence, even when there is no reason to believe that the person stopped participated in the crime."[254] The circumstances surrounding the stop justified prompt investigation: a serious felony had just occurred in the vicinity, it was three o'clock in the morning, this was the only car driving through the area where the suspect had

247. *Id.*
248. *Id.*
249. *Id.* at 1005-06.
250. *See supra* part IV.
251. 837 P.2d 1118 (Alaska Ct. App. 1992).
252. *Id.* at 1120.
253. *Id.* at 1121.
254. *Id.* (citing Metzker v. State, 797 P.2d 1219 (Alaska Ct. App. 1990)).

fled, and the officer could have reasonably believed that the car's occupants had seen something that could have assisted in the investigation.[255]

In *Barron v. State*,[256] a police officer observed the defendant and another individual in a public restroom stall and suspected an illegal drug transaction was in progress.[257] The officer arrested both men and seized a plastic bag from the toilet containing packets of cocaine.[258] Barron contended he had a reasonable expectation of privacy in a closed restroom stall, and thus the officer's actions and the evidence taken from the scene constituted an illegal seizure.[259] Holding that *Coleman v. State*[260] justified the officer's seizure,[261] the court of appeals recognized that a person in a public restroom has a reasonable expectation of privacy but reasoned that the expectation is limited because others who enter the public area may observe that person.[262] Moreover, the court observed: "When a police officer who is in a public area observes two people using the same restroom stall, and apparently not using the stall for its intended purpose, then these observations may permit the police officer to take further reasonable steps to investigate."[263]

In *Chandler v. State*,[264] the police seized Chandler's bag at the Ketchikan airport and took it to the police station.[265] Ninety minutes after the seizure, the police obtained a warrant authorizing them to search the bag, which contained five ounces of cocaine.[266] The defendant argued that the police's actions amounted to a full-

255. *Id.*

256. 823 P.2d 17 (Alaska Ct. App. 1992).

257. *Id.* at 18-19. From outside the stall, the officer noticed four feet inside the stall and also recognized that the feet were far away from the commode. *Id.* at 18.

258. *Id.* at 19.

259. *Id.*; *see* U.S. CONST. amend. IV; ALASKA CONST. art. I, § 14.

260. 553 P.2d 40 (Alaska 1976) (concluding that a police officer can temporarily detain a person when "the officer has a reasonable suspicion that imminent public danger exists or serious harm to persons or property has recently occurred").

261. *Barron*, 823 P.2d at 21.

262. *Id.* at 20.

263. *Id.*

264. 830 P.2d 789 (Alaska Ct. App. 1992).

265. *Id.* at 791.

266. *Id.*

scale seizure of his property requiring a showing of probable cause.[267] The state contended that the seizure involved a minimally intrusive detention requiring only reasonable suspicion.[268]

The court of appeals found that the length of detention in this case exceeded the ninety minute limit for investigative detentions established in *United States v. Place*.[269] The court further reasoned other factors also suggested that this detention amounted to a full-scale seizure, including the fact that the luggage was taken directly from the defendant's person and that it was transported a significant distance from the place of seizure.[270] Thus, probable cause was necessary to support this warrantless seizure.[271] Neither the defendant's nervous behavior nor the police officers suspicion that the defendant was a drug dealer "approach[ed] the level of certainty necessary to establish probable cause."[272]

The defendants in *Newhall v. State*[273] challenged the validity of a search leading to their convictions for misconduct involving a controlled substance in the third degree. The police obtained a warrant authorizing a search for alcohol in a package addressed to the defendants.[274] Inside the package, a police officer found a second package that he knew from its weight could not contain alcohol. Nevertheless, the officer opened the second package and discovered marijuana.[275]

The trial court relied on *Reeves v. State*[276] to uphold the search of the inside package, reasoning that its contents were in

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267. *Id.*
268. *Id.*
269. 462 U.S. 696, 706 (1983).
270. *Chandler*, 830 P.2d at 792.
271. *Id.* at 796.
272. *Id.* The police knew of charges against the defendant that had been dismissed over two years ago. The police also relied upon information about Chandler's drug-related activity stemming from an interview with an informant whom the court of appeals found failed to satisfy the reliability prong of the *Aguilar-Spinelli* test. *Id.* at 794-95. *See* Spinelli v. United States, 393 U.S. 410 (1969); Aguilar v. Texas, 378 U.S. 108 (1964).
273. 843 P.2d 1254 (Alaska Ct. App. 1992).
274. *Id.* at 1256.
275. *Id.*
276. 599 P.2d 727 (Alaska 1979).

plain view.[277] In *Reeves*, a correctional officer searched a balloon found in the pocket of the defendant and discovered that it contained contraband.[278] The Alaska Supreme Court held such a search and seizure to be lawful, stating "the opaque quality of the balloon does not preclude a plain view seizure . . . [if] supported by the requisite probable cause."[279] The court of appeals in *Newhall* held *Reeves* to be inconsistent with federal law insofar as *Reeves* authorized the *search* of closed containers based on mere probable cause.[280] Instead, the court concluded that under federal law, the plain view doctrine entitled police to open a package only if "the contents of the container were identifiable to a virtual certainty. The police are required to have more than probable cause."[281]

In *Fox v. State*,[282] the Alaska Court of Appeals affirmed defendant's conviction and sentence for misconduct involving a controlled substance.[283] Fox challenged the superior court's failure to suppress evidence, claiming it was the fruit of unlawful electronic monitoring. The police had secured a warrant to monitor and record a sale of cocaine by the defendant's brother to undercover agents. The defendant's brother failed to appear, the defendant himself completed the transaction, and the agents recorded the sale.[284]

While agreeing with the defendant that the initial warrant did not authorize recording the transaction with the defendant, the court of appeals nevertheless held that the warrant requirement was waived due to exigent circumstances.[285] The court found the warrantless search to be justified by the unanticipated absence of

277. *Newhall*, 843 P.2d at 1257.

278. *Reeves*, 599 P.2d at 730.

279. *Id.* at 739-40.

280. *Newhall*, 843 P.2d at 1259. The court of appeals concluded, however, that *Reeves* was consistent with federal law in allowing a temporary *seizure* based upon probable cause. *Id.*

281. *Id.*

282. 825 P.2d 938 (Alaska Ct. App. 1992).

283. *Id.*

284. *Id.* at 938-39. Based upon these events, the police arranged a second buy with Fox, obtained a second warrant and made another purchase. *Id.* at 939.

285. *Id.* The court applied the *Fox* rationale to a similar situation in the later case of *Pruitt v. State*, 829 P.2d 1197 (Alaska Ct. App. 1992).

the defendant's brother and the unforeseen intervention of the defendant.[286]

In *Marsh v. State*,[287] the defendant appealed his conviction for driving with a revoked license. He contended the evidence of his identity and his revoked license should have been suppressed since they were obtained during an unjustified investigative stop.[288] A state trooper observed the defendant's automobile apparently stalled on the side of the road and stopped to give assistance.[289] He then discovered the defendant's identity and that his license had been revoked.[290]

Relying upon *Ozhuwan v. State*,[291] the court held such an investigative stop is permissible when there is "'a legitimate reason to be concerned for the welfare of the motorist.'"[292] The court rejected the defendant's argument that the officer's actions could not be justified under the assistance rationale since the car started as the officer pulled up.[293] The officer had already initiated the investigative stop and thus was authorized to request the defendant's license.[294]

2. *Miscellaneous.* The court of appeals reversed the defendant's conviction of sexual abuse of a minor in *Wood v. State*,[295] due to a trial court ruling that effectively precluded the defendant from exercising his constitutional right to cross-examine a witness.[296] The alleged victim of the abuse served as the state's primary witness.[297] The witness, however, had himself been accused of sexually abusing a minor and had entered into a "conduct

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286. *Fox*, 825 P.2d at 939.
287. 838 P.2d 819 (Alaska Ct. App. 1992).
288. *Id.* at 820.
289. *Id.* The trooper activated his overhead lights as he pulled up behind the defendant's car, an action which the court assumed *arguendo* resulted in an investigative stop. *Id.*
290. *Id.*
291. 786 P.2d 918 (Alaska Ct. App. 1990).
292. *Marsh*, 838 P.2d at 820 (quoting *Ozhuwan*, 786 P.2d at 922).
293. *Id.* at 820-21.
294. *Id.* at 821.
295. 837 P.2d 743 (Alaska Ct. App. 1992).
296. *Id.* at 744; *see* U.S. CONST. amend. VI; ALASKA CONST. art. I, § 11.
297. *Wood*, 837 P.2d at 745.

agreement" whereby the state agreed to defer delinquency proceedings for one year and then dismiss the charges if he maintained good behavior.[298] The defense argued that the agreement may have motivated the witness to accuse Wood falsely.[299] The trial judge disallowed any questions relating to the conduct agreement, finding the probative value of the evidence to be outweighed by its potential prejudicial effect.[300]

Relying upon the U.S. Supreme Court's decision in *Davis v. Alaska*,[301] the court of appeals emphasized that inquiry into a witness's bias or motivation is a permissible and important use of the constitutional right of confrontation.[302] Because he was not allowed to establish the existence of the conduct agreement, the defendant could not effectively inquire into the witness's possible bias.[303]

In *Fee v. State*,[304] the arresting officer had interpreted Fee's unwillingness to take a breathalyzer test without the presence of his attorney as a refusal.[305] The court found that Fee's statements, which indicated that his refusal stemmed from the mistaken belief that his *Miranda* rights entitled him to presence of counsel, triggered the *Graham* rule.[306] The court of appeals held that the rule of *Graham*, which involved "an administrative appeal of a civil driver's

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298. *Id.*

299. *Id.*

300. *Id.*

301. 415 U.S. 308 (1974).

302. *Wood*, 837 P.2d at 745-46; *see* U.S. CONST. amend. VI; ALASKA CONST. art. I, § 11.

303. *Wood*, 837 P.2d at 747. The court of appeals also reasoned that the trial judge's concern with the potential prejudice that could result from informing the jury of the charges pending against the witness could have been averted by limiting defense's inquiry about the nature of the agreement. *Id.* at 748.

304. 825 P.2d 464 (Alaska Ct. App. 1992).

305. *Id.* at 465.

306. *Id.* at 465-66. "The *Graham* rule applies only in those cases in which the arrestee has been advised of his or her *Miranda* rights prior to being asked to submit to chemical testing." *Id.* at 465 (citation omitted). The *Graham* court held:

> [W]here an arrested person refuses to submit to a breathalyzer test, the administering officer must inquire into the nature of the refusal and, if it appears that the refusal is based on a confusion about a person's rights, the officer must clearly advise that person that the rights contained in the *Miranda* warning do not apply to the breathalyzer examination.

Graham v. State, 633 P.2d 211, 215 (Alaska 1981).

license revocation," also applied to cases involving criminal charges for refusal to submit to chemical testing.[307] While the court agreed Fee had met his burden of proof under *Graham*, it found that the district court erroneously concluded that the arresting officer had also sustained his burden of providing a clear explanation under the rule.[308] The court held "it is not enough for the officer to advise the arrestee that the breath test is mandatory; the officer must also specifically explain that . . . the *Miranda* rights to silence and to the presence of counsel do not apply to the breath test."[309]

In *Edwards v. State*,[310] the court of appeals reversed the trial court determination that the defendant made his statement voluntarily and was not in "custody" for *Miranda* purposes when interviewed at the police station.[311] Relying upon the objective test announced by the Alaska Supreme Court in *Hunter v. State*,[312] the court of appeals found that a reasonable person in Edwards' position would not have felt free to break off questioning.[313] The police officer "had plainly told Edwards that his freedom to leave the police station was conditioned on his willingness to answer the officers' questions."[314] Because this threat transformed the interview into a custodial interrogation, the court held that his statement must be suppressed.[315] The court remanded the case to clarify the status of other evidence in order to determine whether this *Miranda* violation constituted harmless error or required reversal of Edward's first-degree murder conviction.[316]

In *George v. State*,[317] the court of appeals held that the defendant's statements were admissible despite police officer's

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307. *Fee*, 825 P.2d at 465.
308. *Id.* at 466.
309. *Id.* (footnote omitted).
310. 842 P.2d 1281 (Alaska Ct. App. 1992).
311. *Id.* at 1284.
312. 590 P.2d 888 (Alaska 1979).
313. *Edwards*, 842 P.2d at 1285 (citing *Hunter*, 590 P.2d at 895).
314. *Id.*
315. *Id.* The court rejected, however, the defendant's contention that his statement was also involuntary. *Id.*
316. *Id.* at 1285-86.
317. 836 P.2d 960 (Alaska Ct. App. 1992).

noncompliance with the rule of *Stephan v. State*,[318] which held Alaska due process requires electronic recording of "custodial interrogations in a place of detention, including the giving of the accused's *Miranda* rights . . . ."[319] The *George* court held "[t]he fact that the Metlakatla police did not have a functioning tape recorder . . . excuses non-compliance with the *Stephan* rule."[320] The court further noted that in order for the *Stephan* rule to operate, the defendant must make some suggestion that his statement was presented inaccurately or that the police had acted improperly.[321] In this case, the defendant failed to introduce any such evidence.[322]

B. General Criminal Law

1. *Evidence.* In *Birch v. State*,[323] a defendant convicted of driving while intoxicated argued that the results of a blood test performed at his request and by the State Crime Lab should have been suppressed.[324] The defendant's attorney advised him to have an independent blood test done, but the defendant could not afford the fee. A state trooper told Birch he could have his blood sample drawn at state expense.[325] The court of appeals affirmed the trial court determination that the rationale of *Oines v. State*[326] did not apply.[327] In *Oines*, the court had held that the results of a blood test performed by a hired expert were privileged under Alaska's lawyer client-evidentiary rule.[328] *Birch*, however, did not involve any confidential communications between the lawyer and the lawyer's representative, that is, the lab technician.[329] Since the state only seized one of the two vials of blood, Birch's attorney was

318. *Id.* at 962 (citing Stephan v. State, 711 P.2d 1156 (Alaska 1985)).
319. *Stephan*, 711 P.2d at 1162.
320. *George*, 836 P.2d at 962 (citing *Stephan*, 711 P.2d at 1164).
321. *Id.* (citing *Stephan*, 711 P.2d at 1165).
322. *Id.*
323. 825 P.2d 901 (Alaska Ct. App. 1992).
324. *Id.* at 902.
325. *Id.*
326. 803 P.2d 884 (Alaska Ct. App. 1990).
327. *Birch*, 825 P.2d at 903.
328. *Oines*, 803 P.2d at 886 (citing ALASKA R. EVID. 503).
329. *Birch*, 825 P.2d at 903.

not hindered from consulting experts and the attorney-client privilege was not violated.[330]

In *Shakespeare v. State*,[331] the court of appeals held out-of-court statements made by the defendant's wife[332] to a police officer following assurances of protection from prosecution were not admissible under the statement against interest exception to the hearsay rule.[333] Instead, the court determined the correct inquiry under Rule 804(b)(3) is "whether the statement so far tended to subject [the declarant] to criminal liability that a reasonable person in her position would not have made the statement unless she believed it to be true."[334] The court concluded that a reasonable person would have construed the officer's assurances as a promise against prosecution, and thus would not believe her statements to be against her self-interest.[335]

2. *Criminal Procedure.* The court of appeals in *Willie v. State*[336] held that before denying an unopposed suppression motion, a judge must give "the defendant notice of the intended denial, accompanied by an explanation of the judge's reasoning, and an opportunity to supplement the factual assertions of the original suppression motion."[337] After supplementation of the original motion, if the factual assertions contained in the suppression motion

330. *Id.* at 903.

331. 827 P.2d 454 (Alaska Ct. App. 1992).

332. While the defendant asserted the spousal privilege, the trial judge permitted the state to admit the statements through the testimony of the interviewing officer. *Id.* at 457.

333. *Id.* at 470; *see also* ALASKA R. EVID. 804(b)(3).

334. *Shakespeare*, 827 P.2d at 458.

335. *Id.* The officer told the declarant that he was not interested in prosecuting her and would not "throw her in jail" if she told the truth. *Id.*

336. 829 P.2d 310 (Alaska Ct. App. 1992).

337. *Id.* at 313. An opposing party who does not respond to the filing of a motion violates Alaska Rule of Criminal Procedure 40(d). *Id.* at 312 (citing ALASKA R. CRIM. P. 40(d)). The court noted, however, that where the motion is routine, "the trial court is generally authorized to construe the opposing party's failure to respond as non-opposition and to grant the motion if the relief request appears justified." *Id.* The court can also deny a clearly frivolous motion that remains unopposed. *Id.*

remain insufficient to justify relief, the judge may then deny the motion.[338]

In *Wallace v. State*,[339] the court of appeals held Alaska Rule of Criminal Procedure 25(d) does not apply to a probation revocation proceeding.[340] Relying upon *State v. Sears*,[341] the court determined that probation revocation proceedings are not criminal proceedings.[342] Thus the defendant's right to a peremptory disqualification of the judge was governed by Alaska Civil Rule 42(c),[343] which did not entitle the defendant to bring a peremptory challenge appeal prior to the conclusion of the proceeding.[344]

In *Sharp v. State*,[345] the defendant argued that the superior court had erred in rejoining four counts of sexual abuse of a minor for trial and an additional count for failure to appear.[346] Prior to his original trial date, the superior court had granted the defendant's motion to sever Count IV of the indictment, relying on *Johnson v. State*.[347] In *Johnson*, the appellate court held that a defendant was entitled to severance in cases where only the circumstance of the similar nature of the charged offenses warranted joinder, even if the prosecution would produce the same evidence at separate trials.[348]

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338. *Id.* at 313.

339. 829 P.2d 1208 (Alaska Ct. App. 1992).

340. *Id.* at 1210; *see* ALASKA R. CRIM. P. 25(d) (establishing change of judge as a matter of right).

341. 553 P.2d 907 (Alaska 1976).

342. *Wallace*, 829 P.2d at 1210 (citing *Sears*, 553 P.2d at 910).

343. Alaska Rule of Civil Procedure 42(c)(4) provides in pertinent part:

> (4) A party waives the right to change as a matter of right a judge who has been permanently assigned to the case by knowingly participating before that judge in:
>
> (i) Any judicial proceeding which concerns the merits of the action and involves the consideration of evidence or affidavits
>
> . . . .

ALASKA R. CIV. P. 42(c)(4). Wallace had previously appeared before the judge to make admissions to the petition before mounting his challenge. *Wallace*, 829 P.2d at 1209.

344. *Id.* at 1210. Prior to final judgment on the probation revocation, the defendant only has the remedy of petitioning the court of appeals to hear this issue as an interlocutory appeal. *Id.* at 1211.

345. 837 P.2d 718 (Alaska Ct. App. 1992).

346. *Id.* at 724.

347. 730 P.2d 175 (Alaska Ct. App. 1986).

348. *Id.* at 176-77.

