YEAR IN REVIEW

ALASKA SUPREME COURT AND COURT OF APPEALS YEAR IN REVIEW 1991

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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. Due to the volume of cases, not all cases decided by the courts have been reviewed. The authors have attempted to highlight decisions representing a departure from prior law or resolving issues of first impression.

For easy reference, the opinions have been grouped into eleven categories, according to the general subject matter and import of their holdings rather than the nature of the underlying claims: administrative law, business law, constitutional law, employment law, family law, fish and game law, procedure, property law, tax law, tort law and criminal law. The criminal law section has been placed last because of its sheer volume of cases. In some instances, the eleven categories have been further divided into subcategories representing more specific areas of the law.

Appendix A lists the cases that were omitted from this year's Review because they either applied well-settled principles or involved narrow holdings of limited import. Appendix B notes which Court of Appeals decisions have been granted certiorari by the Alaska Supreme Court.

II. ADMINISTRATIVE LAW

In the area of administrative law, the Alaska Supreme Court decided ten cases challenging agency actions or regulations on a variety of procedural, statutory and constitutional grounds. In particular, the court was guided by a precise approach to statutory language in those cases involving agencies that exceeded the boundaries of their rulemaking authority or that sought to avoid certain statutorily prescribed responsibilities.

In *Fairbanks North Star Borough School District v. NEA-Alaska, Inc.*,[1] the supreme court held that a Department of Education regulation that entitles teachers employed for only fractions of a school year "which equal

1. 817 P.2d 923 (Alaska 1991).

two full school terms"[2] to tenure conflicts with a statute that requires teachers to be employed "in the same district continuously for two *full* school years"[3] in order to be considered for tenure.[4] The superior court granted NEA-Alaska's motion for summary judgment, holding that the Department's regulation is valid.[5]

On appeal, the supreme court found that the language in the statute -- "continuously (employed) for two full school years"[6] -- unambiguously precludes those who have only worked for a fraction of the school year.[7] The court distinguished *State v. Redman*,[8] which had held that a teacher working part-time could qualify for tenure under the statute because that teacher had been employed for two full school years.[9] "The use of the word 'full' in the Alaska statute indicates the Alaska Legislature's intent to preclude a teacher from counting a portion of a year toward the two-year probationary period required for tenure."[10]

Warner v. State,[11] a consolidation of three appeals dismissed by the superior court and the Alaska Real Estate Commission for untimely filing, declared section 64.295 of title 12 of the Alaska Administrative Code[12] invalid "because it was not promulgated pursuant to a legislative grant of authority."[13] Section 64.295 purported to establish a one year statute of limitations for filing claims under the Real Estate Surety Fund Act.[14]

The supreme court reversed the dismissals, holding that the Real Estate Commission lacked the authority to promulgate Section 64.295.[15] The court opined that neither Alaska Statutes section 08.88.081[16] nor section

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2. ALASKA ADMIN. CODE tit. 4, § 18.900(b)(2) (Jan. 1991).

3. ALASKA STAT. § 14.20.150(a)(2) (1987) (emphasis added).

4. *NEA-Alaska*, 817 P.2d at 925. Teachers may be employed for only fractions of a school year for various reasons. For example, the student population may be different than what was originally predicted, or term teachers may leave because of illness or maternity leave. *Id.*

5. *Id.*

6. ALASKA STAT. § 14.20.150(a)(2) (1987).

7. *NEA-Alaska*, 817 P.2d at 926.

8. 491 P.2d 157 (Alaska 1971), *aff'd on other grounds*, 519 P.2d 760 (Alaska 1974).

9. *NEA-Alaska*, 817 P.2d at 926.

10. *Id.* In addition, the court opined that although interpreting the statute less strictly might attract a higher quality of teachers to Alaska, this decision is properly in the domain of the legislature, not the courts or the Department of Education. *Id.*

11. 819 P.2d 28 (Alaska 1991).

12. ALASKA ADMIN. CODE tit. 12, § 64.295 (July 1991).

13. *Warner*, 819 P.2d at 29, 33-34.

14. *Id.* at 29-30; *see* ALASKA STATUTES §§ 08.88.450-.495 (1991).

15. *Warner*, 819 P.2d at 33.

16. Alaska Statutes section 08.88.081 provides: "the commission shall adopt regulations necessary to carry out the purposes of this chapter." ALASKA STAT. § 08.88.081 (1991).

08.88.111[17] authorizes the institution of the one-year statute of limitations provision because neither statute actually appears in the Real Estate Surety Fund Act and both statutes relate only to the licensing powers of the Commission.[18] The court further noted that the Real Estate Surety Fund Act only sets forth the procedures to be followed in adjudicating surety fund claims, and that "the surety fund statutes do not confer a broad grant of rulemaking authority."[19]

In the Matter of E.A.O.[20] defined the scope of certain administrative duties. The supreme court held that the Department of Health and Social Services ("DHSS") continues to have a responsibility for the medical expenses of children in its custody, even when the children are placed in their parents' homes. E.A.O., a child born prematurely due to her mother's alcohol abuse, was in the temporary legal custody of DHSS because of her parents' inability to pay her extensive medical expenses.[21] Although E.A.O.'s medical problems classified her as a "special needs case," the superior court nonetheless released E.A.O. to the custody of her parents, subject to the supervision of DHSS and ruled that DHSS would no longer be responsible for E.A.O.'s medical expenses.[22] E.A.O.'s mother appealed only on the question of whether DHSS had the burden of paying E.A.O.'s medical expenses for the nine-month period when E.A.O. remained legally in the custody of the state, although residing at her parents' home.[23]

In reversing the superior court, the supreme court noted "[w]e think it clear that the department is responsible for the medical costs of children in its custody, whether the children are placed at home or in a foster home."[24] The court relied on Alaska Statutes section 47.10.084(a), which expressly states that the legal custodial relationship imposes the duty of paying medical costs on the department.[25]

The next two decisions in this area involved questions of the functional definition of an administrative appeal and when such an appeal will be deemed exhausted. In *Diedrich v. City of Ketchikan*,[26] the plaintiff

17. Alaska Statutes section 08.88.111 provides: "the commission shall adopt procedural regulations describing (1) how it conducts an examination; (2) how a person applies to take an examination . . . ." ALASKA STAT. § 08.88.111 (1991).

18. *Warner*, 819 P.2d at 31.

19. *Id.* at 32.

20. 816 P.2d 1352 (Alaska 1991).

21. *Id.* at 1353.

22. *Id.* at 1354.

23. *Id.*

24. *Id.* at 1356.

25. *Id.* at 1356-57; *see* ALASKA STAT. § 47.10.084(a) (1990).

26. 805 P.2d 362 (Alaska 1991).

claimed that the City of Ketchikan had deleted funding for his position of Utilities Engineer, resulting in his discharge, in retaliation for an appeal he had previously made to the City Personnel Board.[27] Upon a second appeal, the Board upheld his termination. Fifteen months later, the plaintiff initiated suit in superior court, claiming breach of the implied covenant of good faith and fair dealing and violation of his substantive due process rights.[28] The superior court granted the city's motion to dismiss on the ground that the complaint was untimely under Alaska Rule of Appellate Procedure 602(a)[29] and therefore was the equivalent of an administrative appeal.

On appeal, the supreme court rejected the plaintiff's first three claims. The court upheld the superior court's finding that the plaintiff's claim required the court to consider the propriety of an agency determination and thus was functionally an administrative appeal.[30] The court also held that the non-section 1983 claims were properly dismissed as untimely since "[a]ny claim which is functionally an administrative appeal must be brought within the thirty day limit."[31] The court further reasoned that the grievance procedures enumerated in the plaintiff's employment contract with the city undermined his claimed deprivation of the right to a jury trial.[32]

The court also rejected the contention that "requiring public employees to bring a timely administrative appeal as a prerequisite to invoking the appellate jurisdiction of the superior court" denies equal protection of the laws.[33] The court noted that both private and public employees must exhaust administrative remedies before obtaining judicial review.[34]

The supreme court next addressed the plaintiff's fourth claim, that he need not comply with Appellate Rule 602(a) prior to filing a section 1983 action in Alaska state court. Although the supreme court agreed that Rule 602(a) was inapplicable under *Felder v. Casey*,[35] a recent United States

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27. *Id.* at 364.

28. *Id.* at 364-65. The plaintiff based his due process claim partially on 42 U.S.C. § 1983 (1988). *Id.*

29. *Id.* at 365. Alaska Rule of Appellate Procedure 602(a)(2) provides in part: "[t]he time within which an appeal may be taken to the superior court from an administrative agency shall be 30 days from the date that the order appealed from is mailed or delivered to the appellant." ALASKA R. APP. P. 602(a)(2) (1989).

30. *Diedrich*, 805 P.2d at 366.

31. *Id.* at 365.

32. *Id.* at 367. The court noted that "[w]hen Diedrich agreed to accept employment with the City, he waived any residual right he had to demand a jury trial for an alleged breach of the employment contract." *Id.*

33. *Id.* at 368.

34. *Id.*

35. 487 U.S. 131, 153 (1988) (holding that a plaintiff need not exhaust state

Supreme Court case, the court dismissed Diedrich's 1983 claim under the principle of issue preclusion.[36] Relying heavily on a Ninth Circuit decision, *Eilrich v. Remas*,[37] the court concluded that issue preclusion would bar the claim because the allegations were essentially the same as those presented to the City Personnel Board.[38] The court went on to state that although the section 1983 action in *Eilrich* had been brought in federal court, the principle of collateral estoppel was equally applicable to Diedrich's claim brought in a state court.[39]

Finally, the court addressed the city's cross-appeal for attorneys' fees under Alaska Rule of Civil Procedure 82.[40] The court determined that because the action was treated as an administrative appeal, the Alaska Rules of Appellate Procedure, rather than the Alaska Rules of Civil Procedure, governed the award of attorneys' fees related to the non-section 1983 claims.[41] The court thus remanded the question of attorneys' fees to the lower court to determine whether an award should be granted to the City under Alaska Rule of Appellate Procedure 508(e).[42]

Morgan v. State Department of Revenue[43] involved the issue of exhaustion of administrative remedies in appealing a denial of a permanent fund dividend. Morgan, a state prisoner,[44] claimed that he appealed to the Department of Revenue ("DOR") after the March 2, 1988 denial of his application for a permanent fund dividend. The DOR claimed that Morgan never filed an administrative appeal and that his appeal rights had expired.[45] Morgan filed notice of appeal in the superior court, but the

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administrative remedies before filing a section 1983 action in state court).

36. *Diedrich*, 805 P.2d at 369-70.

37. 839 F.2d 630 (9th Cir. 1988), *cert. denied*, 488 U.S. 819 (1988). The plaintiff in *Eilrich* administratively appealed his dismissal and lost. He filed a section 1983 action in federal court without appealing the administrative decision. The Ninth Circuit held that "collateral estoppel barred consideration of the section 1983 claim because the same issues were resolved in a prior unreviewed administrative proceeding." *Diedrich*, 805 P.2d at 369 (interpreting *Eilrich*, 839 F.2d at 635).

38. *Diedrich*, 805 P.2d at 370.

39. *Id.*

40. *Id.* at 370-71; *see* ALASKA R. CIV. P. 82 (setting a schedule for awarding attorneys' fees to a prevailing party).

41. *Diedrich*, 805 P.2d at 371.

42. *Id.* Rule 508(e) gives the court discretion to award attorneys' fees in appeals. ALASKA R. APP. P. 508(e).

43. 813 P.2d 295 (Alaska 1991).

44. Although Alaska Statutes section 43.23.005 currently holds that a prisoner cannot receive a Permanent Fund Dividend, at the time of Morgan's application in 1987 this provision did not apply. *Id.* at 295 n.1.

45. *Id.* at 295-96.

DOR's motion to dismiss was granted because of Morgan's failure to exhaust administrative remedies and file a timely appeal.[46]

On Morgan's appeal from the superior court's dismissal, the supreme court held that the superior court abused its discretion in dismissing Morgan's appeal because a factual dispute existed as to whether Morgan had filed an appeal.[47] The court further held that it was an abuse of discretion for the superior court to dismiss Morgan's appeal as untimely.[48] The court reasoned that timeliness is only an issue after a "final determination" has been made and that the denial of a dividend is not a "final determination" under the relevant agency rule.[49] Rather, the "final determination" is a determination at the formal hearing level.[50]

Finally, the court characterized Morgan's appeal in superior court as occurring "within a reasonable time" and after he "exhausted what he reasonably could have believed were his remedies within DOR."[51] The court remanded to the superior court for further findings of fact as to whether Morgan exhausted his administrative remedies.[52]

The remaining five decisions in this section address questions concerning the propriety of various agency actions and interpretations of governing statutes. In *McGrath v. University of Alaska*,[53] the supreme court held that the adjudicative provisions of the Administrative Procedure Act ("APA")[54] are applicable to grievance proceedings for University of Alaska employees. In 1987, the community college system merged with the University of Alaska system[55] and all faculty became subject to the same rank and tenure system. Former community college faculty members filed a formal grievance, requesting a change in the rank assignments and claiming that as a result of the merger they were wrongly denied tenure.[56]

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46. *Id.* at 296.

47. *Id.* at 297. The court noted that the superior court "should have taken Morgan's statements as true for purposes of resolving the motion to dismiss, just as a plaintiff's allegations must be viewed as true in determining a dismissal motion based on the failure to state a claim under Civil Rule 12(b)." *Id.* at 297 n.5 (citation omitted).

48. *Id.* at 298.

49. *See* ALASKA ADMIN. CODE tit. 15, § 05.040 (Oct. 1988 & Supp. 1992).

50. *Morgan*, 813 P.2d at 298 (citing Owsichek v. State Guide Licensing & Control Bd., 627 P.2d 616, 622 (Alaska 1981). Section 05.030(i) of title 15 of the Alaska Administrative Code reads in part: "Upon adoption by the commissioner, the written decision of the hearing officer is the final administrative decision of the department for purposes of appeal to the superior court under . . . [section 05.040 of title 15 of the Alaska Administrative Code]." ALASKA ADMIN. CODE tit. 15, § 05.030(i) (Oct. 1988 & Supp. 1992).

51. *Morgan*, 813 P.2d at 298.

52. *Id.*

53. 813 P.2d 1370 (Alaska 1991).

54. ALASKA STAT. §§ 44.62.330-.630 (1989 & Supp. 1991).

55. *McGrath*, 813 P.2d at 1370.

56. *Id.* at 1370-71.

After being advised that their hearing would take place before an interim council[57] but would not be governed by the APA,[58] the plaintiffs sought a declaratory judgment and injunction to require the University to conduct proceedings in accordance with the APA. The superior court held that the APA did not apply in this case.[59]

On appeal, the plaintiffs argued that the University is required by statute to conduct the hearing in accordance with the APA.[60] The University countered that its rules were reasonable and that the APA procedures were extensive and costly, and thus inconsistent with the University's statutory right to adopt reasonable rules of governance and with the Board of Regents' authority to manage the University.[61] The supreme court rejected the University's argument, holding that there is no inconsistency between the power to appoint and supervise faculty, and the APA procedures designed to guarantee due process to those adversely affected by administrative action.[62]

The University also argued that the APA adjudication procedures were inapplicable because the plaintiffs were grieving legislative facts rather than adjudicative facts.[63] The supreme court agreed, noting that although the APA does not explicitly limit adjudicatory hearings to adjudicative facts, the court had previously recognized this distinction[64] and furthermore, the structure of the APA suggests that Alaska has implicitly limited adjudicatory hearings to adjudicative facts and rulemaking to legislative facts.[65] The court reversed and remanded so that any claims made by the plaintiffs based on legislative facts could be excluded from the adjudicatory hearing under the APA.[66]

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57. The University had not yet established grievance procedures for the newly structured administration. The chancellor adopted interim procedures and appointed an interim council to administer them. *Id.* at 1371.

58. *Id.*

59. *Id.*

60. *Id.* at 1371-72. Alaska Statutes sections 44.62.330-.630 govern the adjudicative procedures of the University "except to the extent that its inclusion is inconsistent with the provisions of [Alaska statutes section] 14.40." ALASKA STAT. § 44.62.330(a)(45) (1989 & Supp. 1991). Alaska Statutes section 14.40 provides that the Board of Regents may "adopt reasonable rules, orders and plans . . . for the good government of the university. . . ." ALASKA STAT. § 14.40.170(b)(1) (1987).

61. *McGrath*, 813 P.2d at 1372.

62. *Id.* (agreeing with Aden v. University of Alaska No. 3AN-85-17179 Civil (Alaska Super., Feb. 2, 1987)).

63. *Id.* at 1374.

64. *Id.* (citing Wickersham v. State Commercial Fisheries Entry Comm'n, 680 P.2d 1135 (Alaska 1984)).

65. *Id.* at 1374-75; *see Wickersham*, 680 P.2d at 1143-47 (refusing to apply the more lenient notice requirements of rulemaking procedures involving individual rights).

66. *McGrath*, 813 P.2d at 1375.

In *Borrego v. Alaska*,[67] the supreme court affirmed the superior court's administrative revocation of Harold Borrego's driver's license based on a finding that he had been driving while intoxicated.[68] Borrego was arrested for driving while intoxicated and his license was immediately revoked. Although the jury later acquitted Borrego on the charge, his license revocation was affirmed following administrative review.[69] Borrego then filed an appeal in both the district court and superior court pursuant to Alaska Statutes section 28.05.141(d) and section 28.15.166(m). The superior court affirmed both the district court's dismissal and the administrative decision.[70]

First noting that *Graham v. State*[71] governs situations in which the defendant has the right to file an appeal in both district and superior court, the supreme court held that Alaska Statutes section 28.15.166(m)[72] governs cases of license revocations due to driving while intoxicated, thus allowing Borrego a single avenue of appeal in the superior court.[73] The court recognized that "allowing appeals under both provisions would result in duplicate appeals and needless waste of judicial resources."[74]

The court further held that Borrego's acquittal did not bar administrative revocation of his driver's license.[75] The court held that the doctrine of collateral estoppel did not apply because the standard of proof in a civil licensing case is different from that of a criminal action.[76]

Higgins v. Municipality of Anchorage ("Higgins II")[77] involved an appeal from the denial of a new trial of a wrongful job reclassification action against a municipality.[78] On appeal after remand for failing to

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67. 815 P.2d 360 (Alaska 1991).

68. *Id.* at 362, 366.

69. *Id.* at 362-63.

70. *Id.* at 363.

71. 633 P.2d 211 (Alaska 1981).

72. This section provides:

> Notwithstanding [Alaska Statutes section] 28.05.141(d) . . . a person aggrieved by the determination [of the police] may file an appeal in superior court for judicial review of the hearing officer's determination. . . . The court may reverse the department's determination if the court finds that the department misinterpreted the law, acted in an arbitrary and capricious manner, or made a determination unsupported by the evidence in the record.

ALASKA STAT. § 28.15.166(m) (1989).

73. *Borrego*, 815 P.2d at 364.

74. *Id.*

75. *Id.*

76. *Id.* (citing Avery v. State, 616 P.2d 872 (Alaska 1980)).

77. 810 P.2d 149 (Alaska 1991) ("*Higgins II*").

78. *See* Municipality of Anchorage v. Higgins, 754 P.2d 745 (Alaska 1988) ("*Higgins I*"), *appeal after remand*, Higgins v. Municipality of Anchorage, 810 P.2d 149 (1991). In *Higgins I* the superior court denied the municipality's motion for summary judgment and

exhaust administrative remedies, Higgins argued that newly discovered evidence showed that the municipality misrepresented its policy on the availability of arbitration for reclassification disputes.[79] Although the court agreed that the municipality had misrepresented its position on arbitration,[80] it noted that Higgins could have discovered the misrepresentation two years earlier through due diligence. Thus, according to the court, the lower court had not abused its discretion in denying Higgins' motion for a new trial.[81]

Nevertheless, the court pointed out that at a certain level misrepresentation to the court "offends the integrity of the judicial system itself."[82] Finding that the municipality was "at least reckless in misrepresenting its policies on arbitration in *Higgins I* . . . [and] clearly violated its duty of honest dealing with [the] court,"[83] the court set aside the judgment in *Higgins I* for "fraud upon the court,"[84] reinstating the original denial of the municipality's motion for summary judgment and remanding the case.[85]

Homer Electric Association, Inc. v. City of Kenai[86] involved a dispute over who was responsible for the costs of relocating a utility's equipment in a municipal right of way. The dispute arose when some of the city's light facilities needed to be relocated because of municipal construction projects.[87] Homer Electric Association ("HEA"), which operated and managed the city of Kenai's electrical system, demanded reimbursement from the city for the relocation, but the city refused. HEA then petitioned the Alaska Public Utilities Commission ("APUC") for a ruling that the city had breached its contract with HEA.[88] APUC dismissed the petition, suggesting that HEA apply for a rate surcharge to pay for the relocation

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the supreme court reversed and remanded, holding that Higgins had not exhausted his administrative remedies in light of the availability of arbitration. *Id.* at 747-48.

79. *Higgins II*, 810 P.2d at 150.

80. *Id.* at 151-53. The municipality's position before the court in *Higgins I* was that arbitration was available and even a "preferred means of resolving disputes like Higgins's . . . ." *Id.* at 152. The court noted that the most favorable reading of the municipality's position in *Higgins II* was that "Higgins has a duty to test our refusal to arbitrate before he has recourse to the courts." *Id.*

81. *Id.* at 153.

82. *Id.* at 154.

83. *Id.*

84. *See* ALASKA R. CIV. P. 60(b) (authorizing such set asides).

85. *Higgins II*, 810 P.2d at 154.

86. 816 P.2d 182 (Alaska 1991).

87. *Id.* at 183.

88. *Id.*

expenses. HEA then filed a tariff request with the APUC to obtain the surcharge.[89]

In support of its request for a rate surcharge, HEA challenged the traditional common law rule that "absent a statute or specific agreement to the contrary, a public utility accepts the right to use public rights of way subject to an implied obligation to relocate its facilities when necessary to make way for public improvements."[90] APUC concluded that the common law rule was unreasonable.[91] The city appealed the APUC finding to the superior court, which dismissed the appeal because the city had not been a party to the APUC hearing and thus lacked standing.[92] The city appealed to the Alaska Supreme Court, which held that the city did have standing, vacated the dismissal and remanded the case.[93] On remand, the superior court found in favor of the city, holding that the APUC lacked subject matter jurisdiction over the matter, and awarded attorney's fees to the city.[94]

The supreme court reviewed the case de novo and considered only the question of whether the APUC had jurisdiction under the Alaska Public Utilities Commission Act[95] to issue the order.[96] The court discussed two guiding principles that determine APUC's jurisdictional authority: "a principle of limitation, restricting the APUC's power to the specific jurisdictional areas of its 'stated purposes'" and "a principle of expansion, mandating that the APUC's power to act within its specific areas of

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89. *Id.*

90. *Id.* at 184.

91. *Id.*

92. *Id.*

93. City of Kenai v. State Public Utilities Comm'n, 736 P.2d 760, 763 (Alaska 1987).

94. *Homer Electric*, 816 P.2d at 184.

95. ALASKA STAT. §§ 42.05.010-.721 (1989 & Supp. 1991). The relevant provision was Alaska Statutes section 42.05.251 which pertains to public utilities' use of streets in cities and boroughs. The statute provides in part:

> Public utilities have the right to a permit to use public streets, alleys, and other public ways of a city or borough, whether homerule [sic] or otherwise, upon payment of a reasonable permit fee and on reasonable terms and conditions and with reasonable exceptions the municipality requires. A dispute as to whether fees, terms, conditions, or exceptions are reasonable shall be decided by the commission.

Act of 1970, ch. 113, § 6, 1970 Alaska Sess. Laws 6 (current version at ALASKA STAT. § 42.05.251 (1989)). This section was amended in 1986, but the amendments are not relevant to this case. *Homer Electric*, 816 P.2d at 185 n.11.

The court rejected the city's argument that HEA had no "permit" and thus Alaska Statutes section 42.05.251 was not implicated, noting that the written agreement between the city and HEA expressly provided for a permit for HEA to use streets, alleys, and rights of way. Furthermore, the court rejected the city's argument that HEA's relocation expenses could not be construed as a permit "fee" under the same statutory provision. The court explained that the city's requirement that HEA pay its own relocation expenses was plainly a condition of HEA's permit. *Id.* at 187.

96. *Homer Electric*, 816 P.2d at 185-86.

jurisdiction 'is to be liberally construed.'"[97] The court reviewed its precedent on APUC's jurisdictional authority,[98] and concluded that APUC clearly had jurisdiction to resolve the dispute between the city and HEA.[99] The court then reversed and remanded the case for a review of the substance of APUC's order and vacated the city's award of attorney's fees.[100]

Stepanov v. Homer Electric Ass'n[101] involved contracts between Homer Electric Association ("HEA") and housing developers for extending electrical lines to newly developed land. HEA's policy at the time provided that the cost of overhead line extensions would be paid primarily by HEA; developers would incur substantial costs only if they wanted the lines installed underground.[102] In *Stepanov*, the developers wanted underground lines and agreed to prepay the cost differential.[103] However, several years after these contracts were signed, HEA successfully petitioned the Alaska Public Utilities Commission ("APUC") for permission to begin charging for extending overhead lines.[104] The developers remained unaware of this change of policy until purchasers of lots in their subdivisions complained that HEA had assessed fees for overhead line extensions.[105]

The developers petitioned the APUC for review of HEA's new tariff. The APUC hearing officer characterized the contracts as "special contracts" under section 48.820(36) of title 3 of the Alaska Administrative Code[106]

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97. *Id.* at 186 (quoting ALASKA STAT. § 42.05.141(a)(1) (1989 & Supp. 1991)). The statute provides that APUC shall "regulate every public utility engaged or proposing to engage in such a business inside the state, except to the extent exempted by [Alaska Statutes section] 42.05.711, and the powers of the commission shall be liberally construed to accomplish its stated purposes . . . ." ALASKA STAT. § 42.05.141(a)(1) (1989 & Supp. 1991).

98. B-C Cable Co., Inc. v. City & Borough of Juneau, 613 P.2d 616 (Alaska 1980) (holding that a challenge to a franchise tax clearly fell under the APUC's authority to determine reasonableness of use permit fees); Greater Anchorage Area Borough v. City of Anchorage, 504 P.2d 1027 (Alaska 1972) (holding that a dispute between two municipalities did not clearly fall under the APUC's authority to resolve disputes between competing utilities), *overruled on other grounds by* City & Borough of Juneau v. Thibodeau, 595 P.2d 626, 629 (Alaska 1979).

99. *Homer Electric*, 816 P.2d at 187 (determining that it has "construed [Alaska Statutes section] 42.05.141(a)(1) to mean that the actual areas in which the APUC may exercise its adjudicatory authority are quite narrow," but that the APUC's authority within those areas "are plenary, and as broad as the specific provisions of the Act permit").

100. *Id.*

101. 814 P.2d 731 (Alaska 1991).

102. *Id.* at 732-33.

103. *Id.* at 733.

104. *Id.*

105. *Id.*

106. A "special contract" is defined in the Alaska Administrative Code as:

and approved them for the period prior to when the developers received actual notice that the new tariff applied to their property.[107] Both parties appealed, objecting to the characterization of the agreement as a "special contract." The superior court affirmed on alternate grounds.[108]

The supreme court concluded that the contracts were indeed "special contracts,"[109] requiring prior APUC approval.[110] The court held, however, that the developers were unaware of this requirement and had reasonably relied upon HEA to have knowledge of and comply with any statutory and regulatory requirements.[111] The court further concluded that the harm developers would suffer if the tariff were applied to the property sold before the developers had actual notice of the increased fees would be remedied by APUC's decision to exempt the developers from the new tariff until they had received actual notice.[112]

After the superior court awarded actual attorneys' fees and costs to the developers for the appellate proceedings,[113] the developers claimed that they should have been awarded additional fees for the proceedings before the APUC. The supreme court concluded that the APUC did not have the authority to award the fees without specific authorization.[114] Similarly, the court relied on *Kenai Peninsula Borough v. Cook Inlet Region, Inc.*,[115] holding that fee awards should be partial -- limited to those fees incurred in court, not in prior administrative proceedings -- unless otherwise authorized by statute or in frivolous cases.[116]

> a written agreement between a utility and a customer which contains rates, tolls, rentals or charges, or terms and conditions that deviate substantially from those contained in the same utility's effective tariff for like service offered to the general public under comparable conditions, but excludes contracts that deviate from the serving utility's effective tariff only in respect to incidental matters. . . .

ALASKA ADMIN. CODE tit. 3, § 48.820(36) (Oct. 1988). Section 48.390 provides that special contracts do not take effect without the prior approval of APUC. ALASKA ADMIN. CODE tit. 3, § 48.390 (Oct. 1988).

107. *Stepanov*, 814 P.2d at 733-34.

108. *Id.* at 734. The superior court concluded that the agreements were not special contracts and that they were enforceable without APUC approval. The court held that due process required that HEA give the developers actual notice of the APUC hearing. Policy concerns, however, compelled the court to conclude that the due process violation did not negate the validity of the new tariff and that it was applicable from the time actual notice was recieved. *Id.* at 734 n.8.

109. *Id.* at 735.

110. *See* ALASKA ADMIN. CODE tit. 3, § 48.390 (Oct. 1988).

111. *Stepanov*, 814 P.2d at 735.

112. *Id.* at 736.

113. *Id.* at 737.

114. *Id.*

115. 807 P.2d 487, 501 (Alaska 1991). *See infra* page 209.

116. *Stepanov*, 814 P.2d at 737. The court also relied on *Kenai Peninsula Borough* in concluding that it was an abuse of discretion for the superior court to award actual attorney's fees to the developers; in the absence of frivolousness or undue delay, only partial

III. BUSINESS LAW

In 1991, the bulk of the cases decided by the Alaska Supreme Court in the area of business law were contracts cases. The court decided seven such cases in 1991, addressing the issues of indemnity, implied ratification, foreclosure, damages, exclusive listing agreements, exclusions in damage waivers and promissory estoppel. The court also issued opinions in cases involving insurance, the duty of good faith and fair dealing in settlement negotiations and the propriety of late fees charged by a federally chartered credit union. The contracts cases will be reviewed first, followed by the other business law cases.

In *Fairbanks North Star Borough v. Kandik Construction, Inc.*,[117] the Alaska Supreme Court for the first time extended the traditional role of implied non-contractual indemnity to an instance of implied *contractual* indemnity. The case involved a rehearing of a case decided in 1990 by the Alaska Supreme Court. The court vacated part of its earlier opinion and remanded for a new trial on the question of Roen Design Associates (a co-defendant's) liability to its cross-defendant, the Borough. In the prior decision, the supreme court did not address the jury verdict denying indemnity to the Borough because it found the claim to be redundant given the Borough's alternative cross-claims against Roen for tort and breach of contract. The court ordered a new trial to determine whether Roen was liable to the Borough under a theory of tort or contract.[118]

On rehearing, the supreme court first concluded that the tort and contract claims should not have gone to the jury. The court held that a promise for indemnity gives rise only to a claim for indemnity and not to claims in tort or contract.[119] The Borough did not actually plead any tort or contract claims against Roen, and the Borough did not make any showing that it tried discrete claims of tort and contract independently of the indemnity claim.[120]

The court concluded that the jury was not properly instructed on indemnity.[121] Alaska follows a version of the traditional rule of indemnity: "an indemnitee jointly liable in tort with the indemnitor may

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attorney's fees were appropriate. *Id.*

117. 823 P.2d 632 (Alaska 1991) (rehearing Fairbanks North Star Borough v. Kandik Construction, Inc., 795 P.2d 793 (Alaska 1990)).

118. *Id.* at 633-34.

119. *Id.* at 636-37.

120. *Id.* at 637. Although one element of the indemnity and negligence actions does coincide, failure to exercise reasonable care in the preparation of the plans, the focus of causation and the damages that would flow from the two actions are different. *Id.* at 636.

121. *Id.* at 637.

recover implied *non*-contractual indemnity only if the indemnitee is not in any degree also jointly at fault."[122] More importantly, the court stated for the first time that this rule applies to implied contractual indemnity.[123]

The dissent argued that the majority's decision is inconsistent with Alaska's adoption of comparative negligence.[124] The dissent did not believe that any fault should bar all recovery, and argued that loss should be shared in proportion to the fault of each party.[125]

In *S&B Mining Co. v. Northern Commercial Co.*,[126] the supreme court faced the issue of whether S&B Mining Company was bound by a promissory note that it did not sign. The court concluded that the company was bound, reflecting the court's continuing recognition of ratification by inaction. In 1980, William Swayne II and Baird & Williams Investment Advisors, Inc. ("B&W") formed S&B as general partners. B&W was a Texas corporation whose principals were Baird and Williams.[127] In 1984, Williams signed a promissory note to Northern Commercial Company ("NCC") in return for dismissal of a suit against S&B for failure to make rental payments on equipment.[128] In 1986, NCC filed suit against S&B because the payments on the promissory note were not made.[129] S&B argued that it was not bound by the note signed by Williams. The superior court granted NCC's motion for summary judgment, however, and the supreme court affirmed.[130]

The supreme court held that Williams' execution of the 1984 note bound S&B and its partners, Swayne and B&W.[131] The court based its holding on two alternative lines of reasoning. First, the court found that Swayne impliedly ratified the 1984 note, and in so doing bound S&B under the note.[132] The court noted that there are two requirements for finding ratification by silence. Initially, the act "'must be done by someone who held himself out to be the third party as an agent for the principal.'"[133] The court reasoned that it was clear that Williams was

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122. *Id.* at 638.

123. *Id.*

124. *Id.* at 639-40 (Matthews, J., dissenting) (citing Kaatz v. State, 540 P.2d 1037 (Alaska 1975)).

125. *Id.* at 641 (Matthews, J., dissenting).

126. 813 P.2d 264 (Alaska 1991).

127. *Id.* at 265.

128. *Id.*

129. *Id.* NCC also filed suit against Swayne, Baird, Williams, B&W, and Chena Mining. *Id.*

130. *Id.* at 269.

131. *Id.* at 267.

132. *Id.*

133. *Id.* (quoting Sea Lion Corp. v. Air Logistics of Alaska, 787 P.2d 109, 116-17

acting as an agent for S&B because NCC dropped the suit against S&B in return for the note.[134] Second, the principal must fail to act or respond to the circumstances as one would expect a reasonable person to respond if he or she objected.[135] According to the court, Swayne had full notice and knowledge of the debt and did not object.[136]

The court alternatively focused on S&B's partnership agreement, noting that the amended partnership agreement, dated one month before Williams signed the note, specified that Williams could bind the business of the partnership.[137] S&B argued that the document was not in effect when Williams signed the note, as Baird had not yet signed the partnership agreement. The court disagreed, finding that by signing a document that was predated January 1, the document had a retroactive effect.[138]

The final issue involved exclusion of evidence that NCC agreed not to sue on the promissory note until the collateral had been sold.[139] The supreme court determined that such evidence would violate the parol evidence rule because it contradicted the terms of the note.[140] The completeness and specificity of the note convinced the supreme court that it was an integrated document, and so the proffered evidence violated the presumption "that a creditor may proceed on the note without first foreclosing on the collateral, unless the note states otherwise."[141]

Yang v. Yoo[142] involved the sale of an inn in downtown Anchorage. The Yoos sold the Inlet Inn to the Yangs, who subsequently defaulted on their payments to the Yoos. The Yoos sought foreclosure and the Yangs counterclaimed, alleging that there was an additional oral agreement that provided that the Yoos would return the Yang's down payment if the Yangs did not earn at least one million dollars per year in revenues.[143] The jury found in favor of the Yoos on their foreclosure claim but did not award any damages. The superior court entered judgment for the Yoos and ordered foreclosure and sale of the property.[144]

(Alaska 1990)).

134. *Id.*
135. *Id.* (citing *Sea Lion*, 787 P.2d at 116-17).
136. *Id.* at 268.
137. *Id.* at 266, 269.
138. *Id.* at 268.
139. *Id.* at 269-70.
140. *Id.* at 270.
141. *Id.*
142. 812 P.2d 210 (Alaska 1991).
143. *Id.* at 211.
144. *Id.* at 213.

On appeal, the supreme court rejected the Yangs' argument that the jury's verdict of foreclosure and zero damages meant that the Yangs owed nothing to the Yoos.[145] Since the jury had awarded a foreclosure on the basis that there was no excuse for the Yangs' failure to make payments on the deed of trust held by the Yoos, the court found that it was possible to reconcile the jury's award of zero damages and the foreclosure.[146] The court then reasoned that the underlying obligation, the note, was enforceable against the property but not against the Yangs personally, thus accomplishing the goal of putting "the plaintiffs in as good a position as they would have had the defendants kept their promise."[147]

The court rejected the argument that every foreclosure judgment must specify an exact amount of indebtedness, noting that the existing debt of the Yangs was a matter of math, not law.[148]

The dispute in *Hancock v. Northcutt*[149] centered around an oral contract between the owner-builders of a house and certain concrete contractors who agreed to construct an underground house consisting of seven joined concrete pods. After delays in construction, the owners claimed that the completed construction was defective and sued the contractors for breach of contract, misrepresentation, and negligent and intentional infliction of emotional distress.[150] They sought damages associated with the cost of repairing the house, and emotional distress, and punitive damages. The contractors counterclaimed for the amount allegedly due under the terms of the oral contract and for extra work performed.[151] The jury found for the owners, awarding them certain prejudgment interest, costs and attorneys' fees, and compensatory damages which included the cost of demolishing and rebuilding the house as well as an award for emotional distress.[152]

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145. *Id.* at 214-15. The jury did not believe that "an enforceable oral side agreement existed." *Id.* at 214.

146. *Id.* at 215-16 (When "a plausible theory exists to reconcile the jury's answers on a special verdict form, we will do so.").

147. *Id.* at 216. This goal was what the instruction on damages to the jury stated. The court noted that the question on damages on the verdict form was unnecessary because the Yoos did not request any damages in addition to the note amount. Once the jury awarded foreclosure, there was no reason to calculate the exact amount owed under the note since there was no dispute as to the payments made on the note. *Id.*

148. *Id.* (distinguishing Jones v. North American Acceptance Corp., 442 S.W. 2d 492, 493-94 (Tex. Ct. App. 1969) (invalidating a foreclosure decree for uncertainty, but did so on the basis that there was a clear dispute regarding the amount of indebtedness)).

149. 808 P.2d 251 (Alaska 1991).

150. *Id.* at 252-53.