Several days before the original trial date,[349] the legislature amended Alaska Criminal Rule of Procedure 8(a) to allow "joinder of similar offenses if the government can demonstrate before trial that evidence of each offense will likely be cross-admissible."[350] The court of appeals upheld the superior court's determination that the amendment effectively overruled *Johnson* and no longer entitled the defendant to automatic severance.[351]

In *Miles v. State*,[352] the defendant and the State reached a plea agreement in which the defendant pled no contest to a charge of third-degree misconduct involving a controlled substance and preserved his right to appeal the superior court's denial of his motions to suppress the tape recordings of his conversations with an undercover officer.[353] The court of appeals held that such an agreement goes beyond *Cooksey v. State*[354] as limited by *Oveson v. Anchorage*.[355]

Whether a motion to suppress involves a "dispositive" determination does not rest upon whether the state would have declined to prosecute in the absence of certain evidence.[356] "[A]n issue is 'dispositive' for *Cooksey* purposes only if resolution of the issue in the defendant's favor would either legally preclude the government from pursuing the prosecution or would leave the government without sufficient evidence to survive a motion for judgment of acquittal . . . ."[357] The state would still have had substantial and

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349. The trial court vacated the defendant's original trial date after Sharp feigned his own suicide and fled the state. *Sharp*, 837 P.2d at 722. He was later recaptured and a new date was set. *Id.*

350. *Id.* at 724 (citing ALASKA R. CRIM. P. 8(a)).

351. *Id.*

352. 825 P.2d 904 (Alaska Ct. App. 1992).

353. *Id.* at 905.

354. 524 P.2d 1251 (Alaska 1974) (allowing a defendant to plead no contest and also to reserve the right to appeal a dispositive issue ruled upon in the trial court).

355. *Miles*, 825 P.2d at 906 (citing Oveson v. Anchorage, 574 P.2d 801, 803 n.4 (Alaska 1978) (holding that "appeals under the *Cooksey* doctrine will not be approved unless it is clearly shown . . . that . . . resolution of the issue reserved for appeal will be dispositive of the entire case.")).

356. *Miles*, 825 P.2d at 905.

357. *Id.* at 906.

sufficient evidence to bring the case to the jury, despite suppression of the tapes.[358]

In *Bloomquist v. State*,[359] the defendant argued that the superior court erroneously denied his request to reopen his case so he could testify on his own behalf.[360] The superior court had ruled "that Bloomquist had personally waived his right to testify after a full opportunity to consult with his attorney."[361] The court adopted the standards announced by the Fifth Circuit in *United States v. Walker*,[362] and listed four factors to consider in deciding whether to reopen the case:

> (1) the timeliness of the motion; (2) the character and importance of the testimony the party desires to present; (3) the effect of granting the motion, [and in] particular[] any prejudice to the state's case; and (4) the reasonableness of the grounds asserted for the request to reopen the evidence, as contrasted with evidence that the defendant's motion was motivated by a desire to "delay the proceedings" or to "gain a strategic advantage over the government."[363]

In *Moss v. Alaska*,[364] the defendant challenged his conviction on four counts of criminal contempt, which stemmed from the defendant's past willful noncompliance with a superior court order to pay child support.[365] Six months prior to the filing of the criminal information against the defendant, the attorney general's office had filed a motion for an order to show cause why the defendant should not be held in civil contempt for his failure to pay child support.[366] On appeal, the defendant maintained that his criminal case should have been dismissed for violation of his right to a speedy trial under Alaska Rule of Criminal Procedure 45,[367]

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358. *Id.* The court reasoned that the undercover agent could still testify about the transactions and could provide the necessary foundation for admission of the drugs into evidence. *Id.* (citing State v. Glass, 583 P.2d 872, 877, 880 (Alaska 1978)).

359. 832 P.2d 177 (Alaska Ct. App. 1992).

360. *Id.* at 179. The defendant had not previously testified. *Id.*

361. *Id.*

362. 772 F.2d 1172 (5th Cir. 1985).

363. *Bloomquist*, 832 P.2d at 180 (citing *Walker*, 772 F.2d at 1177-85).

364. 834 P.2d 1256 (Alaska Ct. App. 1992).

365. *Id.* at 1257-58.

366. *Id.* at 1258.

367. Rule 45(c)(1) states that the trial must begin within 120 days, running

because "the civil contempt proceeding was tantamount to an arraignment on the criminal charges."[368] According to the defendant, the time limit should have started to run when he was served with the motion in the civil case.[369]

The court of appeals found the civil contempt proceeding constituted a separate civil matter to which no right to a speedy trial attached under Rule 45.[370] The court distinguished the civil contempt proceedings, which the state initiated to compel future compliance, from the criminal contempt proceedings, through which the superior court intended to punish the defendant for past willful noncompliance with court orders.[371]

Petersen v. Alaska[372] also involved a Rule 45 issue. Prior to trial, the superior court twice permitted the defendant to change his plea of no contest to a plea of not guilty.[373] Peterson subsequently moved to dismiss the charges, alleging a violation of his right to trial within 120 days of arrest.[374] The trial court denied this motion after allowing for various excludable periods under Rule 45(d).[375]

The court of appeals held that the reinstatement of the defendant's not guilty plea did not immediately trigger the resumption of the Rule 45 countdown.[376] The court reasoned that the state terminated active prosecution on the entry of a no contest plea.[377] Thus, the court adopted the rule of *Sundberg II*,[378] allowing a court to exclude an additional thirty-day period under Rule 45 when a defendant changes a plea of no contest to one of not guilty.

"[f]rom the date the defendant is arrested, initially arraigned or from the date the charge (complaint, indictment, or information) is first served upon the defendant, whichever is first." ALASKA R. CRIM. P. 45(c)(1).

368. *Moss*, 834 P.2d at 1258.
369. *Id.*
370. *Id.* at 1259.
371. *Id.* at 1258-59.
372. 838 P.2d 812 (Alaska Ct. App. 1992).
373. *Id.*
374. *Id.*
375. *Id.* at 813-14; *see also* ALASKA R. CRIM. P. 45(d).
376. *Peterson*, 838 P.2d at 815.
377. *Id.*
378. Sundberg v. State, 667 P.2d 1268 (Alaska Ct. App. 1983) (*Sundberg II*).

3. *Sentencing.* In *Curtis v. State,*[379] the defendant was incorrectly sentenced as a first-time DWI offender. Curtis contended that the district court was authorized to modify his sentence only to the extent necessary to correct the error. Therefore, he argued that the district court should have suspended the minimum fine for a second offense to the extent that he had already complied with the original judgment. The court of appeals agreed and remanded the case, holding that because Alaska Statutes section 28.35.030(c)[380] "does not restrict a sentencing court from suspending all or part of the mandatory minimum fine, the court retains this power."[381] This decision clarified the earlier case of *Dunham v. Juneau,*[382] which had implied that no part of a mandated minimum fine could be suspended.[383]

In *State v. Wagner,*[384] the court of appeals addressed the first impression issue of whether the statutorily created three-judge sentencing panel[385] must abide by Alaska's mandatory sentencing provisions. After the panel concurred in the superior court's finding of a non-statutory mitigating factor, it sentenced Wagner to

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379. 831 P.2d 359 (Alaska Ct. App. 1992)

380. Alaska Statutes section 28.35.030(c) was repealed in 1990. The substance of that provision is now contained in Alaska Statutes section 28.35.030(b)(2)(A) which provides:

> (2) the court may not
>
> (A) suspend execution of sentence or grant probation except on condition that the person serve the minimum imprisonment [provided] under (1) of this subsection . . . .

ALASKA STAT. § 28.35.030(b)(2)(A) (Supp. 1991).

381. *Curtis,* 831 P.2d at 361.

382. 790 P.2d 239 (Alaska Ct. App. 1990).

383. *Id.* at 240-41.

384. 835 P.2d 454 (Alaska Ct. App. 1992).

385. The scheme of the three-judge panel is set out in Alaska Statutes section 12.55.175. Alaska Statutes section 12.55.165 establishes the panel's jurisdiction, providing in relevant part:

> *Extraordinary circumstances*: If the defendant is subject to sentencing under AS 12.55.125 (c), (d), (e), or (i) [presumptive sentencing statutes] and the court finds by clear and convincing evidence that manifest injustice would result from failure to consider relevant aggravating or mitigating factors not specifically included in AS 12.55.155 [defining mitigating and aggravating factors] or from imposition of the presumptive term . . . the court shall enter findings and conclusions and cause a record to be transmitted to a three-judge panel for sentencing under AS 12.55.175.

ALASKA STAT. § 12.55.165 (1990).

concurrent terms of eight years with three years suspended on two counts of first-degree sexual abuse of a minor. The panel concluded that the mandatory sentencing provisions of Alaska Statutes section 12.55.025(h) "applied only to sentences imposed by individual judges and did not restrict the sentencing powers of the three-judge panel."[386]

The court of appeals found that the legislature restricted the panel's jurisdictional authority to presumptive sentencing cases.[387] Thus, while the panel is free to depart from the presumptive sentencing mandates, the panel has no authority to deviate from sentencing restrictions of statutes unrelated to Alaska's presumptive sentencing laws.[388] Enacted independently of the presumptive sentencing laws, the consecutive sentence provision governs not the length of sentences, but how sentences are imposed. This reasoning led the court to note that "compliance with AS 12.55.025(h) would not have precluded the three-judge panel from imposing a composite sentence that was in substance identical to the sentence it imposed by use of concurrent terms."[389]

In *Briggs v. Donnelly*,[390] the court of appeals reviewed the lower court's judgment that the Department of Corrections (DOC) did not have the authority to forfeit a prisoner's "good time" because of misconduct that occurred before his resentencing on the same offense.[391] At issue were interpretations of Alaska Statutes sections 33.20.010(a) and 33.20.050.[392] The defendant contended

386. *Wagner*, 835 P.2d at 455.

387. *Id.* at 7. "The three-judge panel is uniquely a creature of presumptive sentencing." *Id.* at 456.

388. *Wagner*, 835 P.2d at 457.

389. *Id.*

390. 828 P.2d 1207 (Alaska Ct. App. 1992).

391. *Id.* Donnelly's original conviction was reversed. He was subsequently convicted again after a retrial and resentenced.

392. Alaska Statutes section 33.20.010(a) provides in relevant part:

> . . . a prisoner convicted of an offense against the state and sentenced to a term of imprisonment that exceeds three days is entitled to a deduction of one-third of the term of imprisonment rounded off to the nearest day if the prisoner follows the rules of the correctional facility in which the prisoner is confined.

ALASKA STAT. § 33.20.010(a) (1986).

Alaska Statutes section 33.20.050 provides:

that upon resentencing, he began with a clean slate and was automatically entitled to a deduction of one-third of his term of imprisonment under Alaska Statutes section 33.20.010(a).

The court noted that the defendant's interpretation would allow prisoners to reap "the windfall of having the DOC retroactively lose their ability to use the good-time statutes to reward and punish prisoners in the manner the legislature obviously intended."[393] Reversing the lower court, the court of appeals held that Donnelly was subject to forfeiture of good time based upon his entire term of imprisonment, and the defendant's "term of imprisonment" included time served under his original sentence.[394]

The lower court in *Mancini v. State*[395] sentenced the defendant to consecutive terms totaling ten years, with one year suspended, for the convictions of theft in the second degree and sexual abuse of a minor in the second degree.[396] The court of appeals first held that the lower court erred in finding defendant subject to the aggravating factor provided in Alaska Statutes section 12.55.155(c)(15), which applies if "the defendant has three or more felony convictions."[397] The defendant argued only two of his out-of-state felony convictions constituted prior felony convictions under Alaska law.[398]

The court of appeals agreed. Holding the statutory definition of "prior felony conviction" in Alaska Statutes section

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> If during the term of imprisonment a prisoner commits an offense or violates the rules of the correctional facility, all or part of the prisoner's good time may be forfeited under regulations adopted by the commissioner of corrections. The amount of good time forfeited shall be related to the severity of the offense or rule violation.

ALASKA STAT. § 33.20.050(a) (1986).

393. *Donnelly*, 828 P.2d at 1209.

394. *Id.*

395. 841 P.2d 184 (Alaska Ct. App. 1992).

396. The charges were unrelated but were consolidated for sentencing after defendant entered pleas of no contest. *Id.* at 186.

397. *Id.* at 188-89. The court initially affirmed the lower court's decision to impose consecutive sentences and to reject a mitigating factor proposed by defendant. *Id.* at 189.

398. *Id.* at 188. Alaska Statutes section 12.55.145(a)(2), a presumptive sentencing statute, provides in relevant part: "a conviction in this or another jurisdiction of an offense having elements similar to those of a felony defined as such under Alaska law at the time the offense was committed is considered a prior felony conviction." ALASKA STAT. § 12.55.145(a)(2) (1990).

12.55.145(a)(2) applicable to aggravating factor (c)(15), the court of appeals concluded that because only two of Mancini's prior convictions would be prior felony convictions under Alaska law, aggravating factor (c)(15) could not be triggered in this case.[399]

Pleading no contest to the offense of driving while intoxicated (DWI), the defendant in *State v. Peel*[400] contended that his 1986 Louisiana DWI conviction should not operate to classify the defendant as a second time DWI offender, since under Louisiana law, defendants charged with criminal offenses carrying a penalty of no more than six months do not have the right to a jury trial.[401] Because trial by jury is a core constitutional right in Alaska, the court of appeals held that the trial court correctly disregarded Peel's prior conviction and sentenced him as a first-time offender.[402]

In *Andrew v. State*,[403] the court of appeals held that when a probation violation is the *sole* basis for a finding of extraordinary circumstances justifying deviation from the *Austin* rule,[404] the conduct amounting to the violation must be supported by clear and convincing evidence.[405] Although the defendant had been acquitted on charges of homicide, the superior court concluded that for purposes of probation revocation,[406] his guilt had been established by a preponderance of the evidence. The trial court then held that the homicide constituted an extraordinary circumstance for sentencing purposes under the *Austin* rule.[407]

The court of appeals held the rationale underlying the *Austin* rule continues to apply in probation revocation proceedings.[408] A probation violation can be established by meeting the preponderance of the evidence test. If, however, the court relies upon the

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399. *Mancini*, 841 P.2d at 189.

400. 843 P.2d 1249 (Alaska Ct. App. 1992)

401. *Id.* at 1250.

402. *Id.* at 1251.

403. 835 P.2d 1251 (Alaska Ct. App. 1992).

404. The *Austin* rule provides that "[n]ormally a first offender should receive a more favorable sentence than the presumptive term for a second offender . . . ." *Id.* at 1252 (quoting Austin v. State, 627 P.2d 657, 657-58 (Alaska Ct. App. 1981)).

405. *Id.* at 1253.

406. Andrew was a first felony offender who received a suspended sentence and was placed on probation for four years. *Id.*

407. *Id.* at 1254.

408. *Id.*

violation of probation conditions to justify departure from the *Austin* rule in imposing sentence, that violation must be supported by clear and convincing evidence.[409]

The court of appeals, cautioned, however, that:

> [t]he absence of clear and convincing evidence of a probation violation does not automatically bar the court from imposing a sentence exceeding the *Austin* limit, . . . rather, the finding of a violation by a mere preponderance of evidence will rule out an exceptional sentence only when the violation itself provides the exclusive ground for exceeding the . . . limit.[410]

If the totality of the circumstances amounts to clear and convincing evidence that the defendant has poor potential for rehabilitation, the trial court is justified in exceeding the *Austin* limit. Thus, the court of appeals in *Andrew* found that the extraordinary circumstance in this case was not the defendant's probable involvement in a homicide, but rather his poor prospects for rehabilitation.[411]

The court of appeals held in *Kelly v. State*[412] that when probation is revoked, any duties and obligations imposed as conditions of probation necessarily terminate as well.[413] After receiving a suspended sentence for her conviction of criminal mischief in the second degree, Kelly was placed on probation and as a special condition of that probation was ordered to pay restitution to injured parties.[414] The court of appeals found that although the sentencing judge had authority to order restitution as an independent aspect of defendant's sentence,[415] the judge had instead imposed restitution as a condition of her probation. The court of appeals held that when the probationary status was revoked, so were all of the obligations conditioned upon that

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409. *Id.*

410. *Id.* at 1255.

411. *Id.* The court of appeals remanded the case, finding that the trial court may have misunderstood that under *Austin*, a first offender is entitled to a *"more favorable* sentence than the presumptive sentence of a second offender." The court apparently began with the premise that an equivalent sentence would be permissible without a finding of extraordinary circumstances. *Id.* (emphasis added) (quoting *Austin*, 627 P.2d at 657-58).

412. 842 P.2d 612 (Alaska Ct. App. 1992).

413. *Id.* at 614.

414. *Id.* at 613.

415. *See* ALASKA STAT. § 12.55.045(a)(1990).

status.[416] To order restitution would violate "the constitutional protection against double jeopardy which mandates that 'once a sentence has been meaningfully imposed, it may not, at a later time, be increased.'"[417]

In *J.T.S. v. State*,[418] the juvenile defendant had a background of continuous offenses and failed placements. Nonetheless, the court of appeals maintained institutionalization of a juvenile must remain a last resort.[419] Moreover, a court must "affirmatively determine that less restrictive options will probably not accomplish the goals of rehabilitation and protection of the public."[420]

In *Perotti v. State*,[421] the court of appeals upheld the trial court's classification of the youthful defendant as a "worst offender" for sentencing on a first degree murder conviction.[422] A fellow high school student was rumored to have assaulted Perotti's girlfriend, and Perotti shot the student execution style and then burned the body. The court rejected the defendant's argument that the case law justifies such a finding only where the offender acted either gratuitously or for pecuniary gain.[423] The court held that a maximum term could still be warranted although a defendant had acted for personal satisfaction rather than for pecuniary gain.[424]

4. *Miscellaneous.* In *Wesolic v. State*,[425] the court of appeals affirmed the denial of the defendant's motion to dismiss a first-degree burglary charge. After waiting for his landlord to leave, Wesolic, who rented a room in the same house, broke into the rooms and stole property, including firearms.[426] The court found: (1) the locked bedrooms and garage in the house where defendant

416. *Kelly*, 842 P.2d at 614.
417. *Id.* (quoting Sonnier v. State, 483 P.2d 1003, 1005 (Alaska 1971)).
418. 825 P.2d 461 (Alaska Ct. App. 1992).
419. *Id.* at 464; *see* Alaska Delinquency Rule 23(d).
420. *J.T.S.*, 825 P.2d at 464.
421. 843 P.2d 649 (Alaska Ct. App. 1992).
422. *Id.* at 651.
423. *Id.* at 650.
424. *Id.* at 651.
425. 837 P.2d 130 (Alaska Ct. App. 1992).
426. *Id.* at 131.

rented a room constituted a separate building,[427] and (2) the first-degree burglary statute encompasses situations where the burglar steals a firearm during the course of a burglary.[428]

In *Cole v. Alaska*,[429] the defendant appealed his conviction of the misdemeanor offense of operating machinery or equipment within ten feet of a high voltage overhead electrical line or conductor.[430] In dicta, the court of appeals declined to allow comparative negligence principles to create an affirmative defense to a criminal charge.[431] However, the court reversed Cole's conviction on the ground that the trial court erred in instructing the jury to convict if it found Cole acted with criminal negligence.[432] In challenging the court's mens rea instructions, the defendant urged the court of appeals to infer a standard of recklessness into Alaska Statutes section 18.60.670. While the court acknowledged a history of reading a negligence requirement into regulatory statutes establishing misdemeanors,[433] it held that with standard criminal offenses where the statute does not specify the mens rea, recklessness, and not negligence, should be the requisite culpable mental state.[434]

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427. *Id.* at 132. Alaska Statutes section 11.46.310(a) provides "[a] person commits the crime of burglary in the second degree if the person enters or remains unlawfully in a building with intent to commit a crime in the building." ALASKA STAT. § 11.46.310 (1989).

428. *Wesolic*, 837 P.2d at 132; *see also* ALASKA STAT. § 11.46.300 (1989) (first-degree burglary statute).

429. 828 P.2d 175 (Alaska Ct. App. 1992).

430. *Id.* at 176.

431. *Cole*, 828 P.2d at 177. Cole contended that the power line he hit was below the National Electric Safety Code height requirement. The court found, however, that even if it were to allow the affirmative defense, his conviction would nevertheless stand because he was not charged with hitting the line, but with operating within ten feet of the line. *Id.*

432. *Id.* at 178.

433. *See* Gregory v. State, 717 P.2d 428 (Alaska Ct. App. 1986) (holding that criminal negligence was the mens rea for the offense of driving with a suspended license); Beran v. State, 705 P.2d 1280 (Alaska Ct. App 1985) (reading civil negligence requirement into misdemeanor commercial fishing violations).

434. *Cole*, 828 P.2d at 179. The court reasoned that, unlike statutes governing driving and commercial fishing, Alaska Statutes section 18.60.670 was not part of a "comprehensive scheme of regulations dealing with participants in a licensed and heavily regulated activity . . . . Rather, the statute . . . establishe[d] a broad-based criminal offense." *Id.*

In *Willett v. State (Willett I)*,[435] the court of appeals affirmed the defendant's conviction for criminal mischief in the second degree based upon damage the defendant intentionally caused to an automobile.[436] The amount of damages determines the degree of the criminal mischief offense.[437] The defendant contended the amount of damages should have been measured by the decrease in the fair market value of the car.[438] The state's evidence and the jury instructions, however, based the measure of damages on the cost of repair.[439]

The court of appeals rejected the defendant's contention that Alaska Statutes section 11.46.980(a)[440] governed the determination of damages in this case.[441] The court ruled that the statute applies only where a determination of property value is necessary, and Alaska's criminal mischief statutes focus on the amount of damage to the property, not the value of the property.[442] Moreover, the court held that the statute does not preclude the prosecution from relying solely upon evidence of cost of repair to prove damages in a criminal mischief case.[443] Only when a defendant argues that the cost of repairs is unreasonable because it exceeds the value of the damaged property does a determination of the pre-damage value become necessary.[444]

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435. 826 P.2d 1142 (Alaska Ct. App. 1992) (*Willett I*).

436. *Id.* at 1143.

437. Alaska Statutes section 11.46.482(a) provides that criminal mischief in the second degree occurs when a person intentionally damages the property of another to the extent of $500 or more. ALASKA STAT. § 11.46.492(a) (1989). Where damage amounts to less than $500, the offense is punishable as a misdemeanor. ALASKA STAT. §§ 11.46.484, 11.46.486 (1989).

438. *Willet I*, 826 P.2d at 1144.

439. *Id.*

440. Alaska Statutes section 11.46.980(a) provides:

> In this chapter, *whenever it is necessary to determine the value of property*, that value is the market value of the property at the time and place of the crime unless otherwise specified or, if the market value cannot be reasonably ascertained, the cost of replacement of the property within a reasonable time after the crime.

ALASKA STAT. § 11.46.980(a) (1989) (emphasis added).

441. *Willett I*, 826 P.2d at 1145.

442. *Id.*

443. *Id.*

444. *Id.* at 1146. The court pointed out that if the prosecution had used diminution in value to prove damages, a determination of the fair market value of

The court of appeals subsequently declared in *Willett v. State (Willett II)*[445] that "[f]eet, regardless of how they are shod, are not *per se* dangerous instruments."[446] Rather, courts must determine whether a foot constitutes a dangerous instrument on a case-by-case basis, considering the manner in which the kick was rendered, the victim's vulnerability to such a kick and the seriousness of the resulting injury.[447]

In *State v. Waskey*,[448] the court of appeals reinstated an indictment of third-degree assault[449] against the defendant after it had been dismissed by the trial judge.[450] The intoxicated defendant had driven through a stop sign and struck a bicyclist.[451] Since a car is not a traditional "deadly weapon," the trial court found that the prosecutor should have given a special instruction to the grand jury on the definition of "dangerous instrument."[452] The court of appeals held, however, that assault with an automobile almost always creates a substantial risk of death or injury, and that an automobile does constitute a "dangerous instrument" under Alaska Statutes section 11.41.220(a).[453]

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the property would have been necessary. *Id.*

445. 836 P.2d 955 (Alaska Ct. App. 1992) (*Willett II*). The assault at issue in this case was alleged to be in retaliation for the victim's testimony in *Willett I.*

446. *Willett II*, 836 P.2d at 959 (emphasis in original).

447. *Id.*

448. 834 P.2d 1251 (Alaska Ct. App. 1992).

449. Alaska Statutes section 11.41.220(a) states in relevant part:

> (a) A person commits the crime of assault in the third degree if that person recklessly
>
> (1) places another person in fear of imminent serious physical injury by means of a dangerous instrument; or
>
> (2) causes physical injury to another person by means of a dangerous instrument.

ALASKA STAT. § 11.41.220(a) (1989).

450. *Waskey*, 834 P.2d at 1252.

451. *Id.*

452. *Id.* The prosecutor read the grand jurors the statutory definition of "dangerous instrument" as provided in Alaska Statutes section 11.81.900(b)(11): "'dangerous instrument' means any deadly weapon or anything that, under the circumstances in which it is used, attempted to be used, or threatened to be used, is capable of causing death or serious physical injury." ALASKA STAT. § 11.81.-900(b)(11) (1989).

453. *Waskey*, 834 P.2d at 1253-54.

The court of appeals in *Brackhan v. State*[454] reversed the defendant's conviction of theft in the fourth degree.[455] The defendant had fled a cab without paying the fare after the driver assaulted him.[456] Over the defendant's objection, the trial court included in its instructions to the jury the language of Alaska Statutes section 11.46.200(b), which provides that proof of "absconding" without payment for services constitutes a *prima facie* showing of deception.[457] The defendant contended that this instruction "created a presumption that impermissibly shifted the burden of proof to the defense."[458]

While it was within the trial court's discretion to inform the jury of the presumption's existence,[459] the trial court did so in a manner that may have caused the jury to feel obliged to accept the presumption.[460] The *prima facie* provision should have been cited without further guidance to the jury.[461]

In *Jurco v. State*[462] the court of appeals held that a person is not entitled to forcibly resist the taking of property by police officers pursuant to a court order.[463] The defendant argued that a federal bankruptcy court order directing him not to sell, transfer or allow creditors to take his property preempted a state court's forfeiture order and entitled him to defend his truck against

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454. 839 P.2d 414 (Alaska Ct. App. 1992).

455. *Id.* at 415. Alaska Statutes section 11.46.200(a)(1) provides:

> (a) A person commits theft of services if
>
> (1) the person obtains services, known by that person to be available only for compensation, by deception, force, threat, or other means to avoid payment for the services.

ALASKA STAT. § 11.46.200(a)(1) (1989).

456. *Brackhan*, 839 P.2d at 415.

457. ALASKA STAT. § 11.46.200(b) (1989).

458. *Brackhan*, 839 P.2d at 415.

459. The court examined Alaska Rule of Evidence 303(a)(1) and determined that when a defendant offers evidence to rebut a presumption, the court has the discretion to inform the jury of the presumption's existence. *Brackhan*, 839 P.2d at 415-16. If, however, the court does inform the jury of the presumption, it must do so in language that creates a permissible inference; the word "presumption" cannot be used. *Id.* at 416.

460. *Id.*

461. *Id.* at 417.

462. 825 P.2d 909 (Alaska Ct. App. 1992).

463. *Id.* at 910-11.

unlawful seizure.[464] The court of appeals held that even if arguendo Jurco "reasonably believed that the seizure of his truck was illegal," he should have submitted peaceably to the officer's order and waited to contest the validity of the taking in court.[465] When someone known to be (or reasonably appearing to be) a police officer acts to execute a court order authorizing the seizure of property, the property owner cannot use force to resist the seizure.[466]

In *State v. Laraby*,[467] Laraby was charged with attempted kidnapping and assault in the fourth degree.[468] His trial counsel requested a lesser-included offense instruction with regard to the attempted kidnapping charge, but then failed to object when the trial court did not give the proposed instruction.[469] At a post-conviction hearing, the trial court found that the defendant's trial counsel had not acted competently and that this incompetence likely contributed to Laraby's conviction.[470]

In affirming the trial court's ruling, the court of appeals first rejected the state's contention that Laraby had not effectively eliminated all possibility that his attorney had a sound tactical reason for failing to object.[471] An action for post-conviction relief is a civil proceeding and thus, the defendant only need prove his attorney's omission was not tactical by a preponderance of the evidence.[472] There was sufficient evidence to support the lower court's finding that the trial attorney's failure to object was more likely than not attributable to error or neglect.[473]

Next, the state argued that such an error was not so "significant to render counsel's performance constitutionally deficient."[474] The court of appeals disagreed, holding that once the attorney had recognized the propriety of requesting a lesser-included offense

464. *Id.* at 911.
465. *Id.*
466. *Id.* at 914.
467. 842 P.2d 1275 (Alaska Ct. App. 1992).
468. *Id.* at 1276.
469. *Id.*
470. *Id.* at 1279.
471. *Id.*
472. *Id.*
473. *Id.* at 1280.
474. *Id.*

instruction, failure to object to the absence of the proposed instruction was an error amounting to incompetence.[475]

VI. EMPLOYMENT LAW

In 1992, the Alaska Supreme Court decided several employment law cases falling in three categories: disability claims, violation of employment contracts and damages. In the disability area, the court examined the sufficiency of evidence necessary to make a claim for temporary total disability benefits. On the contractual front, the court addressed such issues as the claim of economic duress in an involuntary separation agreement and the force of the covenant of good faith implied in "at will" contracts. The damage cases moved in a number of directions. For example, the court issued an important opinion resulting in a lower standard for enjoining the award of lump sums in workers' compensation cases.

A. Disability Claims

In *Big K Grocery v. Gibson*,[476] the supreme court held that testimony given by a qualified medical expert can be sufficient to rebut the presumption of compensability.[477] A doctor had testified that Gibson's symptoms were probably caused by an operation prior to the work-related accident, although he could not rule out the possibility that the accident accelerated the preexisting condition. In reversing the trial court, the supreme court held that the decision of the Alaska Worker's Compensation Board (Board) was supported by substantial evidence sufficient to rebut the presumption of compens-ability.[478]

In *Baker v. Reed-Dowd Co.*,[479] the supreme court examined the sufficiency of evidence supporting a claim of continued temporary total impairment resulting from a shoulder injury. The Board awarded temporary total disability benefits to cover the period

475. *Id.*

476. 836 P.2d 941 (Alaska 1992).

477. *Id.* at 942-43 (citations omitted) (discussing Veco, Inc. v. Wolfer, 693 P.2d 865, (Alaska 1985); Fireman's Fund Am. Ins. Co. v. Gomes, 544 P.2d 1013 (Alaska 1976)).

478. *Id.* at 942 & n.1, 943.

479. 836 P.2d 916 (Alaska 1992).

extending from the time a doctor declared Baker ready to return to work through one year after another doctor performed surgery on the same type of injury in the same shoulder.[480]

The supreme court held that the medical testimony comprised sufficient evidence to support the Board's finding of a connection between the subsequent rotator cuff injury and the initial work-related injury.[481] The supreme court also ruled in favor of Baker on the issue of temporary total disability benefits for recovery time, disagreeing with the Board's conclusion that Baker was no longer physically impaired at the time his benefits were discontinued.[482] The court determined that Reed-Dowd had not met the burden of supplying substantial evidence to overcome the presumption of continuing disability.[483] Although doctors testified as to Baker's medical stability, they were unable to predict his physical capacity for work.[484] Neither the doctors' depositions nor the Board's determination that Baker's testimony was not credible were sufficient to overcome the presumption of continuing disability.[485]

In *Leslie Cutting, Inc. v. Bateman*,[486] the supreme court held that the statute of limitations on a temporary total disability claim for a long-term condition begins to run only when one can no longer reasonably believe that the condition will respond to further treatment.[487] Bateman, a logger with a debilitating allergy to a common forest lichen, had continued working intermittently for years with the assistance of dangerous medications.[488] Eventually,

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480. *Id.* at 918.

481. *Id.* at 920.

482. *Id.*

483. *Id.* at 919 (citing Olson v. AIC/Martin J.V., 818 P.2d 669, 672 (Alaska 1991)).

484. *Id.* at 920. The court noted that the Board apparently confused the term "medical stability," which means that the patient is as healthy as he will ever be, with complete recovery from disability. *Id.* at 920 n.10. This distinction was important, because Baker's injury preceded an amendment to the statute governing temporary total disability benefits. In 1988, the legislature announced, "Temporary total disability benefits may not be paid for any period of disability occurring after the date of medical stability," but this applies only to injuries sustained after July 1, 1988. *Id.* at 919 n.5 (quoting ALASKA STAT. § 23.30.185 (1990) (amended 1988)).

485. *Id.* at 920.

486. 833 P.2d 691 (Alaska 1992).

487. *Id.* at 694.

488. *Id.* at 691-92.

in 1989, Bateman's doctor recommended that he be placed on disability and receive vocational rehabilitation.[489] Responding to Bateman's claim before the Board, the employer's insurance carrier argued that the statute of limitations barred the claim because Bateman knew of his disability since 1984.

The supreme court noted that the Alaska Workers' Compensation Act provides disabled workers two years from when they realize "'the nature of [their] disability and its relation to [their] employment' to file a claim."[490] Bateman had known for years that his injury could be avoided by not working in the woods, but he believed it could be safely controlled by medication. The supreme court had previously held that the examination of disability centers on the loss of earning capacity, not on actual medical impairment.[491] Thus, the court reasoned "that one does not know the nature of one's disability and the relationship of the disability to one's employment until one knows of the disability's full effect on one's earning capacity. The mere awareness of the disability's full physical effect is not sufficient."[492] The supreme court affirmed the lower court's ruling that the statute of limitations did not start to run until the "point that [Baker] was first fully aware of the nature of his disability and the allergy's bearing on his employment," after which he could not reasonably believe that he could still earn his customary wages.[493]

B. Violation of Employment Contracts

In *Bobich v. Stewart,*[494] the trial court ordered Dimond Mini-Storage and its general partner, Matthew Bobich, to pay overtime wages to two employees[495] Bobich appealed the lower court's decision, challenging the existence of a jury issue as to the number of people employed by Dimond.[496] Bobich claimed that Dimond

489. *Id.* at 692-93.
490. *Id.* at 694 (alteration in original) (quoting ALASKA STAT. § 23.30.105(a) (1990)).
491. *Id.* (citing Cortay v. Silver Bay Logging, 787 P.2d 103, 105 (Alaska 1990)).
492. *Id.*
493. *Id.*
494. 843 P.2d 1232 (Alaska 1992).
495. *Id.* at 1233.
496. *Id.* at 1235.

had only three employees (the Stewarts and one part-time employee), and was therefore exempted from the overtime pay provisions of the Alaska Wage and Hour Act (AWHA).[497] The supreme court upheld the trial court's refusal of a directed verdict because reasonable jurors could differ as to whether Bobich and an independent bookkeeper constituted employees or independent contractors under the standard of *Jeffcoat v. State Department of Labor*.[498]

Bobich also claimed that as a partner in Dimond Mini-Storage, he could not be counted as an employee, and therefore the lower court erred in instructing the jury to consider as employees "all officers of a corporation who actively engage in the business."[499] The supreme court reasoned that when a partner receives regular compensation regardless of profits,

> he looks less like a shareholder and more like a salaried corporate officer. Therefore, for the purposes of [Alaska Statutes section] 23.10.060(1), [the court] shall consider such a compensated partner to be both an owner and an employee. To do otherwise would permit employers to defeat the AWHA's remedial purposes by simply calling paid employees 'partners.'[500]

In *Zeilinger v. SOHIO Alaska Petroleum Co.*,[501] an employee appealed from a directed verdict that upheld an involuntary separation agreement. Among other grounds, Zeilinger argued that the agreement should be rescinded because she signed it while under economic duress.[502]

The supreme court looked to its previously articulated standard of duress, requiring that "'(1) one party involuntarily accepted the terms of another, (2) circumstances permitted no other alternative, and (3) such circumstances were the result of coercive acts of the other party.'"[503] The court noted that the third prong requires a

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497. *Id.* at 1234 (citing ALASKA STAT. § 23.10.060(1) (1984)).

498. *Id.* at 1235 (citing Jeffcoat v. State Dept. of Labor, 732 P.2d 1073, 1075-76 (1987)).

499. *Id.* at 1236 & n.6 (quoting ALASKA ADMIN. CODE tit. 8, § 15.140 (April 1991)).

500. *Id.* at 1236.

501. 823 P.2d 653 (Alaska 1992).

502. *Id.* at 657.