151. *Id.* at 253.

152. The jury also awarded compensatory damages for the costs of moving, storage, and temporary housing during construction, for costs incurred by construction delays, and for past lost use of portions of the house. *Id.*

The supreme court vacated the damage award for demolition and rebuilding, holding that the trial court's jury instruction concerning such costs was a misstatement of Alaska law.[153] The trial court had instructed the jury on alternate methods of computing damages for the house. Under the first method, if the jury found that repair was feasible, then the measure of damage should have been cure costs, i.e., the cost of completing the house to the condition promised in the contract. Alternatively, if repair was not feasible or would have created unreasonable waste, then the measure of damages should have been differential value costs, that is, the difference between the value the house would have had if the contract was fulfilled as promised and the actual value of the house as completed.[154] The trial court also instructed the jury that even if repair is impractical and grossly wasteful, the jury can award cure costs if they find any one of the following: "(1) that the house has a special significance to the [owners]; (2) that the [owners] were more likely than not to demolish and rebuild the house; *or* (3) that the house creates a dangerous condition."[155]

The supreme court held that the third instruction was erroneous.[156] In order to avoid unjust enrichment of the plaintiffs, the court held that repair costs greatly exceeding the value differential measure may be awarded only if it appears likely to the jury that the plaintiffs will actually rebuild the house.[157] Because the conditions in the instruction were stated in the disjunctive, the instruction impermissibly allowed the jury to award repair costs based on any one of the three conditions, with no required finding that the plaintiffs were more likely than not to demolish the house and rebuild it.[158] The court vacated the award of rebuilding costs and remanded for a new trial to determine damages based upon the differential value method.[159]

The court also reversed the award of damages for emotional distress, relying on the "general rule . . . that where a tortfeasor's negligence causes emotional distress without physical injury, such damages may not be awarded."[160] The court rejected the plaintiffs' alternative argument that emotional distress damages can be awarded under a breach of contract

153. *Id.* at 255.

154. *Id.* at 254.

155. *Id.* (emphasis added).

156. *Id.* at 255.

157. *Id.* at 256.

158. *Id.*

159. *Id.* at 261. The court also vacated the award for storage costs and temporary housing as that award was based on the assumption that the house would be rebuilt. *Id.* at 257.

160. *Id.* at 257 (citing W. PAGE KEETON ET AL., PROSSER AND KEETON ON THE LAW OF TORTS § 54, at 361 (5th ed. 1984)).

theory when emotional disturbance is likely to result from the breach of that type of contract.[161] In the court's view, "breach of a house construction contract is not especially likely to result in serious emotional disturbance. . . . Further, the typical damages for breach of house construction contracts can appropriately be calculated in terms of monetary loss."[162]

Finally, the court reversed the trial court's denial of prejudgment interest with respect to the demolition and moving costs. The contractors claimed that the costs were calculated in 1989 dollars and, therefore, awarding interest from the date of breach in 1982 would effectively grant double recovery due to inflation.[163] The court held that because prejudgment interest is the norm in Alaska law, the burden of proving an unusual situation such as double recovery falls on the party opposing the award.[164] The court concluded that the contractors had failed to meet this burden.

In *Frontier Companies of Alaska v. Jack White Co.*,[165] Frontier Companies of Alaska entered into an exclusive listing agreement with Jack White Company for the sale of commercial property owned by Frontier.[166] Frontier arranged a sale of the property a few days before the expiration of the listing agreement, but, in agreement with the buyer, chose to postpone closing and signing the transaction until after the listing agreement with Jack White Company expired.[167] The broker, Jack White, brought an action claiming he was entitled to his commission and alleging that Frontier had breached its implied obligation of good faith and fair dealing. The superior court denied Frontier's motion for a directed verdict and submitted the case to the jury. The jury found for the broker and a judgment was entered for six percent of the sale price.[168]

On appeal, the supreme court held that the term "sold or transferred" used in the listing agreement was broad enough to cover the oral agreement for the sale of the property made while the listing agreement was in effect, but not consummated until after the listing agreement had expired.[169] Therefore, the superior court did not err in refusing to direct a verdict on

161. *Id.* at 258.
162. *Id.* at 258-59.
163. *Id.* at 260.
164. *Id.* at 261.
165. 818 P.2d 645 (Alaska 1991).
166. *Id.* at 647.
167. *Id.* at 648.
168. *Id.*
169. *Id.* at 649.

the issue.[170] The court also concluded that the buyer did not tortiously interfere with the exclusive listing agreement between Frontier and Jack White,[171] noting that the buyer's conduct was only an acquiescence in Frontier's breach of contract and therefore did not rise to the level of intentional interference with a contract.[172]

In *Lauvetz v. Alaska Sales and Service*,[173] the supreme court refused to enforce an exclusion in a collision damage waiver contained in a contract for car rental.[174] Lauvetz rented a van from National Car Rental and had an accident while he was intoxicated. Despite Lauvetz's purchase of the waiver, National filed suit against him, invoking the waiver's exclusion for driving while intoxicated. The court phrased the relevant question as "whether the purchaser of the damage waiver reasonably expected the waiver to be subject to any exclusion."[175] Reasoning that the average car renter would expect a waiver to relieve him of responsibility regardless of fault, the court refused to enforce the exclusion to the waiver.[176]

James v. State[177] involved a highly fact-specific promissory estoppel claim against the state by winners of the Potlach Ponds Land Lottery, which was later invalidated by the state.[178] After the invalidation, three letters were drafted by the state indicating its intention to reoffer the land to compensate for potential inequities caused by the invalidation.[179] The appellants based their promissory estoppel claim on the third letter from the Director of the Division of Land and Water Management, which stated in pertinent part:

> *Requested Action:* To hereby grant preference rights to all people whose names were drawn in the 1980 lottery for Potlach Ponds parcels and, as of the date of this decision, have not relinquished their parcels . . . . [I]t is my decision to allow each individual . . . the right to apply for a preference

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170. *Id.* at 650.

171. *Id.* The elements of an intentional interference claim are: "'[P]roof that (1) a contract existed, (2) the defendant . . . knew of the contract and intended to induce a breach, (3) the contract was breached, (4) defendant's wrongful conduct engendered the breach, (5) the breach caused the plaintiff's damages, and (6) the defendant's conduct was not privileged or justified.'" *Id.* (quoting Knight v. American Guard & Alert, Inc., 714 P.2d 788, 793 (Alaska 1986)).

172. *Id.* at 650-51.

173. No. S-4025, 1991 Alas. LEXIS 132 (Alaska Nov. 15, 1991).

174. *Id.* at *12-13.

175. *Id.* at *11.

176. *Id.* at *9-10.

177. 815 P.2d 352 (Alaska 1991).

178. *Id.* at 353. The lottery was invalidated for noncompliance with a local subdivision ordinance. State v. Widener, 684 P.2d 103 (Alaska 1984).

179. *James*, 815 P.2d at 353-54.

> right of purchase for the . . . parcel each originally claimed, or another parcel of similar size or value, pursuant to [Alaska Statutes section] 38.05.035(b)(2).[180]

The supreme court affirmed the superior court's grant of the state's motion for summary judgment, stating that the appellants' promissory estoppel claim failed because the state did not and could not have reasonably foreseen the appellants' reliance on the letter[181] because the letter written to the lottery winners referenced Alaska Statutes section 38.05.035(b)(2), which requires express approval of a preference right by the Commissioner of the Department of Natural Resources in order to make it binding.[182] The court also noted that because of the statute, the letter could not, as a matter of law, grant the appellants a preference right, since such a grant requires the commissioner's approval.[183] Alternatively, the court found that the letter granted only "the right to apply for a preference right."[184]

Atlas Assurance Co. of America v. Mistic[185] involved an innocent co-insured's right to be paid for a loss resulting from the intentional burning down of a house by the other co-insured.[186] Mistic and Rutzebeck, spouses, owned as tenants in common a house that was insured by Atlas Assurance Company for $42,000.[187] Mistic refused to concede that Rutzebeck had intentionally burned the house and sued Atlas for breach of the insurance agreement.[188]

The supreme court first held that Mistic could recover because her rights under the insurance contract were severable.[189] The court limited

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180. *Id.* at 357.

181. *Id.* at 356. The court identified the four elements of promissory estoppel:
> "1)The action induced amounts to a substantial change of position;
> 2)it was either actually foreseen or reasonably foreseeable by the promisor;
> 3)an actual promise was made and itself induced the action or forbearance in reliance thereon; and
> 4)enforcement is necessary in the interest of justice."

Id. (quoting Zeman v. Lufthansa German Airlines, 699 P.2d 1274, 1284 (Alaska 1985)).

182. *Id.* at 357.

183. *Id.*

184. *Id.* at 358.

185. 822 P.2d 897 (Alaska 1991).

186. *Id.* at 898. The trial judge entered summary judgment that Rutzebeck intentionally burned down the house. *Id.*

187. *Id.* The damage to the house was estimated to be $100,000. First Interstate Bank was the mortgagee of the house, and the loss payee on the policy. *Id.*

188. *Id.*

189. *Id.* at 900 (basing its conclusion on the weight of modern authority which favors recovery unless the insurance policy clearly states otherwise).

her recovery, however, to half of the damages or half of the contract limits, whichever was less.[190]

Regarding Atlas' contractual right to subrogation against the co-insureds, the court noted that according to the terms of the insurance contract the insurer could not seek subrogation against Mistic where it had not denied her claim.[191] Thus, by paying the co-insureds, Atlas could not be subrogated for the $21,000 of the sum that was attributable to Mistic's obligation on the deed of trust note.[192] Accordingly, the court found that Atlas, which had received an assignment of the deed of trust note upon paying the mortgage, stood in the mortgagee's position only as to half of the $42,000 which it paid.[193]

Finally, the court held that the parties' divorce and division of property had no effect on Mistic's rights against Atlas because Mistic's "rights were fixed as of the time of the insured loss."[194] Thus, the court affirmed the lower court's decision that Atlas had breached its contract with Mistic when it accepted her husband's full payment of the deed of trust note without paying her or crediting her with the value of the claim.[195]

In *Hagans, Brown & Gibbs v. First National Bank of Anchorage*,[196] the supreme court reversed the superior court's dismissal of Hagans, Brown & Gibbs' ("Hagans") claim that the First National Bank breached an implied duty of good faith and fair dealing when it refused to accept a $175,000 settlement on behalf of Seair Alaska Airlines. The settlement was to be used to satisfy a First National loan to Seair and pay the attorneys' fees Seair owed Hagans.[197]

During settlement negotiations between First National, as Seair's secured creditor, and Husky Oil Operations,[198] First National requested Hagans to reduce its legal fee from $70,000 to $25,000.[199] When Hagans refused, First National declined the Husky Oil $175,000 settlement

190. *Id.* at 901.

191. *Id.* at 902.

192. *Id.*

193. *Id.*

194. *Id.* at 903.

195. *Id.*

196. 810 P.2d 1015 (Alaska 1991).

197. *Id.* at 1015-16. Hagans was representing Seair on a contingency basis when First National began negotiating settlements. *Id.*

198. Seair and Husky Oil Operations were involved in a contract dispute in which the superior court awarded Seair a $220,000 judgment. Seair later granted First National a security interest in that $220,000 in return for a loan. Husky was in the process of appealing the award during the settlement negotiations in question. *Id.* at 1016.

199. *Id.*

offer.[200] The Seair-Husky Oil appeal subsequently went to court, and the court reversed judgment against Seair, leaving First National, Seair and Hagans empty-handed.[201]

In holding that summary judgment was inappropriate in this case, the supreme court opined that First National might be liable to Hagans if a jury found that it acted in bad faith in refusing to accept the settlement offer in order to coerce Hagans into lowering its fees.[202] The court further stated that a duty of good faith and fair dealing would arise if First National assumed the position of Seair in its pursuit of a settlement.[203] The court found evidence that First National assumed the position of Seair by taking advice from Hagans, by tacitly approving the contingency fee agreement of Hagans when deciding to accept Hagans' advice, and by treating its own claim to the settlement as primary, rather than collateral.[204] The court found that these same facts led Hagans to believe that First National was acting as a client, thus leading Hagans to believe that First National was acting on behalf of Seair.[205] As a result, the court held that Hagans had produced sufficient evidence to defeat First National's motion for summary judgment on Hagans' alternative claims of intentional and negligent representation, and it reversed and remanded the case to the superior court.[206]

In *Crissey v. Alaska USA Federal Credit Union*,[207] credit union members brought an action against a federally chartered credit union alleging that the late fees charged on delinquent loan payments were unlawful and were a form of interest that made the total interest charged usurious.[208] The supreme court held that federal law on the permissibility of late charges preempted the plaintiff's state law claims on the issue for a *federally* chartered credit union.[209] In analyzing the usury claim, the court held that the members had again overlooked the preemptive effect of federal law on the issue of the maximum allowable interest rate.[210] However, the court stated that even if it was to consider the claim under

200. *Id.*
201. *Id.*
202. *Id.* (citing Hagans, Brown & Gibbs v. First Nat'l Bank of Anchorage, 783 P.2d 1164, 1168 (Alaska 1989)).
203. *Id.* at 1018.
204. *Id.*
205. *Id.* at 1018-19.
206. *Id.* at 1019.
207. 811 P.2d 1057 (Alaska 1991).
208. *Id.* at 1059.
209. *Id.* at 1058.
210. *Id.* at 1060-61.

the applicable federal law, a claim of usury would not be established.[211] The court also noted that the issue of whether late fees might qualify as interest was one of first impression, and declined to address it in the present case.[212]

IV. CONSTITUTIONAL LAW

In 1991 the Alaska Supreme Court and the Alaska Court of Appeals decided constitutional law cases arising in many areas. The cases are divided into the following categories: equal protection, double jeopardy, Fourth Amendment search and seizure, due process and miscellaneous.

A. Equal Protection

The Alaska Supreme Court decided only one equal protection case in 1991. In *State v. Anthony*,[213] the supreme court reversed the superior court's finding that Alaska Statutes section 43.23.005(d),[214] which renders incarcerated felons ineligible for permanent fund dividends, violated the Equal Protection Clause of the Alaska Constitution.[215] In reversing the superior court, the supreme court evaluated three issues: the constitutional interest impaired by the challenged enactment; the purposes of the challenged statute; and the state's interest in pursuing its goals.[216] The court initially rejected the claimant's argument that the receipt or denial of permanent fund dividends should be subjected to enhanced scrutiny because the dividends constituted not just the right to receive a check, but a protected interest in the natural resources of Alaska, as well.[217] The court reasoned that the dividend was entitled only to minimum protection under Alaska equal protection analysis because it was merely an economic interest.[218]

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211. *Id.* at 1061-62. The court noted that "[t]he Crisseys did not proffer any material . . . to indicate that . . . the total amount of interest and late fees Alaska USA charged them could *possibly* amount to a compensation rate greater than" the maximum allowable federal compensation rate. *Id.* at 1062.

212. *Id.*

213. 810 P.2d 155 (Alaska 1991), *reh'g granted*, 816 P.2d 1377 (Alaska 1991).

214. ALASKA STAT. § 43.23.005(d) (1990).

215. *Anthony*, 810 P.2d at 157.

216. *Id.* (applying a three-part test established in Alaska Pacific Assurance Co. v. Brown, 687 P.2d 264, 269-70 (Alaska 1984)).

217. *Id.* at 157-58.

218. *Id.* at 158. In distinguishing Gilman v. Martin, 662 P.2d 120 (Alaska 1983), which held that a more stringent review may be required when use or disposal of natural resources are concerned, the court stated: "[n]o constitutional provision elevates the status of a

The court also ruled that because the individual interests at stake here were minimal, the state needed only show that its objectives were legitimate when it enacted the statute.[219] The court held that denying dividends to felons bore a fair and substantial relation to the state's goal of funding the crime victim compensation fund and defraying the felon's incarceration expenses.[220]

The court also held that distinguishing between felons who actually serve jail time and those who do not bore a rational relation to the compensation of crime victims because felons who serve time usually have caused more harm than those receiving suspended sentences.[221]

Upon rehearing,[222] the supreme court held that Alaska Statutes section 43.23.005(d) did not violate the ex post facto clause of the Alaska Constitution or the United States Constitution.[223] The inmates argued that the statute "makes more burdensome the punishment for a crime, after its commission."[224] However, the court reasoned that a simple disadvantage to a felon, if caused by a statute, does not automatically invalidate the statute as an ex post facto law.[225] The court reasoned that because the purpose of the challenged statute is to raise funds for crime victims rather than to punish felons, the statute does not violate the ex post facto clause.[226] The court found further evidence of the statute's non-punitive nature in that it did not affect the felon's sentence.[227]

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dividend entitlement to the level of a disposal of a state natural resource." *Anthony*, 810 P.2d at 158.

219. *Anthony*, 810 P.2d at 158.

220. *Id.* at 159-60. Since 1976, only two cases successfully invalidated enactments based on a violation of the fair and substantial relation test. *See Gilman*, 662 P.2d 120; Turner Constr. Co. v. Scales, 752 P.2d 467 (Alaska 1988).

221. *Anthony*, 810 P.2d at 161-62 (reiterating dicta that Alaska's Equal Protection Clause is more protective than its counterpart in the United Stated Constitution and therefore there was no violation of the United States Constitution's Equal Protection Clause). *See* Sonneman v. Knight, 790 P.2d 702, 706 (Alaska 1990). Alaska Statutes section 43.23.005(d) provides that only convicted felons who serve jail time are ineligible for permanent fund dividends. ALASKA STAT. § 43.23.005(d) (1990).

222. 816 P.2d 1377 (Alaska 1991).

223. *Id.* at 1378.

224. *Id.* (citing Dobbert v. Florida, 432 U.S. 282, 292 (1977); Beazell v. Ohio, 269 U.S. 167, 169-170 (1925)).

225. *Anthony*, 816 P.2d at 1378.

226. *Id.* (relying on the United States Supreme Court's decision in De Veau v. Braisted, 363 U.S. 144, 160 (1960), which stated that "a statute enacted for valid regulatory purposes rather than simply to punish individuals for their past conduct does not violate the ex post facto clause").

227. *Id.* at 1379.

B. Double Jeopardy

The Alaska Court of Appeals addressed double jeopardy issues in three cases decided in 1991. In *Whiteaker v. State*,[228] a mistrial was declared when the jury was unable to reach a verdict in the defendant's first-degree murder trial.[229] At the defendant's retrial for first-degree murder, the jury found her guilty of second-degree murder. The defendant appealed on double jeopardy grounds, and the court of appeals reversed her conviction.[230]

In the first trial, the jury had been instructed, in accord with *Dresnek v. State*,[231] that it had to return a verdict on the greatest charge before it returned a verdict on any of the lesser charges and that it could deliberate on the charges in any order.[232] The trial judge polled the jury to determine if they were truly deadlocked, but refused to repoll the jury about whether they had reached a decision on the most serious charge, even after a juror asked the judge a question indicating that possibility.[233]

The court of appeals held that a defendant is entitled to a verdict on the greater charge where the jury has decided that charge but is deadlocked on the lesser-included offenses.[234] The state argued that such a "partial verdict" may represent merely a tentative agreement to acquit on the greater charge, such agreement being subject to change upon further discussion of lesser offenses.[235] The court rejected the state's argument, noting that the state's concern was adequately met by the *Dresnek* procedure.[236] The court also rejected the state's arguments that partial verdicts intrude on the province of the jury and increase the number of mistrials. The court held that the trial judge abused his discretion in concluding that a unanimous verdict could not be reached, and thus held

228. 808 P.2d 270 (Alaska Ct. App. 1991).

229. *Id.* at 271.

230. *Id.*

231. 697 P.2d 1059 (Alaska Ct. App. 1985), *aff'd*, 718 P.2d 156 (Alaska 1986), *cert. denied*, 479 U.S. 1021 (1986).

232. *Whiteaker*, 808 P.2d at 271-72. The jury was instructed on all the lesser offenses included in the charge for first-degree murder: second-degree murder, manslaughter and criminally negligent homicide. *Id.* at 271.

233. *Id.* at 272-73. Immediately after the judge stated that he discharged the jury, one of the jurors asked: "When you gave us instructions to come . . . up with a verdict, we are faced with the charge of first-degree and we considered many degrees. Is it possible to be hung on one charge and not hung on another?" *Id.* at 273.

234. *Id.* at 274.

235. *Id.* at 275 (citing A Juvenile v. Commonwealth, 465 N.E.2d 240, 243-44 (Mass. 1984); People v. Hickey, 303 N.W.2d 19, 21 (Mich. 1981)).

236. *Id.* at 276 (citing Stone v. Superior Court, 646 P.2d 809 (Cal. 1982); State v. Pugliese, 422 A.2d 1319 (N.H. 1980)).

that there was no manifest necessity to justify the trial judge's declaration of a mistrial.[237]

In determining the remedy, the court of appeals discussed *Price v. Georgia*,[238] which held that "when a defendant is improperly tried for a jeopardy-barred offense, the error is not cured if the jury convicts the defendant of only a lesser-included offense."[239] Applying *Price* to the instant case, the court concluded that the defendant cannot face trial on a more serious offense than negligent homicide.[240] The court reasoned that because the record was unclear about the charges on which the jury was deadlocked, it must be presumed to be the least serious charge.[241] Finally, the court held that the trial court may enter a conviction for the least serious offense unless the defendant demonstrates a reasonable probability that she would not have been convicted of the offense if she had been tried on it without inclusion of the jeopardy-barred charge.[242] The court therefore reversed and remanded to the trial court with instructions to enter judgment on the least serious offense unless the defendant could demonstrate prejudice.[243]

In *Cross v. State*,[244] the court of appeals held that a mistrial should not have been granted where the defendant's counsel had merely a potential conflict of interest. The court held that the defendant's conviction in a subsequent trial, therefore, was a violation of the Double Jeopardy Clause of the federal and state constitutions. The fact that a defense attorney's colleague had previously represented a defense witness did not amount to a "manifest necessity," the standard for a mistrial.[245]

Moreover, the court distinguished *Wheat v. United States*.[246] The court of appeals noted that the defendant in *Wheat* sought to engage new

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237. *Id.* at 278.

238. 398 U.S. 323 (1970).

239. *Whiteaker*, 808 P.2d at 278.

240. *Id.* at 279.

241. *Id.* (citing Downum v. United States, 372 U.S. 374 (1963) (holding that doubts about which offense is double jeopardy-barred must be resolved in favor of the citizen)).

242. *Id.* (citing Morris v. Matthews, 475 U.S. 237 (1986)).

243. *Id.* In dissent, Judge Coats argued that the majority of courts considering this issue have adopted the rule that a court has no duty to accept a partial verdict on a greater offense when a jury is unable to agree on the lesser-included offenses. Although the defendant was convicted of second-degree murder at retrial, in the instant matter she could only be convicted of negligent homicide: a windfall for this defendant. Although Judge Coats favored the rule adopted by the majority, he did not believe, in the interests of fairness, that it should be applied retroactively. *Id.* at 279-80. (Coats, J., dissenting).

244. 813 P.2d 691 (Alaska Ct. App. 1991).

245. *Id.* at 694-96.

246. 486 U.S. 153 (1988) (finding an actual conflict of interest where the defendant's proposed counsel was concurrently representing co-defendants in a conspiracy charge).

counsel, and did not involve interfering with an ongoing attorney-client relationship. Further, *Wheat* did not involve the declaration of a mistrial.[247] The court of appeals opined that the conflict of interest question in this case "could in large measure have been addressed by a thorough, on-record inquiry to assure that Cross fully understood his situation and was nonetheless willing to proceed," rather than by a declaration of a mistrial.[248]

In *Mitchell v. State*,[249] the court of appeals rejected the defendant's challenge to her conviction on double jeopardy grounds. Mitchell lied on an unemployment benefits application, and when this falsification was discovered, she repaid the benefits she had received plus the fifty percent penalty specified by law.[250] Relying on the double jeopardy clauses of the federal and state constitutions, Mitchell argued that the fifty percent civil penalty barred her prosecution for five counts of unsworn falsification.[251]

Relying on *United States v. Halper*,[252] which held that the government "may demand compensation according to somewhat imprecise formulas . . . without being deemed to have imposed a second punishment for the purpose of double jeopardy analysis,"[253] the court of appeals rejected her argument that the Double Jeopardy Clause of the United States Constitution barred her prosecution. Because the defendant had not presented an argument based exclusively on the Alaska Constitution in her brief, at oral argument the court declined to address her contention that the Double Jeopardy Clause found in the Alaska Constitution provided broader protection than did the United States Constitution.[254]

C. Search and Seizure

In 1991, only one conviction was reversed on the ground that a warrantless search was unjustified.[255] In that case, Justice Moore, in concurring with the majority, observed that the Alaska Constitution, with its explicit right to privacy, provides broader protection from searches and

247. *Cross*, 813 P.2d at 695.
248. *Id.* at 696.
249. 818 P.2d 1163 (Alaska Ct. App. 1991).
250. *Id.* at 1164; *see* ALASKA STAT. § 23.20.390(f) (1990).
251. *Mitchell*, 818 P.2d at 1164.
252. 490 U.S. 435 (1989).
253. *Id.* at 446.
254. *Mitchell*, 818 P.2d at 1165.
255. Alaska v. Ricks, 816 P.2d 125 (Alaska 1991).

seizures than the Fourth Amendment of the United States Constitution. The remaining challenges based on warrantless searches were unsuccessful in the Alaska Court of Appeals.

In *Alaska v. Ricks*,[256] the Alaska Supreme Court affirmed the reversal of the defendant's conviction for drug possession because of a warrantless search of Ricks' jacket when it was out of his immediate reach. Ricks was arrested, pursuant to a warrant, after three undercover police officers witnessed the sale of drugs to an informant. Ricks had taken the drugs out of his jacket during the sale, but was neither wearing nor near his jacket at the time of his arrest.[257] The officers searched Ricks' jacket without a search warrant and found drugs. Ricks appealed his conviction on the ground that the evidence obtained in the warrantless search should have been suppressed. Although the superior court found that the jacket was "immediately associated" with Ricks,[258] and the search was therefore justified, the court of appeals reversed, emphasizing that the jacket was not in Ricks' "immediate control."[259] The supreme court affirmed the reversal.[260]

In a concurring opinion, Justice Moore observed that article I, section 14 of the Alaska Constitution, especially when read in conjunction with the right to privacy provision of article I, section 22, provides broader protection than the Fourth Amendment of the United States Constitution.[261] He stated that although an exception exists for searches incident to a lawful arrest, the exception is only "justified in order to protect the arresting officers' need to find weapons that the arrestee might use to resist arrest or escape and to prevent the concealment or destruction of evidence."[262] Therefore, the inquiry to be made is whether the area in question was conceivably accessible to the arrestee.[263] Justice Moore concluded that since the jacket was not close enough to the arrestee for him to have access to it, the warrantless search of his jacket was not justified.[264]

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256. 816 P.2d 125 (Alaska 1991).

257. *Id.*

258. *Id.* The superior court found "immediate association" of Ricks and his jacket despite finding that the jacket was not under his "immediate control." *Id.*

259. *Id.*

260. *Id.*

261. *Id.* (Moore, J., concurring) (citing Wood & Rohde, Inc. v. State, 565 P.2d 138, 150 (Alaska 1977)).

262. *Id.* at 127-28 (Moore, J., concurring) (citing Chimel v. California, 395 U.S. 752, 763 (1969)).

263. *Id.* at 128 (Moore, J., concurring) (citations omitted).

264. *Id.* at 128-29 (Moore, J., concurring). However, Justice Moore disagreed with the court of appeals' dicta that there is no limit on the time and circumstances in which a warrantless search may be conducted, and therefore joined the court's order vacating the

In *Lord v. Wilcox*,[265] the supreme court denied a pro se prisoner's request to overturn a summary judgment ruling and an award of attorneys' fees in favor of the defendants, who included the police officers involved in his arrest.[266] Lord, who had been convicted of rape, kidnapping and assault, claimed that the officers violated his Fourth Amendment rights when they arrested him and impounded his car without a search warrant or probable cause.[267] The supreme court upheld the superior court's finding of probable cause because the victim's identification of Lord, Lord's hotel room and his car "were sufficient for someone of reasonable caution to believe Lord had sexually assaulted the alleged victim."[268] The supreme court also determined that the warrant obtained for Lord's arrest was further evidence of probable cause.[269]

The court further ruled that the impoundment of Lord's car was proper because the officers had probable cause to believe the car contained evidence of a crime and had impounded the car solely to preserve the status quo until a search warrant was obtained.[270] With respect to Lord's challenge to the court's award of attorneys' fees, the court held that Lord's suit justified an exception to the general rule that attorneys' fees should not be awarded against a pro se prisoner for bringing an unsuccessful civil rights suit.[271] The court ruled that the award was not an abuse of the trial court's discretion because there was no evidence that Lord's civil rights claims were brought in good faith.[272]

In *Landers v. State*,[273] a defendant who was convicted of fourth-degree misconduct involving a controlled substance appealed the denial of his motion to suppress evidence.[274] After the police had received tips that someone was growing marijuana at a certain house, a police officer went to the house and walked around the outside.[275] Later, two officers returned to the house and talked to Bell, Landers' roommate. When Bell invited the officers inside they detected an overwhelming odor of marijuana. Bell told them that the marijuana was downstairs and that

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lower court's opinion. *Id.* at 129 (Moore, J., concurring).

265. 813 P.2d 656 (Alaska 1991).

266. *Id.* at 657-58.

267. *Id.* at 658.

268. *Id.*

269. *Id.* at 658-59.

270. *Id.* at 659-60 (citing Texas v. White, 423 U.S. 67, 96 (1975) (upholding a seizure and search of a vehicle taken to the police station without a warrant)).

271. *Id.* at 660.

272. *Id.*

273. 809 P.2d 424 (Alaska Ct. App. 1991).

274. *Id.*

275. *Id.* at 424-25.

Landers lived downstairs. The officers obtained a warrant to search the house based on the testimony of the officers about the smell of marijuana and Bell's statements, rather than the observations the officers made while walking around the outside of the house.[276]

Landers appealed the trial judge's conclusion that, assuming the exterior search was illegal, that illegality should not result in the suppression of evidence obtained from the legal search.[277] The court of appeals disagreed,[278] and relying on *Cruse v. State*,[279] affirmed the conviction, reasoning that the trial judge could have concluded that the search warrant was not the product of any illegal activity.[280]

In *Moore v. State*,[281] the court of appeals upheld Moore's conviction for cocaine possession.[282] In affirming the trial court's denial of the defendant's motion to suppress evidence, the court first reasoned that the officers had probable cause to conduct the challenged warrantless search based on Moore's presence in a crack house,[283] the presence of a packet of cocaine at her feet and her visible anxiety during the premises search.[284] The court also reasoned that the possible destruction of evidence justified the warrantless search:[285] "there was ample cause for police to fear imminent destruction of any drugs or related evidence . . . ."[286] People in the house had already tried to escape through windows, and the defendant knew the police suspected her of possession and easily could have destroyed the evidence before the police obtained a warrant.[287]

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276. *Id.* at 425.

277. *Id.* at 426.

278. *Id.* at 427.

279. 584 P.2d 1141 (Alaska 1978) (holding that even assuming that an original search of the trunk of a car was illegal, the search warrant was not a product of the results of the illegal search and therefore the evidence obtained thereunder was admissible).

280. *Landers*, 809 P.2d at 426. There was substantial evidence that the police had made efforts to investigate the tip before any illegal police activity. Also, once Bell consented to allow the police into the residence, the information they obtained was not illegal. *Id.* at 426-27.

281. 817 P.2d 482 (Alaska Ct. App. 1991).

282. *Id.* at 484.

283. This factor alone will not establish probable cause. Ybarra v. Illinois, 444 U.S. 85, 90-91 (1979). The court in *Moore* found that the officers viewed the circumstances in their totality to find probable cause. *Moore*, 817 P.2d at 484.

284. *Moore*, 817 P.2d at 483-84.

285. *Id.* at 484 (citing Finch v. State, 592 P.2d 1196, 1198 (Alaska 1979) (stating criteria that would justify a warrantless search under the destruction of evidence exception: the amount of time needed to obtain a warrant, the ready destructibility of the evidence, and the existence of information which indicates that the suspects are aware that the police are on their trail)).

286. *Id.*

287. *Id.*

In *McGahan v. State*,[288] the court of appeals held that reasonable suspicion justified a warrantless canine sniff of the exterior of a warehouse that was accessible to the public.[289] The combination of suspicions in this case -- the officers had received a tip that the warehouse owners did not act as legitimate business people, had noticed that the warehouse was unusually hot, and had seen that the renovations of the building were consistent with those necessary to grow marijuana[290] -- were viewed by the court as reasonable enough to warrant the canine sniff of the outside of the building.[291]

In *Barrows v. State*,[292] the court rejected the defendant's appeal of his conviction for driving while his license was revoked on the ground that the police officer subjected him to an illegal investigatory stop when the officer asked him for identification. The court first noted that not all encounters between officers and private citizens are investigative stops amounting to seizures for Fourth Amendment purposes.[293] Only if the officer somehow restrains the liberty of the person can a person be seized within the meaning of the Fourth Amendment.[294] The court found that the officer had not seized the defendant when he approached his vehicle, questioned him, and asked him for identification. The court specifically cited the facts that the encounter took place on a public road, the officer did not activate his overhead lights or instruct the defendant to stop, and he did not put his car in such a position so as to block the defendant's departure. Additionally, the officer posed questions to the defendant in a conversational manner, did not display a weapon, and did not make any threats.[295]

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288. 807 P.2d 506 (Alaska Ct. App. 1991).

289. *Id.* at 511. The federal courts almost uniformly hold that sniffs of luggage and other items (such as a garage, mail, and commercial storage facilities) are not searches. *Id.* at 509 n.4. A few federal cases hold that reasonable suspicion will allow the sniff. *Id.* at 510 n.5. In Pooley v. State, 705 P.2d 1293 (Alaska Ct. App. 1985), the Alaska Court of Appeals held that a luggage sniff was a search. However, it was deemed only a minimally intrusive type of search, and one that can be used without obtaining a warrant if the officers have reasonable suspicion. *Id.* at 1311.

290. *McGahan*, 807 P.2d at 511.

291. *Id.* Although the defendants were first-time felony offenders, the size and sophistication of the operation justified the three-year sentences imposed. *Id.* at 512-13; *see* ALASKA STAT. § 12.55.155(c)(25) (1990 & Supp. 1991) (allowing a court to aggravate a sentence when "the offense involve[s] large quantities of a controlled substance").

292. 814 P.2d 1376 (Alaska Ct. App. 1991).

293. *Id.* at 1378 (citing Waring v. State, 670 P.2d 357, 363 (Alaska 1983)).

294. *Id.* The court stated that this is true "only if, in light of all the circumstances, a reasonable person would believe that he or she was not free to leave or to break off the questioning." *Id.* at 1378-79 (citing *Waring*, 670 P.2d at 364).

295. *Id.* at 1379.

In *Brown v. State*,[296] the court of appeals clarified the reach of *Reeves v. State*,[297] which suppressed evidence on the ground that opening a balloon to determine its contents during a pre-incarceration inventory search was illegal absent a warrant. The court of appeals distinguished *Reeves* by noting that in *Reeves* the state never presented any evidence that the officials who seized and searched the balloon had any cause to believe the balloon contained contraband,[298] whereas the state presented evidence in *Brown* that the officer saw the object being passed from the visitor to the prisoner, observed the defendant swallow the object, and then, after the prisoner regurgitated the object, obtained a balloon which the officer knew was of a type frequently used to carry illegal drugs. Thus, in the present case, the warrantless search of the balloon was valid under the plain view exception to the warrant requirement.[299]

In *Williams v. State*,[300] the court of appeals affirmed the defendant's conviction of first-degree murder. The defendant argued on appeal that evidence obtained when the police entered his apartment should have been suppressed because the warrantless entry was improper.[301] The court, however, found that the police officer's entry was proper under the emergency aid doctrine because the officer had information that someone had been assaulted and could be hurt or dead.[302]

The defendant argued on appeal that because eight hours had elapsed between the initial report of a possible homicide and the time when the officer entered the apartment, the emergency aid doctrine could not be invoked.[303] The court rejected this argument, finding that the passage of time, though relevant, was not determinative of the existence of an emergency.[304] The court also rejected the argument that the time lapse

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296. 809 P.2d 421 (Alaska Ct. App. 1991).

297. 599 P.2d 727 (Alaska 1979).

298. *Brown*, 809 P.2d 422.

299. *Id.* at 423-24. The court based its decision on precedent involving situations where an officer's actions were justified by the plain view doctrine since the officer had reasonable grounds to believe that the object seized contained contraband. *See* Texas v. Brown, 460 U.S. 730 (1983); Schraff v. State, 544 P.2d 834 (Alaska 1985).

300. 823 P.2d 1 (Alaska Ct. App. 1991).

301. *Id.* at 3.

302. *Id.* Three conditions must be met to invoke the emergency aid doctrine:

> (1) The police must have reasonable grounds to believe that there is an emergency at hand and an immediate need for their assistance for the protection of life or property.
>
> (2) The search must not be primarily motivated by intent to arrest and seize evidence.
>
> (3) There must be some reasonable basis approximating probable cause to associate the emergency with the area or the place to be searched.

Id.

303. *Id.*

304. *Id.*

prevented the officer from having a reasonable basis to associate the emergency with the apartment because the officer observed blood stains and clothes around the window of the apartment.[305]

D. Due Process

The Alaska Supreme Court decided two cases in 1991 addressing due process issues, while the Alaska Court of Appeals decided one such case. All three decisions reflect a broadening of due process rights under the Alaska Constitution.

In the case of *In re K.L.J.*,[306] the Alaska Supreme Court held that due process requires that the court appoint an attorney for an indigent natural parent who is contesting the termination of his parental rights and refusing to give consent for the child's adoption.[307] When the natural father refused to consent to the adoption of the child by the mother's new husband, the mother filed a motion to terminate the father's right to consent.[308] The father requested the court to appoint counsel due to his indigency. The court refused his request and later granted the motion to terminate his parental rights.[309]

The supreme court began its analysis of what due process was required under the Alaska Constitution's Due Process Clause[310] by recognizing that "[t]he private interest of a parent whose parental rights may be

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305. *Id.* at 4.

306. 813 P.2d 276 (Alaska 1991).

307. *Id.* at 286.