503. *Id.* (quoting Totem Marine Tug & Barge, Inc. v. Alyeska Pipeline Serv. Co., 584 P.2d 15, 21 (Alaska 1978)).

coercive act and a causal link between that act and the economic duress.[504] The court held that even assuming that the employee's discharge was not pursuant to a valid reduction in force, SOHIO took no action constituting threats or coercion.[505] SOHIO had not placed the employee in her already troubled financial circumstances, and her "economic necessity — very often the prime motivation for compromise — is not enough, by itself, to void an otherwise valid release."[506]

Chief Justice Rabinowitz dissented with respect to the court's analysis of the third prong of the test for economic duress. He found the record to contain evidence supporting the claim that SOHIO, aware of its employee's financial straits, wrongfully chose to add her to the reduction in force rather than terminate her under the lengthy standard discipline policy.[507] The Chief Justice concluded that a directed verdict was inappropriate because a reasonable jury could find that SOHIO's threat of "imminent deprivation of her income, which would arguably have an immediate and catastrophic effect on her financial situation, played a direct causal role in her decision to agree to and execute the separation agreement."[508]

In *University of Alaska v. Tovsen*,[509] a university employee on probationary status was terminated, despite the finding of the University Grievance Council that Tovsen's superior had been negligent in training and evaluating her. The Grievance Council believed that a university regulation gave Tovsen's superior "the discretion to terminate Tovsen without just cause based on his subjective dissatisfaction with her performance."[510] The superior court ruled that the regulation does not give a supervisor the right to terminate on subjective dissatisfaction and ordered reinstatement with back pay.[511]

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504. *Id.* at 658.
505. *Id.*
506. *Id.* (citing Horgan v. Industrial Design Corp., 657 P.2d 751, 753-54 (Utah 1982)).
507. *Id.* at 659 (Rabinowitz, C.J., dissenting).
508. *Id.* at 660 (Rabinowitz, C.J., dissenting).
509. 835 P.2d 445 (Alaska 1992).
510. *Id.* at 446.
511. *Id.*

The supreme court affirmed the superior court's interpretation of the regulation, but reversed the reinstatement and back pay order, pending a remand to the Chancellor to examine the case for just cause for dismissal.[512] The court concluded that University Regulation 04.01.06(B), which states "[i]f the employee's performance is found to be unsatisfactory, the employee will be terminated," is not a typical satisfaction clause in that the language of the regulation requires an objective failure to meet acceptable standards.[513] The court held that because "the Grievance Council found that Tovsen's termination was not supported by just cause . . . its recommendation that Tovsen not be reinstated was wrong as a matter of law."[514]

In *Luedtke v. Nabors Alaska Drilling, Inc. (Luedtke II)*,[515] the Alaska Supreme Court returned to the same fact scenario raised in *Luedtke I*,[516] where an employee, Luedtke, was terminated after he tested positive for marijuana use in a urinalysis. Whereas *Luedtke I* dealt with the plaintiff's termination for refusing to submit to a drug test, the court here examined whether Luedtke's suspension for testing positive prior to his termination violated the covenant of good faith and fair dealing implied in "at will" contracts.[517] No other employee was similarly tested, and Nabors immediately suspended Luedtke upon learning the results of the test.[518] The supreme court held that as a matter of law the employer's actions constituted a violation of the implied covenant of good faith and fair dealing.[519] Among the factors that the court considered significant were the lack of notice prior to testing and the failure to test other employees.

512. *Id.* at 448.
513. *Id.* at 447.
514. *Id.*
515. 834 P.2d 1220 (Alaska 1992).
516. 768 P.2d 1123 (Alaska 1989).
517. *Luedtke II*, 834 P.2d at 1222.
518. *Id.* at 1225-26.
519. *Id.* at 1226.

C. Damages

In *Forest v. Safeway Stores, Inc.*,[520] the supreme court held that an employee who sues a third party for the aggravation of an existing work-related injury does not forfeit the right to all compensation from the employer, although the employer has been excluded from settlement negotiations.[521] Forest underwent surgery that aggravated a work-related injury. Safeway, his employer, notified him that it intended to share in the proceeds of his subsequent malpractice action pursuant to Alaska Statutes section 23.30.015, which allows the collection of damages from third-party tortfeasors.[522] When Forest agreed to dismiss his malpractice action with prejudice, Safeway petitioned the Workers' Compensation Board, claiming that in dismissing the suit against the third party without Safeway's permission, Forest had waived his claim to *all* further workers' compensation benefits from Safeway. The Board agreed and on appeal, the superior court affirmed.[523]

The supreme court held that "Safeway had a legitimate, albeit dependent, interest in Forest's third-party claim" against the doctor.[524] However, reading the statute in light of previous pro-employee interpretations, the court held that an employer should not receive the windfall of avoiding all payment merely because an employee's lawyer "blunder[ed]" in pursuing a third-party suit.[525] The court remanded for a determination as to what share of the injury was attributable to the third party's negligence. Forest was assigned the burden of proof in distinguishing his initial injury from any further injury caused by the doctor's negligence.[526]

Justice Matthews, joined by Chief Justice Rabinowitz, dissented with respect to the portion of the majority's holding that discussed how an employee may avoid forfeiture.[527] Justice Matthews accepted the majority view that the employee could avoid forfeiture by showing that the aggravation of the initial work-related injury

520. 830 P.2d 778 (Alaska 1992).
521. *Id.* at 782.
522. *Id.* at 779.
523. *Id.* at 780 (citing ALASKA STAT. § 23.30.015(h) (1990)).
524. *Id.* at 782.
525. *Id.*
526. *Id.*
527. *Id.* at 783 (Matthews, J., dissenting).

was negligible, but reasoned that when an employee dismisses a suit against a third-party joint tortfeasor without the employer's permission, the employee should not be able to avoid forfeiture of his claim by establishing that the third party was not negligent.[528]

In *Alcan Electric v. Bringmann*,[529] the supreme court held that Bringmann, a worker with an ankle injury covered under workers' compensation, could recoup transportation costs incurred in obtaining medical treatment in California.[530] An Alaskan doctor told Bringmann that he would consider performing an operation that would reduce Bringmann's pain, but that the operation would eliminate most of the motion in his ankle.[531] Bringmann then consulted a doctor in California, who operated on Bringmann's ankle with an "extremely complicated" combination of six procedures, each of which the Alaskan doctor testified he could perform individually.[532] The Board agreed with Alcan's claim that Alaska Statutes section 23.30.265(20) did not cover transportation to California, since adequate facilities were available in Alaska.[533]

The supreme court affirmed the superior court's reversal of the Board's decision. First, the supreme court held that the Board erred by overlooking "the presumption of compensability [that] applies to continuing medical care."[534] Second, the court held that Alcan introduced no evidence to show that any doctor working in Alaska had suggested performing this complex combination of procedures, even though the procedures could be performed individually. The court reasoned that when a doctor fails to recommend an option to a patient, the option should be considered unavailable to that patient. The court thus held that Bringmann's evidence coupled with the unrebutted presumption of compensability "satisfied his

528. *Id.* at 783 (Matthews, J., dissenting).

529. 829 P.2d 1187 (Alaska 1992).

530. *Id.* at 1190.

531. *Id.* at 1188.

532. *Id.*

533. *Id.* at 1189. Alaska Statutes section 23.30.265(20) provides in pertinent part that "medical and related benefits' includes . . . transportation charges to the nearest point where adequate medical facilities are available." ALASKA STAT. § 23.30.265(20) (Supp. 1992)).

534. *Alcan Electric*, 829 P.2d at 1189 (quoting Olsen v. AIC/Martin J.V., 818 P.2d 669, 675 (Alaska 1991)).

burden of proof that adequate medical treatment was unavailable in Alaska."[535]

In *Olsen Logging Co. v. Lawson*,[536] the supreme court held that in assessing requests for a stay of enforcement of a lump sum award in workers' compensation cases, the lesser "serious and substantial questions" standard should be used rather than the more strict "probability of success on the merits" standard.[537] In *Wise Mechanical Contractors v. Bignell*,[538] the supreme court had previously announced the "irreparable damage" two-prong test which must be satisfied in order to obtain a stay of a workers' compensation award on appeal.[539] The test requires that the party seeking the stay demonstrate both the financial irresponsibility of the claimant and the *probability* that the claimant will lose on the merits on appeal.[540] The *Bignell* court justified this rule by balancing the hardships of the parties. Under the probability of success on the merits standard alone, the employee would almost always be inadequately protected.[541] Thus, the *Bignell* court required the party seeking the stay to satisfy both prongs of the irreparable damage test.

The *Olsen* court clarified the *Bignell* test, reasoning that "[i]n most cases involving lump sum awards the balance is different. The employee can be adequately protected and the employer generally stands to suffer the greater hardship."[542] The court reasoned that an employee is usually not dependent on lump sum awards for daily expenses, but that under Alaska Statutes section 23.30.155(j), an employer who makes an overpayment to an employee can only recoup that money by holding back up to twenty percent of future compensation out of installment payments.[543] Arguing by analogy to an earlier case concerning preliminary injunctions, *A.J. Industries,*

535. *Id.* at 1190.
536. 832 P.2d 174 (Alaska 1992).
537. *Id.* at 176.
538. 626 P.2d 1085 (Alaska 1981).
539. *Id.* at 1087, *quoted in Olsen Logging*, 832 P.2d at 175.
540. *Id.*, *cited in Olsen Logging*, 832 P.2d at 175.
541. *Olsen Logging*, 832 P.2d at 176 ("[T]he hope of a future award is a meager substitute for life's daily necessities.") (citing *Bignell*, 626 P.2d at 1087).
542. *Id.*
543. *Id.* (citing ALASKA STAT. § 23.30.155(j) (1990)).

Inc. v. Alaska Public Service Commission,[544] the supreme court recalled that the "balance of hardships" approach means that "'if [the balance of hardships tips decidedly toward the plaintiff], it will ordinarily be enough that the plaintiff has raised questions going to the merits so serious, substantial, difficult and doubtful, as to make them a fair ground for litigation and thus for more deliberative investigation.'"[545] Since Olsen bore the greater hardship and had raised "serious and substantial" questions about the merits, Olsen's stay of the lump sum award on appeal was improperly denied.[546]

In *Bozarth v. Atlantic Richfield Oil Co.*,[547] the supreme court affirmed the granting of summary judgment against Bozarth, for although he claimed he was dismissed for raising safety complaints and not for his refusal to submit to drug testing, Bozarth produced no evidence to rebut his employer's assertion.[548] The court also affirmed the lower court's decision to award Atlantic-Richfield fifty percent of its attorney's fees as permissible partial compensation under Alaska Rule of Civil Procedure 82.[549]

Justice Matthews, joined by Justice Compton, dissented in part with regard to the award of attorney's fees. Justice Matthews indicated that the $76,000 sum awarded by the court would represent a crushing financial blow to almost any individual citizen, such that the chilling effect could cause a limitation of access to the courts and a denial of due process.[550] He suggested instead that "in wrongful discharge claims the award of attorney's fees [should] not exceed some fraction of the former employee's annual income."[551]

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544. 470 P.2d 537 (Alaska 1970), *modified*, 483 P.2d 198 (1971).

545. *Olsen Logging*, 832 P.2d at 176 (alteration in original) (quoting *A.J. Industries*, 470 P.2d. at 541; Hamilton Watch Co. v. Benrus Watch Co., 206 F.2d 738, 740 (2d Cir. 1953)).

546. *Id.* at 174.

547. 833 P.2d 2 (Alaska 1992).

548. *Id.* at 3-4.

549. *Id.* at 4.

550. *Id.* at 5-6 (Matthews, J. dissenting).

551. *Id.* at 6 (Matthews, J., dissenting).

VII. FAMILY LAW

In 1992, the Alaska Supreme Court decided many cases in the area of family law, the majority of which concerned issues of custody, child support and property division. In particular, the supreme court upheld the constitutionality of Alaska Rule of Civil Procedure 90.3 and affirmed its application in several child support cases. The court also had the opportunity to consider the effect of the United Services Former Spouses' Protection Act on marital property division.

A. Custody and Child Support

In *Harvick v. Harvick*,[552] the supreme court held that when a custodial parent withdraws her voluntary relinquishment of parental rights under the Indian Child Welfare Act (ICWA),[553] custody does not automatically revert back to that parent.[554] Clyde Harvick appealed a superior court decision which allowed his ex-wife, Dorthea Harvick, to withdraw her relinquishment of parental rights in their daughter. The decision reinstated a 1979 court order awarding custody to Mrs. Harvick.[555]

Under a literal application of ICWA Section 1913(c), Mrs. Harvick was entitled to have the relinquishment document set aside.[556] However, the relinquishment document constituted a modification of custody and, therefore, Mrs. Harvick was not automatically entitled to regain custody of the child.[557] The court reasoned a divorce decree awarding custody is effective only as between the two parties.[558] Thus, when one parent dies, custody necessarily transfers to the non-custodial parent. The court found

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552. 828 P.2d 769 (Alaska 1992).

553. Section 1913(c) of the Indian Child Welfare Act provides:

> In any voluntary proceeding for termination of parental rights to, or adoptive placement of, an Indian child, the consent of the parent may be withdrawn for any reason at any time prior to the entry of a final decree of termination or adoption, as the case may be, and the child shall be returned to the parent.

25 U.S.C. § 1913(c) (1978).

554. *Harvick*, 828 P.2d at 772.

555. *Id.* at 770.

556. *Id.* at 771.

557. *Id.* at 772.

558. *Id.* at 771.

the relinquishment document effected a similar transfer of custody in this case.[559] Concluding Mr. Harvick was the custodial parent, the court remanded, holding that Mrs. Harvick had the burden of showing substantial reasons for a further modification of custody.[560]

In *Coghill v. Coghill*,[561] the supreme court upheld the constitutionality of Alaska Rule of Civil Procedure 90.3, which provides a formula for calculating a non-custodial parent's child support obligation.[562] The appellant argued adoption of the rule by the supreme court effected a substantive change in the law by modifying Alaska Statutes section 25.24.160, which authorizes courts to determine support obligations "'as may be just and proper for the parties to contribute toward the nurture and education of their children.'"[563] The supreme court held Civil Rule 90.3 does not amend Alaska Statutes section 25.24.160, but rather "interprets the statute and establishes guidelines to enable courts to determine what is a 'just and proper' contribution."[564]

The appellant next argued that the rule creates an irrebuttable presumption, denying the non-custodial parent due process.[565] The supreme court noted that other courts "have found that child support guidelines do not offend due process so long as they provide for discretion in their application."[566] Civil Rule 90.3 recognizes the potential need to deviate from the formula and authorizes such a departure in certain circumstances.[567]

Finally, appellant argued that because the income of the custodial parent is not considered in the Rule 90.3 formula, the rule violates standards of equal protection.[568] The supreme court noted, however, that "'equal protection has never required that differently situated persons be treated the same way.'"[569] For

559. *Id.* at 771-72.
560. *Id.* at 772.
561. 836 P.2d 921 (Alaska 1992).
562. *Id.* at 927.
563. *Id.* (quoting ALASKA STAT. § 25.24.160 (1992)).
564. *Id.* (citing ALASKA R. CIV. PRO. 90.3, commentary I(B)).
565. *Id.*
566. *Id.* at 929.
567. *Id.* at 928.
568. *Id.*
569. *Id.* at 929.

purposes of child support, the court concluded that custodial and noncustodial parents are not similarly situated.[570] Because this distinction between custodial and noncustodial parents is of an economic nature, standard equal protection analysis requires only a fair and substantial relationship between the discrimination and the purpose of the rule.[571] In conclusion, the court stated that the percentage of income approach delineated in the rule is fairly and substantially related to the goals of Rule 90.3.[572]

In *Epperson v. Epperson*,[573] the husband contended that past voluntary financial contributions to his daughter in excess of his support obligation constituted good cause to deviate from the Rule 90.3 formula, and should be credited against his future support obligation.[574] The supreme court allowed such contributions to be offset against *past* due child support,[575] but held it to be "contrary to the purpose of Civil Rule 90.3 to offset such contributions against *future* child support payments except in exceptional circumstances."[576]

In *Zimin v. Zimin*,[577] the husband challenged the inclusion of money deposited in a Capital Construction Fund[578] in the calculation of his 1990 income for determining his child support obligation.[579] Although the IRS allows certain amounts to be deducted from income, the commentary to Civil Rule 90.3 provides that these amounts should not be deducted from income for purposes of

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570. *Id.*

571. *Id.*

572. *Id.* at 930.

573. 835 P.2d 451 (Alaska 1992).

574. *Id.* at 453.

575. *Id.*; *see* Arnt v. Arnt, 777 P.2d 668, 671 (Alaska 1989); Young v. Williams, 583 P.2d 201, 203 (Alaska 1978).

576. *Epperson*, 835 P.2d at 453 (emphasis added). The court implied a different result had there been evidence of an agreement between the parents that these contributions were to be considered prepayment for future support. *Id.*

577. 837 P.2d 118 (Alaska 1992).

578. The Merchant Marine Act of 1936 allows a taxpayer who owns an eligible vessel to establish a Capital Construction Fund to support the construction or reconstruction of American vessels. *See* 46 U.S.C. § 1177 (1989). Taxable income is then reduced by certain amounts deposited in the fund for that tax year. *See* 26 U.S.C. § 7518 (c)(1)(A) (1989).

579. *Zimin*, 837 P.2d at 120 n.2.

calculating child support.[580] As the goal of the Rule 90.3 guidelines is to gain a realistic estimate of the non-custodial parent's annual income, the court concluded that the funds secured in the Capital Construction Fund should rightfully be included in Mr. Zimin's 1990 income when calculating child support.[581]

In *Bock v. Bock*,[582] the supreme court held that it did not have jurisdiction to hear an interstate child custody case. In light of the policy "against simultaneous proceedings in separate states, and the importance of avoiding conflicting custody orders," the court found that Alaska improperly continued to exercise jurisdiction following clear indications that Kentucky would not relinquish its jurisdiction.[583] Moreover, the court reasoned that the absence of a formal act of deferral by the Kentucky court solidified Kentucky's claim of continuing jurisdiction.[584] Since Kentucky law also determined whether Kentucky retained jurisdiction to determine future questions of custody, despite the fact that the mother and children resided in Alaska for the preceding four years,[585] the court held that the federal Parental Kidnapping Prevention Act[586] precluded Alaska from asserting jurisdiction over the matter so long as Kentucky claimed a "'significant connection'" to the case under its own child custody act.[587]

In *Pinneo v. Pinneo*,[588] the supreme court held that Alaska had jurisdiction to modify a custody decree although the children had lived outside the state for several years. The trial court asserted jurisdiction to determine custody under Alaska Statutes section 25.30.020(a)(3), finding that no other state would meet the jurisdictional prerequisites.[589] Mrs. Pinneo contended that the trial court

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580. ALASKA R. CIV. P. 90.3, commentary III(B).
581. *Zimin*, 837 P.2d at 122.
582. 824 P.2d 723 (Alaska 1992).
583. *Id.* at 724.
584. *Id.*
585. *Id.*
586. 28 U.S.C. § 1738A(f) (1990).
587. *Bock*, 824 P.2d at 724 (quoting 28 U.S.C. § 1738A(f)(1990)).
588. 835 P.2d 1233 (Alaska 1992).
589. *Id.* at 1236. The children had moved with their mother from Alaska to Washington to Texas to California and back to Texas. *Id.* at 1234. Although Alaska was not the home state of the children at the onset of the proceeding, the court found that on the evidence presented neither California nor Texas could

should have undertaken an independent examination to determine if any other state could exercise jurisdiction over the matter.[590] The supreme court disagreed, reasoning that the "party to a custody dispute [who] believes that another state has jurisdiction under prerequisites substantially in accordance with AS 25.30.020(a)(1) or (2) . . . bears the burden of presenting the court with evidence which . . . would support a finding that the other state has jurisdiction."[591]

Mrs. Pinneo also challenged the grant of custody to the father, arguing that no significant change in circumstances occurred to warrant the modification.[592] Again the supreme court disagreed, finding a series of relocations from state to state constituted a substantial change in circumstances.[593]

In the divorce proceeding of *Deininger v. Deininger*,[594] the supreme court addressed a unique custody arrangement ordered by the trial court. Although the parties were granted joint legal custody of the children, the wife was to have primary physical custody for the first two years. Then, the parents were to share physical custody on an alternating weekly basis.[595] The supreme court affirmed the arrangement, reasoning that trial courts have broad discretion "to fashion custody awards designed to meet the unique needs of the individuals involved."[596] The court also concluded that the arrangement did not effect an automatic modification of custody, but rather allowed the court order of shared physical custody to be slowly implemented over a two-year period.[597]

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assert jurisdiction in accordance with Alaska's jurisdictional conditions. *Id.* at 1236; *see* ALASKA STAT. § 25.30.020(a)(1)-(2) (1992).