308. *Id.* at 277-78. The motion to terminate the father's consent was brought under Alaska Statutes section 25.23.050 which states in part:

> (a) Consent to adoption is not required of. . .
>
> (2) a parent of a child in the custody of another, if the parent for a period of at least one year has failed significantly without justifiable cause, including but not limited to indigency,
>
> (A) to communicate meaningfully with the child, or
>
> (B) to provide for the care and support of the child as required by law or judicial decree; . . . .

ALASKA STAT. § 25.23.050(a)(2) (1991).

309. *K.L.J.*, 813 P.2d at 278.

310. *Id.* at 279-82; *see* ALASKA CONST., art. I, § 7. The court applied the balancing test articulated by the United States Supreme Court in Matthews v. Eldridge, 424 U.S. 319, 355 (1976), and adopted by the Alaska Supreme Court in Keyes v. Humana Hospital Alaska, Inc., 750 P.2d 343 (Alaska 1988). In the latter case, the Alaska Supreme Court stated:

> Identification of the specific dictates of due process generally involves consideration of three distinct factors: the private interest affected by the official action; the risk of an erroneous deprivation of such interest through the procedures used and the probable value, if any, of additional or substitute procedural safeguards; and finally, the government's interest, including the fiscal and administrative burdens that additional or substitute procedural requirements would entail.

Id. at 353 (citations omitted).

terminated via an adoption petition is of the highest magnitude."[311] Accordingly, "[t]he right to the care, custody, companionship, and control of one's children 'undeniably warrants deference and, absent a powerful countervailing interest, protection.'"[312]

The court also found that the state has an articulated interest both in the child and in the rights of an indigent parent.[313] Although the court conceded that the state has an interest in avoiding the cost of appointed counsel, it concluded that the interest did not outweigh the private interests at stake.[314] The court also found that the risk of erroneous deprivation is high in adoption cases when counsel is not provided.[315]

After balancing these factors, the court held that there existed sufficient state involvement to require court-appointed counsel.[316] In so doing, the Alaska Supreme Court noted that it favors a bright-line determination of the right to counsel as opposed to the case-by-case approach[317] taken by the United States Supreme Court in *Lassiter v. Department of Social Services*,[318] but extended the right only to indigent parents who are *defending* the termination of their parental rights.[319]

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311. *K.L.J.*, 813 P.2d at 279.

312. *Id.* (quoting Lassiter v. Dep't of Social Servs., 452 U.S. 18, 27 (1981)).

313. *Id.* at 279-80. Alaska Statutes section 25.23.005 states: "This chapter shall be liberally construed to the end that the best interests of adopted children are promoted. Due regard shall be given to the rights of all persons affected by a child's adoption." ALASKA STAT. § 25.23.005 (1991).

314. *K.L.J.*, 813 P.2d at 280 (citing *Lassiter*, 452 U.S. at 28).

315. *Id.* at 280-81. The court relied on Flores v. Flores, 598 P.2d 893 (Alaska 1979), which stated the following:

> Although the legal issues in a given case may not be complex, the crucial determination of what will be best for the child can be an exceedingly difficult one as it requires a delicate process of balancing many complex and competing considerations that are unique to every case. A parent who is without the aid of counsel in marshalling and presenting the arguments in his favor will be at a decided and frequently decisive disadvantage which becomes even more apparent when one considers the emotional nature of child custody disputes, and the fact that all of the principals are likely to be distraught.

Id. at 896; *see also Lassiter*, 452 U.S. at 30 (observing that parents thrust into distressing situations are likely to be overwhelmed if they lack the assistance of counsel); *In re* Jay, 197 Cal. Rptr. 672, 681 (Cal. Ct. App. 1983) (finding that appointing counsel furthers the state's interest in making the factfinding process more accurate).

In the present case, a lawyer would have been able to inform the natural father that the superior court had erred when it held that indigency was not a legitimate justification for failure to support a child. Additionally, the father did not know how to present evidence or cross-examine witnesses. *K.L.J.*, 813 P.2d at 281. Furthermore, the court noted that the involvement of the state in the adoption process is continuous; it is not a purely private dispute. *Id.* at 283.

316. *K.L.J.*, 813 P.2d at 283.

317. *Id.* at 282 n.6.

318. 452 U.S. 18 (1981).

319. *K.L.J.*, 813 P.2d at 282 n.7. The court acknowledged that it was merely following the trend of numerous court decisions that have recognized the "importance of parental

In *Gudmundson v. State*[320] the defendants were convicted of wanton waste, a misdemeanor, for abandoning the carcass of a Dall sheep ram they had killed on Sheep Mountain when they realized the mountain was closed for hunting.[321]

The defendants sought post-conviction relief, arguing that they were denied due process because they were placed in a "cruel dilemma" of committing a crime whether they acted or not on Sheep Mountain: if they had removed the sheep from the mountain, they would have been criminally liable for illegal transportation of game; if they had left the carcass they would have been liable for wanton waste.[322] The court of appeals affirmed the district court's denial of post-conviction relief on the ground that the defendants' due process claims had been abandoned as a result of inadequate briefing.[323]

The defendants petitioned for rehearing on the ground that their briefs were necessarily inadequate because there had been no legal authority for their position due to their unique factual situation.[324] The court of appeals remanded the case to the district court for determination of whether the defendants acted on a reasonable mistake of law.[325] The supreme court then agreed to hear the case to determine whether the defendants were entitled to post-conviction relief based on the vagueness or unconstitutionality of the laws in question.[326]

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rights and finality of terminating them." *Id.*; *see, e.g.*, V.F. v. State, 666 P.2d 42, 45 (Alaska 1983); Flores v. Flores, 598 P.2d 893, 895 (Alaska 1979); Cleaver v. Wilcox, 499 F.2d 940, 945 (9th Cir. 1974). Finally, the court found that the holding in this case strengthened similar protections it had previously recognized. *K.L.J.*, 813 P.2d at 284-86. *See In re* Adoption of B.S.L., 779 P.2d 1222 (Alaska 1989) (holding that a prospective adoptive parent must prove by clear and convincing evidence that a natural parent's failure to communicate with the child was without justifiable cause); Johnson v. Johnson, 544 P.2d 1028 (Alaska 1976) (Individuals who appeal from a divorce proceeding which resulted in an award of custody of the children to the other party may do so at public expense.), *cert. denied*, 434 U.S. 1048 (1978). The court also noted that in Alaska the court is authorized to appoint counsel for a juvenile without counsel, for biological parents in adoption cases pursuant to the Indian Child Welfare Act, for an indigent parent in a minor guardianship case, and for indigent fathers in actions to establish paternity where the mother has state representation. *K.L.J.*, 813 P.2d at 285-86.

320. 822 P.2d 1328 (Alaska 1991).

321. *Id.* at 1329.

322. *Id.* The state appealed the sentences imposed, arguing that they were less than the statutory minimum. *Id.* The court of appeals remanded the case with instructions to impose the legal sentence. *Id.*

323. *Id.*

324. *Id.*

325. *Id.* at 1330.

326. *Id.* at 1330 & n.2. The supreme court addressed the court of appeals' denial of post-conviction relief. Meanwhile, the court of appeals granted rehearing and remanded to the district court on a mistake of question of law. *Id.*

The supreme court first held that a constitutional challenge to a statute need not be raised before trial under either Alaska Rule of Criminal Procedure 12 or 16.[327] The court also rejected the state's contention that the defendants had waived their right to challenge their convictions on due process grounds because of their failure to raise the issue prior to or at trial.[328] Instead, the court held that the due process challenge is jurisdictional and not subject to Criminal Rule 12(b), which mandates the raising of certain defenses before trial but allows the court to take notice of jurisdictional objections at any time during the pendency of the proceedings.[329]

The court agreed with the defendants that the application of the wanton waste statute and the illegal transportation regulation where the game had been illegally taken impermissibly impinged due process protections,[330] and directed that the defendants' convictions be vacated.[331] "After a big game animal has been illegally killed a hunter should not have to incriminate himself, nor subject himself to liability for further criminal acts."[332]

The defendant in *Ahtuangaruak v. State*[333] was convicted of driving while intoxicated and appealed the district court's denial of his motion to suppress the results of his breath test taken following his arrest.[334] The court of appeals initially noted that under Alaska precedent,[335] Ahtuangaruak acquired a due process right to an independent test of the results once he submitted to a breath test.[336] The state may honor this right in at least two different ways, either by preserving a second breath sample for later testing or by offering the person help in obtaining an independent test.[337] Once a person has accepted this offer or waived the right to an independent test, he or she is asked by the police officer to sign a document to that effect.[338]

The officer in this case attempted to advise the defendant of his right to an independent test, but the defendant refused to sign the document as

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327. *Id.* at 1331 (citing Gray v. State, 525 P.2d 524, 527 (Alaska 1974)).

328. *Id.*

329. *Id.* at 1332; *see* ALASKA R. CRIM. P. 12(b).

330. *Gudmundson*, 822 P.2d at 1333.

331. *Id.*

332. *Id.*

333. 820 P.2d 310 (Alaska Ct. App. 1991).

334. *Id.*

335. *See* Gundersen v. Municipality of Anchorage, 792 P.2d 673 (Alaska 1990); Municipality of Anchorage v. Serrano, 649 P.2d 256 (Alaska Ct. App. 1982).

336. *Ahtuangaruak*, 820 P.2d at 310.

337. *Id.* (citing *Gundersen*, 792 P.2d at 676-77; *Serrano*, 649 P.2d at 258 n.5).

338. *Id.* at 311.

he had minimal ability to understand English and did not understand the officer's explanation of the blood test option. The district court rejected the defendant's argument that his inability to understand the officer deprived him of a "meaningful opportunity to exercise the right granted by *Gundersen* and *Serrano*."[339] The court found that the government met its obligation to make reasonable efforts to offer an independent test to the arrestee, and therefore denied the defendant's motion to suppress the test results.[340]

The court of appeals reversed, holding that the due process clause of the Alaska Constitution required suppression of the breath test.[341] The court noted that an arrestee's waiver of the right to an independent test must be "'knowingly and intelligently made.'"[342] The defendant's lack of understanding of the English language precluded him from having a meaningful opportunity to choose an independent blood test. The court noted that by choosing to offer independent tests, rather than preserving a second breath sample, the state "[ran] the risk that it will be barred from introducing evidence of the Intoximeter result if the arrestee, because of intoxication, a language barrier, or any other reason, fails to acquire a basic understanding of the right to an independent test."[343]

E. Miscellaneous

Five other cases involving constitutional issues were decided by Alaska appellate courts in 1991. These cases addressed the Sixth Amendment right to a speedy trial, the right of a defendant to testify on his own behalf, the constitutional powers of grand juries, the right of a defendant to be tried only for those crimes presented in the indictment, and governmental "taking" of property under both the Alaska Constitution and the United States Constitution.

In *State v. Mouser*,[344] the Alaska Court of Appeals held that a twenty-month delay between the filing of charges against Mouser and his

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339. *Id.*

340. *Id.* The lower court looked at two factors in determining the reasonableness of the government's efforts:

> (1) the arresting officer had made a good faith, reasonable attempt to explain the right to an independent blood test to Ahtuangaruak, and (2) the officer had allowed Ahtuangaruak to telephone both a relative and the Public Defender Agency in an attempt to find someone who could explain the test to Ahtuangaruak.

Id.

341. *Id.* at 311-12 (citing ALASKA CONST. art I, § 7).

342. *Id.* at 311 (quoting *Gundersen*, 792 P.2d at 677).

343. *Id.*

344. 806 P.2d 330 (Alaska Ct. App. 1991).

arrest did not constitute unreasonable pre-accusation delay in violation of the Due Process Clause because the defendant "failed to make an adequate showing of actual prejudice."[345] In such a challenge, a defendant must show "not only '[t]he absence of a valid reason for the delay,' but also the fact of prejudice."[346] The court held that a showing of possible prejudice was not enough; actual prejudice must be shown, consisting of "a particularized showing that the unexcused delay was likely to have a specific and substantial adverse impact on the outcome of the case."[347] Moreover, the court noted that "generalized claims of lost witnesses and faded memories" are insufficient to establish actual prejudice.[348]

The court then found that although the twenty-month delay before Mouser's arrest must be deemed to be prejudicial, this alone was not presumptively a Sixth Amendment violation.[349] The court indicated that under the Alaska Constitution a defendant's Sixth Amendment right to a speedy trial does not attach until formal accusation.[350] Furthermore, even when this right attaches and the delay is presumptively prejudicial,[351] the court must balance "'the reason for the delay, the defendant's assertion of his right, and prejudice to the defendant.'"[352] Furthermore, the court noted that Sixth Amendment analysis also requires an examination of a defendant's failure to assert his right to a speedy trial and the extent of prejudice suffered by the defendant.[353] The court of appeals remanded the case for consideration of these issues.[354]

LaVigne v. State[355] involved a criminal defendant who was denied an opportunity to testify on his own behalf at trial. The lower courts held that the defendant's rights under the United States Constitution and the Alaska Constitution had not been violated because the defendant refused to offer proof of what his testimony would have been, thereby failing to establish

345. *Id.* at 336.

346. *Id.* (quoting York v. State, 757 P.2d 68, 70 (Alaska Ct. App. 1988)).

347. *Id.* at 337. The court also noted that the defendant's anxiety does not constitute prejudice under a due process analysis. *Id.* at 337 n.3.

348. *Id.* at 337-38.

349. *Id.* at 340.

350. *Id.* at 339. In this case the right attached when the district attorney's office filed the information against Mouser. *Id.*

351. The court found the twenty-month delay presumptively prejudicial under both the United States and Alaska Constitutions. *Id.* at 340-41.

352. *Id.* at 340 (quoting Barker v. Wingo, 407 U.S. 514, 530 (1972)).

353. *Id.* at 341-42.

354. *Id.* at 342. The court distinguished Alaska's seminal speedy trial cases, Rutherford v. State, 486 P.2d 946 (Alaska 1970), and Glasgow v. State, 469 P.2d 682 (Alaska 1970), by noting that these cases were decided before the development of *Barker*'s balancing test. *Mouser*, 806 P.2d at 340.

355. 812 P.2d 217 (Alaska 1991).

that he was prejudiced by the violation.[356] The Alaska Supreme Court reversed and remanded holding that "the outcome-affecting harmless error test," should not have been applied.[357]

The court first held that the right to testify is a fundamental constitutional right grounded in the Fifth, Sixth and Fourteenth Amendments.[358] Since the right may be waived only by the defendant himself, LaVigne's attorney's unilateral decision to waive the right did not bind the accused.[359] Next, the court explained the two-step process involved in the application of the appropriate "harmless error beyond a reasonable doubt" standard. First, after showing that the defendant's right to testify has been denied, the defendant must show that "he would have offered relevant testimony had he been allowed to testify . . . . [T]his preliminary burden is a minimal one."[360] Second, if the initial burden is met, "the burden will then shift to the state to show that denial of his constitutional right was harmless error beyond a reasonable doubt."[361] The court noted that there are not likely to be many cases in which the error can be shown to be harmless beyond a reasonable doubt, but, in order to avoid such cases, trial judges should take steps to assure that a defendant's decision not to take the stand is a knowing and voluntary one.[362]

O'Leary v. Superior Court,[363] involved two appeals concerning an investigative grand jury report subject to prepublication judicial review under Alaska Rule of Criminal Procedure 6.1. In *O'Leary* the supreme court held that Rule 6.1 does not violate the Anti-Suspension Clause of article 1, section 8 of the Alaska Constitution, which mandates that the power of grand juries to investigate and make recommendations may never be suspended.[364] In the companion case of *In re Special Grand Jury*, the

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356. *Id.* at 218.

357. *Id.* The United States Supreme Court recognized in Chapman v. California that some rights are so basic that their violation can never be deemed harmless error, and that for some less significant constitutional violations, the error is only harmless if found "'harmless beyond a reasonable doubt.'" *Id.* at 220 (quoting Chapman v. California, 386 U.S. 18, 24 (1967)). The Alaska Supreme Court restated the standard for constitutional errors in Love v. State. *Id.* (citing Love v. State, 457 P.2d 622 (Alaska 1969)).

358. *Id.* at 219.

359. *Id.* at 220.

360. *Id.* at 221.

361. *Id.* (citation omitted).

362. *Id.* at 222. The trial judge should "make an on-the-record inquiry after the close of the defendant's case, although out of the jury's hearing, into whether a nontestifying defendant understands and voluntarily waives his right." *Id.*

363. 816 P.2d 163 (Alaska 1991).

364. *Id.* at 165. The suspension clause of article 1, section 8 provides: "The power of grand juries to investigate and make recommendations concerning the public welfare shall never be suspended." ALASKA CONST. art. I, § 8.

court held that the superior court erred in ordering the entire report involved released.[365]

At the request of Alaska's Attorney General, the grand jury for the third judicial district investigated the conduct of the Anchorage School District, Police Department and District Attorney's Office with respect to the investigation of a Bartlett High School teacher's sexual relationships with students.[366] Under Rule 6.1, grand jury reports that may damage the reputation of a person are subject to judicial review to determine whether "(1) they concern the public safety and welfare, (2) they improperly infringe upon a constitutional right of any person, and (3) the factual findings they contain are supported by substantial evidence."[367] The supreme court ruled that this procedure did not violate the Anti-Suspension Clause.[368] The court reasoned that the grand jury is a part of the judicial branch and is subject to evidentiary rules and constitutional limitations.[369] Moreover, the court found that the Due Process Clause was intended to protect reputational interests, and thus the requirement that grand jury recommendations be based on substantial evidence is derived from the Due Process Clause.[370]

The court further stated that Rule 6.1 was intended to achieve "a proper balance between the values inherent in the grand jury's investigative and recommending function on the one hand and the constitutional rights of individuals on the other."[371] The court noted that construing the Anti-Suspension Clause to prohibit the review of grand jury reports would be inconsistent with persuasive extra-jurisdictional case law.[372]

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365. *O'Leary*, 816 P.2d at 165.

366. *Id.*

367. *Id.* at 166.

368. *Id.* at 169-70.

369. *Id.* at 167-68 (citing Stern v. Morgenthau, 465 N.E.2d 349 (N.Y. 1984) (holding that grand juries must follow procedural and evidentiary rules in New York Criminal Procedural Law and other statutes); People v. Cirillo, 419 N.Y.S.2d 820 (1979) (holding that the court has an inherent power to amend a grand jury indictment on a defendant's motion to protect a constitutional right). The anti-suspension language of the Alaska Constitution is borrowed from the Missouri Constitution, which in turn is based on the New York Constitution. *O'Leary*, 816 P.2d at 167 & n.6.

370. *Id.* at 169-70.

371. *Id.* at 171.

372. *Id.* at 172-73 (citing Wood v. Hughes, 212 N.Y.S.2d 33 (1961); Matter of Interim Report of the Grand Jury, 553 S.W.2d 479 (Mo. 1977)). The court justified its order releasing portions of the grand jury report on the basis of their probable effect on an upcoming municipal election; it justified ordering the release of the names of the interested parties because of a lack of adverse effect on those parties. The court continued to withhold the release of the grand jury's discussion of the allegations against two of the teachers because the allegations were unsubstantiated and release would otherwise "improperly infringe the constitutionally protected reputational interests of the teachers." *Id.* at 173-75.

The defendant in *Michael v. State*[373] appealed his conviction for second-degree assault, claiming he had been convicted of a crime different from the offense alleged in the grand jury indictment. Michael was charged with thirteen counts of assault in the first degree[374] and found guilty of two counts of second-degree assault.[375] The court of appeals noted that a "conviction for an offense different than the one charged is a fatal variance, and requires reversal,"[376] but affirmed the conviction, holding that Michael had sufficient notice of the state's intention to rely upon a lesser-included offense theory and that the indictment was sufficiently clear to allow him to assert double jeopardy if ever charged with the same offense again.[377]

The supreme court declined to accept the view of most states that a fatal variance requires reversal of a conviction "only when it deprives the defendant of fair notice of the charges against him, or leaves the defendant open to the risk of double jeopardy."[378] The court noted that article I, section 8, of the Alaska Constitution[379] is identical to the Fifth Amendment of the United States Constitution, and therefore found it appropriate to follow the United States Supreme Court's treatment of variance.[380] Following the United States Supreme Court, the Alaska Supreme Court drew the distinction "'between a departure in the proof from the indictment sufficiently great to be regarded as a constructive amendment, which is regarded as a reversible error in itself, and a mere variance, which is reversible error only if prejudicial to the defendant.'"[381]

The court held that the variance in this case was significant enough to be fatal.[382] The grand jury made no charge of second-degree assault,[383] and defendant's conviction resulted from a departure from the indictment

373. 805 P.2d 371 (Alaska 1991).

374. *Id.* at 372; *see* ALASKA STAT. § 11.41.200 (1989).

375. *Michael*, 805 P.2d at 372; *see* ALASKA STAT. § 11.41.210(a)(2) (1989).

376. *Michael*, 805 P.2d at 373 (citing Michael v. State, 767 P.2d 193, 201 (Alaska Ct. App. 1988), *rev'd*, 805 P.2d 371 (Alaska 1991)) (citation omitted).

377. *Id.* at 373 & n.8.

378. *Id.* at 373 (citing 2 WAYNE R. LAFAVE & JEROLD H. ISRAEL, CRIMINAL PROCEDURE § 19.2(h), at 468 (1984)).

379. This section provides in pertinent part: "No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a grand jury . . . ." ALASKA CONST. art. I, § 8.

380. *Michael*, 805 P.2d at 373.

381. *Id.* (quoting CHARLES A. WRIGHT, FEDERAL PRACTICE AND PROCEDURE: CRIMINAL § 127, at 418-19 (2d ed. 1982)).

382. *Id.* at 374.

383. The court noted that the acquittal in this case points out the importance of careful pleading under the criminal law of the state. *Id.* at 374 n.13.

which clearly prejudiced his right to be tried only on the charges presented in the indictment.[384] The conviction was reversed and remanded for entry of a judgment of acquittal.[385]

In *State Department of Natural Resources v. Arctic Slope*,[386] the supreme court held that a statutory requirement that oil drillers submit well data to the Department of Natural Resources ("DNR")[387] is not an unconstitutional taking of property. The court first established that oil well data constitutes trade secrets and is protected as property under both the Alaska Constitution and the United States Constitution.[388] In determining whether the government action constituted a "taking," the court applied *Ruckelshaus v. Monsanto Co.*[389] which identified three relevant factors: 'the character of the government action, its economic impact, and its interference with reasonable investment-backed expectations.'"[390] The court concluded that the action was not a "taking" and that "interference with reasonable investment-backed expectations" was the determinative factor in so concluding.[391] In determining that a "taking" had occurred, the trial court had found that the companies challenging the statute had reasonable expectations that DNR would use the data only to determine whether to extend confidentiality, not for its own internal purposes.[392] The supreme court concluded that the assumption was not a "reasonable investment-backed expectation" because the statute and regulations did not contain any guarantees or express promises that DNR would not use the data for internal departmental purposes.[393] Additionally, the court noted that the companies were on notice that DNR did use confidential data in its decisionmaking on oil and gas leasing.[394]

The supreme court also rejected the companies' argument that DNR could exercise only proprietary functions, and that its use of the well data

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384. *Id.* at 374.

385. *Id.* The court made it clear that the acts alleged in the indictment were entirely different from those resulting in conviction so that the act under which the defendant was convicted could not be a lesser-included offense. *Id.* at 374 n.12.

386. No. S-3400, 1991 Alas. LEXIS 132 (Alaska Nov. 22, 1991) (rehearing petition filed Dec. 5, 1991).

387. When the Alaska Oil and Gas Conservation Commission ("AOGCC") issues a permit to drill, they may require well drill reports. *See* ALASKA STAT. § 31.05.035(a) (1985).

388. *Arctic Slope*, 1991 Alas. LEXIS 132, at *10-13.

389. 467 U.S. 986, 1005 (1984).

390. *Arctic Slope*, 1991 Alas. LEXIS 132, at *13 (quoting *Monsanto*, 467 U.S. at 1005).

391. *Id.* at *14.

392. *Id.* at *15.

393. *Id.* at *16.

394. *Id.*

was not justified by the police power.[395] DNR implemented the constitutional mandate that the legislature "provide for the utilization, development, and conservation of all natural resources belonging to the State . . . for the maximum benefit of its people."[396] The court stated that DNR's assessment of state oil and gas resources served two legitimate government objectives: (1) "knowledge of the production potential of state land . . . is critical to DNR's determination of where development should occur and where preservation is appropriate,"[397] and (2) "knowledge of the oil and gas production potential of the state's lands promotes the state's economic welfare by maximizing the amount it receives for the lease of its lands."[398] Therefore, the court held that DNR's purpose to maximize the income from leasing state land was within the police power.[399]

V. EMPLOYMENT LAW

The bulk of the employment law decisions in 1991 concerned the issues of workers' compensation and disability benefits. For the most part, these cases preserved or expanded the rights of injured employees, through doctrines such as the presumption of compensability.[400] The court also decided a few cases addressing other issues arising out of the employment relationship. For example, the court issued an important opinion involving settlement of wage and hour claims.[401] The cases involving workers' compensation will be reviewed first, followed by other employment law cases.

In *Sokolowski v. Best Western Golden Lion Hotel*,[402] the Alaska Supreme Court "adopt[ed] the special hazard exception to the going and coming rule[403] in workers' compensation cases, and [held] that the presumption of compensability[404] applies to the factual determination

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395. *Id.* at *22-23.

396. *Id.* at *23 (quoting ALASKA CONST. art. VIII, § 2).

397. *Id.*

398. *Id.* at *24.

399. *Id.* at *25.

400. *See infra* note 404.

401. McKeown v. Kinney Shoe Corp., 820 P.2d 1068 (Alaska 1991). *See infra* page 170.

402. 813 P.2d 286 (Alaska 1991).

403. The going-and-coming rule states generally that travel between work and home will be considered a personal activity for workers' compensation purposes. *Id.* at 290.

404. Alaska Statutes section 23.30.120(a) provides in relevant part:

> (a) In a proceeding for the enforcement of a claim for compensation under this chapter it is presumed, in the absence of substantial evidence to the contrary, that
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> (1) the claim comes within the provisions of this chapter;
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> (2) sufficient notice of the claim has been given;

necessary to decide whether the claim falls within that exception."[405] The claimant, Sokolowski, fell and broke her wrist on her way to the Golden Lion, her place of employment.[406] Sokolowski was jaywalking across thirty-sixth Avenue in Anchorage, from the IRS parking lot in which most Golden Lion employees parked, and slipped on ice covering the avenue.[407] The Alaska Workers' Compensation Board denied Sokolowski relief because it concluded that the "special hazard" exception[408] to the going-and-coming rule would not apply as Sokolowski could have taken an alternate route to reach the Golden Lion.[409]

On appeal, the supreme court determined that a special hazard exception would apply in Alaska, as it does in other states, because it facilitates the purpose of the Alaska Workers' Compensation Act: "to provide injured workers with a simple and speedy remedy to compensate them for work related injuries."[410] The court held that under Alaska law, a three-prong test would be employed to determine the exception's applicability: (1) the injury must have a causal relationship to the employment; (2) the hazard causing the injury must be "'distinctive in nature or quantitatively greater than risks common to the public'"; and (3) the employee must be using a normal or usual route to work.[411]

The court also determined that the presumption of compensability should apply in determining each of the special hazard exception's three required elements. In applying this exception, the Board must determine

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(3) the injury was not proximately caused by the intoxication of the injured employee or proximately caused by the employee being under the influence of drugs unless the drugs were taken as prescribed by the employee's physician;

(4) the injury was not occasioned by the wilful intention of the injured employee to injure or kill self or another;

. . . .

ALASKA STAT. § 23.30.120 (1990).

405. *Sokolowski*, 813 P.2d at 294 (footnote added).

406. *Id.* at 288.

407. *Id.* at 289.

408. The "special hazard" exception

> has been applied when the "off-premises point at which the injury occurred lies on the only route, or at least on the normal route, which employees must traverse to reach the plant, and that therefore the special hazards of that route become the hazards of the employment."

Id. at 290 (quoting 1 ARTHUR LARSON, WORKMEN'S COMPENSATION § 15.13, at 4-22, (Desk ed. 1990) (footnote omitted)).

409. *Id.*

410. *Id.* (citing Fairbanks North Star Borough v. Roberts & Babler, 747 P.2d 528, 531 (Alaska 1987)).

411. *Id.* at 291 (quoting General Ins. Co. of Am. v. Workers' Compensation Appeals Bd., 546 P.2d 1361, 1364 (1976)). The court noted that a risk may be greater to an employee than to the general public when the employee uses a different route than the general public, and that route is more dangerous that the general public's route. *Id.* at 294.

evidentiary issues and therefore the claimant should be entitled to the presumption.[412]

In *Summers v. Korobkin Construction*,[413] the supreme court held that a worker was entitled to a claim under the Workers' Compensation Act even though his employer had paid his outstanding medical expenses. Henry Summers injured his neck while in the employ of Korobkin Construction and incurred medical expenses in the amount of $2,000.[414] Although Korobkin's insurance paid Summers' bills, the company refused to acknowledge the injury's compensability.[415] Summers filed his injury claim with the Board, but the Board refused to hear his claim on the basis that it had discretionary authority to refuse to hear claims under Alaska Statutes section 23.30.110(c).[416]

The supreme court reversed, holding that the Board lacked such discretion under section 23.30.110(c); rather, a hearing must be held after one is requested.[417] The court also found that Alaska Statutes section 23.30.105 required only a work-related injury as a pre-requisite for filing a claim under the Alaska Workers' Compensation Act; unpaid medical expenses are not necessary.[418]

In *LeSuer-Johnson v. Rollins-Burdick Hunter of Alaska*,[419] the supreme court held that an employee injured while playing in a company-sponsored softball game was entitled to workers' compensation benefits.[420] The claimant argued that the injury arose "out of and in the course of employment" because her employer provided equipment and uniforms, paid the team's league fee, and encouraged all of its employees to either play on the team or support the team as spectators.[421]

The court held that the game was an employer-sanctioned activity. The court also ruled that the workers' compensation statute applies to facilities other than remote job sites, based on the fact that the Alaska Legislature could have easily restricted the provision if it so intended.[422]

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412. *Id.* at 292.

413. 814 P.2d 1369 (Alaska 1991).

414. *Id.* at 1370.

415. *Id.* Unless compensability is acknowledged, compensation for any future claims is not guaranteed. *Id.*

416. *Id.*

417. *Id.*

418. *Id.* at 1371-72. In so holding, the court implicitly relied on a California court's holding that lack of current treatment would not bar a claim. *Id.* at 1372 (citing Zeeb v. Workmen's Compensation Appeals Bd., 432 P.2d 361 (1967) (en banc)).

419. 808 P.2d 266 (Alaska 1991).

420. *Id.* at 267.

421. *Id.*

422. *Id.* Alaska Statutes section 23.30.265(2) provides: "'arising out of and in the course

Accordingly, since the company paid the league fee, thereby making the facility available to its employees, the field was an employer-provided facility, and the company was liable for the employee's injuries.[423]

In *Lajiness v. H.C. Price Construction Co.*,[424] the supreme court held that the Board did not abuse its discretion in rejecting the claimant's attempt to call an unlisted witness to testify, but that the Board erred in excluding two weeks' pay from its wage rate determination of the claimant's damages.[425] Lajiness injured his knee while employed by H.C. Price Construction Company, and sought an adjustment of his claim of temporary total disability benefits.[426] Thereafter, during three of four prehearing conferences Lajiness attended, the parties' witnesses were discussed.[427] When Lajiness' hearing came before the Board, he attempted to call an unlisted witness to testify,[428] but the Board sustained Price Construction's objection to this call.[429]

The supreme court held that the Board did not abuse its discretion in refusing to allow Lajiness to call this additional witness because the prehearing conferences did not discuss the possibility of this witness being called.[430] The Board's refusal to allow the witness was a reasonable exercise of its discretion to control the proceedings before it.[431]

The court also found that the Board's exclusion of two weeks' pay from its determination of Lajiness' wage rate was improper because it unreasonably and speculatively predicted future criminal behavior.[432] The exclusion was initially made based on the fact that Lajiness was incarcerated in a halfway house for two weeks due to a driving while intoxicated charge.[433] The court remanded the case to the Board to

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of employment' includes . . . employer-sanctioned activities at employer-provided facilities." ALASKA STAT. § 23.30.265(2) (1990).

423. *LeSuer-Johnson*, 808 P.2d at 267.

424. 811 P.2d 1068 (Alaska 1991).

425. *Id.* at 1069-70.

426. *Id.* at 1068.

427. *Id.* at 1068-69.

428. *Id.* at 1069.

429. *Id.*

430. *Id.*

431. *Id.* at 1069 n.2.

432. *Id.* at 1070. In holding the Board's exclusion improper, the court stated:

> [w]hether Lajiness would have violated any laws during 1988, and whether, as a result of any violation, he would have been incarcerated for any period of time during 1988, are both uncertain possibilities which cannot furnish a basis for the Board's exclusion of the two weeks worth of wages in the case at bar.

Id.

433. *Id.* One week of the incarceration occurred while Lajiness was absent from work due to his knee injury; the other week occurred after he was able to return to work. *Id.*

recalculate Lajiness' wage rate determination after including the two week period of incarceration.[434]

In *Adamson v. University of Alaska*,[435] the supreme court held that the Board's failure to apply a presumption of compensability to a claim for continuing chiropractic care was an error,[436] but that the error was harmless because substantial evidence was proffered to rebut the presumption.[437] The court noted that since *Municipality of Anchorage v. Carter*[438] had acknowledged the right to continuing medical care for palliative treatment, there should be a presumption of compensability for such care.[439] The court also reasoned that the claimant's failure to prove actual prejudice precluded appellate review of whether "it was prejudicial to refuse to admit the excluded evidence," because failure to do so constituted a waiver of this claim of error.[440]

In *Olson v. AIC/Martin J.V.*[441] the supreme court held that the Board erred in not applying the presumption of compensability when an employer disputed temporary total disability ("TTD") compensation already awarded.[442] In accord with *Bailey v. Litwin Corp.*,[443] the court reasoned that an employee remains temporarily totally disabled unless the employer introduces substantial evidence to rebut the presumption.[444] In *Olson*, the court held that the Board erroneously defined temporary total disability, stating that "the ability to perform any kind of work does not determine whether [TTD] has ended. Rather, . . . the Board must consider Olson's earning potential and the availability of employment."[445] The court concluded that Olson's TTD benefits did not cease due to his employment in a retread shop.[446] The court remanded the issue of

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434. *Id.*

435. 819 P.2d 886 (Alaska 1991).

436. *Id.* at 894.

437. *Id.* at 891.

438. 818 P.2d 661 (Alaska 1991). *See infra* page 163.

439. *Adamson*, 819 P.2d at 894. Justices Compton and Moore noted in their concurrence that "[t]o presume that a claim for continuing treatment or care is compensable is quite different from presuming that continued treatment or care is medically indicated," and that this portion of the majority opinion should thus be disregarded. *Id.* at 895-96 (Compton & Moore, J.J., concurring).

440. *Id.* at 889. The court also affirmed the Board's finding that Adamson's back injury was not work-related, noting that the Board has discretionary power to give the testimony of particular doctors more weight than others. *Id.* at 893.

441. 818 P.2d 669 (Alaska 1991).

442. *Id.* at 672.

443. 713 P.2d 249, 252 (Alaska 1986) (where claimant's return to work at a position with a higher salary than before the injury was sufficient evidence for the employer to overcome the presumption of continuing compensability).

444. *Olson*, 818 P.2d at 672-74.

445. *Id.* at 673.

446. *Id.* at 674. The court quoted Professor Larson:

continuing medical benefits to the Board because the Board failed to apply the presumption.[447]

In *Kirby v. Alaska Treatment Center*,[448] the supreme court reiterated that the presumption of compensability applies to claims for vocational rehabilitation.[449] To be eligible for a rehabilitation plan, however, the court held that an employee must suffer from a permanent disability and must be precluded by that disability from returning to suitable gainful employment.[450] Kirby, a former swimming instructor, received TTD benefits and applied for rehabilitation benefits after contracting reactive airway disease due to chlorine exposure.[451] The Board denied Kirby's application for rehabilitation benefits because she was found able to obtain "suitable gainful employment" as a secretary or receptionist.[452]

The court agreed with the Board's determination that Kirby suffered a permanent disability but that the disability did not preclude her from returning to "suitable gainful employment."[453] The court rejected Kirby's argument that the twenty-five percent reduction in income did not restore her "as nearly as possible" to her former earnings because by her third year of employment she would have been suffering from only a sixteen percent reduction.[454] The court interpreted the words "as nearly as possible" in former Alaska Statutes section 23.30.265(28) to allow a sixteen to thirty percent reduction of former earnings.[455] This interpretation is consistent with recent statutory amendments which provide that remunerative

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> "'The essence of the test is the probable dependability with which claimant can sell his services in a competitive labor market, *undistorted by such factors as* business booms, *sympathy of a particular employer or friends*, temporary good luck, or the superhuman efforts of the claimant to rise above his crippling handicaps.'"

Id. (quoting 2 ARTHUR LARSON, WORKMEN'S COMPENSATION § 57.51, at 10-53 (Desk Ed. 1990) (emphasis added)).

447. *Id.* at 676.

448. 821 P.2d 127 (Alaska 1991).

449. *Id.* at 129 (citing Municipality of Anchorage v. Carter, 818 P.2d 661 (Alaska 1991); Wien Air v. Kramer, 807 P.2d 471 (Alaska 1991)). *See infra* page 163.

450. *Id*; *see* ALASKA STAT. § 23.30.041(c) (1984).

451. *Kirby*, 821 P.2d at 128. This prevented her from working anywhere near chlorine-treated pools. *Id.*

452. *Id.*

453. *Id.* at 130. Former Alaska Statutes section 23.30.265(28) defined suitable gainful employment as:

> [E]mployment that is reasonably attainable in light of an individual's age, education, previous occupation, and injury, and that offers an opportunity to restore the individual as soon as practical to a remunerative occupation as nearly as possible to the individual's gross weekly earnings as determined at the time of injury.

Act of 1983, ch. 70, § 13, 1983 Alaska Sess. Laws 9 (emphasis omitted) (repealed 1988).

454. *Kirby*, 821 P.2d at 130.

455. *Id.*

employability is achieved when an injured worker is restored to at least sixty percent of pre-injury earnings.[456]

In *Wien Air Alaska v. Kramer*,[457] the supreme court determined that a statutory presumption of compensability that arose in an employee's claim for TTD benefits applies as well to a subsequent claim for continuing benefits.[458]

The claimant, Kramer, injured his back and shoulders while in the employ of Wien Air; Wien Air subsequently paid TTD benefits until Kramer was released from his therapy and treatment. When Kramer subsequently worked for another employer, his injury "flared-up." Kramer then filed suit seeking a continuation of TTD benefits from Wien Air.[459] The Board denied Kramer's claim, but the superior court reversed.[460] The supreme court affirmed the decision of the superior court, rejecting the Board's assertion that Kramer was required to establish the existence of a continuing disability by a preponderance of the evidence.[461] According to the court, once an employee establishes an initial link between employment and injury the presumption of compensability applies unless countered by substantial evidence to the contrary.[462]

In *Municipality of Anchorage v. Carter*,[463] the supreme court again examined the presumption of compensability and found it applicable to claims for continuing care as well, even where the care is purely palliative and offers no hope of a permanent cure as long as the evidence establishes that such care promotes recovery from individual attacks caused by a chronic condition.[464]

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456. Act of July 1, 1988, ch. 79, § 10, 1988 Alaska Sess. Laws 5-13 (codified as amended at ALASKA STAT. § 23.30.041 (1988)). This is also consistent with the recent court decision in Olson v. AIC/Martin J.V., 818 P.2d 669 (Alaska 1991), where the court stated that 61-64% of earnings qualified as suitable gainful employment. *Kirby*, 821 P.2d at 130. *See supra* page 162.

457. 807 P.2d 471 (Alaska 1991).

458. *Id.* at 474.

459. *Id.* at 472.

460. *Id.* at 473.

461. *Id.*

462. *Id.* at 474.

463. 818 P.2d 661 (Alaska 1991).

464. *Id.* at 665-66 (noting that other jurisdictions had construed similar statutory language to permit workers' compensation boards "to require employers to pay for beneficial palliative care that offered no hope of a cure").

The employer's obligation to provide continuing care is defined by Alaska Statutes section 23.30.095(a) as follows:

> The employer shall furnish medical, surgical, and other attendance or treatment, nurse and hospital service, medicine, crutches, and apparatus for the period which the nature of the injury or the process of recovery requires, not exceeding two years from and after the date of injury to the employee. . . . It shall be additionally provided that, if continued treatment or care or both beyond the two-year period is

In this case, the employee suffered from a work-related degenerative disc disease and sought "as-needed" chiropractic care and a hot tub.[465] The Board denied the employee's petition, finding no objective evidence that the treatments would help the employee *recover* from the chronic condition.[466] The superior court reversed and the supreme court affirmed on the ground that the Board erroneously failed to apply the presumption of compensability to the claim for continuing care, which would have shifted to the employer the burden of producing substantial evidence that the requested treatment was not medically indicated.[467]

In *Alaska v. Cacioppo*,[468] the supreme court refused to extend the presumption of compensability to a claim for occupational disability benefits under the Public Employees' Retirement System ("PERS").[469] The court reasoned that workers' compensation and PERS serve different functions. Whereas PERS is intended to encourage continued public employment, workers' compensation protects a worker's ability to earn certain wages.[470]

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indicated, the injured employee has the right of review by the board. The board may authorize continued treatment or care or both as the process of recovery may require. ALASKA STAT. § 23.30.095(a) (1990).

465. *Carter*, 818 P.2d at 663.

466. *Id.* at 663-64.

467. *Id.* at 664-65. The court noted that the presumption is not inconsistent with the Board's discretion because only the burden of going forward is shifted, not the burden of proof, and the presumption will drop out if the employer adduces substantial evidence for its position that continued care is not needed. *Id.*

Justice Compton dissented in part, arguing that applying the presumption in this case was of no practical significance. The reasons for establishing a presumption did not exist when all that an employee had to establish was that continued care was indicated. *Id.* at 667 (Compton, J., dissenting in part).

Justice Moore also dissented, arguing that the presumption was inapplicable to the statutory scheme governing continuing treatment. When the court referred to applying the presumption to whether continued treatment was *indicated*, it meant whether such treatment was *needed*. If the court meant *indicated*, then Justice Moore agreed with Justice Compton's dissent. *Id.* at 667 n.1 (Moore, J., dissenting). He argued that the presumption was simply intended to aid an employee who is injured on the job but cannot demonstrate conclusively the cause of the injury, and that the presumption was irrelevant to the court's holding in this case. *Id.* at 668 (Moore, J., dissenting). Even if the presumption were applicable, Justice Moore argued, the presumption should drop out because the record contained substantial evidence to support the Board's position. Justice Moore concluded that the holding was a "direct assault on the compromise between workers' and employers' interests" because "[t]he court turns [the compensation] scheme on its head, requiring [the Board] to presume that any continuing care requested by an employee is indicated medically and to order the employer to pay for it unless the employer can prove that the requested treatment is not indicated." *Id.* at 668-69 (Moore, J., dissenting).

468. 813 P.2d 679 (Alaska 1991).

469. *Id.* at 682-83. The presumption is known as the "last injurious exposure" rule: the "employer at the time of the worker's most recent injury which is causally connected to the disability has full liability . . . ." *Id.* at 682. *See infra* note 475.

470. *Id.* at 682-83 n.3.

The court did, however, extend the definition of legal cause used in workers' compensation cases to PERS. If there is more than one possible cause of a disability, benefits will be awarded when it is established that "employment is a 'substantial factor in bringing about the harm or disability at issue,'" regardless of whether a non-occupational injury also could have independently caused the injury.[471]

In *Hester v. State Public Employees' Retirement Board*,[472] the supreme court affirmed the superior court's determination that a former police officer was not entitled to occupational disability benefits under PERS. Although the court affirmed the denial of benefits in this case,[473] it held that causation standards in workers' compensation cases are applicable under PERS[474] and rejected the state's argument that PERS[475] does not entitle an employee to disability benefits when the employee's preexisting condition is aggravated by his or her work.[476] The court also held that the presumption of coverage found in workers' compensation cases is not applicable under PERS.[477] Hester would have been entitled to PERS compensation if he could have established by a preponderance of the evidence that "work-related stress was a substantial factor in aggravating his . . . disease to the extent that he was no longer capable of working."[478]

In *Houston Contracting, Inc. v. Phillips*,[479] the supreme court focused on benefit computation statutes and the extent of the Board's authority to condition benefits upon compliance with rehabilitation orders. After several appeals and a Board recalculation of benefits, the superior court determined that the Board had improperly applied Alaska Statutes section

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471. *Id.* at 683 (quoting Estate of Ensley v. Anglo Alaska Constr., 773 P.2d 955, 958 (Alaska 1989)).

472. 817 P.2d 472 (Alaska 1991).

473. *Id.* at 477. The court concluded that the Board's decision denying benefits was supported by substantial evidence. *But see id.* at 477-78 (Rabinowitz, C.J., dissenting) (concluding Board's denial of benefits was not supported by substantial evidence).

474. *Id.* at 475.

475. Occupational disability is defined under PERS as:

> [A] physical or mental condition that, in the judgment of the administrator, presumably permanently prevents an employee from satisfactorily performing the employee's usual duties for an employer or the duties of another comparable position or job that an employer makes available and for which the employee is qualified by training or education; however, the proximate cause of the condition must be a bodily injury sustained, or a hazard undergone, while in the performance and within the scope of the employee's duties and not the proximate result of the wilful negligence of the employee.

ALASKA STAT. § 39.35.680(26) (1987 & Supp. 1991).

476. *Hester*, 817 P.2d at 475.

477. *Id.* at 476.

478. *Id.*

479. 812 P.2d 598 (Alaska 1991).

23.30.220(3).[480] The court also penalized the employer for failing to adjust Phillips' benefits when it was first on notice that it should do so.[481] Finally, the superior court determined that the Board improperly withheld benefits when Phillips refused to see a counselor to complete his rehabilitation.[482]

The supreme court reversed, finding that the Board's construction of section 23.30.220(3) was correct.[483] Specifically, the court found that the Board properly considered Phillips' extended work history, since his job on the trans-Alaska pipeline at the time of the injury paid more than any work he had done in previous years, and the nature of construction work in Alaska is episodic.[484]

The court also found that the superior court's award of penalties against Houston Contracting was erroneous.[485] The court held that such penalties are appropriate only when the compensation sought from the employer is "'payable without an award.'"[486] The court found that the adjustment of compensation Phillips requested clearly did not meet this requirement, since a Board determination was necessary before benefits were payable under the relevant statute.[487]

The court further held that Phillips' refusal to participate in a court-arranged evaluation by a rehabilitation expert, combined with his failure to arrange an independent evaluation, justified the Board's termination of his TTD benefits.[488] However, the court held that the Board could not properly direct Phillips to forfeit the benefits retroactively.[489]

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480. *Id.* at 599-600. The Board initially determined Phillips' benefits according to Alaska Statutes section 23.30.220(2), but Phillips argued that the wrong subsection of the statute had been used and applied for an upward adjustment of his compensation rate pursuant to Alaska Statutes sections 23.30.220(1) or 23.30.220(3). Subsection (1) and (2) provided the method by which "Average Weekly Wage" was calculated, depending upon the amount of time employed; subsection (3) permitted the Board discretion to adjust such calculation when (2) yielded an unfairly low result. *See* Act of 1965, ch. 75, § 1, 1965 Alaska Sess. Laws 46 (repealed 1983).

481. *Houston Contracting*, 812 P.2d at 599-600.

482. *Id.* at 600.

483. *Id.* at 601.

484. *Id.* (citing Brunke v. Rogers & Babler, 714 P.2d 795, 799 (Alaska 1986)).

485. *Id.* at 602.

486. *Id.* (quoting Phillips v. Nabors Alaska Drilling, Inc., 740 P.2d 457, 460 (Alaska 1987)).

487. *Id.*

488. *Id.* (citing Bignell v. Wise Mechanical Contractors, 651 P.2d 1163, 1167 (Alaska 1982) (implying that the payment of TTD benefits to an employee is contingent upon cooperation with rehabilitation)). The Board had directed the rehabilitation pursuant to former Alaska Statute section 23.30.040(e). *See* ALASKA STAT. § 23.30.040(e) (repealed 1982).

489. *Houston Contracting*, 812 P.2d at 604.

In *Green v. Kake Tribal Corp.*[490] the supreme court held that an insurer can recoup its overpayment of benefits to an injured worker by withholding up to 100 percent of future payments until the full amount overpaid is recouped.[491] According to both a federal statute[492] and a state statute,[493] an injured worker in Alaska can never receive as workers' compensation more than eighty percent of his pre-injury earnings.[494] The Social Security Administration ("SSA") automatically offsets its payments to achieve this balance until the insurer seeks an offset.[495] In *Green*, an insurance company, the Alaska Timber Insurance Exchange ("ATIE"), overpaid an insured's employee for four years before it sought an offset from the Board.[496]

The Board initially determined that ATIE could recoup its overpayment by withholding twenty percent of each future payment over a period of thirty-three years. Subsequent to this decision, however, the SSA paid the employee a lump sum reflecting the amount it had automatically deducted for four years to keep him within the eighty percent limitation.[497] Thereafter, pursuant to Alaska Statutes section 23.30.155(j),[498] which expressly provides that under certain circumstances more than twenty percent of compensation may be withheld in order to recoup overpayment, the Board modified its prior order and determined that ATIE could withhold 100 percent of its payments for the next six years to recoup the prior overpayments.[499]

The supreme court affirmed the modified order, concluding that the employee was merely "the middleman in what essentially [was] a settling of accounts between SSA and ATIE."[500] The court also noted that "Green is still in an enviable position: he receives a lump sum from SSA immediately, but need only 'return' the money to ATIE over the next six

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490. 816 P.2d 1363 (Alaska 1991).

491. *Id.* at 1365.

492. 42 U.S.C. § 424a(a) (1988).

493. ALASKA STAT. § 23.30.225(b) (1990).

494. *Green*, 816 P.2d at 1364.

495. *Id.*

496. *Id.*

497. *Id.* The SSA paid Morris $36,561. *Id.*

498. The statute provides in relevant part:

> If any employer has made advance payments or overpayments of compensation, the employer is entitled to be reimbursed by withholding up to 20 percent out of each unpaid installment or installments of compensation due. More than 20 percent of unpaid installments of compensation due may be withheld from an employee only on approval of the board.

ALASKA STAT. § 23.30.155(j) (1990).

499. *Green*, 816 P.2d at 1365.

500. *Id.*

years."[501] Finally, the court ruled that ATIE could not recover interest on the overpayment amount; the right to interest applies only when a payment is made late, not in advance.[502] The court reasoned that public policy dictates that ATIE should bear the burden of the discrepancies between federal and state compensation statutes; placing this burden on the worker "goes against the grain of the beneficent purposes of the workers' compensation scheme as well as this court's extensive workers' compensation jurisprudence."[503]

In *Hulsey v. Johnson & Holen*,[504] the supreme court concluded that a law firm's attempt to reopen a workers' compensation claim constituted the rendering of services before the Board, entitling the firm to attorneys' fees.[505] The court reasoned that a petition to reopen a claim is essentially a petition for modification of a workers' compensation award under Alaska Statutes section 23.30.130,[506] and concluded that "a modification proceeding . . . 'originates in the initial claim for compensation.'"[507] Thus, the court held that the firm's actions constituted "legal services in respect to a claim . . . within the meaning of" the statute.[508]

Croft v. Pan Alaskan Trucking[509] dealt with the issue of whether an employer may be reimbursed for attorneys' fees paid to the employee's attorney during the pendency of a workers' compensation appeal that was later resolved in favor of the employer. The supreme court held that Alaska Statutes section 23.30.155(j)[510] provides the exclusive remedy for

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501. *Id.* at 1366. The court noted that the bonus in terms of the time value of money that Green receives from the disharmony between state and federal law is "substantial." *Id.* at 7 n.11.

502. *Id.* at 1368.

503. *Id.* The SSA paid less than was necessary, while ATIE paid more than was necessary. *Id.* at 1364. The "imperfect" fit between the statutes was that they required Green to refund to ATIE the amount of its overpayment, rather than merely requiring the SSA to refund it. *Id.* at 1363-66.

504. 814 P.2d 327 (Alaska 1991).

505. *Id.* at 328. Alaska Statutes section 23.30.145(a) provides: "Fees for legal services rendered in respect to a [workers' compensation] claim are not valid unless approved by the board.". ALASKA STAT. § 23.30.145(a) (1990). The Board itself has created an exception to this rule, but it applies only in certain circumstances, one being that the fee is $300 or less. *See* ALASKA ADMIN. CODE tit. 8, § 45.180(c) (April 1991). In this case, the law firm was suing to recover $3,159.67. *Hulsey*, 814 P.2d at 328 n.1.

506. The statute provides in part:

> Modification of Awards. (a) Upon its own initiative, or upon the application of any party in interest on the ground of a change in conditions . . . or because of a mistake in its determination of a fact, the board may . . . before one year after the rejection of a claim, review a compensation case . . . .

ALASKA STAT. § 23.30.130 (1990).

507. *Hulsey*, 814 P.2d at 328 (quoting Interior Paint Co. v. Rodgers, 522 P.2d 164, 167 (Alaska 1974)).

508. *Id.*

509. 820 P.2d 1064 (Alaska 1991).

510. The statute provides:

an employer to recover overcompensation, inferring that "the inclusion of this specific remedy was intended to exclude other remedies for overcompensation."[511] Finally, the court held that attorneys' fees can be considered compensation for the purposes of the statute.[512]

In dissent, Justice Moore agreed that the statute provided the exclusive remedy for the recovery of advance payments or overpayments, but argued that attorneys' fees should not be considered compensation within the meaning of the statute.[513] Justice Moore found support for this position in the statute's definition of "compensation"[514] and in the express statutory provision of attorneys' fees in addition to the compensation awarded.[515] The purpose of Alaska Statutes section 23.30.155(j), he argued, is to prevent a claimant from experiencing a large financial burden while repaying funds to which he is not entitled; such protection was not meant to be extended to a claimant's attorney.[516]

In *Summerville v. Denali Center*,[517] Summerville appealed the Board's decision denying her temporary and permanent total disability benefits. After Summerville was injured on the job and underwent three years of rehabilitation treatment, the Rehabilitation Administrator ("RA") terminated the treatment on the ground that it would not enable Summerville to return to employment. However, the Board denied Summerville's application for disability benefits on the grounds that she was currently employable.[518]

The supreme court reviewed the relationship between the RA and the Board, as well as their respective roles.[519] It held that while the Board

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> If an employer has made advance payments or overpayments of compensation, the employer is entitled to be reimbursed by withholding up to 20 percent out of each unpaid installment or installments of compensation due. More than 20 percent of unpaid installments of compensation due may be withheld from an employee only on approval of the board.

ALASKA STAT. § 23.30.155(j) (1990).

511. *Croft*, 820 P.2d at 1066 (citing Green v. Kake Tribal Corp., 816 P.2d 1363 (Alaska 1991)).

512. *Id.* at 1067.

513. *Id.* (Moore, J., dissenting).

514. *See* ALASKA STAT. § 23.30.265(8) (1990) (defining "compensation" as "the money allowance payable to an employee or the dependents of the employee as provided for in this chapter, and includes the funeral benefits provided for in this chapter").

515. *Croft*, 820 P.2d at 1067 (Moore, J., dissenting).

516. *Id.* at 1068 (Moore, J. dissenting).

517. 811 P.2d 1047 (Alaska 1991).

518. *Id.* at 1050.

519. The RA's role is narrow. The Administrator must "review a rehabilitative plan and decide whether to approve, modify or deny the plan." *Id.* at 1050 (citing ALASKA STAT. § 23.30.041(f) (1983)). Although the 1988 amendments to the Act only apply to injuries sustained on or after July 1, 1988, the court specifically noted that the "decision concerning the relationship between the RA and the board would be the same under the current statute."

is bound by all the RA's rehabilitation plan decisions which are not appealed, the Board is not bound by the RA's underlying factual findings.[520] The court then noted that the injured worker might have avoided her dilemma if she had appealed the RA's decision in the first place.[521]

In *McKeown v. Kinney Shoe Corp.*,[522] the supreme court held that "an employer's private settlement of a claim for unpaid overtime and liquidated damages under the [Alaska Wage and Hour Act] is injurious to interests of the public and, therefore, void on the grounds of public policy."[523] The court found that the purpose of the liquidated damages provision was to assess punitive damages against the violating employer; compensating the employee was merely an incidental result.[524] According to the court, allowing the employer to settle privately would permit the employer to "escape . . . without punitive sanction."[525] The court supported its holding by stating that private settlement would also appear to violate the Fair Labor Standards Act[526] because such settlements contradict the deterrent effect intended in the statute.[527] The court further held that the "tender-back" requirement of *Thorstenson v. Arco Alaska, Inc.*,[528] which required the return of settlement monies, did not apply in this case. Instead, the court permitted the employees who settled privately with Kinney to retain their settlement money and join the class action, subject to offset of the damage award.[529]

In *Braun v. Alaska Commercial Fishing and Agriculture Bank*,[530] the supreme court held that, on the facts of the case, economic necessity constituted good cause for termination of a bank employee.[531] According

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Id. at 1050 n.2.

520. *Id.*

521. *Id.* at 1051.

522. 820 P.2d 1068 (Alaska 1991).

523. *Id.* at 1070. Alaska Statutes section 23.10.110(a) provides: "[a]n employer who violates a provision of [Alaska Statutes sections] 23.10.060 or 23.10.065 is liable to an employee affected in the amount of unpaid minimum wages, or unpaid overtime compensation . . . and in an equal additional amount as liquidated damages." ALASKA STAT. § 23.10.110(a) (1990).

524. *McKeown*, 820 P.2d at 1070.

525. *Id.*

526. 29 U.S.C. §§ 201-19 (1988).

527. *McKeown*, 816 P.2d at 1070-71. While not identical, the AWHA was based on the Federal Labor Standard Act of 1938. *Id.* at 1070 n.2.

528. 780 P.2d 371 (Alaska 1989).

529. *McKeown*, 816 P.2d at 1071.

530. 816 P.2d 140 (Alaska 1991).

531. *Id.* at 142 (granting summary judgment in favor of the bank on its defense of excuse because no genuine issue of material fact existed as to the necessity of the termination).

to the court, the employee's termination was only one of many good-faith actions the Bank was taking at the time out of concern for the bank's financial stability.[532]

In *International Brotherhood of Electrical Workers Local 1547 v. Ketchikan*,[533] the supreme court determined that when asked to clarify an arbitrator's award, the superior court should not interpret the award, but simply determine if the award is ambiguous and remand any ambiguous sections to the arbitrator for clarification. The arbitrator of a dispute between Ketchikan and its employees' union ordered the city to reinstate five terminated employees and restore the rights they would have had if they had not been laid off. The city asked the arbitrator to clarify the award as it did not specify the extent and duration of the employees' rights. After the arbitrator denied the request, the city sought a declaratory judgment from the superior court. The court determined that the award did not require reinstatement of the employees under the newly negotiated collective bargaining agreement, and the union appealed.[534]

The supreme court held that the superior court erred by interpreting the arbitrator's decision and instructed the superior court to remand the award to the arbitrator for clarification.[535] However, the supreme court rejected the union's argument that the superior court did not have jurisdiction over the declaratory judgment action.[536]

In *Alaska State Employees Ass'n v. Alaska Public Employees Ass'n*,[537] the supreme court approved the transfer of funds from the Alaska Public Employees Association ("APEA") to the Alaska State Employees Association ("ASEA"), the General Government Unit of the state employees' new union.[538] The supreme court found the Second Circuit's rationale in a similar case[539] persuasive. There the Second Circuit held that both unjust enrichment and the discouragement of employees' liberty to choose their own representatives by disallowing

532. *Id.* at 142-43. Other measures included increasing the loan volume handled by each loan officer, articulating a new policy on contracts and capital acquisitions to lower expenses, and eliminating positions and not filling vacancies. *Id.* at 143.

533. 805 P.2d 340 (Alaska 1991).

534. *Id.* at 341.

535. *Id.*

536. *Id.* at 342-43 (noting that the statutes and common law of Alaska demonstrate a strong policy of minimal court interference with arbitration). The union argued that the court's declaratory judgment jurisdiction normally is used only to determine matters of suitability of arbitration. The court noted that "[w]hile many declaratory actions do involve arbitrability, other issues can be resolved as well." *Id.* at 342 n.6.

537. 825 P.2d 451 (Alaska 1991).

538. *Id.* at 457.

539. Local 50, Bakery and Confectionery Workers Union, AFL-CIO v. Local 3, Bakery and Confectionery Workers Union, AFL-CIO, 733 F.2d 229 (2d Cir. 1984).

transfer of union funds are fundamental problems in this type of case.[540] The Alaska Supreme Court held that because the APEA funds were held in trust for the use and benefit of the government employees,[541] the "equitable principle against unjust enrichment" mandates the transfer of a pro rata amount of funds in all the accounts from the APEA to the ASEA.[542] The court noted that a pro rata transfer was appropriate because many employees voted to retain the APEA as their bargaining representative, hence, they did not voluntarily leave the APEA.[543]

The court also held that characterizing the funds contributed to the APEA's Strike Fund as dues was not determinative of whether the Strike Fund was a trust to benefit the employees; the APEA gave up its ownership rights to the funds, from whatever source derived, when it deposited the funds into the Strike Fund.[544] The court also concluded that the APEA's Business Leave Bank was subject to fiduciary duty analysis as a trust because the state was not personally liable for any part of the funds, and either the APEA or its members had a beneficial interest in the funds.[545]

VI. FAMILY LAW

In 1991, the Alaska Supreme Court and Court of Appeals decided ten cases in the area of family law. These cases have been subdivided into two categories: child and spousal support, and property division. Most notably, the supreme court determined in *Ogard v. Ogard*[546] that marital property should be valued at the date of trial, and applied this standard to several cases throughout the year.

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540. *Id.* at 233.

541. *Alaska State Employees Ass'n*, 825 P.2d at 457. The APEA accumulated funds into three trusts, the Strike Fund, the Legal Trust Fund, and the Business Leave Bank. *Id.* at 453.

542. *Id.* at 456-58.

543. *Id.* at 457.

544. *Id.* at 458 (the court remanded, not ruling on the status of the Strike Fund because the purpose of the fund, the beneficiaries of the fund, and the interpretation of certain clauses pertaining to the fund were questions for the trier of fact to determine).

545. *Id.* at 458-61.

546. 808 P.2d 815 (Alaska 1991). *See infra* page 174.

A. Child and Spousal Support

In *Pugil v. Cogar*,[547] the Alaska Supreme Court held that the superior court did not abuse its discretion in basing the father's child support obligation on his potential income.[548] Basing its decision on two previous decisions, *Pattee v. Pattee*[549] and *Patch v. Patch*,[550] the court declared that a "trial court must consider all the circumstances of the change in employment to determine [child support]."[551]

In *Pugil*, the court acknowledged the superior court's finding that, considering the father's child support obligation, his plans for further education and new employment as a welder were unrealistic. In addition, the court held that since the father's "reduction in income was voluntary and temporary in nature," and the mother was physically impaired, the superior court did not err in refusing to place a greater burden of support on the mother, notwithstanding that she was the custodial parent.[552]

In the divorce proceeding of *Kowalski v. Kowalski*,[553] the court again addressed a situation involving a change in employment. The supreme court affirmed the trial court's determination of child support, holding that "a showing of bad faith is not a prerequisite to a finding that unemployment is voluntary."[554] In so ruling, the court reaffirmed the principle set out in *Houger v. Houger*[555] that the obligor parent bears the burden of establishing a "'justifiable reason for being relieved of his duty to support his children.'"[556] In *Kowalski*, the obligor-husband produced no evidence supporting his claim that he could not currently earn the amount set by the trial judge. The court noted that if he could not meet his obligation, he could seek modification of the award, which would give him *and his former wife* a chance to present evidence on his ability to earn income at his pre-marriage level.[557]

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547. 811 P.2d 1062 (Alaska 1991).
548. *Id.* at 1067.
549. 744 P.2d 658 (Alaska 1987).
550. 760 P.2d 526 (Alaska 1988).
551. *Pugil*, 811 P.2d at 1066 (citing *Patch*, 760 P.2d at 529); *see also, Pattee*, 744 P.2d at 662.
552. *Pugil*, 811 P.2d at 1067.
553. 806 P.2d 1368 (Alaska 1991).
554. *Id.* at 1371.
555. 449 P.2d 766 (Alaska 1969).
556. *Kowalski*, 806 P.2d at 1371 (quoting *Houger*, 449 P.2d at 770).
557. *Id.* at 1372.

In *Musgrove v. Musgrove*,[558] the obligor-husband refused to continue rehabilitative spousal support because his wife was cohabitating with a man. The superior court found that there was no reason to discontinue the spousal support, characterizing the living arrangement as having the same economic effect as if the wife had chosen to live with a female roommate.[559] The supreme court affirmed, defining rehabilitative alimony as an award for a short duration that has a specific purpose "'limited to job training or other means directly related to entry or advancement within the work force.'"[560] Such support is modifiable only where there is a "material and substantive change in circumstances related to its purpose."[561] The court held that the former wife's cohabitation with a man did not qualify as a substantial change of circumstances, and the wife had not completed or ceased her rehabilitative efforts.[562]

B. Property Division

In *Ogard v. Ogard*[563] the Alaska Supreme Court clarified that with respect to the division of marital property, the date of valuation should be "as close as practicable to the date of trial."[564] The court explained that confusion arose when "value" had been misused in a previous decision, *Nelson v. Nelson*,[565] which involved the determination, not valuation, of marital and non-marital assets. The court noted, however, that there may be some situations in which the separation date is more appropriately used for valuation than the date of trial.[566]

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558. 821 P.2d 1366 (Alaska 1991).

559. *Id.* at 1369.

560. *Id.* (quoting Richmond v. Richmond, 779 P.2d 1211, 1215 (Alaska 1989)).

561. *Id.* at 1370.

562. *Id.*

563. 808 P.2d 815 (Alaska 1991).

564. *Id.* at 819.

565. 736 P.2d 1145 (Alaska 1987). In *Ogard*, the court stated:

> In [*Nelson*], we held that when "the parties had not co-mingled their financial affairs since their separation[, t]he separation was . . . a convenient and appropriate time at which to value the marital property for division." In so stating we misused the word "value," for there was no issue of valuation in *Nelson*. A more appropriate word would have been "determine."

Ogard, 808 P.2d at 819 (quoting *Nelson*, 736 P.2d at 1147) (citation omitted).

566. *Ogard*, 808 P.2d at 820. The court gives two examples of this: when one spouse deliberately causes the value of the marital property to decline and when the value increases due to the efforts of one of the spouses. *Id.* The court also rejected the lower court's calculation of the husband's income because it had included a $6,000 savings of rental costs which the court regarded as the imputed benefit of living in a four-plex he owned. The supreme court held that this, in effect, required the husband to pay rent to live in a place he owned. *Id.* at 818.

Ogard also involved the calculation of interim child support, retroactive to the date of separation, that was to be paid by the husband until the final amount was determined. The supreme court ruled that the superior court should have adjusted the amount of support to reflect the money that the husband spent on the children after the separation.[567] The court noted that such a reduction was not precluded because no clear agreement had been made as to custody and support obligations.[568]

Doyle v. Doyle[569] involved a husband's appeal of a lower court's division of property and award of child support. In analyzing the division of property, the supreme court relied on *Ogard v. Ogard*[570] and held that the marital property should be valued as of the date of trial unless the trial court specifically finds a special situation which requires a different valuation date.[571] Consistent with its approach in *Nelson v. Jones*,[572] the court rejected a method of valuation based on purchase price or replacement cost, and held that fair market value is the appropriate valuation of a marital asset.[573] The court also upheld the trial court's decision to include the husband's military pension as divisible marital property.[574]

The court further held that it was not an abuse of the trial court's civil contempt power to order the husband and son to return personal property taken from the wife's home.[575] However, the court concluded that the fine of $1,000 per item not returned was not a proper exercise of the court's power.[576]

In reviewing the trial court's award of child support, the supreme court concluded that the trial court impermissibly departed from the child support award required by Alaska Rule of Civil Procedure 90.3, by taking into

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567. *Id.* at 817.

568. *Id. Compare* Young v. Williams, 583 P.2d 201, 203 (Alaska 1978) (holding that when a defendant husband must pay child support and the unpaid support becomes a judgment in favor of the plaintiff, the husband "cannot, as a matter of law, claim credit on account of payments voluntarily made directly to the children").

569. 815 P.2d 366 (Alaska 1991).

570. 808 P.2d 815, 819 (Alaska 1991).

571. *Doyle*, 815 P.2d at 369.

572. 781 P.2d 964, 970 (Alaska 1989).

573. *Doyle*, 815 P.2d at 369-70.

574. *Id.* at 370 (citing Lang v. Lang, 741 P.2d 1193, 1196 (Alaska 1987)).

575. *Id.* at 371.

576. *Id.* at 371-72. Alaska Statutes section 09.50.040 states that the court may punish for contempt and "give judgment in favor of the party aggrieved" in an amount "sufficient to indemnify that party and to satisfy the costs and disbursements of that party." ALASKA STAT. § 09.50.040 (1983). In Hartland v. Hartland, 777 P.2d 636 (Alaska 1989), the court interpreted section 09.50.040 to mean that there must be a correlation between the aggrieved party's actual damages and the fine imposed. *Id.* at 648.

consideration the spouses' earning power disparity, the child's age of near-majority, and the role the child played in the divorce.[577] The supreme court held that none of the factors considered by the trial court met the requirements of Civil Rule 90.3(c), which permits variance only for "good cause."[578] The court noted that any determination of "good cause" in awarding child support must focus on the child's needs, a focus lacking in the trial court's findings.[579]

In *Moffitt v. Moffitt*,[580] the supreme court held that when calculating the value of a business' goodwill in divorce proceedings, a reasonable deduction must be taken for depreciation.[581] The supreme court held that a determination of goodwill is a question of fact, and can therefore be overturned only upon a finding of clear error on the trial court's part.[582] The court then determined that the trial court had committed clear error in its determination of goodwill because it failed to make a depreciation adjustment to any of the firm's assets in accordance with the reasoning of its recent decision in *Ogard v. Ogard*,[583] failed to attribute any income to Mrs. Moffitt because the couple had agreed she would not be paid any salary,[584] and attributed an arbitrarily low salary to Mr. Moffitt.[585]

The court further relied on *Ogard* in holding that the trial court should consider the value of the company as of the date of the trial on remand, rather than on the original divorce trial date.[586] In *Ogard*, the court opined that the later date was a better date for valuation because it reflects "'the most current and accurate information possible and . . . avoids inequitable results.'"[587]

Finally, the court recognized that judicial efficiency might require the valuation date to be the date of the original trial on remand, when

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577. *Doyle*, 815 P.2d at 372-73; *see* ALASKA R. CIV. P. 90.3 (providing that "[t]he court may vary the child support award as calculated . . . for good cause . . . .").

578. *Doyle*, 815 P.2d at 373.

579. *Id.*; *see* ALASKA R. CIV. P. 90.3 cmt. I(B).

580. 813 P.2d 674 (Alaska 1991).

581. *Id.* at 676.

582. *Id.*

583. 808 P.2d 815 (Alaska 1991). *See supra* page 170. In *Ogard*, the court stated that "[d]epreciation is a means of reflecting on an annual basis the cost of capital equipment. Such costs are real and should not be disregarded unless it appears that equipment was acquired in order to avoid or reduce an obligor's child support obligation." *Id.* at 819.

584. *Moffitt*, 813 P.2d at 676-77. The supreme court held that whether or not the parties were paying themselves a salary was irrelevant, as an objective purchaser of the business would value Mrs. Moffitt's contributions to the firm. *Id.* at 677 n.5.

585. *Id.* at 677.

586. *Id.* at 676-78.

587. *Id.* at 678 (quoting *Ogard*, 808 P.2d at 819).

circumstances force a court to value many distributed assets at their old values.[588]

In *Miles v. Miles*,[589] the supreme court affirmed the superior court's equal division of marital property in a divorce case and found no error in the trial court's finding that the husband's lobbying practice had no goodwill value.[590] The supreme court noted that the allocation of marital property is within the broad discretion of the trial court and that equal division is presumptively the most equitable, absent a showing of circumstances that would warrant otherwise.[591] In the instant case, where both parties were professionals with substantial earning capacity, it was not an abuse of discretion for the trial court to divide the marital property equally.[592]

The wife also challenged the court's classification of certain properties as the husband's separate property. The court concluded, however, that the relevant properties in Alaska belonged to the husband prior to marriage and there was no intent on the part of the parties to hold the properties jointly; the wife "did not contribute to mortgage payments or reside on the properties, nor did she assume any financial risk or work extensively to maintain or manage them."[593] The supreme court further concluded that the down payment for a jointly held Florida condominium remained the husband's separate property.[594] The court noted that although "[i]t is within the trial court's discretion to find that premarital assets have become part of the marital estate . . . commingling assets 'does not automatically establish intent to jointly hold property, and a court always should consider the property's source when determining what assets are available for distribution.'"[595]

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588. *Id.*

589. 816 P.2d 129 (Alaska 1991).

590. *Id.* at 131. The supreme court held that the use of an expert witness and of the method of capitalization of excess earnings to determine whether goodwill exists was acceptable. *Id.* As goodwill value was found not to exist, the issue of marketability of goodwill was not reached. *Id.* (citations omitted).

591. *Id.* Factors to be considered in dividing marital property are the following: "earning ability of the parties, their station in life, the circumstances and necessities of each, their physical conditions and health, their financial circumstances including the time and manner of acquisition of the property at issue, its value at the time and any income producing capacity." *Id.* (citing Merrill v. Merrill, 368 P.2d 546, 547 n.4 (Alaska 1962)).

592. *Id.*

593. *Id.* at 131-32.

594. *Id.* at 132.

595. *Id.* (quoting Carlson v. Carlson, 722 P.2d 222, 224 (Alaska 1986)). Chief Justice Rabinowitz dissented on this point, arguing that the down payment should not have been considered separate property. *Id.* at 133 (Rabinowitz, C.J., dissenting). He noted that even though property may have been acquired by one spouse prior to marriage, the court should consider the property as jointly held if the parties display an intent to treat the property as joint, "'usually through joint management and control of the property.'" *Id.* (quoting

Wood v. Collins[596] involved the division of the property of Vernon Collins and Helene Wood after the termination of their twelve-year, non-matrimonial relationship. When the relationship ended, Helene left Vernon's apartment and moved to Hawaii to live in a condominium they co-owned. Vernon brought suit to dissolve the partnership in the condominium, and Helene counterclaimed alleging that Vernon had promised to take care of her housing needs for the rest of her life, even if they separated.[597]

On appeal, the supreme court affirmed the superior court's holding that no express or implied contract to provide Helene with housing had been formed.[598] The court also held, however, that the superior court erred in awarding Vernon half of the payments made in connection with the property prior to the separation.[599] Relying on *Beal v. Beal*,[600] the court held that property accumulated during cohabitation before separation should be divided according to the express or implied intent of the parties.[601] Applying this rule, the court determined that the record supported the conclusion that it was the intent of the parties that Vernon was to pay the majority of the expenses.[602] The court additionally held that the regular rules of cotenancy should apply after the separation.[603] Although the rules of cotenancy provide that an occupying cotenant need not pay rent to the other non-occupying cotenant, the court noted that an exception exists when one cotenant's use of the property effectively excludes the other's use and enjoyment of the property.[604] The court concluded that Vernon was properly awarded half the payments made in connection with the property after separation.[605]

Carlson, 722 P.2d at 224) (Rabinowitz, C.J., dissenting). The dissent believed that the intent was shown in the instant case --both parties held title, were obligors on the note and worked together to repair and improve the property, *id.* (Rabinowitz, C.J., dissenting), -- and argued that Matson v. Lewis, 755 P.2d 1126 (Alaska 1988), which held that a down payment from separate property had become a marital asset, was indistinguishable. *Miles*, 816 P.2d at 133-34 (Rabinowitz, C.J., dissenting).

596. 812 P.2d 951 (Alaska 1991).

597. *Id.* at 953.

598. *Id.* at 955. The court also held that equitable principles did not favor Helene, and equitable relief requiring Vernon to take care of Helene's housing needs would not be appropriate. The court noted that it would not even reach the preliminary issue of whether equitable relief involving property would be available when cohabitating couples end a relationship. *Id.*

599. *Id.* at 956-57.

600. 577 P.2d 507 (Or. 1978).

601. *Wood*, 812 P.2d at 956.

602. *Id.* at 957.