590. *Pinneo*, 835 P.2d at 1236.

591. *Id.*

592. *Id.* at 1238. Alaska Statutes section 25.20.110 authorizes the modification of a custody award only where there has been a change in circumstances and the modification would be in the best interests of the child. ALASKA STAT. § 25.20.110 (1992).

593. *Pinneo*, at 1238.

594. 835 P.2d 449 (Alaska 1992).

595. *Id.* at 450.

596. *Id.* at 451.

597. *Id.*

B. Property Division

In *Johnson v. Johnson*,[598] the supreme court held that the plaintiff was not entitled to an equitable share of her husband's military retirement pension.[599] Under the Uniformed Services Former Spouses' Protection Act (USFSPA),[600] military retirement benefits may be subject to marital property division, depending upon state law. Alaska law provides that military benefits may be equitably divided between divorcing spouses.[601] The USFSPA was amended in 1990, providing divorce decrees entered prior to June 25, 1981 could not be reopened in order to divide military retirement benefits. Since the divorce decree was entered in 1977, the supreme court found that the 1990 amendment precluded any rights the wife might have had to the benefits under Alaska law.[602]

The supreme court was called upon again to interpret the USFSPA in *Clauson v. Clauson*.[603] In the divorce proceedings, Mrs. Clauson had been awarded an equitable share of her husband's military retirement pension. When her husband later elected to waive his retirement benefits in order to collect veterans disability benefits, Mrs. Clauson filed for and obtained a modification of the final divorce decree, requiring her former husband to pay her an amount equivalent to her share of the waived retirement pension. Her husband challenged this award, arguing it contravened the United States Supreme Court holding in *Mansell v. Mansell*,[604] which "precludes state courts from considering a former spouse's military disability benefits received in lieu of waived retirement pay when making an equitable division of marital assets."[605]

The Supreme Court of Alaska held that under *Mansell*, the USFSPA clearly prohibited the redistribution effected by the

598. 824 P.2d 1381 (Alaska 1992).

599. *Id.* at 1382.

600. 10 U.S.C. § 1408 (1990).

601. Chase v. Chase, 662 P.2d 944 (Alaska 1983).

602. The supreme court found that although the 1990 amendment was enacted only while this appeal was pending, the retroactive intent of Congress was clear and thus the court was to apply the amended version of the USFSPA. *Johnson*, 834 P.2d at 1383.

603. 831 P.2d 1257 (Alaska 1992).

604. 490 U.S. 581 (1988).

605. *Clauson*, 831 P.2d at 1262.

Clauson modification order,[606] since the effect of the trial court's award was to give Mrs. Clauson a share of her husband's disability benefits. The supreme court also held, however, that Alaska courts were not precluded by federal law from considering the economic consequences of veteran's disability pay when equitably allocating marital property upon divorce.[607]

In *Chotiner v. Chotiner*,[608] the husband challenged the court's classification of a $100,000 annuity as marital property subject to division. The funds used to purchase the annuity consisted of the husband's military severance pay and inheritance money. The supreme court concluded that the inheritance and military severance pay should have been considered separate property, unless the husband conveyed those assets to the marital estate. If those funds were marital assets when the annuity was purchased, the annuity was marital property at the time of divorce.[609] As the trial court made no findings as to whether the husband intended to transfer his separate assets to the marital estate, the supreme court remanded the case for further consideration.[610] Finally, the supreme court concluded that neither (1) joint investments made by the parties resulting in significant losses, nor (2) the wife's status as the primary wage earner justified invading the annuity to effect an equitable distribution.[611]

VIII. FISH AND GAME LAW

In 1992, several cases were decided in the area of fish and game law. One strengthened the state's power to restrict or prohibit particular methods of hunting and fishing (that is, the use of aircraft to spot fish), while another addressed Alaska's complex statutory scheme governing subsistence hunting. The remaining two cases clarified various administrative provisions governing fishing.

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606. *Id.*

607. *Id.* at 1264. The supreme court warned, however, against merely shifting "an amount of property equivalent to the waived retirement pay from the military spouse's side of the ledger to the other spouse's side." *Id.*

608. 829 P.2d 829 (Alaska 1992).

609. *Id.* at 833.

610. *Id.*

611. *Id.*

In *Alaska Fish Spotters Ass'n v. State Department of Fish & Game*,[612] the supreme court upheld a regulation prohibiting the use of aircraft to locate salmon in Bristol Bay during open commercial salmon fishing periods.[613] The supreme court held, however, that Article VIII, Section 2 of the Alaska Constitution gave the Board authority to ban aerial fish spotting for the purpose of conserving the natural resources of the state.[614]

The Fish Spotters claimed that the regulation "eliminated their 'historical' and 'long enjoyed' access to the fish resource," thus violating the common use clause of the Alaska Constitution.[615] The court, however, reasoned that the common use clause does not obligate the state "to guarantee access to a natural resource by a person's preferred means or method."[616] Neither did the court find Fish Spotters to be a unique 'user group,' defined by their preferred means of accessing the resource.[617] Under past 'common use' clause analysis, the court consistently defined 'user groups' in terms of the nature of the resource and the nature of the use and the court explicitly refused to alter such analysis.[618] The court noted the prohibition did not preclude *all* uses of the resource by those people, and it was a permissible limitation on the means and methods of fishing.[619]

The Fish Spotters' second constitutional claim alleged the regulation violated the "no exclusive rights" clause of the Alaska Constitution,[620] because it sheltered non-spotter-aided fishermen from competition.[621] The court rejected this claim, for although in the past the court had struck down regulatory schemes granting special monopolistic privileges, the banning of aerial spotting did not

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612. 838 P.2d 798 (Alaska 1992).

613. *Id.* at 799.

614. *Id.* at 800-01; *see* ALASKA CONST. art. VIII, § 2.

615. *Alaska Fish Spotters*, 838 P.2d at 801; *see* ALASKA CONST. art. VIII, § 3 ("Wherever occurring in their natural state, fish, wildlife, and waters are reserved to the people for common use.").

616. *Alaska Fish Spotters*, 838 P.2d at 801.

617. *Id.*

618. *Id.* at 803.

619. *Id.*

620. ALASKA CONST. art. VIII, § 15 ("No exclusive right or special privilege of fishery shall be created or authorized in the natural waters of the State.").

621. *Alaska Fish Spotters*, 838 P.2d at 803.

create "an exclusive right or a special privilege," nor did it exclude the Fish Spotters from many other uses of the fishing resource.[622] Finally, the court quickly rejected the Fish Spotters' other constitutional claims of violations of the "equal protection"[623] and "uniform application"[624] clauses of the constitution, because the regulation applied equally to all citizens.[625]

In *State v. Morry*,[626] the supreme court construed a variety of statutes and regulations affecting subsistence hunting in Alaska. The case arose when a subsistence hunter was charged with shooting a brown bear without complying with two provisions of the Alaska Administrative Code. Specifically, the hunter was charged with violating section 92.012(c) of title 5 of the Code, which required the hunter to tag his bear.[627] In addition, the hunter failed to keep the skin and skull of the bear and have a state official stamp those parts with a seal as required by section 92.165 of title 5.[628] The supreme court addressed the validity of these regulations under the state's subsistence preference law.[629]

Four distinct issues were raised by the case. First, the court addressed the validity of the regulations. The court found persuasive the plaintiffs' argument that application of the regulations, which were designed to govern *trophy hunting*, would be "manifestly unreasonable" in the subsistence use context.[630] The court also examined the proper standard of review for assessing the validity of regulations covering subsistence uses. The supreme court noted that

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622. *Id.*

623. ALASKA CONST. art. I, § 1.

624. ALASKA CONST. art. VIII, § 17 ("Laws and regulations governing the use or disposal of natural resources shall apply equally to all persons similarly situated with reference to the subject matter and purpose to be served by the law or regulation.").

625. *Alaska Fish Spotters*, 838 P.2d at 803-04.

626. 836 P.2d 358 (Alaska 1992).

627. *Id.* at 360; *see* ALASKA ADMIN. CODE tit. 5, § 92.012(c) (Oct. 1991).

628. *Morry*, 836 P.2d at 360; *see* ALASKA ADMIN. CODE tit. 5, § 92.165 (Supp. Jan. 1993).

629. *Morry*, 836 P.2d at 360.

630. *Id.* at 363-64. The court also found that the required administrative hearings regarding adoption of the challenged regulations had never been held. *Id.* at 364; *see* ALASKA STAT. §§ 44.62.010-.650 (1989 & Supp. 1992); ALASKA STAT. § 16.05.255(a) (1992) ("Board of Game may adopt regulations it considers advisable in accordance with AS 44.62 [Administrative Procedure Act]").

Alaska's subsistence laws did not explicitly mention the "least intrusive" standard, nor could the standard be implied from the "reasonable opportunity" the law affords subsistence users to harvest the resource.[631]

The court next concluded that "all Alaskans are . . . eligible to participate in first tier subsistence harvests and uses."[632] Finally, the court reversed the superior court's holding that the boards of fish and game must protect the customary and traditional patterns and methods of subsistence hunting and fishing under Alaska's subsistence preference laws.[633] Thus, the court invalidated the administrative regulations as subsistence regulations, and remanded to the board for promulgation of appropriate regulations.[634]

Alaska Commercial Fisheries Entry Commission v. Russo[635] involved Alaska's regulatory point system governing issuance of entry permits.[636] Specifically, the supreme court examined the "unavoidable circumstances" provision governing the award of "past participation points."[637] The case arose when the Commercial Fisheries Entry Commission (CFEC) determined that Russo was entitled to thirteen participation points under the regulatory scheme, thus falling short of the seventeen required to receive a permit.[638] While the court recognized that Russo, as a non-licensee partner,

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631. *Id.* at 365; *see* ALASKA STAT. § 16.05.258(b)(1)(a) (1992); ALASKA STAT. § 16.05258(f) (1992).

632. *Id.* at 368 (citing Madison v. Alaska Dep't of Fish and Game, 696 P.2d 168, 174 (Alaska 1985) (Board of Game lacks authority to adopt eligibility criteria for first tier subsistence users absent statutory authority); McDowell v. State, 785 P.2d 1,9 (Alaska 1990) (statute authorizing distinction between urban and rural residents at first tier violates Alaska Constitution)).

633. *Id.* at 370.

634. *Id.* at 370-71.

635. 833 P.2d 7 (Alaska 1992).

636. *See* ALASKA ADMIN. CODE tit. 20, §§ 05.600-.751 (Oct. 1988 & Supp. Jan. 1993).

637. *Russo*, 833 P.2d at 7. Under section 05.630(a)(4), a fisherman who is not a gear license holder may earn only eight past participation points unless he is entitled to unavoidable circumstance points under part (a)(5). Part (a)(5) provides "if unavoidable circumstances exist such that an applicant's past participation . . . is not realistically reflected by points awarded . . ., the commission may award an applicant up to a maximum of 16 points upon a special showing of past participation." ALASKA ADMIN. CODE tit. 20, § 05.630(a)(4)-(5) (Oct. 1988).

638. *Russo*, 833 P.2d at 7.

may have been in a unique situation, this status had not been brought about by unavoidable external forces. Thus, the court concluded that the CFEC's refusal to find unavoidable circumstances was proper.[639]

In *Haggren v. State*,[640] the Alaska Court of Appeals clarified a strict liability regulation prohibiting the operation of a commercial drift gill net within 600 feet of a set gill net.[641] Haggren was fishing with a drift gill net when another fisherman placed a set gill net in the water nearby. The nets eventually became tangled.[642] Haggren was subsequently tried and convicted for the strict liability violation of operating his drift net within 600 feet of the set gill net.[643]

Haggren argued he had priority because his net was in the water first. Under his suggested "first in time, first in right" rule, the other fisherman was obliged to deploy the set gill net more than 600 feet from Haggren's drift net.[644] The court rejected this argument, holding the regulation was intended to restrict the drift net fisherman *regardless of the order of arrival of the nets*.[645]

IX. NATIVE LAW

In 1992, the Alaska Supreme Court decided three cases concerning the sovereignty of native tribal governments. The court's interpretation of both contracts and statutes served to limit tribal sovereignty. Chief Justice Rabinowitz dissented alone in each of the three cases, arguing in favor of preserving sovereign immunity.

In *Hydaburg Coop. Assoc. v. Hydaburg Fisheries*,[646] Hydaburg Cooperative Association (HCA), a Native American corporation, entered into a joint venture agreement with Hydaburg Fisheries to operate a fish processing plant. When the United States Department of Commerce Economic Development Administration failed to approve the project, the parties submitted certain disputes to

639. *Id.* at 10.
640. 829 P.2d 842 (Alaska Ct. App. 1992).
641. *Id.* at 842-43; *see* ALASKA ADMIN. CODE tit. 5, § 21.335(a) (Oct. 1991)).
642. *Haggren*, 829 P.2d at 843.
643. *Id.*
644. *Id.*
645. *Id.*
646. 826 P.2d 751 (Alaska 1992).

arbitration, in accordance with their agreement, to be settled under the Uniform Arbitration Act of the State of Alaska.[647] After losing in arbitration over certain expenditures claimed by Hydaburg Fisheries, HCA did not appeal the award of damages. Rather, HCA appealed the superior court's order directing the application of HCA's property to the judgment against it.[648] HCA argued that it retained sovereign immunity and further, that section 16 of the Indian Reorganization Act protected its assets from execution.[649]

The supreme court first held that HCA is merely an Alaska Native association and, without proof of tribal status recognition from the federal government, could not claim sovereign immunity.[650] Second, even assuming HCA's historical tribal status might entitle it to sovereign immunity, the court determined that HCA had waived immunity by agreeing to arbitration.[651] The arbitration clause would be rendered meaningless if HCA had not intended to waive its immunity to arbitration.[652]

As to HCA's second claim, the court held that federal law could not operate to prevent the enforcement of the judgment against HCA's assets because HCA does not fall under the protection of section 16 of the Indian Reorganization Act.[653] In the absence of any proof supporting section 16 status, the supreme court held that HCA must therefore be presumed to be a non-

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647. *Id.* at 752. Because HCA had received a public grant to develop the processing plant, the project was contingent on the approval of the Economic Development Administration. *Id.*

648. *Id.*

649. *Id.* (citing Indian Reorganization Act, 25 U.S.C. § 476 (1988)).

650. *Id.* at 753-54 (citing Native Village of Stevens v. Alaska Management & Planning, 757 P.2d 32, 34 (Alaska 1988)).

651. *Id.* at 754.

652. *Id.* at 755.

653. *Id.* at 756. The Indian Reorganization Act reads in pertinent part:

> In addition to all powers vested in any Indian tribe or tribal council by existing law, the constitution adopted by said tribe shall also vest in such tribe or its tribal council the following rights and powers: . . . to prevent the sale, disposition, lease, or encumbrance of tribal lands, interest in lands, or other tribal assets without consent of the tribe.

Indian Reorganization Act, 25 U.S.C. § 476 (1988).

exempt section 17 organization subject to judgment against its property.[654]

Although Chief Justice Rabinowitz agreed that HCA did waive its rights,[655] he dissented on the issue of whether HCA could claim protection under section 16: "That the HCA was involved in a commercial agreement does not overcome the presumption that its assets are exempt from execution unless specifically conveyed or set aside to the [section] 17 corporation."[656]

In *Nenana Fuel Co. v. Native Village of Venetie*,[657] Nenana Fuel Company attempted to collect on a promissory note signed by the Venetie Tribal Government and the Native Village of Venetie.[658] The security agreement contained a "Remedies on Default" clause which allowed Nenana to bring suit upon the promissory note and pursue additional remedies upon default.[659] The court construed the "Remedies on Default" clause as expressly waiving any sovereign immunity to which either the Tribal Government or the Village Corporation may have been entitled.[660] Reversing the superior court, the supreme court further held that the agreement's terms, which clearly permitted suits in Alaska courts, did not require Nenana to exhaust all tribal remedies prior to pursuing an action in state court.[661]

In employing contract analysis to find a general waiver, the supreme court expressly refused to address the major underlying question of whether the Tribal Government constituted a sovereign body at all.[662] In his concurrence, Justice Moore considered the issue and asserted that the Alaska Native Claims Settlement Act (ANCSA) "constitutes an express indication of Congress' will that,

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654. *Hydaburg*, 826 P.2d at 757.

655. *Id.* at 758 (Rabinowitz, C.J., concurring in part and dissenting in part).

656. *Id.* at 759 (Rabinowitz, C.J., concurring in part and dissenting in part).

657. 834 P.2d 1229 (Alaska 1992).

658. *Id.* at 1230. In 1940, the Village of Venetie had its constitution approved by the Secretary of the Interior, thus creating the Tribal Government. It also incorporated itself under the Indian Reorganization Act that year in order to transact business for the community. *Id.* at 1230-31.

659. *Id.* at 1232.

660. *Id.* at 1233.

661. *Id.* The superior court had stayed the exercise of its jurisdiction and ordered Nenana to exhaust its tribal court remedies. *Id.* at 1230.

662. *Id.* at 1233.

with the sole exception of the Metlakatla Indian Community, any sovereign status held by Alaska Native groups prior to 1971 be terminated."[663] Chief Justice Rabinowitz dissented on the grounds that the Tribal Government does constitute a sovereign body, and as such, must be treated with great deference. In his view, the federal government's grant of an Indian Reorganization Act reservation gave the Tribal Government sovereignty.[664] Moreover, Congress created ANCSA to *protect* aboriginal rights rather than destroy them.[665] Thus ANCSA's termination of reservations was not intended to extinguish self-government.[666] In Chief Justice Rabinowitz's view, proper deference to Native American sovereignty would require an "explicit and unequivocal waiver of immunity" by the Tribal Government and the exhaustion of tribal remedies before the commencement of proceedings in the state courts.[667]

The third case reviewed by the supreme court on the issue of native sovereignty was *In the Matter of F.P., W.M. and A.M.*[668] In this petition for temporary child custody brought by the Alaska Department of Health and Social Services, the native Village of Circle intervened and claimed exclusive jurisdiction over the dispute involving three native children.[669] Circle relied on a recent Ninth Circuit case, *Native Village of Venetie I.R.A. Council v. Alaska,*[670] which held that two native villages retained concurrent jurisdiction in child custody matters. The Ninth Circuit Court of Appeals based its decision on the fact that the villages are sovereign bodies with

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663. *Id.* at 1243 (Moore, J., concurring). Justice Moore specifically pointed to ANCSA's "declaration of policy," and found that any assertion that the Alaska Natives had sovereignty "would be at odds with Congress' desire to abolish the reservation system and to avoid prolonged wardship or trusteeship of Alaska Natives." *Id.* at 1239 (citing American Native Claims Settlement Act, 43 U.S.C. § 1601(b) (1988)) (Moore, J., concurring).

664. *Id.* at 1246 (Rabinowitz, C.J., dissenting).