603. *Id.* at 958.

604. *Id.*

605. *Id.*

In *Thomas v. Thomas*,[606] the supreme court determined the proper approach in valuing a non-vested pension. Relying on its decision in *Laing v. Laing*,[607] the court held that the lower courts need to state a specific factual finding on whether the non-vested pensions will vest in the future.[608] When it is apparent at the time of trial that the pension will not vest and that the employee's contributions will be refunded, those contributions made during the marriage will be considered marital property to be divided equally.[609] The supreme court remanded to the trial court to decide whether the pension will vest in the future. If the pension is expected to vest in the future, instead of valuing the pension at the time of trial, the court will reserve jurisdiction on the issue.[610] If the pension later vests, the court may then divide the proceeds.[611]

The court also addressed the proper valuation of a limited-entry seine permit.[612] The supreme court held that the trial court properly treated the permit as marital property but erred in failing to account for its appreciation over the course of the marriage.[613]

In *Bays v. Bays*,[614] the supreme court affirmed the lower court's award of temporary rehabilitative support, an interest in the husband's pension plan, and child support. The court first held that, since the husband was a well-paid city employee and the wife had few job skills, the award of reasonable rehabilitative support of limited duration was not an abuse of discretion by the superior court.[615] The court noted that the rule established in *Schanck v. Schanck*[616] for meeting the needs of the parties through a division of property rather than through alimony does not apply to rehabilitative or limited duration support.[617]

The court sustained the superior court's calculations and division of the husband's pension benefits on the ground that the husband waived his objection by never differentiating between the pension contributions made before or after marriage and those made during the marriage.[618] The

606. 815 P.2d 374 (Alaska 1991).
607. 741 P.2d 649 (Alaska 1987).
608. *Thomas*, 815 P.2d at 376.
609. *Id.*
610. *Id.* at 375.
611. *Id.* at 375-76.
612. *Id.*
613. *Id.* at 377.
614. 807 P.2d 482 (Alaska 1991).
615. *Id.* at 485.
616. 717 P.2d 1, 5 (Alaska 1986).
617. *Bays*, 807 P.2d at 485.
618. *Id.* at 486.

court also stated that the decision concerning the pension could be upheld on alternative grounds. A determination of when a couple ceases functioning as a unit will establish at what point post-marital property is considered separable from marital property.[619] In this case, the evidence, including the husband's monetary contributions to his wife and children after the separation and before trial, established that the couple continued to operate as a marital unit until the date of trial.[620]

Finally, the court held that the lower court properly calculated the husband's child support obligation by not deducting his pension payments from the total wage figure reported in his W-2 form. The pension deductions were non-taxable and thus would not be included in his W-2 form gross figure.[621]

VII. FISH AND GAME LAW

Seven cases were decided by the Alaska courts in the area of fish and game law during 1991. The cases addressed the requisite mens rea for certain offenses, fine limitations, proper preservation and restitution for Alaska wildlife, and the availability of the "first in time" defense.

In *Peninsula Marketing Ass'n v. State*,[622] the Alaska Supreme Court held that Alaska Statutes section 16.05.251(e) applies to the allocation of fish resources between two commercial fisheries. Peninsula Marketing Association sought injunctive relief against the enforcement of a cap of 500,000 chum on the June fishery, which was adopted by the Alaska Board of Fisheries to ensure that enough chum would reach the fisheries in the western part of Alaska.[623]

Although the Board of Fisheries rendered its case technically moot by raising the cap to 600,000 chum,[624] the supreme court heard the case because of the public interest in interpreting Alaska Statutes section 16.05.251(e).[625] This provision establishes relevant criteria for the Board of Fisheries' determination of "the allocation of fishery resources among personal use, sport and commercial fishing."[626] The court held that

619. *Id.* (citing Schanck v. Schanck, 717 P.2d 1, 3 (Alaska 1986)).

620. *Id.*

621. *Id.*

622. 817 P.2d 917 (Alaska 1991).

623. *Id.* at 918; *see also* ALASKA ADMIN. CODE tit. 5, § 09.365(f) (Oct. 1991).

624. ALASKA ADMIN. CODE tit. 5, § 09.365(f) (Oct. 1991).

625. *Peninsula Marketing*, 817 P.2d at 920.

626. The statute provides in part: "[t]he Board of Fisheries shall establish criteria for the allocation of fishery resources among personal use, sport, and commercial fishing." ALASKA STAT. § 16.05.251(e) (Supp. 1991).

although this phrase specifically meant to preclude allocation among subsistence uses, it was "equally applicable to intra-group resource allocation as [it was] to inter-group allocation," and thus included the allocation of fish between two commercial fisheries.[627] The court further reasoned that since Alaska Statutes section 16.05.251(d)[628] applied to intra-commercial allocations under *Meier v. State Board of Fisheries*,[629] it would be disharmonious for the court not to apply subsection (e) intra-commercially.[630]

The court rejected the argument that the statute's plain meaning could be overcome by the legislative history of the section: "[w]e can find no support for interpreting [Senator Fischer's] comments as meaning that no criteria need be established by the [B]oard for decisions allocating resources between two commercial fisheries."[631] Furthermore, according to the court, "the [B]oard's belief that it was supposed to apply the section 251(e) criteria supports the conclusion that section 251(e) was meant to apply to intra-group allocations."[632]

In *State v. Stein*,[633] the court of appeals rejected the rule followed by some courts that restitution is not due when a payment of a fine is made voluntarily pursuant to a mistake of law.[634] Defendant Stein was fined $1000 when he was convicted of a strict liability violation for unlawful commercial fishing in closed waters. Two years later, relying on *Constantine v. State*,[635] in which the court of appeals held that the legislature limited the fine for strict liability fishing violations to $300, Stein moved to have his judgment corrected and his fine reduced.[636] The court of appeals affirmed the district court's grant of the defendant's motion for return of $700, holding that, in doing so, the district court did not abuse its discretion.[637]

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627. *Peninsula Marketing*, 817 P.2d at 921.

628. Alaska Statutes section 16.05.251(d) provides:

> Regulations adopted under (a) of this section must, consistent with sustained yield and the provisions of [Alaska Statutes section] 16.05.258, provide a fair and reasonable opportunity for the taking of fishery resources by personal use, sport and commercial fishermen.

ALASKA STAT. § 16.05.251(d) (Supp. 1991).

629. 739 P.2d 172 (Alaska 1987).

630. *Peninsula Marketing*, 817 P.2d at 921.

631. *Id.* at 922.

632. *Id.*

633. 806 P.2d 346 (Alaska Ct. App. 1991).

634. *Id.* at 347.

635. 739 P.2d 188 (Alaska Ct. App. 1987).

636. *Stein*, 806 P.2d at 346.

637. *Id.* at 347.

In *State v. Danielson*,[638] the defendants were also convicted of commercial fishing in closed waters under a strict liability theory. They were each fined $2500 and ordered to pay the state $2000 in lieu of forfeiting their fishing nets.[639] The defendants sought and received a refund under the cap established in *Constantine*,[640] thereby reducing their fine to $300.[641]

Defendants applied for modification of their sentence under Alaska Rule of Criminal Procedure 35, and for post-conviction relief under Rule 35.1.[642] The state argued that the district court did not have jurisdiction to order the state to reimburse the defendants for the illegally assessed fines.[643] The state maintained that the order to reimburse violated Alaska Statutes section 22.15.050[644] because it was equitable in nature and turned the state into a defendant.[645] The court of appeals rejected both arguments, holding that motions for post-conviction relief are part of the original criminal proceedings and thus are not governed by the civil jurisdiction of the district court, and that the state was not turned into a defendant by the order of reimbursement because the Rule 35(a) motion was part of a criminal proceeding in which Danielson was a defendant.[646]

The court further rejected the argument that the refund was barred by sovereign immunity.[647] The court reasoned that the application for refund was not a cause of action against the state barred by Alaska Statutes section 09.50.250[648] because the application was part of the original criminal case, not an action against the state.[649]

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638. 809 P.2d 937 (Alaska Ct. App. 1991).

639. *Id.* at 938.

640. *See supra* note 635 and accompanying text.

641. *Danielson*, 809 P.2d at 938.

642. *Id.* Rule 35 details the procedure required for a reduction, correction, modification or suspension of a sentence. Rule 35.1 details procedures for post-conviction relief. ALASKA R. CRIM. P. 35, 35.1.

643. *Danielson*, 809 P.2d at 939.

644. The statute provides:

> The jurisdiction of the district courts does not extend to
>
> (1) an action in which the title to real property is in question;
>
> (2) an action for false imprisonment, libel, slander, malicious prosecution, actions of an equitable nature (except as otherwise provided by law), or actions in which the state is a defendant.

ALASKA STAT. § 22.15.050 (1988).

645. *Danielson*, 809 P.2d at 939.

646. *Id.*

647. *Id.* at 940.

648. The statute outlines what types of claims are actionable against the state. ALASKA STAT. § 09.50.250 (1983 & Supp. 1991).

649. *Danielson*, 809 P.2d at 941.

In *McCann v. State*,[650] the court of appeals rejected the state's theory of "making the state whole," and found that ordering forfeiture when seizure had already occurred contravened the plain meaning of Alaska Statutes section 16.05.722.[651] Officers of the State Fish and Wildlife Protection Agency seized undersized crab from defendant McCann's vessel and returned them to the sea. The trial court imposed the maximum fine under the statute and also entered a forfeiture order requiring McCann to pay the fair market value of the crabs that were either dead or unlikely to survive their return to the sea.[652] McCann appealed the forfeiture order, arguing that the state could not seize the crab and then impose a forfeiture order. The state contended that the forfeiture order was proper because McCann had to pay the fair market value of only those crabs that were either dead or unlikely to survive, thus making the state whole by compensating it for a lost resource.[653] In rejecting this argument, the court of appeals held that the controlling statute seeks to prevent any profit from illegal catches and in so doing provides for one of two penalties for fishers: fine or forfeiture. Forfeiture may be either the crab itself or its fair market value. Since McCann did not profit from sale of the crab, he was not subject to forfeiture.

In *Jurco v. State*,[654] the court of appeals interpreted the meaning of the term "salvage" in section 92.410(b) of title 5 of the Alaska Administrative Code[655] to impose a duty to save property from destruction or waste.[656] In the case of defensive game killing, the killer has a "duty to deliver the meat to the authorities and to exercise reasonable

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650. 817 P.2d 484 (Alaska Ct. App. 1991).

651. The section provides in pertinent part:

> (a) A person who without any culpable mental state violates [Alaska Statutes section] 16.05.440 - 16.05.690, or a regulation of the Board of Fisheries or the department governing commercial fishing, is guilty of a violation and upon conviction is punishable by a fine of not more than
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> (1) $3,000 for a first conviction; and
>
> (2) $6,000 for a second or subsequent conviction.
>
> (b) In addition, the court shall order forfeiture of any fish, or its fair market value, taken or retained as a result of the commission of the violation.

ALASKA STAT. § 16.05.722 (Supp. 1991).

652. *McCann*, 817 P.2d at 485-86.

653. *Id.* at 486.

654. 816 P.2d 913 (Alaska Ct. App. 1991).

655. This section provides:

> Game taken in defense of life or property is the property of the state. A person taking such game shall immediately salvage the meat . . . . A person taking game under this section shall notify the department of the taking immediately, and shall submit a written report of the circumstances of the taking to the department within 15 days after the taking.

ALASKA ADMIN. CODE tit. 5, § 92.410(b) (Oct. 1991).

656. *Jurco*, 816 P.2d at 914.

care in assuring that the meat is delivered in an edible condition."[657] The court noted that in some cases this regulation may require gutting the animal or delivering the animal to the authorities in order to preserve the meat, but it did not impose an absolute duty to gut the animal in all cases.[658]

In *Waiste v. State*,[659] the court of appeals concluded that the general negligence standard prescribed in Alaska Statutes section 16.05.723[660] does not supersede Board of Fisheries' regulations that specify a mens rea other than negligence. Specifically, the court determined that regulation section 39.105(d)(3) of title 5 of the Alaska Administrative Code,[661] which provides that a drift gill net is legal when it "'has not been *intentionally* staked, anchored, or otherwise fixed . . . .'"[662] still requires a mens rea of intent rather than the lower negligence standard. The court reasoned that to hold that the later-enacted statute superseded prior regulations would "contravene[] the widely accepted presumption against repeal of prior laws by implication."[663] As additional support for its decision, the court noted the general rules that (1) a more specific statute should prevail when different statutes, albeit in broader terms, deal with the same subject; and (2) ambiguous criminal statutes should be strictly construed in favor of the accused.[664]

In *Clucas v. State*,[665] the court of appeals reversed the defendant's conviction for operating a set gill net within 600 feet of another gill net for the first time,[666] holding that the "first in time, first in right" defense applies in criminal cases, even those involving violations of strict liability statutes.[667] The court noted that the principle has been applied consistently in civil cases and that Alaska courts have assumed that the

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657. *Id.* at 915.

658. *Id.*

659. 808 P.2d 286 (Alaska Ct. App. 1991).

660. *Id.* at 289-90. Alaska Statutes section 16.05.723(a) provides in pertinent part: "[a] person who negligently violates [Alaska Statutes section] 16.05.440 - 16.05.690, or a regulation of the board of fisheries or the department governing commercial fishing, is guilty of a misdemeanor . . . ." ALASKA STAT. § 16.05.723(a) (Supp. 1991).

661. ALASKA ADMIN. CODE tit. 5, § 39.105(d)(3) (Oct. 1991).

662. *Waiste*, 808 P.2d at 287 (quoting ALASKA ADMIN. CODE tit. 5, § 39.105(d)(3) (Oct. 1991)) (emphasis added).

663. *Id.* at 289 (citing 1A C. DALLAS SANDS, SUTHERLAND STATUTORY CONSTRUCTION § 23.10, at 346 (Norman J. Singer ed., rev. 4th ed. 1985)).

664. *Id.* (citations omitted).

665. 815 P.2d 384 (Alaska Ct. App. 1991).

666. *Id.* at 385. Clucas argued that he had placed his nets first and a subsequent person had placed his nets within 600 feet of Clucas' net. *Id.*

667. *Id.* at 388.

defense also applies to violations of minimum distance fishing regulations.[668]

In addressing whether the defense should apply to the violation in question, which triggered strict liability violations, the court concluded that the wording of the relevant statute, Alaska Statutes section 16.05.722, which establishes liability for those who violate fisheries regulations "'without any culpable mental state,'"[669] affects only defenses based on the lack of a culpable mental state, not defenses unrelated to mental state.[670] In reaching this conclusion, the court distinguished strict from absolute liability. Strict liability prohibits any defenses based on the accused's mental state, whereas absolute liability precludes any defense at all.[671] This distinction recognizes that proof of all elements of a crime may not link the defendant to the harm sought to be prevented by the statute.[672] The "first in time, first in right" defense is valid for minimum distance fishing violations because the harm of depleting Alaska's fishery resources is caused not by the first person who begins fishing, but by subsequent arrivals who fish within 600 feet. In deference to the state's interest in assuring that its regulations are effectively enforced, the court imposed a significant limitation on raising a "first in time" assertion: the defendant must affirmatively raise the defense and bear the burden of proof by a preponderance of the evidence.[673]

VIII. PROCEDURE

The Alaska Supreme Court faced a variety of procedural challenges during 1991. Although many of these cases involve substantive questions of import, procedural issues predominate and thus justify treatment in a separate section. The case summaries fall into four categories: failure of prosecution, modification of final judgment, statute of limitations, and attorneys' fees and sanctions. Other case summaries appear in the "miscellaneous" heading at the end of this section.

Three cases of particular interest in this area are *State v. Municipality of Anchorage*,[674] which determined when it is appropriate to order a new trial for less than all the parties involved, *Lee Houston & Associates, Ltd.*

668. *Id.* at 387-88.
669. *Id.* at 389 (quoting ALASKA STAT. § 16.05.722 (1991)).
670. *Id.*
671. *Id.* at 388.
672. *Id.* at 389-90.
673. *Id.* at 390.
674. 805 P.2d 971 (Alaska 1991). *See infra* page 198.

v. Racine,[675] which expanded the statute of limitations applicable to claims for professional malpractice, and *Pedersen v. Zielski*,[676] which modified the "discovery rule" applied to the statute of limitations.

A. Failure of Prosecution

In *Power Constructors, Inc. v. Acres American*,[677] the Alaska Supreme Court affirmed the superior court's dismissal of an action with prejudice because the claimant failed to prosecute the case for three years.[678] Power Constructors, Inc. filed suit in 1986, but failed to advance the proceeding beyond preliminary discovery. More than a year passed with neither party taking further action; the superior court served notice of dismissal in 1988. After having been granted an opposition to the notice and a motion for additional time for withdrawal and substitution of attorney, Power Constructors again took no action on the case for more than a year. In 1989, the superior court dismissed the action with prejudice.[679]

The supreme court held that, by themselves, the substitution of counsel and the need for additional time to review the lawsuit were not good cause for the sixteen-month delay caused by Power Constructors.[680] The court also ruled that the trial memorandum filed by Power Constructors after the court-issued notice of dismissal did not constitute a "proceeding" within the meaning of Alaska Rule of Civil Procedure 41(e), and therefore could not prevent dismissal.[681] The court also held that dismissal with prejudice was proper where Power Constructors made no diligent effort to move the case forward, filed no motion for additional time, and let the case drag on for three years.[682]

Moreover, the supreme court concluded that the trial court properly exercised its discretion in dismissing the case because it conducted a "reasonable exploration of possible and meaningful alternatives to dismissal."[683] The supreme court determined that Acres American was

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675. 806 P.2d 848 (Alaska 1991). *See infra* page 190.

676. 822 P.2d 903 (Alaska 1991). *See infra* page 194.

677. 811 P.2d 1052 (Alaska 1991).

678. *Id.* at 1053.

679. *Id.*

680. *Id.* at 1054.

681. *Id.* Alaska Rule of Civil Procedure 41(e) states that dismissal is proper when no proceeding has been undertaken in more than a year. The rule was designed to stop stall tactics and prevent coercion of settlement of non-meritorious lawsuits. *Id.* at 1053-54.

682. *Id.* at 1055.

683. *Id.* The trial court had rejected alternative routes such as fining Power Constructors

prejudiced by the delay because the lapse of time increased the costs associated with locating and deposing witnesses.[684] The court noted in dicta, however, that a showing of prejudice is not necessary to find proper a court's dismissal with prejudice.[685]

In *Ford v. Municipality of Anchorage*,[686] the supreme court held that Alaska Rule of Civil Procedure 16.1 provides the exclusive procedure for dismissing "fast-track" cases for failure to prosecute. Rule 16.1(g) provides that a court will transfer a case designated as "fast-track" to the inactive calendar if no motion to set trial is filed within 270 days after service of the summons and complaint.[687]

The supreme court held that dismissal under Alaska Rule of Civil Procedure 41(e) was improper in light of Rule 16.1(m), which states that Rule 16.1 supersedes all other civil rules in cases of conflict.[688] In this case, the court noted that the superior court failed to transfer the case to the inactive calendar, and thereby failed to provide the plaintiff with adequate notice.[689] The court concluded that since the plaintiff's case was specifically assigned to the fast-track, she should have been afforded all the protections of Rule 16.1, including proper notice.[690]

In dissent, Justice Burke argued that the majority's strict compliance with the rules of civil procedure led to an "absurd and manifestly unjust" result.[691] Justice Burke contended that Alaska Rule of Civil Procedure 94[692] should have been invoked to permit the court to forego strict adherence to the rules when injustice would result.[693]

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or awarding Acres American the costs of finding and deposing witnesses. *Id.* Justice Rabinowitz dissented, arguing that the dismissal was improper since the statute of limitations had not yet run on the action. *Id.* at 1057 (Rabinowitz & Matthews, J.J., dissenting).

684. *Id.* at 1056.

685. *Id.* at 1056 n.7.

686. 813 P.2d 654 (Alaska 1991).

687. *Id.*

688. *Id.*

689. *Id.* at 656.

690. *Id.*

691. *Id.* (Burke, J., dissenting)

692. Rule 94 states that "[t]hese rules are designed to facilitate business and advance justice. They may be relaxed or dispensed with by the court in any case where it shall be manifest to the court that a strict adherence to them will work injustice." ALASKA R. CIV. P. 94.

693. *Ford*, 813 P.2d at 656 (Burke, J., dissenting).

B. Modification of Final Judgment

In *Barnes v. Barnes*,[694] the Alaska Supreme Court held that, contrary to the general rule announced in *Duriron Co. v. Bakke*,[695] the superior court did not need to petition the supreme court for remand in order to modify a final judgment under Alaska Rule of Civil Procedure 60(b)[696] when the case was on appeal.[697] Instead, the court affirmed the superior court's grant of Ramona Barnes' Rule 60(b) motion,[698] stating that an application to the supreme court would have been unnecessary because its earlier remand order directing the superior court to resolve the question at issue in the 60(b) motion -- the "distribution of certain deferred compensation funds" -- gave the superior court authority to rule on the Rule 60(b) motion.[699]

The supreme court also found that the superior court's order to pay $82,000 and accrued earnings on a deferred income account from the date of the original divorce decree to the date of the order was not beyond Mr. Barnes' financial ability because he had the option of either liquidating his assets to satisfy the order or obtaining the money from the deferred income account.[700] Similarly, the court found that tax implications should not be taken into account in this award[701] because, although Mr. Barnes would

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694. 820 P.2d 294 (Alaska 1991).

695. 431 P.2d 499 (Alaska 1967). *Duriron* held that if the superior court wishes to grant a Rule 60(b) motion while an appeal is pending "it must first apply for and obtain a remand of the case from this court for the stated purpose of granting a Civil Rule 60(b) motion." *Id.* at 500.

696. The rule provides in part:

> (b) On motion and upon such terms as are just, the court may relieve a party or his legal representative from a final judgment, order, or proceeding for the following reasons:
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> (1) mistake, inadvertence, surprise or excusable neglect;
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> (2) newly discovered evidence which by due diligence could not have been discovered in time to move for a new trial under Rule 59(b);
>
> (3) fraud (whether heretofore denominated intrinsic or extrinsic), misrepresentation, or other misconduct of an adverse party;
>
> (4) the judgment is void;
>
> (5) the judgment has been satisfied, released, or discharged, or a prior judgment upon which it is based has been reversed or otherwise vacated, or it is no longer equitable that the judgment should have prospective application; or
>
> (6) any other reason justifying relief from the operation of the judgment.
>
> . . . .

ALASKA R. CIV. P. 60(b).

697. *Barnes*, 820 P.2d at 296.

698. Ramona Barnes sought amendment to the original divorce decree that awarded her Larry Barnes' deferred income account because the account was found to be non-transferrable and could be made available only upon a showing of current financial hardship. *Id.* at 295.

699. *Id.* at 297.

700. *Id.*

701. *Id.* The court noted that in order to take tax liability into consideration, there must

have to pay taxes on the deferred income account, "it is uncertain as to whether [he] intends . . . to use the deferred income account to discharge his liability to [his former spouse]."[702]

The court did find, however, that the superior court should have considered Mr. Barnes' Rule 60(b) motion based on its independent jurisdiction.[703] The court remanded this portion of the appeal and noted that no further remand would be necessary if the superior court decided to grant his Rule 60(b) motion because the case would no longer be pending before the supreme court.[704]

In *Lowe v. Lowe*,[705] the supreme court held that a final judgment, in this case a divorce decree, may be modified under Alaska Rule of Civil Procedure 60(b)(6)[706] in a case where a dissolution petition provided that one spouse would have primary custody of the children, but the other spouse maintained primary custody despite the petition. The supreme court held that the husband's non-disclosure of his military retirement benefits, interest in oil leases and marital home did not justify relief from the decree by operation of Rule 60(b)(6),[707] and that his threat to "use every available legal means to protect his interests" did not amount to the "extraordinary circumstances" contemplated by subsection (6).[708] The court found, however, that the couple's agreement to let the husband have the retirement benefits because he was to have primary custody of the children was a "valid basis for modifying the dissolution decree under subsection (6) of Rule 60(b)" where he did not take the children.[709] The court found the factors set out in *Schofield v. Schofield*[710] used to determine "extraordinary circumstances" that justify relief under Rule 60(b)(6) had been met because the breach of the agreement destroyed the underlying assumption of the decree.[711]

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be "'immediate and specific tax liability.'" *Id.* (quoting Oberhansly v. Oberhansly, 798 P.2d 883, 887 (Alaska 1990)).

702. *Id.*

703. *Id.* at 298.

704. *Id.*

705. 817 P.2d 453 (Alaska 1991).

706. *See supra* note 696.

707. *Lowe*, 817 P.2d at 457-58.

708. *Id.* at 458.

709. *Id.* at 459.

710. 777 P.2d 197 (Alaska 1989). The four factors consider whether: "(1) the fundamental, underlying assumption of the dissolution agreement had been destroyed; (2) the parties' property division was poorly thought out; (3) the property division was reached without the benefit of counsel; and (4) the marital residence was the parties' principal asset." *Id.* at 202.

711. *Lowe*, 817 P.2d at 459.

The court also found that although a Rule 60(b)(6) motion is not subject to the one-year time limitation of motions based on subsections (1) through (3), it must nonetheless be filed within a reasonable time.[712] The supreme court remanded the case for a determination of whether four and one-half years constituted a reasonable amount of time for purposes of Rule 60(b)(6).[713]

C. Statute of Limitations

In *Lee Houston & Associates, Ltd. v. Racine*,[714] the supreme court resolved the conflict over the statute of limitations to be applied in cases involving alleged professional malpractice.[715] The plaintiff entered into an agreement with a real estate agent of the defendant's company to sell property received in an estate settlement. The property was sold for cash and a promissory note supposedly secured by a "third" deed of trust on property in Anchorage, terms that the plaintiff claimed the agent represented as "exceptional."[716] The buyer ceased making payments on the note after approximately a year, and did not respond to a demand letter sent by the plaintiff's lawyer. In 1986, the plaintiff received notice of foreclosure on the Anchorage property from the holder of a senior deed on the property. It was at this time that the plaintiff learned that she had a sixth deed of trust and that there was over $410,000 of indebtedness superior to hers on the property. She filed suit against the agent and the real estate company, claiming negligence, misrepresentation, fraud and breach of professional contract of employment.[717]

The supreme court affirmed the trial court's ruling that the tort claims were barred by the two-year statute of limitations in Alaska Statutes section 09.10.070 because the plaintiff should have known of the conduct of the agent when she received no answer from her demand letter.[718] The court

712. *Id.* at 457.

713. *Id.*

714. 806 P.2d 848 (Alaska 1991).

715. For further discussion of this case and the statute of limitations applicable to malpractice claims, see Scott Lawrence Altes, Note, *The Statute of Limitations For Professional Malpractice in Alaska After* Lee Houston & Associates, Ltd. v. Racine, 9 ALASKA L. REV. 41 (1992).

716. *Lee Houston*, 806 P.2d at 850. The plaintiff received $100,000 cash and a $255,000 promissory note supposedly secured by a third deed of trust on property in Anchorage. She claimed that the agent represented that the deed she was receiving was a third deed of trust with only $70,000 to $80,000 in debt ahead of her. In truth, the closing documents clearly indicated that the deed to the Anchorage property was a sixth deed of trust with more than $410,000 in superior indebtedness. *Id.*

717. *Id.*

718. *Id.*

next considered the plaintiff's breach of contract claim. The defendants argued that plaintiff's breach of contract claim actually sounded in tort as a claim of professional malpractice, and therefore that the two-year torts statute of limitations[719] applied rather than the six-year contracts statute of limitations.[720] The defendant relied on *Van Horn Lodge, Inc. v. White*,[721] in which the supreme court treated an attorney malpractice claim as a tort claim because there was no breach of a particular promise, only of a duty of due care imposed by law.[722] The plaintiff, on the other hand, relied on *Bibo v. Jeffrey's Restaurant*,[723] where the supreme court held that a breach of fiduciary duty by a corporate director was a claim upon an implied contract,[724] and claimed that the listing agreement gave rise to fiduciary duties owed by the defendant.

The court recognized that although both cases dealt "with a professional's alleged breach of a duty of due care which was implied by law as a result of a contractual undertaking,"[725] one claim was deemed to be a tort claim and the other a contract claim. The court attributed this inconsistency to "the limited utility of the 'gravamen' test in the context of claims of professional incompetence which may be reasonably said to arise either in tort or in contract."[726] The court looked at the language of the statutes, as well as the policies behind them, to resolve the inconsistency of prior case law and to determine the applicable statute of limitations.

The court noted that the language of the two-year statute of limitations[727] indicates its inapplicability to "actions arising out of professional service relationships which primarily involve economic injury."[728] The statute, which specifically limits the claims for injuries to the "rights of another *not arising on contract*,"[729] cannot apply to a breach of a professional service arising in part from a contract. In contrast, the court noted that language in the six-year statute of limitations, which limits claims "'upon a contract *or liability*,'" does seem to include claims

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719. ALASKA STAT. § 09.10.070 (1983). *See supra* note 157.

720. ALASKA STAT. § 09.10.050 (1983).

721. 627 P.2d 641 (Alaska 1981).

722. *Lee Houston*, 806 P.2d at 852-53 (citing *Van Horn Lodge*, 627 P.2d at 643).

723. 770 P.2d 290 (Alaska 1989).

724. *Lee Houston*, 806 P.2d at 853 (citing *Bibo*, 770 P.2d at 295-96).

725. *Id.*

726. *Id.* at 853-54 (citing Jones v. Wadsworth, 791 P.2d 1015, 1017 (Alaska 1973)). The court has held that the "gravamen" of the plaintiff's claim determines if the claim sounds in contract or in tort, thereby determining the applicable statute of limitations. *Id.* at 852 (citing *Van Horn Lodge*, 627 P.2d at 643; Austin v. Fulton Ins. Co., 444 P.2d 536, 538-39 (Alaska 1968)).

727. ALASKA STAT. § 09.10.070 (1983).

728. *Lee Houston*, 806 P.2d at 854.

729. ALASKA STAT. § 09.10.070 (1983) (emphasis added).

arising from professional service relationships, even if the claim is not based exclusively on contract principles.[730]

The court further supported its decision on the basis of policy, noting that courts generally favor longer limitations periods.[731] Further, the court felt application of the longer period of limitations would be consistent with the primary purpose of statutes of limitations -- to encourage the prompt bringing of claims "and avoid injustice which may result from lost evidence, faded memories and disappearing witnesses."[732] In cases based on economic loss, such as the plaintiff's claim in *Lee Houston*, the court concluded that the evidence would be largely documentary, and that the likelihood of memories fading or witnesses being lost would be low.[733]

The court thus held that the action was based on a "contract or liability" for the purposes of determining the applicable statute of limitations, and overruled *Van Horn Lodge* to the extent that it was inconsistent with this holding.[734] Justices Burke and Moore dissented, arguing that *Bibo* instead of *Van Horn Lodge* should be overruled because the claim sued on arose in tort, not in contract.[735]

In *Cameron v. State*,[736] the supreme court added a third part to the discovery rule, which determines when an action accrues for purposes of the statute of limitations. Alaska Statutes section 09.10.070[737] requires that a claim be brought within two years of the accrual of the cause of action.[738] The traditional rule provided that accrual was established at the time of injury,[739] but the "discovery rule" was developed to deal with the situation where the injury does not provide sufficient notice of the cause of action.[740] The supreme court reviewed previous cases and expressed the discovery rule as follows:

> (1) a cause of action accrues when a person discovers, or reasonably should have discovered, the existence of all elements essential to the cause of action;

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730. *Lee Houston*, 806 P.2d at 854 (quoting ALASKA STAT. § 09.10.050 (1983) (emphasis added)).

731. *Id.* at 854-55.

732. *Id.* at 855 (citation omitted).

733. *Id.*

734. *Id.*

735. *Id.* at 856-57 (Burke, J., dissenting).

736. 822 P.2d 1362 (Alaska 1991).

737. ALASKA STAT. § 09.10.070 (1983).

738. *Cameron*, 822 P.2d at 1364-65.

739. Pedersen v. Zielski, 822 P.2d 903, 906 (Alaska 1991), *see infra* page 194; Russell v. Municipality of Anchorage, 743 P.2d 372, 375 (Alaska 1987).

740. *Cameron*, 822 P.2d at 1365.

> (2) a person reasonably should know of his cause of action when he has sufficient information to prompt an inquiry into the cause of action, if all of the essential elements of the cause of action may reasonably be discovered within the statutory period at a point when a reasonable time remains within which to file suit.[741]

The court also added a third part to the discovery rule based on *Pedersen v. Zielski*:[742]

> where a person makes a reasonable inquiry which does not reveal the elements of the cause of action within the statutory period at a point where there remains a reasonable time within which to file suit, the limitations period is tolled until a reasonable person discovers actual knowledge of, or would again be prompted to inquire into, the cause of action."[743]

The court concluded that Cameron, a miner, was on inquiry notice at least by March 7, 1984, when he was informed by his doctor that he had asthma,[744] and that he could reasonably have filed his suit within ten months.[745]

In a concurring opinion, Justice Compton stated that he believed the case should have been affirmed based on a "straightforward application of *Mine Safety Appliances Co. v. Stiles*."[746] He argued that *Mine Safety* does not suggest two different accrual dates, nor does *Pedersen* add a third part to the discovery rule.[747] He concluded that the cause of action in *Cameron* accrued on February 27, 1984, when Cameron first approached his doctor. Justice Compton further suggested that the court's responsibility is to determine when the time limits commence, not to determine whether the time limits set by the legislature are reasonable.[748]

In *State Department of Corrections v. Welch*,[749] the court again applied the discovery rule in barring an action brought against the Department of Corrections by the parents of a teenager shot and killed by

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741. *Id.* at 1366 (citing Mine Safety Appliances Co. v. Stiles, 756 P.2d 288 (Alaska 1988); Palmer v. Borg-Warner Corp., 800 P.2d 920 (Alaska 1990), *superseded by* 818 P.2d 632 (Alaska 1991)).

742. 822 P.2d 903 (Alaska 1991), *see infra* page 194.

743. *Cameron*, 822 P.2d at 1367.

744. Cameron consulted a doctor about his breathing difficulties on February 27, 1984. On May 7, 1984, the doctor provided Cameron with a letter stating that there was evidence to suggest that his breathing difficulties stemmed from occupational exposure. Cameron dug tunnels and was exposed to heavy concentrations of rock dust, diesel exhaust and dynamite-blasting by-products. *Id.* at 1363-64.

745. *Id.* at 1367. On March 14, 1986, more than two years after his initial visit to the doctor, Cameron filed a complaint against the state for negligence in failing to provide a safe workplace. *Id.* at 1364.

746. *Id.* at 1368 (Compton, J., concurring) (citing *Mine Safety*, 756 P.2d at 288).

747. *Id.* at 1369-70.

748. *Id.* at 1370.

749. 805 P.2d 979 (Alaska 1991).

a parolee. Although the murder occurred on August 18, 1986, and the parolee was arrested on September 9, 1986, the parents did not file suit until January 12, 1989.[750] The state moved for summary judgment, claiming that the suit was time-barred by Alaska Statutes section 09.55.580(a).[751] The parents also moved for summary judgment, arguing that the earliest date the statute of limitations could begin to run was February 5, 1987, the date the parolee pleaded guilty to the murder.[752] The superior court denied both motions, noting that genuine issues of material fact existed concerning when the plaintiffs had adequate knowledge of an available cause of action.[753]

The supreme court reversed, directing the superior court to enter judgment in favor of the state. The court applied the discovery rule, which holds that a statute of limitations "begins to run 'when a reasonable person has enough information to alert that person that he or she has a potential cause of action or should begin inquiry to protect his or her rights.'"[754] The court noted that among other things, the parents had knowledge through the newspapers and television of the murderer's status as a parolee, and that the Judgment and Order of Probation on Indictment concerning the murderer was a public document that stated as a condition of probation that the individual seek psychiatric treatment.[755] The court deemed the information available to the parents sufficient to provide the critical inquiry notice to them prior to January 12, 1987.[756]

In *Pedersen v. Zielski*,[757] the supreme court held that the discovery rule applies not only when an injury "is undiscovered and reasonably undiscoverable" but also where "the injury is known but its cause is unknown and reasonable diligence would not lead to its discovery."[758] This medical malpractice case was governed by a two-year statute of limitations pursuant to Alaska Statutes section 09.10.070 and Alaska's

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750. *Id.* at 980.

751. The statute provides in part:

> [w]hen the death of a person is caused by the wrongful act or omission of another, the personal representatives of the former may maintain an action therefore against the latter, if the former might have maintained an action, had the person lived, against the latter for an injury done by the same act or omission. The action shall be commenced within two years after the death . . . .

ALASKA STAT. § 09.55.580(a) (Supp. 1991).

752. *Welch*, 805 P.2d at 981.

753. *Id.*

754. *Id.* at 982 (quoting Mine Safety Appliances Co. v. Stiles, 756 P.2d 288, 291 (Alaska 1988)).

755. *Id.* at 981.

756. *Id.* at 982.

757. 822 P.2d 903 (Alaska 1991).

758. *Id.* at 907.

broad formulation of the discovery rule.[759] The court opined that in this case the cause of the plaintiff's injury might not be reasonably deduced from the information available to him.[760] Moreover, the court found that the plaintiff had been diligent in questioning his doctors and hiring lawyers to investigate the situation.[761] Subsequently, the court found that a jury question existed as to whether the plaintiff's inquiry was reasonable, noting that if the jury so found, the statute of limitations "should not accrue until [the plaintiff] received actual knowledge of the cause of his paralysis or he received new information which would prompt a reasonable person to inquire further."[762]

The court also found that because of the existing physician-patient relationship between the plaintiff and his doctors (defendants), the defendants could be estopped from relying on the statute of limitations.[763] The court opined that the doctors' non-disclosure of a possible cause of the plaintiff's injury satisfied the first prong of the equitable estoppel analysis set forth in *Russell v. Municipality of Anchorage*.[764] Relying on various case law from other states, the court found that "the fact that the true state of affairs appeared in the medical records [did not] necessarily preclude[] an estoppel."[765]

In *Fields v. Fairbanks North Star Borough*,[766] the supreme court held that for the purposes of tolling a statute of limitations provision, the limitation period will exclude the date of the triggering event and include the last day of the limitations period.[767] Angel McFetridge was injured at North Pole High School before she had achieved the age of majority.[768] Because she was a minor when injured, Alaska Statutes section 09.10.140 governed the applicable statute of limitations period, deemed to be two years after majority is reached.[769]

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759. *Id.* at 906-07; *see* State Dep't of Corrections v. Welch, 805 P.2d 979 (Alaska 1991).

760. *Pedersen*, 822 P.2d at 907.

761. *Id.*

762. *Id.* at 908. Justice Compton's dissent noted that the majority's reasoning produced two distinctive discovery rule accrual dates: first, "when the plaintiff has information sufficient to alert a reasonable person to the fact that he has a potential cause of action"; and second, when "within the statutory period, the essential elements may be reasonably discovered." Compton found this two-part analysis contrary to the discovery rule adopted in Greater Area Inc. v. Bookman, 657 P.2d 828 (Alaska 1982). *Pedersen*, 822 P.2d at 911 (Compton, J., dissenting in part).

763. *Pedersen*, 822 P.2d at 908-09.

764. 743 P.2d 372 (Alaska 1987).

765. *Pedersen*, 822 P.2d at 910.

766. 818 P.2d 658 (Alaska 1991).

767. *Id.* at 661.

768. *Id.* at 659.

769. *Id.*; *see* ALASKA STAT. § 09.10.140 (Supp. 1991).

The supreme court noted that the "common law rule for computation of time periods," codified in Alaska Statutes section 01.10.080, governed when the statute of limitations ran.[770] The court rejected the superior court's application of the birthday exception "under which a person is deemed to have reached a given age on the earliest moment of the day preceding an anniversary of birth,"[771] as contrary to the common concept of a birthday.[772] Instead, the court applied the common law practice of computing a statute of limitations time period by excluding the day of the triggering event -- here the attainment of majority age -- and including the final day of the period.[773] Thus the court held that McFetridge's claim was timely because it was filed on the first business day following the birthday two years after she reached the age of majority.[774]

D. Attorneys' Fees and Sanctions

In *Citizens Coalition for Tort Reform, Inc. v. McAlpine*,[775] the supreme court affirmed the denial of certification of an initiative to set limits on the recovery of attorneys' fees in personal injury cases.[776] Applying Alaska Statutes section 15.45.010[777] and article XI, section 7 of the Alaska Constitution,[778] the court concluded that the initiative was properly removed from the "sphere of the electorate,"[779] because it attempted to prescribe a rule of court. Additionally, the court held that the superior court did not abuse its discretion in finding that the group was not

770. *Fields*, 818 P.2d at 660. Alaska Statutes section 01.10.080 provides: "[t]he time in which an act provided by law is required to be done is computed by excluding the first day and including the last, unless the last day is a holiday, and then it is excluded." ALASKA STAT. § 01.10.080 (1990).

771. *Fields*, 818 P.2d at 660.

772. *Id.* at 661.

773. *Id.*

774. *Id.*

775. 810 P.2d 162 (Alaska 1991). For further discussion of this case, see Laurence Keyes, *Alaska's Apportionment of Damages Statute: Problems for Litigants*, 9 ALASKA L. REV. 1, 15 n.75 (1992).

776. *Citizens Coalition*, 810 P.2d at 163.

777. Alaska Statutes section 15.45.010 provides that the people may exercise, through the initiative, the law-making powers of the legislature, subject to the same restrictions that appear in article XI, section 7 of the Alaska Constitution. ALASKA STAT. § 15.45.010 (1988).

778. Article XI, section 7 of the constitution provides that "[t]he initiative shall not be used to dedicate revenues, make or repeal appropriations, create courts, define the jurisdiction of courts or prescribe their rules, or enact local or special legislation." ALASKA CONST. art. XI, § 7.

779. *Citizens Coalition*, 810 P.2d at 170-71.

a public interest litigant and thus that the group had to pay attorneys' fees.[780] The Coalition failed to prove that there was no relationship between the lawsuit and the group's economic interests, and thereby failed to satisfy the last criterion of the four necessary to be considered a public interest litigant.[781]

Alaska State Employees Ass'n v. Alaska Public Employees Ass'n[782] involved a dispute over union dues between two groups competing to represent state employees. After the Alaska State Employees Association ("ASEA") won the representation election, there was a four-month delay before it was certified formally as the union representative. During that delay, the former union bargaining representative, the Alaska Public Employees Association ("APEA") continued to collect dues and later sent demands for delinquent dues to members represented by ASEA.[783] ASEA filed suit to enjoin the union from collecting these dues and to force APEA to disgorge any other dues wrongfully collected.[784] Although the suit was dismissed, APEA filed for and was granted sanctions under Alaska Rule of Civil Procedure 11.[785]

The supreme court concluded that the superior court abused its discretion in awarding sanctions, stating: "[i]n our view, "ASEA's position was not so devoid of merit as to justify the imposition of sanctions."[786]

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780. *Id.* at 171-72.

781. *Id.* The four criteria for identifying a public interest litigant are:
(1) Is the case designed to effectuate strong public policies?
(2) If the plaintiff succeeds will numerous people receive benefits from the lawsuit?
(3) Can only a private party have been expected to bring the suit?
(4) Would the purported public interest litigant have sufficient economic incentive to file suit even if the action involved only narrow issues lacking general importance?
Id. (quoting Anchorage Daily News v. Anchorage School District, 803 P.2d 402, 404 (Alaska 1990)).

782. 813 P.2d 669 (Alaska 1991).

783. *Id.* at 670.

784. *Id.* at 670-71.

785. The version of the rule in effect at the time the superior court granted the sanctions read in part:
> The signature of an attorney or party constitutes a certificate by him that he has read the pleading, motion, or other paper; that to the best of his knowledge, information, and belief formed after reasonable inquiry it is well grounded in fact and is warranted by existing law or a good faith argument for the extension, modification, or reversal of existing law, and that it is not interposed for any improper purpose, such as to harass or to cause unnecessary delay or needless expense in the cost of the litigation. . . . If a pleading, motion, or other paper is signed in violation of this rule, the court, upon motion or upon its own initiative, shall impose upon the person who signed it, a represented party, or both, an appropriate sanction . . . .

ALASKA R. CIV. P. 11. This rule is virtually identical to the federal rule. Recent amendment to the rule deleted the mandatory sanction provision. *Alaska State Employees Ass'n*, 813 P.2d at 671 n.4.

786. *Alaska State Employees Ass'n*, 813 P.2d at 672.

The court held that ASEA's argument that no employee is obligated to pay dues after employees vote to replace a union as its bargaining representative constituted a good faith argument for the extension, modification, or reversal of existing law.[787] The court further held that the theories of relief advanced by ASEA to enjoin APEA from collecting delinquent dues were reasonable.[788]

E. Miscellaneous

State v. Municipality of Anchorage[789] involved an issue of first impression as to whether it is appropriate for a trial court to order a new trial for less than all of the co-defendants.[790] The state and the Municipality of Anchorage were co-defendants in a negligence action brought by the personal representative of the estate of a man killed while biking on a paved pathway in Anchorage. The jury found the municipality not negligent, but found the state's negligence to be a partial cause of Mr. Hanson's death,[791] and awarded Mrs. Hanson $33,000 and her daughter $3,000.[792] The jury also found Mr. Hanson comparatively negligent and apportioned seventy percent of the negligence to him.[793] Mrs. Hanson moved for a new trial, claiming that the damages were inadequate and that the jury failed to follow the court's instructions.[794] The superior court denied the motion as to the municipality, but ordered a new trial against the state, noting that it would be unconscionable to let the verdict stand in light of the low damages award.[795]

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787. *Id.* ASEA based its argument on Lyons Apparel, Inc., 218 N.L.R.B. 1172, which held that after a deauthorization vote, the union could not demand that new employees pay initiation fees and dues pending certification of the election results. The court also held that based on Ferro Stamping & Manufacturing Co., 93 N.L.R.B. 1459 (1951), the contention that no dues are owed where an employee has signed a dues check-off but the state has failed to collect the dues, is also a valid good faith argument. *Alaska State Employees Ass'n*, 813 P.2d at 673.

788. *Alaska State Employees Ass'n*, 813 P.2d at 673. The court found no necessary bar to using estoppel as a basis for relief in the context of an injunction. *Id.* (citing Municipality of Anchorage v. Schneider, 685 P.2d 94 (Alaska 1984)). Similarly, the court held that waiver and laches could also support an action for an injunction. *Id.*

789. 805 P.2d 971 (Alaska 1991).

790. *Id.* at 973.

791. *Id.* at 972.

792. *Id.*

793. *Id.*

794. This claim was partially based on a phone call from the jury foreman to the judge after the trial ended. The foreman indicated to the judge that the jury had considered Mr. Hanson's negligence in calculating damages. *Id.*

795. *Id.*

The sole issue on review was whether the superior court erred in denying a new trial against the municipality.[796] Because the issue was one of first impression,[797] the court analyzed the case law of a number of other jurisdictions[798] in combination with Alaska case law concerning separable issues[799] and found that trial courts have discretion to grant a new trial as to some, but not all, of the co-parties.[800] Because the jury had clearly indicated that the municipality was not negligent, the supreme court found there was no need to separate the issue of liability from the issue of percentage of fault.[801] Furthermore, the court found that the state had a full and fair opportunity to convince the jury that it was the municipality that had caused the accident, but had failed to do so. As there was no sign that the jury error as to damages affected their decision that the municipality was not negligent, the court held that the trial court properly exercised its discretion and affirmed the denial of the motion for a new trial against the municipality.[802]

In *Ferguson v. State Department of Corrections*,[803] the supreme court held that the principle of res judicata would not bar Ferguson's due process and equal protection claims because Ferguson had not been provided the chance to fully litigate the action. While imprisoned, Ferguson was tested randomly for drugs.[804] Following a positive test result, Ferguson's request for a retest was denied due to his indigency.[805] As a result of the positive test, and without a disciplinary hearing, Ferguson was removed from the Alaska Correction Industries Program ("ACI") and moved back into the prison dormitory.[806] Ferguson filed a civil rights complaint seeking declaratory and injunctive relief.[807] The superior court dismissed

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796. *Id.* at 973.

797. *Id.*

798. *Id.* at 974-75 (citing Juneau Square Corp. v. First Wisconsin Nat'l Bank of Milwaukee, 624 F.2d 798, 811 (7th Cir.), *cert. denied*, 449 U.S. 1013 (1980); McIntosh v. Lawrance, 469 P.2d 628 (Oregon 1970); Halverson v. Anderson, 513 P.2d 827 (Wash. 1973); Williams v. Slade, 431 F.2d 605 (5th Cir. 1970)).

799. *Id.* at 973-74 (citing Sturm, Ruger & Co., Inc. v. Day, 615 P.2d 621 (Alaska 1980)).

800. *Id.* at 975.

801. *Id.*

802. *Id.*

803. 816 P.2d 134 (Alaska 1991).

804. *Id.* at 136.

805. *Id.*

806. *Id.* Ferguson later appeared before the prison's disciplinary committee. The committee sanctioned him with thirty days of lost statutory good time, twenty days of punitive segregation, forty hours of free labor and placement in a drug monitoring program. *Id.* at 136-37.

807. *Id.* at 137. Ferguson alleged that:

the case, stating that Ferguson's first allegation failed to state a claim upon which relief could be granted and that the remaining issues raised were barred by the res judicata effects of *Cleary v. Smith.*[808]

On appeal, the supreme court found that the doctrine of res judicata should not apply because the *Cleary* plaintiffs did not adequately represent Ferguson's interests, and that the traditional res judicata test should be modified when the absent class member was not fairly and adequately represented in the initial litigation.[809] The court noted that the plaintiffs in *Cleary* had not litigated the drug testing issue, as evidenced by their failure to consult any drug testing experts as to the reliability of the drug test or the admissibility of drug testing evidence.[810] Moreover, the court found that although Ferguson did not have a protected federal constitutional right to prison employment, under Alaska law he had "an unenforceable interest in continued participation in rehabilitation programs."[811] The court found that the ACI program was a rehabilitation program, and as such, Ferguson could not be terminated from the program without due process of law.[812] The court further noted that removing Ferguson from the ACI program based solely on the results of the drug test was not adequate process due to the possible unreliability of the test.[813]

In *Broderick v. King's Way Assembly of God Church*[814] the plaintiff appealed a grant of summary judgment in a child abuse case. The main issue in the case was whether Broderick, the child's mother, had presented sufficient evidence to establish a genuine issue of material fact as to whether her child was abused by a church employee while at the church's "tiny tots" program.[815]

In opposition to the defendant's motion for summary judgment, Broderick filed affidavits by a doctor, Lee Maxwell, which stated that after reviewing the Kaufman report[816] and interviewing the child, he

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1) his liberty interest in participation in the ACI program was abrogated without due process; 2) he was denied the right to challenge the evidence used against him and thus was denied due process; 3) the indigence-based denial of a retest resulted in a denial of equal protection; and 4) the drug test used was not sufficiently reliable without alternative testing to be used in this manner.

Id.

808. *Id.; see* Cleary v. Smith, No. 3AN-81-527 (Alaska Sup. Ct. Sept. 21, 1990). For a full discussion of *Cleary*, see Bradford J. Tribble, Note, *Prison Overcrowding in Alaska: A Legislative Response to the* Cleary *Settlement*, 8 ALASKA L. REV. 155 (1991).

809. *Ferguson*, 816 P.2d at 138.

810. *Id.* at 139.

811. *Id.*

812. *Id.* at 140.

813. *Id.*

814. 808 P.2d 1211 (Alaska 1991).

815. *Id.* at 1215.

816. Kaufman was the child's counselor for a period of about six months, and as of the

determined that the child had been sexually molested.[817] These affidavits were disallowed by the superior court because of "a serious credibility problem."[818] The supreme court, however, held that the issue of credibility should be determined by the trier of fact, not by the court in its determination of a summary judgment motion.[819] Subsequently, the court permitted Maxwell's testimony because Alaska Rule of Evidence 703 allows an expert to use hearsay evidence in forming an opinion. The court also stated that the appropriate rule to challenge an expert's opinion as "novel" is Rule 702,[820] not Rule 703.[821] The court then held that Maxwell's affidavit was admissible under Rule 702, noting that "[e]xpert testimony that a child has been sexually molested and is suffering from post-traumatic stress has routinely been admitted in court in other jurisdictions."[822]

A hearsay issue was also raised because the only identification of the child's abuser came from the child's mother rather than the child. Affirming a practice that is widespread in other jurisdictions, the court ruled that the hearsay exception provided in Rule 803(23)[823] governed

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time of the appeal he had not been located. *Id.* at 1214 nn.5-6.

817. *Id.* at 1214.

818. *Id.* at 1215-16.

819. *Id.* at 1216.

820. Alaska Rule of Evidence 702(a) provides:

> If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise.

ALASKA R. EVID. 702(a).

821. *Broderick*, 808 P.2d at 1216. Alaska Rule of Evidence 703 provides:

> The facts or data in the particular case upon which an expert bases an opinion or inference may be those perceived by or made known to him at or before the hearing. Facts or data need not be admissible in evidence, but must be of a type relied upon by experts in the particular field in forming opinions or inferences on the subject.

ALASKA R. EVID. 703.

822. *Broderick*, 808 P.2d at 1216.

823. Alaska Rule of Evidence 803(23) provides:

> A statement not specifically covered by any of the foregoing exceptions but having equivalent circumstantial guarantees of trustworthiness, [is admissible] if the court determines that (a) the statement is offered as evidence of a material fact; (b) the statement is more probative on the point for which it is offered then any other evidence which the proponent can procure through reasonable efforts; and (c) the general purposes of these rules and the interest of justice will best be served by admission of the statement into evidence. However, a statement may not be admitted under this exception unless the proponent of it makes known to the adverse party sufficiently in advance of the trial or hearing to provide the adverse party with a fair opportunity to prepare to meet it, his intention to offer the statement and the particulars of it, including the name and address of the declarant.

ALASKA R. EVID. 803(23). If for some reason the child is unable to testify or to remember the identification and is therefore "unavailable," Alaska Rule of Evidence 804(b)(5), having the same purpose as Rule 803(23), is applicable. *Broderick*, 808 P.2d at 1218 n.16.

this situation.[824] The court cited several factors that indicated the reliability of the mother's statements: the child's spontaneity when identifying her abuser in the presence of her mother, the young age of the child, the "childish terminology" used by the child and the child's consistency.[825]

In *State v. United Cook Inlet Drift Ass'n*,[826] the supreme court held that a temporary restraining order issued by the trial court was improper because the court "failed to consider the injury to subsistence users which would result as a consequence of the issuance of the temporary restraining order."[827] The court held that issuing a temporary restraining order only on a showing of "serious and substantial questions going to the merits of the case" is appropriate only when the injury that will result from the restraining order is slight in comparison to the injury that will be suffered by the individual seeking the injunction, or when the injury can be indemnified by a bond.[828] The court held that the subsistence user's injury was as irreparable as that of a commercial fisherman and that therefore the court should have determined whether the claimants would have succeeded on the merits of the case before issuing the restraining order.[829]

Stadler v. State[830] involved criminal contempt sanctions for a juror's failure to return to the courthouse after a recess.[831] Stadler gave no explanation for his failure to return except that he needed a job and did not think he could continue jury duty for an extended period of time.[832] At his arraignment, the superior court held Stadler in contempt of court and sentenced him to ninety hours of jury duty.[833]

The supreme court found that the superior court's sentence was punitive,[834] and therefore found that superior court treated Stadler's contempt as criminal, not civil, because in civil contempt cases the

824. *Broderick*, 808 P.2d at 1218 & n.17.

825. *Id.* at 1219-20.

826. 815 P.2d 378 (Alaska 1991).

827. *Id.* at 379

828. *Id.* at 378-79.

829. *Id.* at 379.

830. 813 P.2d 270 (Alaska 1991).

831. *Id.* at 271.

832. *Id.*

833. Stadler was without counsel at this arraignment. *Id.*

834. *Id.* at 272. The court found that the superior court's sentence to Stadler could not have been remedial because Stadler's obligation to serve as a juror still existed. The state "could not have been compensating the community for a still existing obligation." *Id.* at 273.

punishment given is remedial rather than punitive.[835] The court further noted that no third party was involved in the contempt and that Stadler had no opportunity to purge the contempt,[836] factors mitigating in favor of a criminal contempt finding. Furthermore, the court found Stadler's contempt to be indirect rather than direct,[837] thus entitling Stadler to procedural protections.[838] The court thus vacated Stadler's sentence and remanded for resentencing.[839]

IX. PROPERTY LAW

In 1991, the Alaska courts decided five property cases in the areas of eminent domain, landlord-tenant law, deed reservations and intellectual property. Two decisions expanded the rights of property owners to compensation in eminent domain proceedings, while another case broadened landlords' rights to interfere with tenants' lease assignments. In the intellectual property area, the court refused to broaden investors' rights to protect their financial interests in their inventions beyond the conventional methods of patent, contract or trade secret.

In *8,960 Square Feet, More or Less v. State*,[840] the Alaska Supreme Court determined that, as a matter of law, loss of visibility is compensable in an eminent domain proceeding where the diminished visibility is the result of changes to the property taken. Plaintiffs, Dimond D Properties and Dimond D Developers ("Dimond D"), owned a subdivision bounded on the north by Dimond Boulevard and on the east by a right of way owned by the Alaska Railroad.[841] The state began a project to improve Dimond Boulevard, which included building a railroad overpass across the boulevard supported by gradually rising earth berms, lowering the grade of

835. *Id.* at 272 (citing Johansen v. State, 491 P.2d 759, 763 (Alaska 1971)).

836. *Stadler*, 813 P.2d at 272.

837. *Id.* The court stated that direct contempt required an offender to wilfully disregard the orders or authority of the court, and since the superior court "could not ascertain the wilfulness of Stadler's violation from its own observation," the supreme court concluded that Stadler's contempt must be considered indirect. *Id.* at 273-74.

838. The court found that Stadler's contempt clearly fell under Alaska Statutes section 09.50.010(11), which dictates a maximum penalty of $100 per violation, and since the superior court did not give Stadler notice that he might be subject to a penalty greater than the statutory limit, that court exceeded its authority in sentencing Stadler to ninety hours of jury duty. *Id.* at 275. The court also held, however,that Stadler was not entitled to a jury trial since the potential punishment he could receive for the type of contempt he committed did not include incarceration. *Id.* at 274.

839. *Id.* at 275-76.

840. 806 P.2d 843 (Alaska 1991).

841. *Id.* at 845.

Dimond Boulevard itself, and condemning a portion of Dimond D's subdivision in order to widen the road to six lanes.[842] At a hearing to determine just compensation for the taking of land for the expansion of the road, Dimond D claimed damages due to the loss of visibility of the subdivision from the boulevard and also from a shopping mall on the other side of the newly built berms. The superior court granted the state's motion for summary judgment, holding that loss of visibility was not compensable as a matter of law.[843]

The supreme court reversed, finding loss of visibility to be compensable in some eminent domain proceedings. The court drew a sharp distinction, however, between the claim regarding the berms and the claim regarding the lowering of the road.[844] The court noted that the berms were built entirely on land belonging to the railroad, and without an easement of some type, Dimond D had no property interest in the right of way and therefore had no legal basis for a claim of loss of visibility.[845] In contrast, the lowering of the boulevard was distinct from the building of the berms, as the lowering and widening of the road was accomplished by taking land that belonged to Dimond D. The court reasoned that "ownership of land abutting on a road gives the owner the right to control the visibility of all adjoining land further off the road,"[846] and held that "loss of visibility to a remaining parcel is compensable where that loss is due to changes made *on the parcel taken by the state*."[847] Thus the court concluded that, in an eminent domain proceeding, loss of visibility is compensable where the diminished visibility results from changes on the property taken from the landowner, but not where it occurs due to changes on the property of another.[848]

In *Gates v. City of Tenakee Springs*,[849] Gates sued the city when it moved her fence in order to repair Tenakee Avenue after she refused to move the fence herself.[850] The trial court granted summary judgment for

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842. *Id.*

843. *Id.*

844. *Id.* at 846.

845. *Id.*

846. *Id.*

847. *Id.* (emphasis in original). The court also noted the possibility of the state taking land and not immediately creating an obstruction to visibility. In that situation, the court held that the owner of the remaining land reserves an easement of visibility. Thus, if and when the state does create a loss of visibility, a separate taking of the easement occurs and the owner has a right to bring an inverse condemnation proceeding for the loss of visibility. *Id.* at 846 n.6.

848. *Id.* at 848. The court reversed and remanded to the lower court to determine if the lowering of the road resulted in a loss of visibility. *Id.* at 848 n.10.

849. 822 P.2d 455 (Alaska 1991).

850. *Id.* at 457. Gates alleged that the city violated her right to equal protection by

the city, on the grounds that Gates failed to appeal an administrative decision within thirty days as required by Alaska Rule of Appellate Procedure 602(a)(2)[851] and the city had municipal immunity against Gates' claims under Alaska Statutes section 09.65.070.[852]

The supreme court first held that Gates' claims for damages, her archaeological site claims, and her statutory claims were inappropriately characterized as an administrative appeal, and thus that summary judgment under Rule 602(a)(2) was incorrectly granted.[853] All of the claims, however, that dealt with the *decision* to move the fence, rather than the actual *act* of moving the fence, were properly before the city council acting as an administrative agency.[854] Nevertheless, the court declined to resolve the issues, concluding that all of Gates' claims stemming from the decision to move the fence failed on the merits.[855]

The court held that the city's decision to revoke Gates' permit for the fence was immunized under the plain language of Alaska Statutes section 09.65.070(d)(3) and affirmed summary judgment as to any damage claims arising from the city's *decision* to move the fence.[856] While the court recognized that the actual act of moving the fence could give rise to a negligence action for damages,[857] it concluded that because the fence always stood and still stands on a right of way owned by the city, Gates was not entitled to any damages to the real property under the fence.[858] However, the court did recognize that there was a material issue of fact as to how much damage Gates' other property sustained when the city removed the fence, and it remanded the case for a determination of whether there had been any damages caused by the negligent removal of the fence by the city.[859]

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singling out her encroachment for removal, destroyed her real and personal property as well as an archaeological site, unlawfully widened Tenakee Trail, and violated her right to due process. *Id.*

851. The rule provides in part: "An appeal may be taken to the superior court from an administrative agency within 30 days from the date that the decision appealed from is mailed or otherwise distributed to the appellant." ALASKA R. APP. P. 602(a)(2).

852. *Gates*, 822 P.2d at 457; *see* ALASKA STAT. § 09.65.070 (1983 & Supp. 1991).

853. *Gates*, 822 P.2d at 458.

854. *Id.*

855. *Id.* at 458-59.

856. *Id.* at 459.

857. *Id.* The court cites Urethane Specialties v. City of Valdez, 620 P.2d 683 (Alaska 1980), for the proposition that planning and operational decisions are to be treated differently in evaluating a discretionary function exception to sovereign immunity. *Gates*, 822 P.2d at 459.

858. *Id.*

859. *Id.* at 459-60.

In *Ran Corp. v. Hudesman*,[860] the supreme court held that the "construction of privilege" test presented in *Bendix Corp. v. Adams*[861] for purposes of intentional interference tort analysis, should apply to lease assignment contracts when an owner-landlord interferes with a tenant's lease assignment.[862] The court noted that "an owner of property has a financial interest in the assignment of a lease of the property he owns."[863] Accordingly, the court found that the property owner in this case should be permitted to interfere with his tenant's assignment of the lease when the owner believed he would receive a greater economic benefit with another assignee.[864] The court further noted that the owner's threat of litigation to the current tenant was irrelevant to the existing claim of intentional interference.[865]

In *Norken Corp. v. McGahan*[866] the current owner of three parcels of land, Norken, disputed the scope of the original grantor's rights to the gravel deposits on the parcels.[867] McGahan owned the gravel deposits by virtue of deed reservations.[868] The court held that gravel is not a mineral, and thus gravel rights are included as a part of the surface estate, not the mineral estate.[869]

In *Darling v. Standard Alaska Production Co.*,[870] the supreme court held that "where an inventor applies for a patent on a product, and relies solely on that patent application to protect his or her rights, the inventor cannot obtain restitution for unjust enrichment from a party who copies and uses that product if the patent application is ultimately rejected."[871] Citing *Alaska Sales and Service, Inc. v. Miller*,[872] the court identified three prerequisites to Darling's unjust enrichment claim. Since the user of the product, Standard Alaska Production Co. ("Standard") admitted that it received a benefit and that it appreciated that benefit, the court focused on "whether considerations of equity will permit Standard to retain the benefit

860. 823 P.2d 646 (Alaska 1991).

861. 610 P.2d 24 (Alaska 1980).

862. *Ran Corp.*, 823 P.2d at 649.

863. *Id.*

864. *Id.* at 649-50. The dissent noted, however, that there was "no direct economic reason to prefer either of the competing tenants" since both agreed to pay the same rent. *Id.* at 651 (Burke, J., dissenting).

865. *Id.* at 650.

866. 823 P.2d 622 (Alaska 1991).

867. *Id.* at 623.

868. *Id.*

869. *Id.* at 628.

870. 818 P.2d 677 (Alaska 1991), *cert. denied*, 112 S.Ct. 1176 (1992).

871. *Id.* at 683.

872. 735 P.2d 743, 746 (Alaska 1987).

without compensating Darling."[873] The court explained that Darling's design was not protected since enforcement of his claim would offend federal patent policies which encourage disclosure of ideas and innovations: "enforcement of Darling's unjust enrichment claim would clearly hamper free exploitation of ideas which are in the public domain . . . ."[874] The court noted, however, that those in Darling's position are not without protection. Inventors who want to secure compensation for their ideas before disclosure can protect themselves through several methods: patent, contract, or trade secret.[875] Since Darling voluntarily disclosed his ideas, and failed to seek either contractual or promissory protection, his only safeguard was the patent application. When this was denied, he lacked other forms of protection and his right to compensation was lost.[876]

X. TAX LAW

The Alaska Supreme Court heard four cases in the area of tax law during 1991. One involved a narrow interpretation of the term "appropriation" under the Alaska Constitution. Two companion cases interpreted the definition of "developed" land for purposes of determining eligibility for tax-exempt status under the Alaska Native Claims Settlement Act. Finally, the court held that discriminatory taxes on the sale of liquor were unlawful.

In *City of Fairbanks v. Fairbanks Convention and Visitors Bureau*,[877] the Alaska Supreme Court held that a proposed initiative from the Interior Taxpayers Association was constitutional and should be placed on the ballot.[878] The proposed initiative sought to change Fairbanks General Code Ordinance 5.402, which delineated how the Fairbanks "bed tax" should be appropriated among various interests.[879] Whereas Ordinance 5.402 specified certain percentages to be allocated among specific groups absent a council vote to the contrary, the proposed initiative provided that the council vote for submitted appropriations annually.[880] The superior

873. *Darling*, 818 P.2d at 680.

874. *Id.* at 682.

875. *Id.*

876. *Id.* at 682-83.

877. 818 P.2d 1153 (Alaska 1991).

878. *Id.* at 1159.

879. *Id.* at 1154-55, 1154 n.2. Fairbanks General Code Ordinance 5.402(b) divides such revenues between the Fairbanks Industrial Development Corp. (10%), the Fairbanks Convention and Visitors Bureau (70%), beautification (3%) and various other administrative and discretionary purposes. FAIRBANKS, ALASKA, GENERAL CODE ORDINANCE 5.402(b) (1988).

880. *City of Fairbanks*, 818 P.2d at 1154 n.3.

court issued a permanent injunction holding that "the initiative dedicated funds unconstitutionally . . . [and] repealed an existing appropriation."[881]

On appeal, the supreme court held that since Ordinance 5.402 was not an appropriation, the initiative did not repeal an appropriation and was therefore constitutional under article XI, section 7 of the Alaska Constitution.[882] In keeping with the purpose of the prohibition on repeal of appropriations, the court construed the term "appropriations" narrowly to keep budgetary control in the hands of the legislature.[883] The court compared Ordinance 5.402 to Alaska Statutes section 29.35.100,[884] the legislative appropriations authority, and found that Ordinance 5.402 was not itself an appropriation "because it does not reflect an action taken by the governing body after annual approval of the budget, nor can it be construed in any sense to be a supplemental or emergency act of the governing body."[885]

Moreover, the court found that the initiative was not an appropriation because it broadened rather than restricted the council's authority to allocate the bed tax.[886] The court noted that the initiative did not allocate funds in an "executable, mandatory, and reasonably definite" manner.[887] While declining to rule on the constitutionality of the ordinance under the Dedicated Revenues Clause of article IX of the Alaska Constitution,[888] the court held that the proposed initiative did not attempt to dedicate revenues because it did not earmark funds for any specified organization, nor did it limit the council's discretion.[889] Instead, the court held that the initiative broadened the council's flexibility, and was therefore consistent

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881. *Id.* at 1155.

882. *Id.* at 1159. Article XI, section 7 of the Alaska Constitution provides in relevant part: "[t]he initiative shall not be used to dedicate revenues, make or repeal appropriations, ..." ALASKA CONST. art. XI, § 7.

883. *City of Fairbanks*, 818 P.2d at 1157.

884. Alaska Statutes section 29.35.100 provides:

> (a) The governing body shall establish the manner for the preparation and submission of the budget and capital program. After a public hearing, the governing body may approve the budget with or without amendments and shall appropriate the money required for the approved budget.
>
> (b) The governing body may make supplemental and emergency appropriations. Payment may not be authorized or made and an obligation may not be incurred except in accordance with appropriations.

ALASKA STAT. § 29.35.100 (a)-(b) (1985).

885. *City of Fairbanks*, 818 P.2d at 1157.

886. *Id.*

887. *Id.*

888. *Id.* at 1158 n.7. The dedicated revenues clause of article IX of the Alaska Constitution places limits on the dedication of proceeds of any state tax to "special purposes." ALASKA CONST. art. IX.

889. *City of Fairbanks*, 818 P.2d at 1158.

with the intent of the constitution's prohibition on dedicated revenues as it maintained "the potential of flexibility in budgeting."[890]

In *Kenai Peninsula Borough v. Cook Inlet Region, Inc.*,[891] the supreme court held that lands are considered "developed" for tax purposes if they are legally[892] and practically[893] suitable for sale to the ultimate user. Because native-owned lands were involved, the court examined the Alaska Native Claims Settlement Act ("ANCSA"),[894] which conveyed forty-four million acres of public land and 962.5 million dollars to Alaska natives in exchange for the extinguishment of all claims based on aboriginal title.[895] The act provides a limited exemption from real property taxation for conveyed lands that "'are not developed or leased to third parties.'"[896]

The Kenai Borough assessor denied property tax exemptions to land held by the Cook Inlet Region and the Salamat Native Association because the parcels were within a surveyed and subdivided plat capable of gainful and productive use. Therefore, the parcels at issue were considered "developed."[897] Disagreeing with this conclusion, the superior court found the property to be tax-exempt and the borough appealed to the supreme court.[898] To determine the meaning of the term "developed," the supreme court examined the legislative history of ANCSA and the Alaska National Interest Lands Conservation Act ("ANILCA"),[899] and cases from other jurisdictions dealing with the term in the context of land. Rejecting the appellees' assertion that property must actually produce income to be considered developed, the court concluded that "developed" means merely that the land has been converted into an area suitable for use or sale.[900] The court noted that since the subdivided lots at issue were actively being marketed and had access to roads and utilities, they were developed for purposes of 42 U.S.C. § 1620.[901] The court held that the

890. *Id.*

891. 807 P.2d 487 (Alaska 1991).

892. Legal suitability indicates compliance with Alaska Statutes section 40.15.010. Under that statute, a parcel of land may not be divided for selling purposes without an approved and recorded plat. *Cook Inlet*, 807 P.2d at 498.

893. Land that is suitable may not be considered practically suitable for sale if a profit maximizing land developer would re-plat or make additional improvements. *Id.*

894. 43 U.S.C. §§ 1601-28 (1988).

895. *Cook Inlet*, 807 P.2d at 490.

896. *Id.* at 490 (quoting 43 U.S.C. § 1620(d)(1) (1988)). The exemption is also limited in time to twenty years. 43 U.S.C. § 1620(d)(1) (1988).

897. *Cook Inlet*, 807 P.2d at 490.

898. *Id.* at 490-91.

899. *Id.* at 492-96.

900. *Id.* at 497.

901. *Id.* at 498-99.

unsubdivided lots at issue were not developed since they were "not suitable for sale from the standpoint of a knowledgeable owner wishing to maximize profits."[902] The court remanded several other parcels of land to the superior court because that court failed to apply appropriate legal standards in determining whether the parcels were developed.[903]

In a companion case to *Cook Inlet*, the supreme court again addressed the definition of "developed" for purposes of the ANCSA property exemption. In *Kenai Peninsula Borough v. Tyonek Native Corp.*,[904] the Kenai Peninsula Borough appealed the superior court's decision that a parcel of land owned by the Tyonek Native Corporation ("Tyonek") was exempt from taxation for 1985.[905] The parcel, which had been leased by Tyonek to Kodiak Lumber Mills in the early 1970's, was substantially improved by Kodiak.[906] Tyonek retook possession of the parcel in 1983,[907] and later claimed that the land was exempt from taxation under the ANCSA exemption.[908] The borough assessor determined that although the property was no longer leased, it was developed, and therefore not exempt from taxation.[909] The superior court reversed the assessor's finding, however, stating that the land was exempt as long "as the property lies unleased or otherwise unproductive and idle."[910]

The supreme court focused on the question of "whether the property was 'developed' as that term was used in 43 U.S.C. § 1620(d)(1)."[911] The borough defined "developed" as land that was made suitable for residential or business uses.[912] Tyonek, on the other hand, argued that the definition was controlled by a state statute that "purports to define the word 'developed' as used in the federal statute."[913] The statute defines the term to mean "a purposeful modification of the property from its original state that effectuates a condition of gainful and productive present use without further substantial modification . . . ."[914] Tyonek interpreted

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902. *Id.* at 499. The court also held that an unsubdivided lot not accessible by road was undeveloped. *Id.*

903. *Id.* at 499-500.

904. 807 P.2d 502 (Alaska 1991).

905. *Id.* at 503.

906. *Id.* Kodiak built, among other things, warehouses, a chip mill, a dock, an air strip, mobile homes, duplexes, houses, and sewage, water and electrical facilities. *Id.*

907. *Id.*

908. 43 U.S.C. § 1620(d)(1) (1988).

909. *Tyonek*, 807 P.2d at 504.

910. *Id.*

911. *Id.* at 505.

912. *Id.*

913. *Id.* at 503-04.

914. ALASKA STAT. § 29.45.030(m)(1) (1991).

this definition to require current actual use of the property in order to tax it, not merely current potential use.

The court rejected Tyonek's argument, finding that Tyonek's definition was "contrary to the common understanding of the meaning of [developed]."[915] The court found no intent on Congress' part in enacting the statute for the term "developed" to have a special meaning.[916] The court therefore found that the land had been so improved that it was "necessarily developed within the meaning of section 1620(d)."[917] While the definition in the state statute is less than clear, the court construed the meaning of "developed" to be consistent with the meaning as used in the federal statute. To do otherwise, the court opined, would raise "serious and substantial questions concerning the constitutionality of this statute under the equal rights clause of the Alaska Constitution."[918]

In *Lagos v. City of Sitka*,[919] the supreme court held that section 4.08.040 of the Sitka General Code was unlawful because Alaska Statutes section 04.21.010(c)(2) prohibits the use of discriminatory sales tax rates on alcohol, i.e., mandates that alcohol be taxed at the same rate as other goods.[920] The court found that while the text of Alaska Statutes section 04.21.010(c)(2) alone is ambiguous, when it is interpreted in conjunction with subsection (c)(3) and the legislative history of the amendment to section 04.21.010(c), it "indicate[s] that the legislature intended . . . to prohibit the imposition of discriminatory sales taxes . . . ."[921]

XI. TORT LAW

The Alaska Supreme Court decided eighteen tort cases during 1991. These cases are grouped into the following broad categories: judicial misconduct, malpractice, negligence and product liability. Cases falling outside the scope of these categories are discussed under the "miscellaneous" heading at the end of this section.