665. *Id.* at 1246-47 (Rabinowitz, C.J., dissenting).

666. *Id.* at 1248 (Rabinowitz, C.J., dissenting).

667. *Id.* at 1249-50 (citing Iowa Mutual Ins. Co. v. LaPlante, 480 U.S. 9 (1987); National Farmers Union Ins. Co. v. Crow Tribe of Indians, 471 U.S. 845 (1985); Atkinson v. Haldane, 569 P.2d 151, 175 (Alaska 1977)) (Rabinowitz, C.J., dissenting).

668. 843 P.2d 1214 (Alaska 1992).

669. *Id.* at 1215.

670. 944 F.2d 548 (9th Cir. 1991).

the same powers as continental Native American groups, including jurisdiction in custody cases.[671] The supreme court refused to accept as binding precedent federal question decisions of federal courts below the United States Supreme Court,[672] and reaffirmed its interpretation of title 25, section 1918(a) of the United States Code, giving Alaska "'exclusive jurisdiction over matters involving the custody of Indian children . . . .'"[673] Chief Justice Rabinowitz, again the lone dissenter, asserted that Circle's motion should be granted because the Ninth Circuit case had employed the correct analysis.[674]

X. PROCEDURE

The Alaska Supreme Court faced a variety of procedural issues in 1992. Although many of the cases summarized in this section address important substantive issues, procedural questions predominate. The case summaries are divided into four primary categories: attorney's fees, failure of prosecution, statute of limitations, and modification of final judgment. Other case summaries appear under the "miscellaneous" heading at the end of this section.

A. Attorney's Fees

In *In re Soldotna Air Crash Litigation*,[675] the supreme court clarified the proper method for apportioning attorney's fees and costs in a wrongful death case. Two of the defendants settled, but SouthCentral Airlines obtained a jury verdict in its favor.[676] Under Civil Rules 79 and 82, SouthCentral moved for recovery of attorney's fees and costs.

After several attempts by SouthCentral to secure its fees, the trial court allocated the costs against the decedents' estates,

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671. *F.P., W.M., and A.M.*, 843 P.2d at 1215 (citing Native Village of Venetie I.R.A. Council v. Alaska, 944 F.2d 548, 559 (9th Cir. 1991)).

672. *Id.* at 1215 n.1 (citing Harrison v. State, 791 P.2d 359, 363 n.7 (Alaska Ct. App. 1990)).

673. *Id.* at 1215-16 (quoting Native Village of Nenana v. Department of Health & Social Services, 722 P.2d 219, 221 (Alaska), *cert. denied*, 479 U.S. 1008 (1986)).

674. *Id.* at 5-14 (Rabinowitz, C.J., dissenting).

675. 835 P.2d 1215 (Alaska 1992).

676. *Id.* at 1217-18.

assessing each liable for a one-seventh pro-rata share.[677] South-Central challenged the judgment on two substantive grounds: (1) primary liability should have been assessed against the personal representatives and the statutory beneficiaries; and (2) each party should have been held jointly and severally liable rather than liable for a mere one-seventh share.[678]

The supreme court held that the previous settlement constituted a fund as provided for under Alaska Statutes section 09.60.040, which the lower court should have reserved for distribution until it could determine the "costs and expenses of suit" under Alaska's wrongful death statute.[679] Thus, the judgment should have been "against the personal representatives in their official capacities . . . [and] been 'chargeable' only against the reserved fund."[680] Since the trial court had since distributed the fund, the supreme court held that SouthCentral could pursue the actual beneficiaries of the judgment for costs and fees.[681]

As for the choice between joint and several or pro-rata share liability, the supreme court further held that the trial court had discretion to determine the extent of each plaintiff's liability for costs and fees.[682] The court ordered the trial court, however, to reconsider the fairness of imposing pro-rata liability and to reallocate liability for costs and fees so as to place responsibility for payment upon the statutory beneficiaries.[683]

State Farm Insurance Co. v. American Manufacturers Mutual Insurance Co.,[684] also involved litigation over attorney's fees. Wright was injured when her automobile collided with a car being driven by Krueger. State Farm, the latter driver's insurance company, negotiated a settlement of Wright's claims for $45,000, in consideration for a waiver from Wright releasing State Farm from

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677. *Id.* at 1219.
678. *Id.* at 1220.
679. *Id.* at 1221 (quoting ALASKA STAT. § 09.55.580(a) (Supp. 1992)).
680. *Id.* at 1222.
681. *Id.* at 1223.
682. *Id.* (distinguishing *Stepanov v. Gavrilovich*, 594 P.2d 30 (Alaska 1979), which stood for the proposition that in cases where multiple plaintiffs jointly moved for consolidation, the trial court could — but was not required to — impose joint and several liability for costs and fees).
683. *Id.* at 1223-24.
684. 843 P.2d 1210 (Alaska 1992).

all claims and liens.[685] Both Wright and State Farm were aware that American Manufacturers Mutual Insurance Company (AMMIC) had asserted a subrogation claim for $10,000 directly against State Farm for Wright's previous medical treatment.[686]

State Farm subsequently paid $35,000 to Wright while placing the remaining $10,000 in the court registry for an interpleader action.[687] The superior court granted State Farm's motion for summary judgment and dismissed it from the interpleader action, awarding the insurer $1,000 as partial compensation for its fees totaling $7,173.50.[688] State Farm appealed to the Alaska Supreme Court that it was entitled to full recovery of fees.[689]

The supreme court noted that under Civil Rule 82(a)(1), where no money is recovered in an interpleader action, the "prevailing party" is entitled to fees "'fixed by the court in its discretion and in a reasonable amount.'"[690] However, the court has permitted full attorney's fees to be awarded in cases where a party's liability stems from an indemnity clause[691] or where a party litigates in bad faith.[692] The supreme court first held that because State Farm brought an action in interpleader, rather than an indemnity action, the insurer did not satisfy the indemnity exception of Civil Rule 82(a)(1).[693] The court reasoned that it would be inappropriate to allow State Farm to fully recover under an indemnity theory without having ever established the right to indemnity.[694] The court then held that Wright did not litigate in bad faith. Because the settlement agreement had not been clearly drafted, it was not improper for Wright to dispute her liability for AMMIC's claim.[695] There-

685. *Id.* at 1211. The release stated in part: "The undersigned warrants that he/she has the authority to execute this Release, that he/she has not assigned the claim in full or in part and that there are no medical liens outstanding. He/She will indemnify Releasees from any loss resulting from a breach of this warranty." *Id.*

686. *Id.*

687. *Id.*

688. *Id.*

689. *Id.* at 1212.

690. *Id.* (quoting ALASKA R. CIV. P. 82(a)(1)).

691. *Id.* (citing Manson-Osberg Co. v. State, 552 P.2d 654, 660 (Alaska 1976)).

692. *Id.* (citing Keen v. Ruddy, 784 P.2d 653, 657 (Alaska 1989)).

693. *Id.* at 1213.

694. *Id.*

695. *Id.* at 1214.

fore, the superior court did not abuse its discretion in awarding State Farm only partial fees.

In *Hilliker v. Hilliker*,[696] the supreme court held that Administrative Rule 7(c), which limits recovery by the prevailing party to expert fees of fifty dollars per hour, does not govern divorce proceedings, and thus full reasonable costs may be awarded.[697] The court reasoned that the same underlying rationales which preclude application of Alaska Rule of Civil Procedure 82 to divorce proceedings justified a similar exception under Administrative Rule 7(c).[698] First, courts should consider neither party in a divorce as prevailing over the other.[699] Second, courts should give both parties the opportunity to present their case regardless of individual economic circumstances.[700] Third, Alaska Statutes section 26.24.140(a)(1), which authorizes the court to award a spouse expenses during the pendency of an action, provides for "actual" costs as well as attorney's fees.[701]

B. Failure of Prosecution

In *Smith v. Stratton*,[702] the supreme court considered whether Alaska Statutes section 09.10.240[703] applies to an action dismissed prior to trial for failure to prosecute. Complying with a two-year statute of limitations, Smith filed an action in October of 1986 against Stratton to recover for injuries sustained in an automobile

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696. 828 P.2d 1205 (Alaska 1992).

697. *Id.* at 1206. Administrative Rule 7(c) provides that "recovery of costs for a witness called to testify as an expert is limited to the time when the expert is employed and testifying and shall not exceed $50.00 per hour." *Id.*

698. *Id.*

699. *Id.*

700. *Id.*

701. *Id.* The statute provides: "'During the pendency of the action, a spouse may, upon application and in appropriate circumstances, be awarded expenses, including (1) attorney fees and costs that reasonably approximate the actual fees and costs required to prosecute or defend the action; . . . .'" *Id.* at 1205 n.1 (quoting ALASKA STAT. § 25.24.140(a)(1) (1991)).

702. 835 P.2d 1162 (Alaska 1992).

703. Alaska Statutes section 09.10.240 provides: "If an action is commenced within the time prescribed and is dismissed upon the trial or upon appeal after the time limited for bringing a new action, the plaintiff . . . may commence a new action upon the cause of action within one year after the dismissal or reversal on appeal." ALASKA STAT. § 09.10.240 (Supp. 1992).

collision. Smith granted a request from Stratton's insurer, Allstate Insurance Company, for an indefinite extension of time to file an answer so as to facilitate settlement negotiations between Smith and Allstate regarding this accident and two subsequent unrelated accidents occurring in 1987 and 1988.[704]

On January 15, 1988, the clerk of the superior court issued a Notice to Show Cause pursuant to Civil Rule 41, which asked why the court should not dismiss Smith's cause of action. Although Smith's attorney responded, the superior court dismissed the action on June 24, 1988, when no further action had been undertaken by the plaintiff.[705] On April 4, 1989, Smith refiled the action, including claims from the two later accidents in her pleading. Stratton later moved for summary judgment, claiming that the cause of action was barred by the running of the statute of limitations.[706] Smith countered that Alaska Statutes section 09.10.240 permitted the refiling of the case within one year of dismissal.[707]

The supreme court construed the statutory phrase "dismissed upon the trial or upon appeal" to encompass those cases dismissed for failure to prosecute.[708] The court reasoned that the legislature could not have intended to exclude from the statute's reach those causes of action dismissed before trial when they could be dismissed after the commencement of trial for identical reasons.[709] The court therefore held Alaska Statutes section 09.10.240 "applies to all actions which have been dismissed, other than on their merits, at both the trial court and appellate court levels."[710]

In *Johnson v. Siegfried*,[711] the supreme court reviewed a lower court's dismissal of a complaint under Alaska Rule of Civil Procedure 41(e).[712] On May 10, 1989, Johnson filed a complaint

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704. *Smith*, 835 P.2d at 1163.
705. *Id.*
706. *Id.*
707. *Id.* at 1163-64.
708. *Id.* at 1165 (quoting ALASKA STAT. § 09.10.240 (Supp. 1992)).
709. *Id.*
710. *Id.*
711. 838 P.2d 1252 (Alaska 1992).
712. Alaska Rule of Civil Procedure 41(e) provides that "[a]ctions which have been pending in a court for more than one year without any proceedings having been taken may be dismissed as a matter of course, for want of prosecution, by the court on its own motion or on motion of a party to the action." ALASKA R. CIV.

pro se against Dr. Siegfried alleging medical malpractice.[713] Because process had not been served on Dr. Siegfried, on May 30, 1990, the court issued a Notice and Order of Dismissal pursuant to Civil Rule 41(e).[714] On July 3, 1990, Johnson secured an extension order which cautioned that if no "proceedings" were undertaken during the additional 180 days, the case would be dismissed.[715] During the allotted extension, Johnson obtained counsel, secured the relevant medical records, prepared a summons, filed an amended complaint and arranged for out-of-state counsel to appear if the claim had merit.[716] On the defendant's motion, the trial court dismissed the action with prejudice for failure to prosecute the claim in a timely fashion under Rule 41(e).[717]

Interpreting the term "proceedings" as used in the extension order to be no more demanding than as used in Rule 41(e), the supreme court found that the plaintiff undertook adequate steps in pursuit of the claim during the 180 day period to evidence a serious determination to pursue the action.[718] The court rejected the argument that a "sufficient" complaint must be filed or served, noting that the "proceedings" requirement necessitates only steps that are "'reasonably expected in the pursuit of the cause of action.'"[719] Justice Burke dissented, arguing that the lower court reasonably dismissed the case as it has "remained over the defendant's head for more than three years" without any signs of progressing to trial.[720]

C. Statute of Limitations

In *Siemion v. Rumfelt*,[721] the supreme court decided whether to allow an amendment of the pleadings to relate back to the date

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P. 41(e).

713. *Johnson*, 838 P.2d at 1253.

714. *Id.*

715. *Id.* at 1254.

716. *Id.* Dr. Siegfried alleged that the amended complaint was defective for failing to restate every pleading incorporated from the original complaint, as required under Civil Rule 15(e). *Id.* at 1256 n.5.

717. *Id.* at 1254.

718. *Id.* at 1255.

719. *Id.* at 1256 (quoting Shiffman v. "K", Inc., 657 P.2d 403, 403 (Alaska 1983)).

720. *Id.* at 1257 (Burke, J., dissenting).

721. 825 P.2d 896 (Alaska 1992).

of the original complaint when the statute of limitations period had since expired.[722] Jeffrey Rumfelt, a minor driving his father's car, collided with the Siemions' vehicle. The Siemions filed an action seeking personal damages arising out of the accident against Timothy Rumfelt, the minor's father.[723] Timothy Rumfelt then filed a motion to dismiss or for summary judgement because the plaintiffs failed to name Jeffrey Rumfelt in the complaint. The Siemions subsequently moved to amend their complaint to include Jeffrey and his mother Vicky Rumfelt, requesting that the amendment relate back to the date of the original complaint[724] which had complied with the two-year statute of limitations prescribed by Alaska Statutes section 09.10.070.[725]

In affirming the lower court's dismissal of the complaint, the supreme court looked to the test set forth in *Farmer v. State*,[726] and held that although the Siemions showed that Jeffrey and Vicky Rumfelt had sufficient notice of the action so as not to be prejudiced,[727] the Siemions failed to provide any evidence showing that there had been a mistake of identities.[728]

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722. The court applied Alaska Rule of Civil Procedure 15(c).

723. *Siemion*, 825 P.2d at 897.

724. To be allowable, an amendment made after the passage of the statute of limitations must relate back to the date of the original pleading. *Id.* at 898-99 (citing McCutcheon v. State, 746 P.2d 461, 469 (Alaska 1987)).

725. *Id.* at 827.

726. 788 P.2d 43, 49 (Alaska 1990). *Farmer* adopted the rule as stated in Schiavone v. Fortune, 477 U.S. 21 (1986):

> Relation back is dependent upon four factors, all of which must be satisfied: (1) the basic claim must have arisen out of the conduct set forth in the original pleading; (2) the party to be brought in must have received such notice that it will not be prejudiced in maintaining its defense; (3) that party must or should have known that, but for a mistake concerning identity, the action would have brought against it; and (4) the second and third requirements must have been fulfilled within the prescribed limitations period.

Schiavone, 477 U.S. at 29.

727. *Siemion*, 825 P.2d at 900.

728. *Id.* at 901.

D. Modification of Final Judgment

In *Palmer v. Borg-Warner Corp.*,[729] Palmer's husband was killed in a plane crash.[730] Palmer had originally filed a wrongful death action against the pilot's estate but then learned that the cause of the crash was most likely a defective carburetor float.[731] As a result, she filed suit against the carburetor manufacturer in 1988, two years and nine days after the crash.[732] The superior court granted the defendant's motion for summary judgment because the two-year statute of limitations period had run.[733] In 1990, the court determined in another plaintiff's case that the carburetor manufacturer had prior knowledge that some of the floats were defective.[734] Consequently, the plaintiff refiled her suit pursuant to Alaska Rule of Civil Procedure 60(b)(2).[735] The lower court denied Palmer's motion without comment.[736]

The supreme court held that the trial court abused its discretion in failing to consider the evidence of fraudulent concealment and the doctrine of equitable estoppel.[737] The supreme court noted that the evidence was relevant and of such character that it "would probably change the result in a new proceeding."[738] The supreme court remanded the case, ordering the lower court to enter findings concerning the existence of fraudulent concealment.[739] If found, the lower court must then determine whether the Palmer estate discovered, or should have discovered, the fraudulent concealment before the entry of summary judgment in the original suit.[740]

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729. 838 P.2d 1243 (Alaska 1992).
730. *Id.* at 1244.
731. *Id.* at 1245.
732. *Id.*
733. *Id.*
734. *Id.* at 1246.
735. *Id.* Alaska Rule of Civil Procedure 60(b)(2) states that a court can relieve a party from final judgment when there exists "newly discovered evidence which by due diligence could not have been discovered in time to move for a new trial under Rule 59(b)." ALASKA R. CIV. P. 60(b)(2).
736. *Palmer*, 838 P.2d at 1246.
737. *Id.* at 1252.
738. *Id.*
739. *Id.*
740. *Id.* (citing ALASKA R. CIV. P. 60(b)(2)).

Lyman v. State[741] involved a state employee who was fired and subsequently filed concurrent wrongful termination suits in federal and state court citing violations of federal grand jurors' employment protection, federal civil rights, and a state law cause of action.[742] The superior court dismissed the state cause of action, while the federal court found for the State of Alaska on the federal claims and dismissed the state claim without prejudice.[743] The superior court subsequently granted Alaska's motion for summary judgment on the federal claims on the basis of res judicata, dismissing the case with prejudice.[744] The court also awarded the state attorney's fees, noting that the plaintiff's lawsuit "bordered on the frivolous."[745]

Lyman challenged the dismissal on the grounds that the court should not have dismissed the claim with prejudice because his claim was being reconsidered in the federal district court, and an appeal to the circuit court was still possible.[746] The court responded that the nature of the dismissal was irrelevant because Lyman could subsequently institute a state action under Alaska Rule of Civil Procedure 60(b)(5) if his federal appeal proves successful.[747]

Lyman also advanced a fairness argument that to make him pay the state's costs would be unjust given that he was having financial difficulty and was unemployed.[748] The supreme court found that the superior court's shifting of fees on the basis of Alaska Rules of Civil Procedure 79 and 82 was in plain error.[749] When the underlying claim is federal, the court must use the procedural standards provided in the federal statutes rather than those of Alaska.[750] The federal statutes, in this case, authorized the recovery of attorney's fees upon finding a claim to be frivolous, not bordering

741. 824 P.2d 703 (Alaska 1992).
742. *Id.*
743. *Id.*
744. *Id.* at 704-05.
745. *Id.* The fee award was made pursuant to Alaska Rules of Civil Procedure 79 and 82. *Id.* at 704.
746. *Id.* at 705.
747. *Id.*
748. *Id.*
749. *Id.* at 707.
750. *Id.*

on such.[751] Because there was no assessment as to which costs were attributable to the state's defense of the state law claim, the case was remanded for such a determination.[752]

E. Miscellaneous

Cameron v. Hughes[753] addressed two procedural questions arising from an action to collect past due child support. After divorcing Hughes, Cameron began receiving disability benefits due to an injury which forced him to stop working. Hughes filed an action to recover lost child support, and the superior court awarded judgment in her favor for $26,746.31.[754] Cameron, in turn, appealed the decision and filed for bankruptcy.[755] Relying on Civil Rule 204(d), Hughes subsequently moved for an order requiring Cameron to place a supersedeas bond for $80,000 as security with the court or face dismissal of his appeal.[756] Hughes also moved to increase her original judgment by $37,714.75 to reflect attorney's and collection fees.[757] The superior court granted both motions, which Cameron immediately challenged.[758]

Addressing the supersedeas bond, the supreme court held that the superior court lacked authority to grant Hughes' motion.[759] The bond provision of Alaska Rule of Civil Procedure 204(d) would have effect only if Cameron as the appellant had requested a stay pending appeal; this did not occur in the instant case.[760]

In regard to the award of attorney's fees, the supreme court remanded the case since no "findings concerning the necessity and

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751. *Id.* (citing 28 U.S.C. § 1875 (West Supp. 1991)). *See supra* text accompanying note 745.