915. *Tyonek*, 807 P.2d at 503-04.
916. *Id.*
917. *Id.*
918. *Id.*
919. 823 P.2d 641 (Alaska 1991).
920. *Id.* at 645.
921. *Id.*

A. Judicial Misconduct

Inquiry Concerning a Judge[922] involved an appeal of a decision by the Judicial Conduct Commission finding that petitioner had violated judicial canons and recommending that petitioner be publicly admonished by the supreme court. The petitioner was an officer, director, and shareholder of City Mortgage Corporation ("CMC"), as well as a Justice of the Alaska Supreme Court.[923] The controversy centered on several actions taken by the petitioner in the context of a settlement conference between CMC and the Alaska Housing Finance Corporation ("AHFC") in which the petitioner participated.[924]

The supreme court, sitting by assignment, disagreed with both the petitioner's and the commissioner's arguments about how the petitioner's conduct should be evaluated under Canon 2 of the Code of Judicial Conduct,[925] and concluded that the appropriate test was "whether [the judge] failed to use reasonable care to prevent a reasonably objective individual from believing that an impropriety was afoot."[926] In the instant case, the court found that an appearance of impropriety was created when petitioner used chambers stationery for three private letters to opposing counsel,[927] and met with the governor in order to persuade him to intervene in a manner favorable to petitioner's interests.[928]

In analyzing the petitioner's meeting with the governor, the court reviewed the text and context of Canons 1, 2, 4 and 5.[929] The court

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922. 822 P.2d 1333 (Alaska 1991) ("*Judge III*").

923. *Id.* at 1336.

924. *Id.*

925. Canon 2 states:

> A Judge Should Avoid Impropriety and the Appearance of Impropriety in all His Activities
>
> A. A judge should respect and comply with the law and should conduct himself at all times in a manner that promotes public confidence in the integrity and impartiality of the judiciary.
>
> B. A judge should not allow his family, social, or other relationships to influence his judicial conduct or judgment. He should not lend the prestige of his office to advance the private interests of others; nor should he convey or permit others to convey the impression that they are in a special position to influence him. He should not testify voluntarily as a character witness.

CODE OF JUDICIAL CONDUCT Canon 2 (1984).

926. *Judge III*, 822 P.2d at 1340. The test employed by the court is the so-called *"Judge II"* test that was announced in *In Re* Inquiry Concerning a Judge, 788 P.2d 716, 723 (Alaska 1990).

927. *Judge III*, 822 P.2d at 1340-41.

928. *Id.* at 1341-42.

929. *Id.* at 1342-43. Canon 1 "requires judges to participate in establishing and maintaining high standards of conduct to preserve the integrity and independence of the judiciary." *Id.* at 1342. Canon 2 requires "judges to avoid impropriety and the appearance of impropriety at all times." *Id.* Canon 4 permits judges involved in quasi-judicial

concluded that petitioner violated these canons because a "reasonably objective person would be justified in believing that an impropriety was afoot upon learning of a personal meeting between a justice of the state supreme court and the Governor involving the justice's private business matters that were then in litigation with the state."[930]

In determining the appropriate sanction, the court looked to American Bar Association Standards.[931] The court found that while the petitioner acted negligently, there was no actual harm because the governor did not do any favors for the petitioner after the meeting.[932] Nevertheless, the court concluded that the violation was "moderately serious" because it created the potential harm of undermining the public's confidence in the judiciary.[933] After taking into account mitigating and aggravating factors, the court concluded that a private reprimand was appropriate.[934]

There were three other opinions in the case -- all three both concurred and dissented with the majority. Judge Hodges argued that the *call* alone to the governor's office created an appearance of impropriety, and the meeting with the governor was actually improper, not just apparently improper.[935] Judge Schulz disagreed with the majority's application of the objectively reasonable person test, arguing that a reasonable person apprised of all the details of the petitioner's conduct would not have found

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activities to consult with members of the executive or legislative branches "but only on matters concerning the administration of justice." *Id.* (quoting CODE OF JUDICIAL CONDUCT Canons 1, 2 & 4 (1984)). Finally, Canon 5

> requires a judge to regulate his or her extra-judicial activities to minimize the risk of conflict with his or her judicial duties. . . . Subsection C(1) clearly requires a judge to refrain from financial and business dealings that tend to reflect adversely on his impartiality, interfere with the proper performance of his judicial duties or exploit his judicial position. Subsection C(2) limits a judge to holding and managing investments only if they do not conflict with the requirements of subsection (1).

Id.

CODE OF JUDICIAL CONDUCT Canon 5 (1984).

930. *Judge III*, 822 P.2d at 1342.

931. *Id.* at 1343. The four-pronged test is as follows:

1. What ethical duty did the lawyer (judge) violate?
2. What was the lawyer's (judge's) mental state?
3. What was the extent of the actual or potential injury caused by the lawyer's (judge's) misconduct?
4. Are there any aggravating or mitigating circumstances?

Id. (citing *Judge II*, 788 P.2d at 724; *Disciplinary Matter Involving Buckalew*, 731 P.2d 48, 52 (Alaska 1986) (quoting AMERICAN BAR ASSOCIATION STANDARDS FOR IMPOSING LAWYER SANCTIONS (1986), *reprinted in* ABA/BNA LAWYERS' MANUAL ON PROFESSIONAL CONDUCT, §§ 01:805-01:856 (1986) [hereinafter *ABA/BNA*]).

932. *Id.* at 1344.

933. *Id.*

934. *Id.* at 1345-46. The mitigating factors included the absence of prior disciplinary proceedings, the petitioner's cooperation with the disciplinary process and his excellent reputation. The aggravating factors were the petitioner's selfish motive and his substantial experience in the practice of law. *Id.* at 1345.

935. *Id.* at 1346 (Hodges, J., concurring in part, dissenting in part).

an appearance of impropriety.[936] Judge Tunley agreed with Judge Schulz and reiterated the fact that the *Judge II* test must include the requirement that objectively reasonable persons be reasonably informed of surrounding circumstances.[937]

DeNardo v. Michalski[938] addressed the question of whether judicial immunity protected Judge Michalski from liability for damages due to the incarceration of the claimant, DeNardo. In a prior proceeding, a court ordered Denardo to pay attorneys' fees to the state. When DeNardo failed to comply with the judge's order, the state called for a judgment debtor's examination against DeNardo, over which Michalski presided. During these proceedings, DeNardo was questioned about his financial status, and upon pleading the Fifth Amendment several times, he was held in contempt of court and incarcerated. DeNardo filed suit against Michalski and June, the state's counsel who instituted the judgment debtor's examination hearing, claiming his incarceration was a violation of his constitutional rights and an abuse of process. DeNardo claimed that Michalski should have recused himself from the hearing in accordance with Alaska Statutes section 22.20.020(a)(5), which states that a judicial officer may not preside over any matter in which he or she has been retained by either party to the action, or has counseled either party to the action within the past two years.[939] Michalski had litigated appeals against DeNardo within two years prior to the hearing in question.[940]

The supreme court held that judicial immunity precluded Michalski's liability.[941] Adhering to United States Supreme Court precedent, the court noted that judges will not be liable for their judicial actions "'even when such acts are in excess of their jurisdiction, and are alleged to have been done maliciously or corruptly.'"[942] The court held that Judge Michalski should be liable only if his acts were not judicial or were outside his subject matter jurisdiction.[943] Because Michalski's actions were clearly judicial, and because he had subject matter jurisdiction over judgment debtors, he retained his judicial immunity.[944] In so holding, the court noted that even if Michalski should have recused himself from the hearing, his jurisdictional status over the case was not affected; rather, the

936. *Id.* at 1351 (Schulz, J., concurring in part, dissenting in part).
937. *Id.* at 1352 (Tunley, J., concurring in part, dissenting in part).
938. 811 P.2d 315 (Alaska 1991) (per curiam).
939. *Id.* at 316 & n.2.
940. *Id.* at 316.
941. *Id.*
942. *Id.* (quoting Bradley v. Fisher, 80 U.S. (13 Wall.) 335, 351 (1871)).
943. *Id.* (citing Stump v. Sparkman, 435 U.S. 349, 356-57 (1978)).
944. *Id.*

court found that because Michalski had jurisdiction in deciding whether or not to recuse himself in light of Alaska Statutes section 22.20.020(a)(5), choosing not to do so did not strip him of his original subject matter jurisdiction.[945] The court likewise found that Michalski's failure to award DeNardo a jury trial would not affect his jurisdictional status.[946]

B. Malpractice

In *Shaw v. State*[947] the defendant was convicted of burglary in 1973 along with a co-defendant. In 1986, the defendant's conviction was set aside because Shaw was denied effective assistance of counsel due to a conflict of interest.[948] In 1988, the defendant brought a legal malpractice action against his attorney and the Public Defender Agency for the conviction. The superior court granted summary judgment for the state, holding that the suit was barred under the two-year statute of limitations for legal malpractice claims.[949]

The supreme court reversed and held that a convicted criminal must obtain post-conviction relief before pursuing a legal malpractice claim against his attorney, and that the statute of limitations is tolled until such relief is granted.[950] The court noted that other jurisdictions were divided on the issue, but agreed with those jurisdictions which held that public policy requires post-conviction relief as a prerequisite to a legal malpractice claim.[951] The court noted several reasons underlying its ruling: the requirement promotes judicial economy, establishes an easy to implement bright-line test, and is consistent with the law on malicious prosecution which requires that a plaintiff show that an unsuccessful prosecution occurred in order to establish the tort.[952]

In re Disciplinary Matter Involving Schuler[953] involved a district attorney who was convicted of a misdemeanor when he concealed merchandise with the intent of leaving a store without paying. Schuler completed the terms of his probation and the criminal case was

945. *Id.*

946. *Id.* at 316-17.

947. 816 P.2d 1358 (Alaska 1991).

948. *Id.* at 1359-60.

949. *Id.*

950. *Id.* The court noted that post-conviction relief usually, but not always, is taken under Alaska Rule of Criminal Procedure 35 or 35.1, which allow correction of an illegal sentence "at any time." *Id.* at 1360 n.3, 1362.

951. *Id.* (citing Carmel v. Lunney, 511 N.E.2d 1126, 1128 (N.Y. 1987)).

952. *Id.* at 1361-62.

953. 818 P.2d 138 (Alaska 1991).

dismissed.[954] In 1988, the supreme court entered an order of interim suspension from the practice of law and referred the matter to the Alaska Bar Association Discipline Counsel ("Counsel").[955] The supreme court subsequently rejected the stipulation accepted by the Counsel in which Schuler would be suspended from the practice of law for six months and be required to take and pass the Multistate Professional Responsibility Exam ("MPRE"). The court stated that the crime was normally serious enough to warrant disbarment.

The Counsel presented a revised stipulation to the court that recommended a two-year suspension from the practice of law and a requirement that Schuler take and pass the MPRE. Upon the court's request for information relating to any prior criminal or juvenile convictions of Schuler, a 1973 conviction for petty larceny was disclosed. The Counsel considered this information and chose not to modify the stipulation.

The supreme court approved the revised stipulation.[956] The court found that Schuler violated Disciplinary Rule ("DR") 1-102(A)(3) and (4) by engaging in conduct involving moral turpitude and dishonesty.[957] The court also found that Schuler's conviction demonstrated that he acted with intent, and that his theft caused serious injury under the relevant ABA Standards.[958] Although the court concluded that the sanction of disbarment, rather than suspension, was the appropriate reference point from which to evaluate any mitigating and aggravating factors,[959] the court found several mitigating factors which prompted its approval of the revised stipulation. These factors included the absence of any prior disciplinary record, absence of personal or emotional problems, Schuler's

954. *Id.* at 139.

955. The court entered the order pursuant to Alaska Bar Rule 26(a). *Id.*

956. *Id.* at 145.

957. *Id.* at 140.

958. *Id.* at 141.

959. *Id.* at 142. Standard 5.11 of the Model Standards provides:

> Disbarment is generally appropriate when:
> (a) a lawyer engages in serious criminal conduct a necessary element of which includes intentional interference with the administration of justice, false swearing, misrepresentation, fraud, extortion, misappropriation, or theft; or the sale, distribution, or importation of controlled substances; or the intentional killing of another; or an attempt or conspiracy or solicitation of another to commit any of these offenses; or
> (b) a lawyer engages in any other intentional conduct involving dishonesty, fraud, deceit, or misrepresentation that seriously adversely reflects on the lawyer's fitness to practice.

ABA/BNA, *supra* note 931, at 01:829.

completion of probation, and the fact that he lost his job as district attorney.[960]

C. Negligence

Wassilie v. Alaska Village Electric Cooperative, Inc.[961] involved a negligence action brought against Alaska Village Electric Cooperative, Inc. ("AVEC") by Wassilie, who suffered severe electrical shock when his citizens' band ("CB") antenna toppled near AVEC's newly installed overhead transmission lines, and electricity arced through the antenna to the CB unit. The trial court granted judgment notwithstanding the verdict for AVEC, finding that AVEC did not have a duty to warn Wassilie of the dangers because it could not have foreseen that Wassilie would create a dangerous condition by moving the CB antenna closer to the lines.[962] Additionally, the court concluded that Wassilie had received generalized warnings and had not demonstrated that the absence of specific warnings was the proximate cause of his injuries.[963]

The supreme court disagreed with the trial court, finding that the jury could have reasonably concluded that AVEC should have been aware of the danger before the accident occurred.[964] The court noted that a reasonable jury could have concluded that AVEC negligently failed to warn and that failure to provide explicit warnings was the proximate cause of the injury.[965] The court reversed and remanded to the superior court for a ruling on the motions for a new trial and remittitur.[966]

In *State v. Will*,[967] the State of Alaska and a state trooper appealed a jury award of damages for the shooting of a mentally impaired individual. In early September, 1984, Will exhibited symptoms of acute paranoia, and began acting irrationally, believing that unknown persons were attempting to kill him. After his boat was found adrift in Icy Strait, Will's family contacted the Hoonah Police Department ("HPD") and the state troopers to report Will missing. Will's family and friends also

960. *Schuler*, 818 P.2d at 143-44.

961. 816 P.2d 158 (Alaska 1991).

962. *Id.* at 159-60.

963. *Id.*

964. *Id.* at 161-62. Since Wassilie presented evidence that the CB antenna was the same distance from the overhead transmission lines even after it was moved and that the antenna was moved prior to the energizing of the overhead system, reasonable jurors could differ on the foreseeability issue. *Id.*

965. *Id.* at 162.

966. *Id.* at 162-63.

967. 807 P.2d 467 (Alaska 1991).

informed the HPD and the troopers that Will was armed, mentally unstable, and would most likely react unfavorably to the sight of police officers. Will located and boarded his boat at the Hoonah harbor where it had been docked after it was found adrift. Responding to a report of a shot fired at the harbor, the police chief, several officers and troopers surrounded the boat, but made no attempt to communicate their presence or purpose to Will. Will left the boat armed with a pistol, and fired two shots in the direction of the officers. The trooper and an officer fired back, wounding Will at least five times. Will sued the state, the City of Hoonah, and the officers involved in the shooting claiming damages for battery, negligence and violations of his constitutional rights.[968] The defendants[969] appealed the trial court's denial of their motions for summary judgment, for judgment notwithstanding the verdict, judgment consistent with the verdict, new trial and remittitur.[970]

The supreme court first found that the trial court had incorrectly relied upon the "acting in concert" theory[971] in determining as a matter of law that the state trooper was liable for the negligence of the city and the HPD chief.[972] The jury had found that the trooper did not commit assault or battery against Will and that he was not negligent.[973] However, the trial court, relying on the "acting in concert" theory set out in *Williams v. Alyeska Pipeline Service Co.*,[974] determined that the trooper was liable. The supreme court disagreed, distinguishing *Williams* from the present case as *Williams* involved collective intentional torts.[975] The court found the theory inapplicable in a case where negligence is alleged, as "[a]n individual who acts with reasonable care cannot be deemed negligent simply because those with whom he cooperates act negligently."[976]

The jury also found that although the state was negligent, its negligence was not the legal cause of Will's injury.[977] The trial court nevertheless held that the state was vicariously liable to Will under a theory

968. *Id.* at 468-69.

969. The City of Hoonah and the two HPD officers settled with Will, leaving the state and the state trooper as appellants. *Id.* at 468.

970. *Id.* at 469.

971. The court defined the purpose of the theory as "hold[ing] all individuals engaged in a joint enterprise with a tortious purpose accountable for the harm any member of the enterprise may inflict." *Id.* at 470 (citing W. PAGE KEETON ET AL., PROSSER AND KEETON ON THE LAW OF TORTS § 46, at 322-23 (5th ed. 1984)).

972. *Id.*

973. *Id.*

974. 650 P.2d 343, 348 (Alaska 1982).

975. *Will*, 807 P.2d at 470.

976. *Id.* (citing RESTATEMENT (SECOND) OF TORTS § 876 cmt. c (1979)).

977. *Id.*

of respondeat superior due to the trooper's actions in the shooting.[978] The supreme court reversed, holding that the state could not be held vicariously liable as the trial court had incorrectly determined that the trooper was negligent.[979] The court thus reversed and remanded both the judgment against the state and the trooper.

Croxton v. Crowley Maritime Corp.[980] arose from the fatal crash of an aircraft that Croxton was co-piloting as an employee of Puget Sound Tug and Barge Company ("PST&B"). Croxton's estate sued PST&B and its parent company, Crowley, for wrongful death, alleging that the chief pilot of Crowley's aviation department was negligent in assigning the pilot-in-command of the flight without first properly training him.[981] The superior court concluded that the chief pilot was negligent and that the negligence was the proximate cause of Croxton's death.[982] The court also held, however, that the chief pilot was an employee of PST&B, not of Crowley, and thus was Croxton's co-employee.[983] Consequently, the suit was barred by the exclusive remedies provision of Alaska Statutes section 23.30.055.[984]

The supreme court reversed and remanded for entry of judgment against Crowley.[985] The court found that the lower court erred in allowing Crowley to argue that employment status should be determined by the *substance* of employment, rather than its *form*.[986] The court noted that the error stemmed from the superior court's failure to apply the general rule that a corporation may not evade the consequences of its being a separate entity when it suits its convenience.[987] The supreme court rejected Crowley's argument that the chief pilot was actually employed by

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978. *Id.* at 471.

979. *Id.*

980. 817 P.2d 460 (Alaska 1991).

981. *Id.* at 461. The case came to trial with Crowley as the remaining defendant. *Id.* The superior court dismissed the claim against PST&B in an earlier proceeding, since an employer's liability under the workers' compensation statutes is exclusive of all other liability. Croxton v. Crowley Maritime Corp., 758 P.2d 97 (Alaska 1988).

982. *Croxton*, 817 P.2d at 462.

983. *Id.*

984. *Id.* The statute provides:

> The liability of an employer prescribed in [Alaska Statutes section] 23.30.045 is exclusive and in place of all other liability of the employer and any fellow employee to the employee, the employee's legal representative, husband or wife, parents, dependents, next of kin, and anyone otherwise entitled to recover damages from the employer or fellow employee at law or in admiralty on account of the injury or death.

ALASKA STAT. § 23.30.055 (1990).

985. *Croxton*, 817 P.2d at 467.

986. *Id.* at 464.

987. *Id.*

its subsidiary, the decedent's former employer. The court stated that the corporate veil should only be pierced when the corporate structure is used to perpetrate fraud or injustice.[988] Furthermore, an employee is presumed to be controlled by his formal employer unless the corporate veil is pierced.[989] Since the veil was not pierced and the chief pilot was paid by Crowley, the exclusive remedy provision of the Workers' Compensation Act did not apply.[990] The court also noted that this decision accords with a large number of courts that have refused to allow corporations to disavow their forms in workers' compensation contexts.[991]

In *Loeb v. Rasmussen*,[992] the supreme court held that neither intentional misconduct nor comparative negligence is a defense when a defendant violates statutes prohibiting persons from selling or furnishing alcohol to minors.[993] The court held that prior case law and the public policy behind the statutes reflected the need to protect minors from themselves, not from liquor salesmen; allowing the defense of contributory negligence would defeat this purpose.[994] Moreover, the court found that Alaska Statutes section 09.17.060, which codifies the doctrine of comparative negligence in Alaska, does not change the impropriety of a comparative negligence defense in this context. For the same reasons, the court found that wilful misconduct is similarly not a defense in this situation.[995]

In *Hiibschman v. City of Valdez*,[996] the plaintiff sued the city for injuries she sustained as she went over a ski bump-jump on a beginner run at a city ski hill.[997] The case primarily involved interpreting Alaska's

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988. *Id.* at 466. Nevertheless, the court noted that neither veil-piercing option was "available to the corporation to pierce its own corporate form," as was the case in *Croxton*. *Id.* at 465 n.9 (citations omitted). For further discussion of veil-piercing in Alaska, see *infra* Philip Reed Strauss, Note, *Control and/or Misconduct: Clarifying the Test For Piercing the Corporate Veil in Alaska*, 9 ALASKA L. REV. 65 (1992).

989. *Croxton*, 817 P.2d at 466.

990. *Id.* at 467.

991. *Id.* at 466-67.

992. 822 P.2d 914 (Alaska 1991).

993. Alaska Statutes section 04.16.051 prohibits persons from furnishing alcohol to minors; Alaska Statutes section 04.16.050 requires liquor licensees to procure proof of age from a person whom they have reason to believe may be a minor.

994. *Loeb*, 822 P.2d at 917-18 (citing Nazareno v. Urie, 638 P.2d 671 (Alaska 1981)).

995. *Id.* at 920 (citing Morris v. Farley, 661 P.2d 167 (Alaska 1983)). The dissent argued that the Alaska pure comparative negligence standard as adopted in Kaatz v. State, 540 P.2d 1037 (Alaska 1975), left no room for the "exceptional statute rule" used by the majority. *Loeb*, 822 P.2d at 921-22 (Moore, J., dissenting). Justice Moore argued that none of the legislative history behind Alaska Statutes sections 04.16.051 and 04.21.050 indicated an attempt to insulate minors completely from all liability simply because alcohol was involved. *Id.* at 923-24.

996. 821 P.2d 1354 (Alaska 1991).

997. *Id.* at 1355. The plaintiff was a beginner skier who watched others take the jump

Limitations on Claims Arising From Skiing Act ("Ski Act").[998] The supreme court affirmed the superior court's determination that a genuine issue of material fact existed as to whether the jump constituted an inherent risk of skiing.[999] The court began by noting that the Ski Act does not eliminate a ski area's liability for negligence: "The statute was intended to bar recovery for those actions which only the skier could control and that were beyond the ski operator's control."[1000] An inherent risk, the court stated, is one that is obvious and necessary.[1001] The court ruled that ski area operators' protection from liability for artificial conditions should be narrowly construed,[1002] and it also found that whether the jump was artificially made or a natural part of the terrain was a question for the jury.[1003]

The court further held that the trial court erred in not submitting the issue of whether the plaintiff was skiing beyond her ability to the

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and was told by a friend how to take the jump. The jump threw her straight up in the air, and she landed on her tail bone, resulting in permanent paralysis from the waist down. *Id.* at 1356.

998. Alaska Statutes section 09.65.135 states:

> Limitations on claims arising from skiing.
> (a) A skier may not recover from a ski area operator for injury resulting from an inherent risk of skiing unless the injury occurred when the ski area operator was not providing the information required by (b) of this section.
> (b) A ski area operator shall post trail signs at prominent locations within a ski area which shall include a list of the inherent risks of skiing and the limitation on liability of the ski area operator provided by this section.
> (c) In this section
> (1) "inherent risks of skiing" means the dangers or conditions which are an integral part of the sport of skiing, including, but not limited to,
> (A) changing weather conditions;
> (B) variations or steepness in terrain;
> (C) snow or ice conditions;
> (D) surface or subsurface conditions such as bare spots, forest growth, and rocks;
> (E) collisions with lift towers, other structures, and their components unless the skier is on the lift;
> (F) collisions with other skiers; and
> (G) a skier's failure to ski within the limits of the skier's ability;
> (2) "injury" means a personal injury or property damage or loss;
> (3) "skier" means a person in a ski area engaged in the sport of skiing, sliding downhill on snow or ice on skis, a toboggan, a sled, a tube, a ski-bob, or other device for recreation in snow;
> (4) "ski area" means all ski slopes, trails and other places under the control of a ski area operator and administered as a single enterprise in the state;
> (5) "ski area operator" means the operator of a ski area.

ALASKA STAT. § 09.65.135 (1983).

999. *Hiibschman*, 821 P.2d at 1358.

1000. *Id.* at 1359.

1001. *Id.* at 1360.

1002. *Id.* at 1361.

1003. *Id.* at 1362.

jury.[1004] In order to be skiing beyond one's ability, one must subjectively know that he or she is skiing beyond his or her ability.[1005] It is also possible for the skier to voluntarily and unreasonably assume a negligently created risk.[1006] The skier's recovery may be limited by her comparative negligence as the court interpreted the Ski Act so as not to nullify Alaska's comparative negligence statute.[1007]

In *Brown v. State*,[1008] a marine engineer was injured while working on board a ship in the course of his employment as a sailor. Brown was operating under a union contract at the time of the injury.[1009] His complaint, based on the Jones Act[1010] and the doctrine of unseaworthiness, was dismissed by the superior court. The supreme court reversed and remanded.[1011] The court initially noted that a sailor has three important rights: the maritime law right to maintenance and cure, the maritime law right to recover damages for injuries caused by unseaworthiness of a vessel, and the Jones Act right to recover damages caused by an employer's negligence. The union contract affected all three of these rights.[1012]

After a brief review of the three rights, the court analyzed section 9.03 of the contract in relation to the rights, and concluded that the provision was invalid.[1013] First, the court held that a sailor's rights to maintenance and cure could not be abrogated by contract.[1014] The right to

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1004. *Id.* at 1362-63.

1005. *Id.*

1006. *Id.* at 1363.

1007. *Id.* at 1364. Alaska's comparative negligence statute provides:

> [i]n an action based on fault seeking to recover damages for injury or death to a person or harm to property, contributory fault chargeable to the claimant diminishes proportionally the amount awarded as compensatory damages for the injury attributable to the claimant's contributory fault, but does not bar recovery.

ALASKA STAT. § 09.17.060 (Supp. 1991).

1008. 816 P.2d 1368 (Alaska 1991).

1009. Section 9.03 of the contract provided: "Employees shall be entitled to Alaska Workers' Compensation Benefits in lieu of remedies for wages, maintenance and cure, unseaworthiness, and negligence for illness and injuries incurred while in the service of the Employer." *Id.* at 1370.

1010. 46 U.S.C. app. § 688 (1988).

1011. *Brown*, 816 P.2d at 1370, 1376. Brown received benefits for his injury under the Alaska Workers' Compensation program. He had brought an action based on the Jones Act and the doctrine of unseaworthiness in federal court which was dismissed after the Ninth Circuit held in a similar case that the Eleventh Amendment to the United States Constitution bars a state-employed sailor from suing the state in federal court. *Id.* at 1370. For a discussion of a sailor's ability to sue the state under the Jones Act in state court, see John R. Fitzgerald, *An Analysis of Jurisdictional Issues Presented When State-Employed Seamen are Injured and Seek Redress*, 8 ALASKA L. REV. 203 (1991).

1012. *Brown*, 816 P.2d at 1371.

1013. *Id.* at 1373.

1014. *Id.* at 1374. Some courts have upheld contracts which set a rate for maintenance

maintenance and cure is traditionally unconditional,[1015] and the court found that section 9.03 impermissibly exchanged Workers' Compensation coverage for maintenance -- effectively excluding a maintenance right for the class of sailors who became ill or injured while on duty, but whose illness or injury was not related to work. The court next held that section 9.03 impermissibly altered the state's obligation to provide a seaworthy vessel by substantially limiting the state's liability.[1016] Finally, the court held that section 9.03 impermissibly allowed the state to exempt itself from liability under the Jones Act, with the result that injured sailors would not be fully compensated.[1017] Section 5 of the Federal Employers' Liability Act,[1018] which limits the ability of the employer to exempt itself from liability, is incorporated by reference into the Jones Act and thus limits the state's ability to exempt itself from liability under that act as well.[1019] The dissent argued that the court was willing to sacrifice state sovereignty to federal supremacy without a clear federal constitutional requirement to do so.[1020]

D. Product Liability

In *Colt Industries Operating Corp. v. Frank W. Murphy Manufacturer, Inc.*[1021] the Alaska Supreme Court held that a settling tortfeasor must not be included in determining the number of pro rata shares available for the remaining tortfeasor's individual liability under Alaska Statutes section 09.16.040.[1022] The case arose from a wrongful death action brought by the estate of Ralph Howard against Colt (a compressor manufacturer),

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and cure, but even those make clear that total abrogation is not permissible. *See* Al-Zawkari v. American S.S. Co., 871 F.2d 585, 588 (6th Cir. 1989); Gardiner v. Sea-Land Service, Inc., 786 F.2d 943, 949-50 (9th Cir. 1986).

1015. *Brown*, 816 P.2d at 1374.

1016. *Id.* at 1375.

1017. *Id.*

1018. 45 U.S.C. §§ 51-60 (1988).

1019. *Brown*, 816 P.2d at 1375.

1020. *Id.* at 1376-77 (Compton, J., dissenting).

1021. 822 P.2d 925 (Alaska 1991).

1022. *Id.* at 935-36. The statute provides:

> When a release or covenant not to sue or not to enforce judgment is given in good faith to one of two or more persons liable in tort for the same injury or the same wrongful death
>
> (1) it does not discharge any of the other tortfeasors from liability for the injury or wrongful death unless its terms so provide; but it reduces the claim against the others to the extent of any amount stipulated by the release or the covenant, or in the amount of the consideration paid for it, whichever is the greater; and
>
> (2) it discharges the tortfeasor to whom it is given from all liability for contribution to any other tortfeasor.

ALASKA STAT. § 09.16.040 (1983).

Craig Taylor (Colt's distributor), and Murphy (the manufacturer of a component part used in the compressor).[1023] Colt settled and sought contribution from Murphy.

The supreme court reversed the trial court's directed verdict for Murphy on the issue of design defect, relying on a strict liability design defect theory.[1024] Under one of the tests set out in *Caterpillar Tractor Co. v. Beck*,[1025] a product is considered defectively designed if "'the plaintiff proves that the product's design proximately caused injury and the defendant fails to prove, in light of the relevant factors, that on balance the benefits of the challenged design outweigh the risk of danger inherent in such design.'"[1026] The court ruled that Colt had presented sufficient evidence to establish a prima facie case that the design defect proximately caused the injury, and remanded the case for a new trial on the issue of design defect.[1027]

The court reversed the superior court's ruling that Colt, as a settling tortfeasor, should be included in calculating the number of pro rata shares available for the remaining tortfeasors' liability. The court concluded that Colt and Craig Taylor, the distributor, should have been treated as a single share for contribution purposes because under a strict liability theory Craig Taylor is entitled to indemnification and there was no evidence to hold the distributor liable based upon its own independent conduct.[1028] The court thus reversed the superior court's ruling that there were three pro rata shares, and stated that if Murphy was found to be a joint tortfeasor, there would be two pro rata shares.[1029]

1023. *Colt Industries*, 822 P.2d at 927-28.

1024. *Id.* at 931.

1025. 593 P.2d 871 (Alaska 1979).

1026. *Colt Industries*, 822 P.2d at 929 (quoting *Beck*, 593 P.2d at 886).

1027. *Id.* at 931. The court also rejected Murphy's argument that the problem should have been defined as a manufacturing defect. The court noted that the line between design defects and manufacturing defects is blurry, and rigid delineation between the categories is unnecessary and undesirable. The court concluded that the theories of manufacturing defect and design defect can operate simultaneously, and did so in this case. *Id.* at 930-31.

1028. *Id.* at 935-36.

1029. *Id.* Justice Compton's dissenting opinion disagreed with the majority view on whether settling tortfeasors should be included in calculating the number of pro rata shares. *Id.* at 937-38 (Compton, J., dissenting in part). The dissent argued that former Alaska Statutes section 09.16.040(2) does not suggest that discharging a tortfeasor from all liability for contribution means that they cannot be included in the equation to determine the total number of shares in the entire liability. *Id.*

E. Miscellaneous

In *Johnson v. State Department of Fish & Game*,[1030] the supreme court held that Alaska Statutes sections 18.80.255(1) ("Human Rights Act")[1031] and 22.10.020[1032] together "constitute express legislative consent for persons to bring particular civil rights actions against the state."[1033] The case involved restrictions on salmon fishing on the Alsek and East Alsek Rivers imposed against native surf fishermen. The court found that although the state was not immune from prosecution under the Alaska Human Rights Act,[1034] the state could not be liable for punitive damages since they were not expressly authorized by the statute.[1035] The court did hold, however, that the Human Rights Act established a cause of action for mental anguish damages,[1036] opining that the rationale for concurrent jurisdiction under the Act, in both the superior court and the Human Rights Commission, was the radical difference in damage awards.[1037]

The court also concluded that the administrative decision of the Human Rights Commission should have been given collateral estoppel effect.[1038] Relying on the test established in *Rapoport v. Tesoro Alaska Petroleum Co.*,[1039] the court held that the Commission's procedures contained the "essential elements of adjudication," and thus its adjudication of the critical issues was "exhaustive." Since the state neither appealed the decision nor asserted the inadequacy of the adjudication, a preclusive effect should have been given to the Commission's decision.[1040]

1030. No. 3778 (Alaska Nov. 29, 1991).

1031. Alaska Statutes section 18.80.255 provides in relevant part: [i]t is unlawful for the state or any of its political subdivisions (1) to refuse, withhold from, or deny to a person any local, state, or federal funds, services, goods, facilities, advantages, or privileges because of race, religion, sex, color, or national origin." ALASKA STAT. § 18.80.255 (1991).

1032. ALASKA STAT. § 22.10.020(i) (1988).

1033. *Johnson*, slip op. at 15.

1034. *Id.* at 17.

1035. *Id.* at 18.

1036. *Id.* at 37.

1037. *Id.* at 38.

1038. *Id.* at 19.

1039. 794 P.2d 949 (Alaska 1990). The three requirements for issue preclusion are:

> 1) The plea of collateral estoppel must be asserted against a party or one in privity with a party to the first action;
> 2) The issue to be precluded from relitigation . . . must be identical to that decided in the first action;
> 3) The issue in the first action must have been resolved by a final judgment on the merits.

Id. at 951 (citations omitted).

1040. *Johnson*, slip op. at 24-25.

In *Kulawik v. ERA Jet Alaska*,[1041] the supreme court held that Alaska Statutes section 09.55.580(c)(1) permits a designated beneficiary to recover his or her "prospective inheritance" in a wrongful death suit.[1042] Moreover, the court held that future gross income must be reduced to reflect future income tax liability,[1043] and that an estate could not be interpreted as a "statutory beneficiary" according to the express language of Alaska Statutes section 09.50.580(a).[1044] The court opined that the income tax rule set forth in *Beaulieu v. Elliott*[1045] could not be used "as a sword to compute future gross income and simultaneously . . . as a shield against reducing future disposable income."[1046]

The court noted that prospective inheritance "represents that portion of the decedent's 'probable accumulations' which a survivor could reasonably expect to inherit."[1047] Such an award is warranted by the legislature's liberal approach to wrongful death recoveries.[1048] The court held that Alaska Statutes section 09.55.580 was intended to provide beneficiaries with pecuniary damage awards representing loss-to-the-beneficiaries rather than loss-to-the-estate amounts.[1049] Moreover, the court noted that its interpretation of the statutory language as a "substantive directive against exclusively using the loss-to-the-estate measure of damages," rather than a limitation on the type of evidence admissible to prove damages[1050] was consistent with its prior decisions.[1051] The court awarded the decedent's

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1041. 820 P.2d 627 (Alaska 1991).

1042. *Id.* at 634; *see* ALASKA STAT. § 09.55.580(c)(1) (1983).

1043. *Kulawik*, 820 P.2d at 634.

1044. *Id.* at 635. Alaska Statutes section 09.55.580(a) provides:

> [t]he amount recovered, if any, shall be exclusively for the benefit of the decedent's spouse and children when the decedent is survived by a spouse or children or other dependents. When the decedent is survived by no spouse or children or other dependents, the amount recovered shall be administered as other personal property of the decedent but shall be limited to pecuniary loss.

ALASKA STAT. § 09.55.580(a) (1983).

1045. 434 P.2d 665 (Alaska 1967).

1046. *Kulawik*, 820 P.2d at 630.

1047. *Id.* at 631.

1048. The 1955 amendment to Alaska Statutes section 09.55.580 provided that:

> the court . . . shall consider . . . . [d]eprivation of the expectation of pecuniary benefits to the beneficiary or beneficiaries, without regard to the age thereof, that would have resulted from the continued life of the deceased and *without regard to* probable accumulations or what the deceased may have saved during his lifetime.

Id. at 633 n.14 (quoting Ch. 153, § 1, SLA 1955).

1049. *Id.* at 633. Additionally, the court justified its result by noting that allowing prospective inheritances is the majority rule. *Id.* at 634-35. Justice Burke, however, opined in his dissent that the plain words of the statute ("without regard to . . .") absolutely precluded recovery of prospective inheritance. *Id.* at 642 (Burke, J., dissenting).

1050. *Id.* at 634.

1051. *Id.* (citing Horsford v. Estate of Horsford, 561 P.2d 722, 728-29 (Alaska 1977) (holding that this language is "simply a substantive directive against precluding recovery for

beneficiaries all of their probable accumulations based on the theory that the designated beneficiaries should recover the entire loss, whether to the estate or the beneficiaries, rather than only their personal losses.[1052]

In *Kissick v. Schmierer*,[1053] the court construed an exculpatory clause as permitting a wrongful death action, since the clause did not "consciously and unequivocally" cover such an action. The case arose from a plane crash which killed the pilot, a major in the United States Air Force, and three passengers.[1054] All three passengers signed an agreement not to bring a claim against "the US Government and/or its officers, agents, or employees, or [the Air Force Elmendorf] Aero Club members . . . for any loss, damage, or injury to my person or my property which may occur from any cause whatsoever. . . ."[1055] In defense to the wrongful death claims, the pilot's estate claimed that the covenant not to sue barred all claims, and additionally, that Air Force regulations preempted any state tort claims.[1056]

The supreme court affirmed the trial court's ruling that the claims were not barred by federal preemption and that the covenant did not bar wrongful death actions.[1057] The court reviewed case law in other states which held that covenants not to sue promulgated by the federal government should be evaluated according to state law as though the parties were private individuals.[1058] The court also stated that "[i]n the absence of a direct conflict, state law is only preempted 'when Congress intends that federal law occupy a given field.'"[1059] The court concluded that there was no evidence that Congress intended the Air Force regulations requiring the signing of the covenant not to sue to preempt state tort law, and therefore, that the covenant had to be evaluated under state law as an agreement between private parties.[1060]

Turning to the covenant, the court noted that "ambiguities in a pre-recreational activity exculpatory clause will be resolved against the party seeking exculpation, and that to be enforced the intent to release a party from liability for future negligence must be conspicuously and

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adult-aged beneficiaries" and not a limitation on admissible evidence)).