752. *Id.*

753. 825 P.2d 882 (Alaska 1992).

754. *Id.* at 883.

755. *Id.* at 884.

756. *Id.* The pertinent part of Alaska Rule of Civil Procedure 204(d) provides that "[w]henever in a civil case an appellant entitled thereto desires a stay on appeal, he may present to the superior court for its approval a supersedeas bond which shall have such surety or sureties as the court requires." ALASKA R. CIV. P. 204(d).

757. *Cameron,* 825 P.2d at 884.

758. *Id.*

759. *Id.* at 885.

760. *Id.*

reasonableness" of the award were made.[761] Although Alaska Rule of Civil Procedure 82 allows the courts broad discretion in awarding costs and fees when a party seeks modification of an arrearage judgment, recovery is limited to the "'costs of the action.'"[762]

In *State v. Kluti Kaah Native Village*,[763] the supreme court reviewed the issuance of a preliminary injunction obtained by the residents of the Kluti Kaah Native Village of Copper Center that replaced a seven day general moose hunt with a twenty-six day subsistence hunt.[764] In issuing the injunction, the superior court found that the plaintiffs satisfied the three prongs of the "balance of hardships" test:[765] "'(1) the plaintiff must be faced with irreparable harm; (2) the opposing party must be adequately protected; and (3) the plaintiffs must raise 'serious' and substantial questions going to the merits of the case; that is, the issues raised cannot be 'frivolous or obviously without merit.'"'[766]

The supreme court held that the trial court abused its discretion in finding that the second prong of the test had been met.[767] The court concluded that the trial court had failed to consider the potential damage to the moose population and to the state's interest in orderly game allocation when it granted the preliminary injunction.[768] The court noted that since the lower court's issuance of the injunction, seven other villages had filed similar claims for the right to a greatly extended hunting season.[769] Because the Kluti Kaah failed to satisfy the "protection" prong of the test, the trial court should have required a showing of probable success on the merits.[770]

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761. *Id.* at 887.

762. *Id.* (quoting O'Link v. O'Link, 632 P.2d 225, 231 n.15 (Alaska 1981)).

763. 831 P.2d 1270 (Alaska 1992).

764. *Id.* at 1271.

765. *Id.* at 1272 (citing A.J. Indus., Inc. v. Alaska Pub. Serv. Comm'n, 470 P.2d 537 (Alaska 1970), *modified in other respects*, 438 P.2d 198 (Alaska 1971)).

766. *Id.* at 1273 (quoting Messerli v. Department of Natural Resources, 768 P.2d 1112, 1122 (Alaska 1989)).

767. *Id.* at 1274.

768. *Id.*

769. *Id.*

770. *Id.* at 1275.

Chief Justice Rabinowitz was joined by Justice Compton in dissent, arguing that the lower court did not abuse its discretion in concluding that the injury to the public and the state would be insignificant.[771] Contending that the extended hunt would neither disadvantage non-subsistence hunters, nor injure the moose population, the dissenters noted that the lower court's injunction allowed the Kluti Kaah to harvest only forty moose, the same number they were allotted under the original seven day general hunt.[772]

XI. PROPERTY LAW

In 1992, the Alaska Supreme Court decided five consequential cases in property law. The issues were diverse, ranging from the rights of a contingent beneficiary to a trust to the application of the ancient doctrine of *lis pendens.*

In *Barber v. Barber,*[773] William Lee Barber, the contingent beneficiary of a private trust, contested the superior court's approval of a settlement agreement which terminated the trust over his objections.[774] The supreme court held that the interest of a contingent beneficiary is sufficiently definite to deserve constitutional due process protection.[775] The court further held that as a contingent beneficiary, Barber was considered an "interested party" under the law governing the internal affairs of trusts and was entitled, pursuant to Alaska Statutes section 13.06.060, to notice of the settlement proceedings.[776] Finding that Barber was provided neither notice of the impending settlement proceeding nor an opportunity to be heard prior to the court's approval of the settlement agreement, the court concluded that the lowere court erred in overruling Barber's objection to the settlement.[777]

In *LeDoux v. Kodiak Island Borough,*[778] Kodiak Island Borough sought an injunction to prevent the LeDouxs from using

771. *Id.* at 1277 (Rabinowitz, C.J., dissenting).
772. *Id.* (Rabinowitz, C.J., dissenting).
773. 837 P.2d 714 (Alaska 1992).
774. *Id.* at 715.
775. *Id.* at 717.
776. ALASKA STAT. § 13.36.060 (1985), *cited in Barber,* 837 P.2d at 717.
777. *Barber,* 837 P.2d at 717-18.
778. 827 P.2d 1121 (Alaska 1992).

their property as a professional office building in violation of the Borough's parking regulations. The Borough had approved a zoning variance for the property on the condition that adequate parking spaces would be built, as set forth in a parking plan submitted by the LeDouxs. The parking spaces, however, were never provided, and the trial court granted the Borough's motion for summary judgment.

The supreme court affirmed the issuance of an injunction, first holding that the Borough was not required to show the lack of an adequate remedy at law because Alaska Statutes section 29.40.190(a) specifically authorizes such injunctive relief.[779]

The supreme court also rejected the property owners' estoppel argument, holding that the Borough's acceptance of a parking plan was not a representation that the construction of the parking lot on their property would be feasible.[780] The supreme court reasoned that to require the examination of the practicality of every variance application would severely burden municipalities.[781]

In *Fireman's Fund Mortgage Corp. v. Allstate Insurance Co.*,[782] the supreme court held that a non-judicial foreclosure sale does not as a matter of law operate to extinguish the underlying debt.[783] In this first-impression case, the senior lienholder Fireman's Fund Mortgage Corporation had purchased the property at issue at its own non-judicial foreclosure sale, discovering only after the sale that the property had been destroyed by fire. The second mortgagee, First National Bank of Anchorage, argued that when Fireman's Fund foreclosed on the property, it was no longer entitled to collect the insurance proceeds from the fire.[784] Allstate, the insurer, filed this interpleader action to determine the proper beneficiary of the

779. *Id.* at 1123 (citing ALASKA STAT. § 29.40.190(a) (1992) ("An action to enjoin a [zoning] violation may be brought notwithstanding the availability of any other remedy.")).

780. *Id.* at 1124.

781. *Id.*

782. 838 P.2d 790 (Alaska 1992).

783. *Id.* at 793.

784. *Id.* at 792.

insurance proceeds. The trial court granted First National's motion for summary judgment, awarding the amount interpled plus interest.[785]

The supreme court reversed, holding that under Alaska's antideficiency statute,[786] the non-judicial foreclosure did not entirely divest Fireman's Fund of its right to collect the insurance proceeds because the underlying debt had not been fully satisfied.[787] The court did hold, however, that Fireman's Fund was entitled to the insurance proceeds only to the extent necessary to discharge the outstanding debt. The junior lienholder was entitled to the remaining proceeds.[788]

In determining the amount of the outstanding debt, the supreme court rejected Fireman's Fund's request to disregard its offset bid made in ignorance of the property's damaged condition at the foreclosure.[789] The court reasoned that to disregard the bid as an actual payment and award the insurance proceeds in entirety would theoretically give the creditor a double recovery.[790]

The supreme court then held, however, that Fireman's Fund was entitled to seek reformation of the foreclosure sales contract in order to reflect the actual market value of the property in its damaged state.[791] The court has previously allowed reformation where the interests of equity and justice so required, and the court concluded that to permit reformation would be an appropriate remedy in this case.[792]

In *Leisnoi, Inc. v. Stratman*,[793] the supreme court held that pursuant to the doctrine of *lis pendens*, a native village corporation was not bound by a settlement agreement made while the corporation was merged with another native village corporation.[794] Leisnoi and Koniag, two native village corporations holding the

785. *Id.*
786. ALASKA STAT. § 34.20.100 (1990).
787. *Fireman's Fund*, 838 P.2d at 793-94.
788. *Id.* at 797.
789. *Id.* at 796.
790. *Id.* at 795.
791. *Id.* at 797. The court noted that Fireman's Fund would have the burden of proving by clear and convincing evidence that reformation of the offset bid is warranted. *Id.*
792. *Id.* (citing Vockner v. Erickson, 712 P.2d 379 (Alaska 1976)).
793. 835 P.2d 1202 (Alaska 1992).
794. *Id.* at 1208-09.

surface rights and subsurface rights respectively to the property in question, merged in 1980.[795] The plaintiffs were cattle ranchers whose grazing leases partially overlapped with the property.[796] As a result of a decertification action initiated by the plaintiffs,[797] Koniag entered into a settlement agreement, quitclaiming both surface and subsurface title of the disputed property to the plaintiffs. Demerger litigation was pending at the time of the settlement and subsequently, Leisnoi was reconstituted as a separate corporation to which the surface land rights were returned.[798] The superior court granted the plaintiffs' motion for specific performance, holding that Leisnoi remained bound by the settlement agreement despite the demerger.[799]

The supreme court reversed, relying upon the doctrine of *lis pendens*.[800] which provides that "'[p]ersons acquiring an interest in property that is a subject of litigation are bound by, or entitled to the benefit of, a subsequent judgment.'"[801] The court held that because the plaintiffs knew of the pending demerger litigation and its possible ramifications, their interests under the settlement agreement were subject to the outcome of that dispute.[802]

Justice Moore dissented, arguing that the "majority incorrectly treat[ed] this case as one involving conflicting claims to title of real property when the real issue is the enforceability of a contract for the conveyance of real property."[803] Justice Moore reasoned that the doctrine of *lis pendens* is applicable only where a description of the real property at issue is contained in the pleadings.[804]

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795. *Id.* at 1205.

796. *Id.* at 1204.

797. The corporation had been certified under the Alaska Native Claims Settlement Act, 43 U.S.C. §§ 1601-42 (1988). The plaintiffs had initiated an action against the village corporations, seeking a permanent injunction to prevent the transfer of land patents from the United States to the corporations. *Leisnoi*, 835 P.2d at 1204.

798. *Leisnoi*, 835 P.2d at 1205.

799. *Id.* at 1207.

800. *Id.* at 1208 (citing RESTATEMENT (SECOND) OF JUDGMENTS § 44 (1982)).

801. *Id.* (quoting *Golden State Bottling Co. v. NLRB*, 414 U.S. 168, 179 (1973)).

802. *Id.* at 1210.

803. *Id.* at 1212 (Moore, J., dissenting).

804. *Id.* at 1213 (citing Herman v. Goetz, 460 P.2d 554, 559 (Kan. 1969); Flanagan v. Clark, 11 P.2d 176 (Okla. 1992)) (Moore, J., dissenting).

In *Foster v. Hanni*,[805] the supreme court considered whether, in a leasehold dispute, a "cash offer is so different from a later offer at the same price, but with owner financing, that the latter offer would have to be resubmitted to the holder of the right of first refusal."[806] In remanding for further determinations, the court held there were in fact two offers, both of which should have been submitted to the lessor for first refusal.[807] Because banks were unwilling to extend the necessary financing, the offer including long-term seller financing was substantially more attractive than the initial cash offer.[808]

XII. TAX LAW

The Alaska Supreme Court decided two significant cases in the area of tax law during 1992. The first addressed the constitutionality of retroactively applying a new tax rate; the other interpreted provisions of the Multistate Tax Compact as adopted by Alaska.

In *Arco Alaska, Inc. v. State*,[809] several large oil producers challenged a statute increasing their tax liability.[810] On March 22, 1989, the Alaska House of Representatives modified the tax formula by a simple majority vote.[811] A clause of the bill making the statute immediately effective failed to gather the two-thirds majority necessary for adoption.[812] On May 8, the Senate passed the bill by simple majority vote and the governor signed the bill that very day.[813] The statute contained a provision making it retroactively effective from January 1, 1989.[814]

Article II, section 18 of the Alaska Constitution provides that "[l]aws passed by the legislature become effective ninety days after enactment. The legislature may, by concurrence of two-thirds of the

805. 841 P.2d 164 (Alaska 1992).
806. *Id.* at 170.
807. *Id.* at 170-71.
808. *Id.* at 171.
809. 824 P.2d 708 (Alaska 1992).
810. *Id.*
811. *Id.* at 709.
812. *Id.*
813. *Id.*
814. Act of May, 1989, Ch. 25, § 4, 1989 Alaska Sess. Laws 1.

membership of each house, provide for another effective date."[815] The oil producers argued that, as the House vote on the immediate effective date did not pass, the effective date was August 6, 1989, ninety days after the governor had signed the bill.[816]

The supreme court first found article II, section 18 of the Alaska constitution did not provide substantive protection against retroactive legislation.[817] The court distinguished retroactivity from an effective date: a retroactive provision identifies *what* conduct will be effected, while an enactment date identifies *when* the conduct will be effected.[818] Relying on this analysis and noting its consistency with other jurisdictions' interpretations of tax laws, the court held article II, section 18 does not require a two-thirds vote of the legislature to enact retroactive provisions.[819]

In *State Department of Revenue v. Parsons Corp.*,[820] the Department of Revenue (DOR) challenged the income figures Parsons reported under three contracts for construction of oil and gas facilities for an oil conglomerate (ARCO).[821] Hired as an independent contractor, Parsons was responsible for the fabrication, delivery, and on-site construction of modules and other equipment.[822] Title to such property was not to pass from Parsons to ARCO until the equipment and modules were completed, delivered, and accepted on site.[823] Partial fabrication of this equipment took place in other states.[824]

Under the Multistate Tax Compact, Alaska determines the tax liability of inter-state businesses by measuring the income generated in each state through three factors: property, payroll and sales.[825] Parsons argued the ARCO contracts involved sale of agency services

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815. ALASKA CONST. art. II, § 18.
816. Ch. 25, § 4; *Arco*, 824 P.2d at 709.
817. *Id.* at 710.
818. *Id.* at 711.
819. *Id.* at 712.
820. 843 P.2d 1238 (Alaska 1992).
821. *Id.* at 1239-40.
822. *Id.* at 1240.
823. *Id.*
824. *Id.* Parsons provided engineering, design, and procurement services from its office in California. Some assembly and construction management occurred in Washington and Oregon. *Id.*
825. ALASKA STAT. § 43.19.010 Art. IV(9) (1990).

performed in California, while DOR argued the contracts covered sale of property to an Alaska customer.[826] The supreme court upheld DOR's characterization of both the nature and the site of Parson's sales.[827] Alaska Statutes section 43.19.010 classifies the sale of tangible personal property as within Alaska if the "property is delivered or shipped to a purchaser" within the state.[828] Although the modules were ordered from Parsons' facilities outside of Alaska, the court found the ultimate recipient and purchaser, ARCO, to be in Alaska. In rejecting Parsons' argument the sales were for services, the court noted the sales included the entire reimbursed cost for the materials, in addition to the fee.[829]

In considering the proportion of activities occurring within the state, the court observed the importance of these contracts to Parsons.[830] Thus, the court held DOR could properly allocate all of the revenues to Alaska for sales factor purposes, even though most of Parsons' activities took place out of state.[831] The court concluded "[f]ailure to attribute sales to the state in which they are made 'would greatly underrepresent the extent'" of Parsons' activities within Alaska.[832]

XIII. TORT LAW

In 1992, the Alaska Supreme Court extended the range and flexibility of the tort law provisions it reviewed. The cases decided by the supreme court have been classified under causes of action, affirmative defenses, procedure and damages. Addressing causes of action, the court expanded liability in several areas: prescription drug products, parental wrongful death suits for loss of society of a dependent child, and legal malpractice. The court's expansive approach also applied to affirmative defenses, where the court

826. *Parsons*, 843 P.2d at 1242.

827. *Id.* at 1239.

828. *Id.* at 1242; ALASKA STAT. § 43.19.010 (1990).

829. *Parsons*, 843 P.2d at 1243.

830. *Id.* Parsons characterized itself as the "unrivaled leader in the modularization of production and process facilities for use" on the North Slope. *Id.*

831. *Id.*

832. *Id.* (quoting Sjong v. State Dep't of Revenue, 622 P.2d 967, 978 (Alaska 1981)).

discussed the circumstances insulating a bailor from the tort of conversion after surrendering property to a third party.

A. Causes of Action

In *Shanks v. Upjohn Co.*,[833] the supreme court held that prescription drugs are not exempt from strict products liability claims alleging a design defect. Under Alaska's previous two-prong test for design defect products liability, a product is defectively designed if: "'(1) [it] failed to perform as safely as an ordinary consumer would expect when used in an intended or reasonably foreseeable manner, or (2) [given proof that the product proximately caused the injury,] the defendant fails to prove . . . that on balance the benefits of the challenged design outweigh the risk of danger inherent in such design.'"[834]

Reasoning that patients generally hold few expectations concerning the performance safety of prescription drugs, the court altered the consumer expectation prong of the test to consider instead the expectations of the "ordinary doctor" as to how the drug will operate.[835] The court upheld the risk/benefit prong of the test, refusing to assert as a rule that the social benefits of drugs and the potential chilling of research and production of new drugs always outweigh the benefits to the public of imposing strict liability for design defects.[836]

> [Instead,] the fact finder should consider the seriousness of the side effects or reactions posed by the drug, the likelihood that such side effects or reactions would occur, the feasibility of an alternative design which would eliminate or reduce the side effects or reactions without affecting the efficacy of the drug, and the harm to the consumer in terms of reduced efficacy and any new side effects or reactions that would result from an alternative design. In evaluating the benefits, the fact finder should be permitted to consider the seriousness of the condition for which the drug is indicated.[837]

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833. 835 P.2d 1189 (Alaska 1992); *see* Thomas A. Matthews, *Products Liability in Alaska*, 10 ALASKA L. REV. 1 (1993).

834. *Id.* at 1194 (quoting Caterpillar Tractor Co. v. Beck, 593 P.2d 871, 878 n.15 (Alaska 1979); Barker v. Lull Eng'g Co., 573 P.2d 443, 457-58 (Cal. 1978)).

835. *Id.* at 1195.

836. *Id.* at 1196.

837. *Id.* at 1196-97 (declining to adopt comment K to section 402(a) of the Restatement (Second) of Torts).

In examining the lower court's jury instructions on the failure-to-warn claim, the court found two errors. First, the instructions treated the strict liability claim as a negligence claim.[838] Second, the instructions placed the burden of proving Upjohn's knowledge of the risks of injury on the plaintiff, rather than placing on the defendants the burden of establishing that the risks, if proven, were scientifically unknowable at that time.[839] Addressing the plaintiff's negligence *per se* claims under Alaska Statutes sections 17.20.290(1) and 17.20.090(6), the supreme court held that the superior court did not abuse its discretion in refusing to give a negligence *per se* jury instruction since the statutes added little to the common law duty to warn.[840]

In *Gillispie v. Beta Construction Co.*,[841] the supreme court declared that parents may recover for loss of society arising from the wrongful death of a dependent child.[842] The court recognized that Alaska's wrongful death statute allows the spouse, child or dependent of the decedent to recover for the emotional loss that he or she experiences, but that wrongful death actions maintained by the personal representative measure recovery only by the loss to the decedent's estate.[843] The court advanced, however, a two-step rationale to allow another statutory provision to grant the parents of a deceased child a cause of action for loss of society.

First, the court held that Alaska Statutes section 09.15.010,[844] adopted from the Oregon civil code in 1900, authorizes a separate parental cause of action, reasoning that the interpretation of the Oregon Supreme Court prior to 1900, which allowed such actions,

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838. *Id.* at 1199 (citing Patricia R. v. Sullivan, 631 P.2d 91, 102 (Alaska 1981)).

839. *Id.* at 1199-1200.

840. Alaska Statutes section 17.20.290(a)(1) of the Alaska Food, Drug, and Cosmetic Act bars the manufacture or sale of misbranded drugs. Alaska Statutes section 17.20.090(6) states that a drug is misbranded unless its labeling bears adequate directions and warnings.

841. 842 P.2d 1272 (Alaska 1992).

842. *Id.* at 1274.

843. *Id.* at 1272-73 (citing ALASKA STAT. § 09.55.580 (Supp. 1991); quoting *In re* Estate of Pushruk, 562 P.2d 329, 331 (Alaska 1977)).

844. Alaska Statutes section 09.15.010 provides that "[a] parent may maintain an action as plaintiff for the injury or death of a child below the age of majority . . . ." ALASKA STAT. §09.15.010 (1983).

had also been adopted by the Alaska legislature.[845] Second, the court noted that under Alaska law, in the spousal context, the master-servant recovery principle had evolved to include comfort and companionship.[846] Thus recognizing the parental cause of action to be parallel to wrongful death actions under section 09.55.580, the court held that parents may recover for loss of society of a child.[847]

Chief Justice Rabinowitz concurred, stating that he would prefer that the court not "resuscitate" section 09.15.010, but rather find a common law action for loss of a child's society.[848] Such an action, the Chief Justice asserted, would not be precluded or preempted by the operation of the state's wrongful death statute.[849]

In *Doe v. Hughes, Thorsness, Gantz, Powell & Brundin*,[850] the court examined whether lawyers representing adoptive parents in an artificial insemination procedure erred as a matter of law in failing to fully comply with adoption procedures required under the Indian Child Welfare Act.[851] To save their client expense,[852] the attorneys advised the adoptive parents to first request the superior court's opinion as to whether the statute applied.[853] The superior court determined that it did not, and a final decree of adoption was entered.[854] Approximately one year later, the child's natural

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845. *Gillispie*, 842 P.2d at 1273 (citing ALASKA STAT. § 09.15.010 (1983) (formerly 31 Stat. 337 (1900)); HILL'S ANNOTATED LAWS OF OREGON, § 34) (quoting City of Fairbanks v. Schaible, 375 P.2d 201, 208 (Alaska 1962) ("'[I]t is presumed that [the statutes were] adopted with the interpretation that had been placed upon [them] by the Oregon Supreme Court prior to 1900.'")).

846. *Id.* (citing Schreiner v. Fruit, 519 P.2d 462, 465-66 (Alaska 1974)).

847. *Id.*

848. *Id.* (Rabinowitz, C.J., concurring).

849. *Id.* (Rabinowitz, C.J., concurring).

850. 838 P.2d 804 (Alaska 1992).

851. *Id.* at 805-806 (citing Indian Welfare Act, 25 U.S.C. § 1913(a) (1978) (requiring *judicial certification* that natural parents of an "Indian Child" understood terms and consequences of their consent to the adoption)).

852. *Id.* at 807.

853. *Id.* at 805. The attorneys secured the natural mother's signed, written consent to terminate her rights. The issue presented to the superior court, therefore, was whether Hughes, Thorsness needed to take "the additional steps needed to make the mother's consent 'valid.'" *Id.*

854. *Id.*

mother initiated a suit to vacate the adoption on the theory that her consent was not obtained in accordance with the Act's requirements. After the adoptive parents and their new counsel successfully defended the adoption decree, the parents brought a legal malpractice claim against Hughes, Thorsness.[855]

The supreme court reversed the superior court's grant of summary judgment for the defendants, holding that malpractice occurred as a matter of law through the lawyers' failure to advise their clients that complying with the statute would be prudent.[856] The court concluded that "[a]ny uncertainty there might have been about the applicability of the Indian Child Welfare Act made Hughes, Thorsness' failure to obtain compliance with the Act *more, rather than less, blameworthy* . . . . The decision to ignore the additional steps required for a 'valid' consent was anything but the act of a reasonably prudent lawyer."[857]

In *Beck v. State Department of Transportation and Public Facilities*,[858] the supreme court reversed summary judgment against Beck's negligent infliction of emotional distress claim. The court held that viewing the injuries of a loved one at the hospital, rather than at the accident scene was sufficiently foreseeable and close enough in time to support a claim of negligent infliction of emotional distress.[859]

B. Affirmative Defenses

The plaintiff in *Thompson v. Anderson*[860] sued Mail Boxes, Inc., and its employee Anderson, for the tort of conversion. Thompson had asked Anderson to send a package box by Federal Express, although he later agreed to have it shipped by DHL.[861] Suspicious of Thompson, the employee obtained permission from

855. *Id.* at 806.
856. *Id.* at 807.
857. *Id.* at 807 n.7.
858. 837 P.2d 105 (Alaska 1992). *See infra* notes 874-875, 902-906 and accompanying text.
859. *Id.* at 111 (citing Mattingly v. Sheldon Jackson College, 743 P.2d 356, 365 (Alaska 1987); Tommy's Elbow Room, Inc. v. Kavorkian, 727 P.2d 1038 (Alaska 1986)).
860. 824 P.2d 712 (Alaska 1992).
861. *Id.* at 713.

both DHL and Federal Express to open the package as their agent.[862] Upon opening the box, she discovered a large sum of cash, which the police later seized as alleged drug money.[863]

The supreme court held that the defendants were not liable for conversion, reasoning that "it should not be a tort for a bailee to obey the command of a police officer to turn over property in the bailee's possession."[864] In a footnote, the court expressly limited its holding, stating that it expressed no opinion as "to situations where the bailee has the option of not delivering the property to the police."[865]

In *University of Alaska v. Shanti*,[866] the supreme court held that a university-owned ski hill was "improved land" under Alaska's recreational use/landowner immunity statute.[867] The university, in an attempt to defend a suit arising from a sledding accident, had claimed tort immunity as an owner of "unimproved land."[868] The superior court disagreed, holding that the ski hill did not constitute "unimproved land" because it was in or near an urban area.[869]

Concurring in the lower court's judgment but not in its rationale, the supreme court affirmed the denial of summary judgment to the University. In its first opportunity to construe Alaska Statutes section 09.45.795, the supreme court looked to the statute's legislative history and to other jurisdictions to shape its definition of "unimproved land."[870] The court then held that for purposes of determining immunity under the statute on a motion for summary judgment, trial courts should weigh the following factors in distinguishing between improved and unimproved land: "(1) the proximity of improvements to the accident site; (2) the extent of the property maintenance undertaken by the landowner; and (3)

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862. *Id.*

863. *Id.* at 713-14. At the criminal trial, the evidence was suppressed as the fruit of an illegal search. *Id.* at 714.

864. *Id.* at 715.

865. *Id.* at 715 n.7.

866. 835 P.2d 1225 (Alaska 1992).

867. *Id.* at 1226-27 & n.1 (citing ALASKA STAT. § 09.45.795 (Supp. 1991)).

868. *Shanti*, 835 P.2d at 1227.

869. *Id.* at 1226.

870. *Id.* at 1228-32 (citing ALASKA STAT. § 09.45.795 (Supp. 1991); Walker v. City of Scottsdale, 786 P.2d 1057 (Ariz. Ct. App. 1989); Boaldin v. University of Kansas, 747 P.2d 811, 813 (Kan. 1987)).

whether the character of the property as a whole justifies the conclusion that the landowner is responsible for reasonable risk management of the area."[871]

The court found that the University kept the ski hill as a maintained, landscaped section of the main campus and that the hill was located near a gymnasium and a hockey rink.[872] Applying the above factors, the court held as a matter of law that the hill was "improved land" not covered by Alaska Statutes section 09.45.795 and affirmed the denial of summary judgment.[873]

C. Procedure

In *Beck v. State Department of Transportation and Public Facilities*,[874] the Alaska Supreme Court considered whether still photos may be admitted as evidence to depict a moving scene. Beck challenged an evidentiary ruling, claiming that the lower court erred in admitting experimental evidence that had purported to reconstruct the road conditions at the time of an auto accident. The supreme court concluded that the trial court correctly applied the standards for experimental evidence announced in *Love v. State*,[875] agreeing that the experimental conditions were substantially similar to those existing at the time of the accident.

In *Bohna v. Hughes, Thorsness, Gantz, Powell & Brundin*,[876] the supreme court faced a host of procedural issues arising out of Bohna's malpractice claim against both Hughes, Thorsness and Allstate, and a resulting indemnity cross-claim by Allstate against Bohna and the law firm. Most notably, the court held clearly erroneous the lower court's granting to both Allstate and Bohna the same number of peremptory challenges as had been given to Hughes, Thorsness. The supreme court found that under Alaska Rule of Civil Procedure 47(d),[877] Allstate and Bohna did not have

871. Id. at 1232 (footnotes omitted).

872. *Id.*

873. *Id.*

874. 837 P.2d 105 (Alaska 1992). *See supra* notes 858-859 and *infra* notes 902-906 and accompanying text.

875. 457 P.2d 622, 627 (Alaska 1969).

876. 828 P.2d 745 (Alaska 1992). *See infra* notes 881-895 and accompanying text.

877. Alaska Rule of Civil Procedure 47(d) governs peremptory challenges and provides in part:

adverse interests and should have been treated as a single party for the award of challenges.[878]

Because Hughes, Thorsness did not produce any compelling proof that the jury was not impartial.[879] Thus, the trial court's mistake was harmless error: "[w]hether or not any or all of these people [stricken by the four extra challenges] were biased in some fashion, [Hughes, Thorsness] has no basis to complain as long as four unbiased people were selected in their places."[880]

D. Damages

The supreme court also addressed several damages issues in *Bohna v. Hughes, Thorsness, Gantz, Powell & Brundin.*[881] Bohna sued Hughes, Thorsness under the theory that rather than settle his case within the limits of his insurance policy, the attorneys made offers of judgment in excess of the policy limits pursuant to Alaska Rule of Civil Procedure 68.[882] This strategy apparently caused Bohna to incur a large uninsured judgment.[883] Bohna agreed to the strategy, however, because he thought that the size of the settlement would not matter when he pursued bankruptcy.[884] After settling for $4.6 million, prejudgment interest included, Bohna discovered that he might not be able to discharge the judgment in bankruptcy because the accident involved alcohol. The defendant

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> Each party may challenge peremptorily three jurors. Two or more parties on the same side are considered a single party for purposes of peremptory challenge, but where multiple parties having adverse interests are aligned on the same side, three peremptory challenges shall be allowed to each party represented by a different attorney.

ALASKA R. CIV. P. 47(d). The trial court initially gave each party three peremptory challenges, but upon subsequent agreement, the number was raised to four. *Bohna*, 828 P.2d at 761 n.44.

878. *Bohna*, 828 P.2d at 761-62 (citing ALASKA R. CIV. P. 47(d)).

879. *Id.* at 763.

880. *Id.*

881. 828 P.2d 745 (Alaska 1992). *See supra* notes 876-880 and accompanying text.

882. Civil Rule 68 provides in part that if a settlement offer proves to be greater than the offeree's final judgment, the offeree will be ineligible to recover any costs or fees incurred after the offer was made and will be liable for such fees incurred by the offeror. *Id.* at 749 n.6 (citing ALASKA R. CIV. P. 68).

883. *Id.* at 748.

884. *Id.*

agreed not to enforce the judgment while Bohna sued his attorneys and insurer for malpractice.[885] Allstate settled with Bohna for $1 million, and then sued Hughes, Thorsness for indemnity.[886]

The supreme court rejected the law firm's claim that Bohna failed to mitigate damages by not pursuing bankruptcy proceedings. The court noted that bankruptcy would not nullify Bohna's malpractice claim, but merely transfer it to the trustee in bankruptcy as an asset. "Moreover, even if Bohna's bankruptcy would have reduced [Hughes Thorsness's] liability, we hold as a matter of public policy that the duty to mitigate does not extend to filing for bankruptcy."[887]

In conjunction with his settlement with Allstate, Bohna had signed a $3 million loan receipt agreement, to be repaid to the extent of the proceeds from his suit against Hughes, Thorsness.[888] The trial court held that any portion of the $3 million loan that Bohna was not required to repay to Allstate was "consideration" for Bohna's release of Allstate and thus deductible from the verdict by statute.[889] Although Hughes, Thorsness claimed that loan receipt agreements violate Alaska law and public policy in the plaintiff/co-defendant setting,[890] the supreme court held that such an agreement did not constitute an "illegal assignment."[891] Hughes Thorsness further argued that the loan receipt agreement permits a settling tortfeasor to effect contribution from a nonsettling joint tortfeasor contrary to the intent of the Alaska Statutes section 09.16.010(d).[892] The supreme court found no statutory language

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885. *Id.* at 750-51.

886. *Id.* at 748.

887. *Id.* at 754.

888. *Id.* at 748.

889. *Id.* at 751-52, 758 ("'When a release . . . is given in good faith to two or more persons liable in tort for the same injury . . . it reduces the claim against the others . . . in the *amount of the consideration paid for it* . . . .'") (quoting ALASKA STAT. § 09.16.040(1) (repealed March 5, 1989)).

890. *Id.* at 755-56.

891. *Id.* at 756.

892. *Id.* at 757. The statute once provided:

> A tortfeasor who enters into a settlement with a claimant is not entitled to recover contribution from another tortfeasor whose liability for the injury or wrongful death is not extinguished by the settlement nor in respect to any amount paid in a settlement which is in excess of what was reasonable.

prohibiting such agreements.[893] However, in determining the proper amount the lower court should have deducted from the verdict as consideration, the court noted that "if the [full] loan amount . . . is not treated as consideration . . . neither plaintiffs nor settling defendants would have any incentive not to structure 100% of all settlements as [loan receipt agreements]."[894] Acknowledging its minority stance in deducting the full amount, the court reasoned that such a position does not run afoul of the uniformity of interpretation clause of Alaska's Uniform Contribution Act.[895]

In *Williams v. Utility Equipment, Inc.*,[896] the supreme court reviewed the disbursement of settlement funds in a products liability claim in which Williams attributed his back injury to a fall from a defectively designed truck. The jury found that Williams did not fall off the truck and returned a verdict in the defendant's favor. At the close of trial, the plaintiff's attorneys held a large sum of money from pretrial settlements with two other manufacturer co-defendants. The supreme court was asked to assess whose right to the funds took precedence: Utility Equipment's right to attorney's fees as the prevailing party; Williams' attorneys' own statutory right to the settlement funds as compensation; or the employer's right (held by the insurer Alaska Rural Electric Cooperative Association (ARECA)) to recoup workers' compensation benefits.[897]

The supreme court first noted that Williams' litigation costs had exceeded the total recovery from which ARECA demanded its compensation. "Essentially, ARECA asks to share in the fruits of Williams' successful claims while forcing Williams to shoulder the entire cost of his unsuccessful claim against Utility Equipment."[898] The court held that while the plaintiff may *voluntarily* agree to earlier disbursements, "he or she has the right to retain any funds recovered until all third-party claims are resolved."[899]

Id. at 757 n.28 (quoting ALASKA STAT. § 09.16.010(d) (repealed March 5, 1989)).

893. *Id.* at 757.

894. *Id.* at 758.

895. *Id.* at 759 (citing ALASKA STAT. § 09.16.050 (repealed March 5, 1989)).

896. 837 P.2d 1112 (Alaska 1992).

897. *Id.* at 1117 (citing ALASKA STAT. §§ 23.30.015(g) (1990), 34.35.430(b) (1990); ALASKA R. CIV. P. 82).

898. *Id.*

899. *Id.* at 1117-18.

To adjudicate the remaining competing claims of Williams' own lawyers and the victorious opposing counsel for Utility Equipment, the court applied Alaska Statutes section 34.35.430(b), which provides that an attorney lien is "subordinate to the rights existing between the parties."[900] Construing the statute to refer only to the "parties" actually involved in the settlement, and not to Utility Equipment, a third party to the pretrial settlement, the court held the rights of Williams' attorneys' superior.[901]

The supreme court examined the lower court's rulings on wrongful death damages in *Beck v. State Department of Transportation and Public Facilities*.[902] Relying on prior Alaska case law, the court affirmed the lower court's ruling that to limit recovery by the amount that an unwed, childless decedent *would have spent* on dependents is "too speculative."[903] Rather, in wrongful death cases where the decedent is survived by neither spouse nor dependents, recovery is limited to "the decedent's probable future earnings, less the amount he would have spent on living expenses assuming 'an absence of dependents throughout the deceased's life expectancy.'"[904]

Beck also argued that Alaska Statutes section 09.17.040(a)-(b), which requires the reduction of future economic awards to the present value, applies only to personal injury awards, and therefore excludes by omission wrongful death recoveries.[905] The supreme court held that although the legislature had not foreseen this particular argument, the legislative intent underlying the statute encompassed wrongful death awards.[906]

Attila I. Bodi
Debra E. Munsen
James P. Walsh

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900. *Id.* at 1118 (quoting ALASKA STAT. § 34.35.430(b) (1990)).

901. *Id.*

902. 837 P.2d 105 (Alaska 1992). *See supra* notes 858-859, 874-875 and accompanying text.

903. *Id.* at 116 (citing Osborne v. Russell, 669 P.2d 550, 560 (Alaska 1983); *In re* Estate of Pushruk, 562 P.2d at 329, 332 (Alaska 1977)).

904. *Id.* at 116 (quoting *Osborne*, 669 P.2d at 560).

905. *Id.* at 116-17 (citing ALASKA STAT. § 09.17.040(a)-(b) (Supp. 1992)).

906. *Id.* at 117.

APPENDIX

CASES OMITTED FROM 1992 YEAR IN REVIEW

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