1052. *Id.* at 637-38.

1053. 816 P.2d 188 (Alaska 1991).

1054. *Id.*

1055. *Id.* at 189.

1056. *Id.*

1057. *Id.*

1058. *Id.*

1059. *Id.* at 190 (quoting California v. ARC America Corp., 490 U.S. 93, 100 (1989)).

1060. *Id.*

unequivocally expressed."[1061] The court decided that the covenant was ambiguous as to whether the term "injury" included death,[1062] and thus concluded that the covenant did not bar the claims.[1063]

The dissent assumed that the majority's preemption decision was correct and that the covenant should be construed according to state law, but disagreed with the conclusion that the covenant was ambiguous.[1064] The dissent argued that any "reasonable construction" of the covenant would not exclude death.[1065] In addition, the dissent argued that even if the covenant were ambiguous, it should only be strictly construed against the United States government, the party that prepared it, and not against the pilot.[1066]

Barber v. National Bank of Alaska[1067] involved an action brought against the National Bank of Alaska ("NBA") for misrepresenting the postponement of the foreclosure on Barber's property. NBA suggested to Barber that, since he could not make his mortgage payments, he should apply for refinancing through the Home Owner's Assistance Program ("HOAP") in order to avoid foreclosure.[1068] NBA repeatedly assured Barber that foreclosure would be postponed while his HOAP application was pending, but nevertheless pursued foreclosure. Further, although the foreclosure sale took place while Barber's HOAP application was still being processed,[1069] NBA did not inform Barber of the sale, telling him instead that the sale had been postponed until the next month.[1070]

The supreme court affirmed the directed verdict for NBA on the claim of breach of implied covenants of good faith and fair dealing.[1071] The court also rejected Barber's appeal from the grant of summary judgment on his claim under the Fair Debt Collection Practices Act[1072] because the statute's definition of "debt collector" does not include collection of mortgage debt by a bank[1073] and because the legislative history states

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1061. *Id.* at 191.
1062. *Id.* at 191-92.
1063. *Id.* at 192.
1064. *Id.* (Compton, J., dissenting).
1065. *Id.* (Compton, J., dissenting).
1066. *Id.* (Compton, J., dissenting).
1067. 815 P.2d 857 (Alaska 1991).
1068. *Id.* at 859-60.
1069. *Id.* at 860.
1070. *Id.*
1071. *Id.* at 864. The court stated that Barber's contract was with the mortgagee, not with NBA, and even if there were a contractual relationship with NBA, Barber did not allege sufficient facts to show a breach with respect to the servicing of the loan. *Id.*
1072. *Id.* at 859 (citing 15 U.S.C. §§ 1692-1692o (1988 & Supp. 1989).
1073. *Id.* at 860 & n.5 (citing 15 U.S.C. § 1692a(6)(F) (1988)).

that those who service debt for others are not debt collectors for purposes of the Act.[1074]

Finally, the supreme court reversed and remanded Barber's claim for negligence, one of the misrepresentation claims, and the related punitive damages claims.[1075]

Regarding Barber's argument that NBA was negligent in failing to postpone the mortgage sale, the court reversed and remanded the issue for retrial.[1076] The court found that a fair-minded juror could conclude that Barber had detrimentally relied on the promised postponement by failing to file for bankruptcy prior to the foreclosure, thereby incurring increased federal tax liability.[1077] The court also reversed the directed verdict against Barber regarding NBA's misrepresentation of the postponement of the foreclosure.[1078] The court applied the test set out in *Bevins v. Ballard*[1079] of a "'duty to provide accurate information,' once one undertakes to speak."[1080] The court then remanded the issue of punitive damages on the claims of negligence and misrepresentation with respect to the postponement of the foreclosure.[1081] In doing so, the court directed the superior court "to consider the public policy implications of the conduct at issue," noting that "[f]inancial institutions must handle such dealings in a scrupulous fashion taking care to disclose and explain all relevant matters to the parties."[1082]

1074. *Id.* at 860-61 (citing S. REP. No. 382, 95th Cong., 1st Sess. 3 (1977), *reprinted in* 1977 U.S.C.C.A.N. 1695, 1701). The court then rejected Barber's appeal from the grant of summary judgment on his claim under the state counterpart to the Act. *Id.* at 861. Barber claimed that the Alaska act applied in his situation because the mortgage service was a "good" or, alternatively, a "service." The court, following State v. O'Neill Investigations, Inc., 609 P.2d 520 (Alaska 1980), held that since NBA's principal business is not debt collection, and thus NBA is not an independent debt collector, the mortgage service is not a "service" under the statute. Following State v. First National Bank of Anchorage, 660 P.2d 406 (Alaska 1982), the court held that Barber's loan was not a "good" and that the sale of real property is not governed by the state act. *Barber*, 815 P.2d at 861.

1075. *Barber*, 815 P.2d at 859.

1076. *Id.* at 862.

1077. *Id.* at 861-62.

1078. *Id.* at 863.

1079. 655 P.2d 757 (Alaska 1982). The test for determining whether a duty to "speak carefully" exists is the following:

> (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. at 760.

1080. *Barber*, 815 P.2d at 862 (quoting Bevins v. Ballard, 655 P.2d 757 (Alaska 1982)).

1081. *Id.* at 864.

1082. *Id.*

XII. CRIMINAL LAW

The criminal law cases decided in 1991, the bulk of which were decided by the Alaska Court of Appeals, will be broken down into four categories: evidence, general criminal law, procedure, and sentencing.

A. Evidence

The Alaska Court of Appeals considered a wide range of evidentiary issues in 1991. Four cases involved defendants' motions to suppress evidence and two dealt with the validity of police search warrants. Other issues included the propriety of allowing jurors to blow into a breathalyzer machine and the admissibility of an expert witness' prior misstatement of his credentials.

In *State v. Lewis*,[1083] the Alaska Court of Appeals affirmed the superior court's suppression of evidence upon a finding that (1) exigent circumstances present were not substantial enough to support the police entry into Lewis' apartment without a warrant, and (2) the independent source doctrine was inapplicable to this case.[1084] The police entered Lewis' apartment approximately fifteen to twenty minutes after they had heard from an uncorroborated source that a drug deal was in process in the apartment.[1085] The police then used items that they noticed during a visual search of the apartment to obtain a search warrant.[1086]

The court of appeals declared that under the standard presented in *Johnson v. State*,[1087] the superior court did not err in concluding "that there was a substantial likelihood that the drug transaction would have been completed during the fifteen- to twenty-minute gap when the police did not observe Lewis' apartment," and thus the circumstances were not sufficient to justify police entry into the apartment.[1088] In addition, the court of appeals refused to extend the independent source doctrine[1089] established

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1083. 809 P.2d 925 (Alaska Ct. App. 1991).

1084. *Id.* at 929.

1085. *Id.* at 926-27.

1086. *Id.* at 927.

1087. 662 P.2d 981, 985-86 (Alaska Ct. App. 1983) (asking "in light of the totality of the circumstances was there a compelling need for official action and an insufficient time to obtain a warrant?").

1088. *Lewis*, 809 P.2d at 928-29.

1089. This doctrine "allows the state to admit evidence when the evidence was obtained through information which was wholly independent of the illegal police conduct." *Id.* at 929.

in *Segura v. United States*[1090] to the facts of *Lewis*.[1091] The court opined that true "independence" did not exist in this case because the state used "information which they obtained after illegally entering Lewis' apartment to obtain the search warrant."[1092] Furthermore, the court held that use of the doctrine was inappropriate because the police did not have probable cause to arrest Lewis, and thus police entry into his apartment constituted a substantial invasion of privacy.[1093] Furthermore, the court of appeals speculated in dicta that the Alaska Supreme Court would most likely adhere to the *Segura* dissent which criticized the use of the independent source doctrine in situations where, as here, "avoiding a risk of loss of evidence . . . motivated the agents . . . to violate the Constitution."[1094]

In *Marcy v. State*[1095] the court of appeals affirmed the defendant's conviction and sentence for first-degree murder, first-degree sexual assault, and first-degree burglary. In the defendant's first confession to police officers investigating the case, the defendant admitted being in the victim's residence but denied the murder and the sexual assault. In the second confession, the defendant admitted to the murder. The defendant argued that the jury should not have been allowed to hear the confessions because the first confession was involuntary and tainted the second confession.[1096]

The defendant stated that the police officer lied to him to get him to confess the first time by telling him that they had seen the defendant's truck at the victim's residence and that they had found his fingerprints.[1097] The court of appeals noted that trickery alone will not render a confession inadmissible so long as the tricks will not produce an untruthful confession.[1098] The court of appeals upheld the trial court on the grounds that the defendant failed to raise the voluntariness issue in a timely manner, and consequently, the most review to which the defendant was entitled was for plain error.[1099]

1090. 468 U.S. 796 (1984).

1091. *Lewis*, 809 P.2d at 930.

1092. *Id.*

1093. *Id.*

1094. *Id.* at 930 (quoting *Segura*, 468 U.S. at 836-37). The concurring justices in *Lewis* found it "unnecessary to determine whether the dissenting view in *Segura* should be followed as a matter of state constitutional law" but joined in the remainder of the opinion. *Id.* at 931 (Bryner, C.J., concurring).

1095. 823 P.2d 660 (Alaska Ct. App. 1991).

1096. *Id.* at 662.

1097. *Id.* at 664.

1098. *Id.* at 665.

1099. *Id.*

In addition to affirming the conviction, the court affirmed the sentence and parole restriction. The defendant received consecutive sentences of ninety-nine years for murder, ten for burglary, and thirty for sexual assault.[1100] After his probation was revoked on earlier cases, the defendant was sentenced to a total of 146 and one-half years with a parole restriction of ninety-seven years.[1101] The court affirmed, holding that the sentencing judge could have properly concluded that Marcy "was a defendant from whom society may never be safe if released from custody," and consecutive sentences exceeding ninety-nine years are appropriate in those circumstances.[1102]

In *Billingsley v. State*,[1103] the defendant was convicted of robbery in the first degree after he turned himself in and confessed to the police.[1104] At trial he denied committing the robbery and said that he had lied to the police because he wanted to be locked up in order to get help for his alcohol problem.[1105] On appeal, the court affirmed the conviction based on *Harris v. State*,[1106] where the court rejected a per se suppression rule for unrecorded confessions.[1107] The defendant next requested counsel in order to help him with a claim of ineffective assistance of counsel, and the court appointed the Office of Public Advocacy ("OPA").[1108]

The supreme court subsequently reversed *Harris* in *Stephan v. State*,[1109] ruling that unrecorded confessions were to be suppressed. OPA filed a petition for post-conviction relief on Billingsley's behalf based on a claim of ineffective assistance of counsel but did not request any relief based on suppression of the unrecorded confession.[1110] After this petition was denied, the defendant hired independent counsel who filed a claim seeking application of the *Stephan* decision to this case.[1111] On remand, the trial court denied the application, holding that Billingsley was not entitled to retroactive application of *Stephan*.[1112] The court of appeals reversed and remanded and the trial court subsequently held that

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1100. *Id.* at 667.
1101. *Id.*
1102. *Id.* at 669-70.
1103. 807 P.2d 1102 (Alaska Ct. App. 1991).
1104. *Id.* at 1103.
1105. *Id.* at 1104.
1106. 678 P.2d 397 (Alaska Ct. App. 1984).
1107. *Billingsley*, 807 P.2d at 1104 (citing *Harris*, 678 P.2d at 404).
1108. *Id.*
1109. 711 P.2d 1156 (Alaska 1985).
1110. *Billingsley*, 807 P.2d at 1104-05.
1111. *Id.* at 1105.
1112. *Id.*

the admission of the confession was harmless error beyond a reasonable doubt.[1113]

On this appeal, the court of appeals first held that Billingsley did not waive his right to raise the *Stephan* issue because OPA had only been appointed to investigate the ineffective assistance claim.[1114] Addressing the harmless error question, the court further held that in order to find harmless error, the error must be harmless beyond a reasonable doubt.[1115] The court concluded that since the evidence against the defendant without the custodial confession was strong, but not overwhelming enough to find harmless error beyond a reasonable doubt,[1116] Billingsley was entitled to a new trial.

The defendant in *McLaughlin v. State*[1117] challenged the validity of the search warrant that led to his conviction for misconduct involving a controlled substance in the third degree.[1118] McLaughlin also challenged the superior court's joinder of two charges against him and its subsequent failure to sever the charges and declare a mistrial on the second count after granting a judgment of acquittal on the first count.[1119] The evidence obtained in the second search led to the second charge of possession with intent to deliver.

McLaughlin moved to suppress the evidence obtained in the search on the ground that the warrant hearing did not adequately establish the background and reliability of the informant. Applying the "clearly erroneous" standard, the court of appeals affirmed the superior court's finding that the officers did not recklessly or intentionally omit or misstate any pertinent information, the only grounds for invalidating a warrant based on inaccurate or incomplete information.[1120]

McLaughlin also challenged the lack of corroborative evidence as to the informant's veracity. The court found the United States Supreme Court's *Aguilar/Spinelli* test[1121] inapplicable since the informant

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1113. *Id.*

1114. *Id.* at 1106.

1115. *Id.* In determining whether error is harmless beyond a reasonable doubt, "'[t]he question is whether there is a reasonable possibility that the evidence complained of might have contributed to the conviction.'" *Id.* (quoting Chapman v. California, 386 U.S. 18 (1967)).

1116. *Id.* at 1106-07.

1117. 818 P.2d 683 (Alaska Ct. App. 1991).

1118. *Id.* at 685.

1119. *Id.* at 686-87.

1120. *Id.* at 685-86 (citing State v. Malkin, 722 P.2d 943 (Alaska 1986)).

1121. *Id.* at 686. The court reasoned that the *Aguilar/Spinelli* test is meant to apply in Alaska only when information provided by a confidential informant is communicated to the issuing magistrate in the form of hearsay. *Id.; see* Aguilar v. Texas, 378 U.S. 108 (1964); Spinelli v. United States, 393 U.S. 410 (1969). *See infra* note 1130.

personally appeared before the magistrate, submitted to an oath, and was available for questioning.[1122]

The court further held that it was proper for the state to allow the grand jury to consider evidence on the first count, the sale of cocaine, when deciding whether to return an indictment on the second count, possession with intent to sell.[1123] The court found that the grand jury issued two "plainly separate charges" and was not confused by being allowed to consider one indictment in order to arrive at another.[1124] The court also upheld joinder of the similar charges under Alaska Rules of Criminal Procedure 8(a)(1) and 8(a)(3).[1125]

McLaughlin argued on appeal that because the state was unable to call the informant as a witness, the charges should have been severed when the court ordered an acquittal on the first count. The court stated that

> [t]he fact that the state's evidence of the . . . sale was insufficient to establish McLaughlin's guilt on Count I beyond a reasonable doubt does not altogether deprive that evidence of probative value. To be relevant, evidence need not be conclusive; it need only have some tendency to advance the proposition for which it is offered.[1126]

The court's failure to sever the charges did not prejudice the defendant because the evidence of the sale would have been admissible on the second count even if the first count were never prosecuted.[1127]

In *Kvasnikoff v. State*,[1128] the court of appeals reversed the defendant's convictions on the ground that the search warrant was improper. At issue in the case was the reliability of out-of-court statements on which the search warrant was issued and whether these statements established probable cause for the warrant.[1129]

The court of appeals held that the *Aguilar/Spinelli* test[1130] applies to all levels of hearsay testimony when multiple levels exist.[1131] Because

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1122. *McLaughlin*, 818 P.2d at 686.

1123. *Id.*

1124. *Id.*

1125. *Id.*

1126. *Id.* at 687 (citing ALASKA R. EVID. 401; Byrne v. State, 654 P.2d 795 (Alaska Ct. App. 1982); Denison v. Anchorage, 630 P.2d 1001 (Alaska Ct. App. 1981)).

1127. *Id.*

1128. 804 P.2d 1302 (Alaska Ct. App. 1991).

1129. *Id.* at 1303.

1130. The test, as applied in Alaska, consists of two prongs: "hearsay may be relied on to support a finding of probable cause when sufficient evidence is presented to . . . determine the *veracity* and *reliability* of the hearsay." *Id.* at 1306 (citing State v. Jones, 706 P.2d 317, 324-25 (Alaska 1985)) (emphasis added). For purposes of this case, the court assumed the veracity of Vinberg's statements. *Id.* at 1306-07.

1131. *Id.* at 1306 (citing Resek v. State, 644 P.2d 877, 878-79 (Alaska Ct. App. 1982)).

"the magistrate must be able to find that the hearsay declarant's statements were truthful and based on personal knowledge,"[1132] the court found problems with the testimony on which the search warrant was based; the person testifying, Merrigan, did not differentiate between that which Vinberg, a third party, actually told him and that which he concluded from her statements.[1133] Moreover, the court found that Merrigan's testimony indicated that Vinberg's statements actually were based on information received from another person, Jennifer Clark.[1134] The court noted that since Clark's information comprised another level of hearsay testimony, the *Aguilar/Spinelli* test must be applied to those additional statements to determine whether evidence supported "the conclusion that Clark gave Vinberg reliable information about [the defendant]."[1135] The court found that Merrigan's testimony never asserted that Vinberg recieved the information from direct conversations with Clark, and thus there was a possibility that Vinberg's statements about Clark were purely speculation.[1136] The court concluded that since the state had failed to adequately corroborate the evidence implicating the defendant, the sum of the evidence did not sufficiently establish probable cause for the search warrant.[1137]

In *Swain v. State*,[1138] the court of appeals held that an objective, rather than subjective standard should be used to determine the influence of prejudicial extrinsic information and related juror misconduct on a juror's vote. After his conviction for burglary and robbery, the defendant moved for a mistrial on the basis that one of the jurors, Darcella Perry, had been exposed to extrinsic prejudicial information about a similar burglary that they had committed at the residence of one of Perry's babysitting clients.[1139] Perry insisted that her acquaintance and discussions with her client, Schmelzer,[1140] did not influence her vote and that she never discussed it with any other jurors. In denying the motion for mistrial, the trial judge relied on Perry's assurances that the information from Schmelzer did not affect her vote.[1141]

1132. *Id.*
1133. *Id.* at 1307.
1134. *Id.*
1135. *Id.*
1136. *Id.* at 1308.
1137. *Id.* at 1308-09.
1138. 817 P.2d 927 (Alaska Ct. App. 1991).
1139. *Id.* at 929.
1140. An affidavit disclosed that Schmelzer did not describe the robbery in detail. *Id.*
1141. *Id.* at 929-30.

The court of appeals discussed two lines of cases, the first dealing with situations in which jurors are exposed to extrinsic prejudicial matter, and the second dealing with jury misconduct threatening the integrity of the verdict.[1142] Regarding the first line of cases, the court held that, although the trial judge had properly applied the fact-specific test developed in *Ciervo v. State*,[1143] that test wrongly suggested a subjective standard for determining the influence of extrinsic prejudicial information on a juror's vote.[1144] Relying heavily on American Bar Association Standard 8-3.7, Alaska Rule of Evidence 606(b), and authority from other jurisdictions, the court held that an objective test should have been used.[1145] Rule 606(b) in particular establishes that a juror should only be questioned as to what extra information he or she was exposed to, not the effect that information had on his or her vote.[1146] The court also found an objective standard required under the second line of cases involving jury misconduct, specifically *Fickes v. Petrolane-Alaska Gas Service*.[1147]

The court of appeals indicated that the trial judge's mistaken reliance on Perry's subjective assurances would have been harmless error if it were objectively clear that Perry's acquaintance and discussions with Schmelzer had no influence on Perry's vote.[1148] However, it was not clearly established exactly what information Schmelzer told Perry about the defendant's involvement in the burglary/robbery at the Schmelzer residence. This question was of "crucial significance"[1149] since such information might have affected her vote by suggesting that the defendant had a habit of committing this type of crime.

1142. *Id.* at 930.

1143. 756 P.2d 907 (Alaska Ct. App. 1988).

1144. *Swain*, 817 P.2d at 931.

1145. *Id.* at 931-32.

1146. *Id.* at 932 (citing ALASKA R. EVID. 606(b) commentary).

1147. 628 P.2d 908 (Alaska 1981). In *Fickes* the Alaska Supreme Court reiterated the two-prong standard developed in *West v. State*:

> Whether the verdict should be set aside and a new trial ordered rests in the sound discretion of the trial judge, but generally the verdict should stand unless the evidence clearly establishes a serious violation of the juror's duty *and* deprives a party of a fair trial.

409 P.2d 847, 852 (Alaska 1966) (emphasis added). Regarding the second prong of the *West* test, the *Fickes* court announced three relevant criteria:

> Three considerations provide guidelines for making this determination. First, if the party asserting prejudice had known the true facts, is it probable that it would have challenged the juror? Second, did the improper comment merely go toward a collateral matter, e.g., the general credibility of a witness or did it go to the essence of a claim or defense? Third, viewed objectively, was the probable effect of the comment prejudicial?

Fickes, 628 P.2d at 911 (citations and footnotes omitted).

1148. *Swain*, 817 P.2d at 933.

1149. *Id.* at 934.

The court of appeals held that under either the *Ciervo* standard for cases in which jurors are exposed to extrinsic prejudicial matter or the *Fickes* standard for cases involving jury misconduct, the need for a mistrial depended on what information Schmelzer told Perry about the second burglary/robbery.[1150] The court of appeals remanded the case to the superior court for a finding on this point, and held that a mistrial should be declared unless the superior court found that Schmelzer did not tell Perry of the defendant's part in the Schmelzer robbery.[1151]

In *Bowlin v. State*,[1152] the court of appeals affirmed the defendant's conviction of refusal to submit to a breath test despite the fact that the trial court allowed jurors to blow into the mechanism to gain personal knowledge of the amount of air necessary to trigger the machine.[1153] The court of appeals rejected the defendant's contention that a jury view is improper if it produces "new evidence," i.e., evidence that is more than illustrative of a witness' testimony.[1154] The court noted that the jury simply observed the workings of the machine, which was an accepted part of evidence.[1155] Furthermore, the participation of the jurors did not, as the defendant claimed, turn each juror into a witness against her.[1156] The issue was simply how much breath was needed to trigger the machine, and the jurors' participation did not implicate any due process rights, confrontation rights, or rights of cross-examination.[1157]

In *Snyder v. Foote*,[1158] the supreme court held that both a doctor's misstatement of his credentials at a prior judicial proceeding as well as the judge's finding at that proceeding were collateral and inadmissible evidence of prior acts under Alaska Rule of Evidence 608. During a medical malpractice suit, the superior court judge allowed Foote to present evidence that the plaintiff's expert witness had misstated his credentials at a previous

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1150. *Id.* at 935.

1151. *Id.* at 935-36.

1152. 823 P.2d 676 (Alaska Ct. App. 1991).

1153. *Id.* at 676-77. Bowlin contended at trial that her asthma rendered her incapable of blowing enough air into the machine to trigger the register. At trial, the judge, both attorneys, Bowlin, and the jurors went as a group to the local police station where each juror was allowed to blow into the machine. *Id.* at 677.

1154. *Id.*

1155. The court noted that the traditional concerns associated with "jury views" were not present. First, the test was narrowly and similarly executed to limit any conclusions to "the amount of air necessary to trigger the machine." The test therefore would not lead to blind speculation. Second, the presence of the judge and attorneys eliminated any concerns with "out of court" jury views. *Id.* at 678.

1156. *Id.*

1157. *Id.* at 678-79.

1158. 822 P.2d 1353 (Alaska 1991).

trial.[1159] The supreme court reversed, opining that the expert witness' earlier misstatement did not pertain to his actual credentials, and that it therefore affected his testimony only insofar as it implied that he might commit other acts of this nature.[1160] The court further held that, while cross-examination of character evidence pertaining to the truthfulness of statements is admissible under Rule 608, "the absence of the admissibility predicate for this type of evidence" rendered the evidence in the instant case inadmissible.[1161] Nor was the evidence admissible under a bias theory of Alaska Rule of Evidence 613(a).[1162]

The court also ruled that prior civil judgments are not admissible under Alaska Rule of Evidence 803(8), the public records exception to the hearsay rule, because of the explicit wording of subsection (b)(iv).[1163] Finally, the court found that, since the inadmissible evidence played a "dominant role" in the trial, the evidence was prejudicial.[1164] The plaintiff was therefore granted a new trial.[1165]

B. General Criminal Law

In this area, the Alaska Supreme Court decided only two cases dealing with witness immunity and dram-shop liability. On the other hand, the Court of Appeals decided various cases regarding controlled substances, parole violations, sexual offenses and alcohol-related offenses.

In *Closson v. State*,[1166] the Alaska Supreme Court vacated Tyoga Closson's conviction of second-degree theft based on the state's anticipatory breach of an immunity agreement. Closson stole a pistol which was later used by John Bright in a murder-for-hire shooting.[1167] During his interrogation, Closson and the Assistant District Attorney reached an agreement whereby Closson agreed to aid the state's investigation by wearing a concealed wire and testifying in further

1159. *Id.* at 1356.

1160. *Id.* at 1357-58.

1161. *Id.* at 1359.

1162. *Id.* Alaska Rule of Evidence 613(a) provides that: "evidence of bias or interest on the part of the witness . . . [is] admissible for the purpose of impeaching the credibility of a witness." ALASKA R. EVID. 613(a).

1163. *Id.* at 1359-60. This subsection excludes "factual findings resulting from special investigation of a particular complaint, case, or incident . . ." from the public records exception. ALASKA R. EVID. 803(8)(b)(iv).

1164. *Snyder*, 822 P.2d at 1361.

1165. *Id.* at 1361-62.

1166. 812 P.2d 966 (Alaska 1991).

1167. *Id.* at 967.

proceedings against the suspected murderer.[1168] In return, the state arranged to have the Municipality of Anchorage drop a pending assault charge against Closson and promised not to prosecute him for his theft of the pistol.[1169] Closson was also promised state protection and confidentiality.[1170] Closson's name and involvement in the investigation were revealed in the charging instrument and press coverage,[1171] and Closson subsequently refused to wear a wire or testify or appear before the grand jury indictment of the murder case. Believing that Closson materially breached the immunity agreement, the state charged Closson with second-degree theft and the grand jury indicted him.[1172]

The supreme court overturned Closson's conviction, reasoning that a reasonable person in Closson's circumstances would interpret the state's promise of confidentiality to mean that his name would not be disclosed publicly until absolutely necessary -- at trial.[1173] The court found that, after the public disclosure of Closson's identity, the state's subsequent request to have Closson wear a wire was an anticipatory breach of the immunity agreement.[1174]

Relying on contract principles,[1175] the court held that Closson was entitled to specific performance based on the fact that the state's anticipatory breach prevented Closson from returning to the same position he would have been in absent the agreement.[1176] Moreover, the court held that fundamental fairness concerns weighed substantially in Closson's favor because Closson cooperated with the police at all times up until the state needlessly breached the confidentiality agreement, and because the state handled the situation poorly after the breach occurred.[1177] The court thus vacated Closson's second-degree theft conviction, holding the state to specific performance of the immunity agreement.[1178]

1168. *Id.*

1169. *Id.*

1170. *Id.* at 971 n.6.

1171. *Id.* at 968.

1172. *Id.*

1173. *Id.* at 970-73.

1174. *Id.* at 973-74.

1175. *Id.* at 970. The court analyzed the immunity agreement under contract principles based on United States v. Irvine, 756 F.2d 708 (9th Cir. 1985), United States v. Carrillo, 709 F.2d 35 (9th Cir. 1983), and United States v. Brown, 801 F.2d 352 (8th Cir. 1986).

1176. *Closson*, 812 P.2d at 974.

1177. *Id.* at 975. The state "simply threatened Closson with prosecution if he did not comply with their demand." *Id.*

1178. *Id.* at 976.

In *Lord v. Fogcutter Bar*,[1179] the supreme court ruled that one's own criminal conduct precludes recovery for any cause of action based on that conduct. In this case, a bartender served Robert William Lord more than fourteen drinks over a period of several hours at the Fogcutter Bar, after which he left with a woman whom he subsequently kidnapped, raped and assaulted.[1180] Lord filed a complaint against the Fogcutter Bar and its bartender alleging that the bar owed him damages resulting from his imprisonment, as the bar had sold him liquor in violation of Alaska's dram shop statute. The supreme court affirmed the trial court's grant of summary judgment for Fogcutter and its award of attorneys' fees to the defendant on the basis that Lord's claims were frivolous.[1181] Assuming for purposes of summary judgment review that Fogcutter actually did violate Alaska's dram shop statute by selling a drunken person alcohol, the court nevertheless affirmed the trial court on the grounds that "Lord's criminal conduct preclud[ed] his recovery for any cause of action based on his criminal conduct."[1182]

The court reasoned that the dram shop statute was not meant to protect people from the consequences of their own intentional, criminal conduct.[1183] The court stated that this principle is "grounded in public policy"[1184] and noted that it affirmed summary judgment in this case for the same reasons it did so in *Adkinson v. Rossi Arms Co.*[1185] In *Adkinson*, the court held that a person convicted of manslaughter could not sue the manufacturer or the seller of a shotgun for direct personal losses which resulted from a shooting.[1186]

In *Tuckfield v. State*,[1187] the court of appeals affirmed the defendants' felony convictions under Alaska Statutes section 04.16.200(b)[1188] for the distribution of alcohol in violation of the results of a local option election. Although local option elections are now conducted under Alaska Statutes sections 04.11.490 to 04.11.500, the local

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1179. 813 P.2d 660 (Alaska 1991).

1180. *Id.* at 661.

1181. *Lord*, 813 P.2d at 662.

1182. *Id.*

1183. *Id.* at 663.

1184. *Id.*

1185. 659 P.2d 1236 (Alaska 1983).

1186. *Lord*, 813 P.2d at 663. The court noted that "allowing a criminal defendant, who has been convicted of an intentional killing, to impose liability on others for the consequences of his own anti-social conduct runs counter to basic values underlying our criminal justice system." *Id.* (citing *Adkinson*, 659 P.2d at 1240).

1187. 805 P.2d 982 (Alaska Ct. App. 1991).

1188. ALASKA STAT. § 04.16.200(b) (Supp. 1991). Alaska Statutes section 04.11.010 requires anyone who sells alcohol to have a license or permit. ALASKA STAT. § 04.11.010 (1986).

option at issue here was put in place in 1977 under former Alaska Statutes section 04.10.430(a).[1189] At the time of this election, violation of a local option law was only a misdemeanor.[1190] The defendants argued that the legislature intended that communities hold new local option elections any time penalties were increased. After a review of the legislative history, the court of appeals held that the legislature intended to redesignate former Alaska Statutes section 04.10.430 as Alaska Statutes section 04.11.490 and to include it in the new legislation.[1191] The court found no indication that the legislature intended that the communities hold new elections after the passage of new legislation.[1192] Finally, the court noted that anyone who could come up with as sophisticated a legal argument as the defendants in this case could certainly be charged with the knowledge that "provisions of an original act which are repeated in an amendment are considered as a continuation of the original act."[1193] The court affirmed the defendants' convictions.[1194]

In *Chambers v. State*,[1195] the court of appeals addressed the first impression issue of whether converting cocaine into crack qualifies as "manufacturing" under Alaska Statutes section 11.71.900(13)(A).[1196] The defendant argued that converting cocaine into crack does not amount to "manufacture" under Alaska law because the cocaine molecule remains unchanged during the process of converting cocaine hydrochloride to crack cocaine.[1197] The court disagreed and affirmed the defendant's conviction for possession with the intent to manufacture a controlled substance.[1198]

In *State v. Thronsen*,[1199] the court of appeals affirmed an order dismissing an indictment of the defendant for possession of cocaine "in the body."[1200] The court held that a person who has cocaine in his or her

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1189. *Tuckfield*, 805 P.2d at 984.

1190. *Id.* at 983.

1191. *Id.* at 986.

1192. *Id.*

1193. *Id.*

1194. *Id.* at 987.

1195. 811 P.2d 318 (Alaska Ct. App. 1991).

1196. *Id.* at 321. Alaska Statutes section 11.71.900(13)(A) provides that "manufacture":

> [m]eans the production, preparation, propagation, compounding, conversion, growing, or processing of a controlled substance, either directly or indirectly by extraction from substances of natural origin, or independently by means of chemical synthesis, or by a combination of extraction and chemical synthesis; however, the growing of marijuana for personal use is not manufacturing.

ALASKA STAT. § 11.71.900(13)(A) (Supp. 1991).

1197. *Chambers*, 811 P.2d at 319.

1198. *Id.* at 321.

1199. 809 P.2d 941 (Alaska Ct. App. 1991).

1200. *Id.* at 964.

body has no control over the cocaine and therefore may not be convicted for possession.[1201]

The court in *Jordan v. State*[1202] reversed the defendant's conviction for possession of cocaine,[1203] on the basis of the trial court's error in refusing to give his proposed jury instructions. Jordan attempted to establish at trial that he abandoned the drugs.[1204] He also argued that he could not be convicted of possession because under both *Adams v. State*[1205] and *Moreau v. State*,[1206] "momentary or passing control of drugs for purposes of disposal does not amount to unlawful possession."[1207] The trial court refused, however, to give an instruction on passing control.[1208] On appeal, the state characterized passing control as an affirmative defense, thereby requiring the defendant to produce evidence supporting his theory.[1209] The court of appeals rejected this characterization, noting that "[t]he more relevant inquiry here is whether, under the totality of the evidence, an instruction on passing control was necessary to allow the jury to properly decide the issue of Jordan's guilt."[1210] Since the evidence allowed a finding of abandonment, the court found that the instruction was necessary and reversed the conviction.[1211]

In *Marion v. State*,[1212] the court of appeals reversed Marion's conviction for cocaine possession because "a defendant's mere presence in a car containing drugs is insufficient to establish a *prima facie* case of knowing possession."[1213] The court held that under Alaska Rules of Criminal Procedure 6(q) and 6(r) the grand jury did not have enough evidence to indict Marion because the only evidence linking Marion to the

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1201. *Id.* at 943. The court noted that the state could have avoided this problem by charging the defendant with possession of cocaine at the time and place of ingestion, rather than possession of cocaine "in the body." *Id.* at 942-43.

1202. 819 P.2d 39 (Alaska Ct. App. 1991).

1203. Witnesses saw Jordan place something into the wheel well of a nearby parked car. After learning this information, the police checked under the wheel and found a package of cocaine. They arrested Jordan and charged him with possession. *Id.* at 40.

1204. *Id.*

1205. 706 P.2d 1183, 1186 (Alaska Ct. App. 1985).

1206. 588 P.2d 275, 286 (Alaska 1978).

1207. *Jordan*, 819 P.2d at 40.

1208. *Id.* The court noted that the "passing control doctrine presumes that a defendant's temporary control over drugs is for the sole purpose of disposal or abandonment. The doctrine thus has no application when a person secretes drugs with intent to reassert control over them at a later time, or as a means of transferring them to others." *Id.* at 42 n.2.

1209. *Id.* at 41.

1210. *Id.*

1211. *Id.* at 43.

1212. 806 P.2d 857 (Alaska Ct. App. 1991).

1213. *Id.* at 860.

cocaine other than his proximity to it was inadmissible hearsay evidence.[1214] The court stated that "evidence of proximity to contraband cannot in itself establish knowing possession."[1215]

In *Castillo v. State*,[1216] the defendant successfully appealed his conviction for misconduct involving a controlled substance on the basis that he was deprived of his right to a unanimous verdict. At trial, the state argued that Castillo could be convicted as a principal for possession of cocaine, or, in the alternative, he could be convicted as an accomplice. The jury returned a general verdict of guilty. The court of appeals reversed the conviction, holding that a general verdict form in this case was insufficient.[1217]

The court distinguished *State v. James*[1218] and *Ward v. State*,[1219] noting that in both of those cases "the defendant was charged with violating two alternative sections of the same statute."[1220] In the present case, the state's two theories of liability described two different criminal events, not two different theories by which Castillo could be convicted of the same criminal act. The general verdict was insufficient because it did not indicate whether the jury unanimously agreed on which act Castillo was guilty of committing.[1221] The jury could have been divided on which criminal act Castillo committed and still returned a verdict of guilty due to the verdict form. The court of appeals held that "Castillo was deprived of his right to a unanimous verdict on what criminal act he committed."[1222]

In *State v. Stores*,[1223] the court of appeals held that Alaska's criminal escape statute applies in cases of parole arrests.[1224] The defendant,

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1214. *Id.* at 859-60. Alaska Rule of Criminal Procedure 6(q) provides in part: [t]he grand jury shall find an indictment when all the evidence taken together, if unexplained or uncontradicted, would warrant a conviction of the defendant." ALASKA R. CRIM. P. 6(q). Alaska Rule of Criminal Procedure 6(r)(1) provides in part: "[H]earsay evidence shall not be presented to the grand jury absent compelling justification for its introduction." ALASKA R. CRIM. P. 6(r)(1).

1215. *Marion*, 806 P.2d at 859.

1216. 821 P.2d 133 (Alaska Ct. App. 1991).

1217. *Id.* at 135-37.

1218. 698 P.2d 1161 (Alaska 1985).

1219. 758 P.2d 87 (Alaska 1988).

1220. *Castillo*, 821 P.2d at 137.

1221. *Id.*

1222. *Id.*

1223. 816 P.2d 206 (Alaska Ct. App. 1991).

1224. *Id.* at 210. Alaska's criminal escape statute, Alaska Statutes section 11.56.310(a)(1)(B), provides:

> (a) One commits the crime of escape in the second degree if, without lawful authority, one
> (1) removes oneself from . . .

Stores, ran away from a police officer who was arresting him on a felony warrant for parole violations. The court noted that a parolee remains, for all intents and purposes, a convict or a prisoner because the correctional system retains its grasp and power over the parolee.[1225] Moreover, the court held that both the plain language of the statute[1226] and its legislative history exhibited an intention to encompass a parolee's underlying conviction.[1227] Finding that the statute was not unconstitutionally vague, the court further opined that the language of the statute was broad enough for someone to understand that running away from a police officer after arrest is prohibited.[1228]

In *State v. Staael*[1229] the court of appeals reviewed the lower court's revocation of defendant's parole for violating two standard conditions of parole.[1230] At issue were three findings made by the trial court at a hearing for post-conviction relief. The trial court found that "defendant should have been granted a hearing on the special conditions of parole,"[1231] that "parole was unlawfully revoked,"[1232] and that the defendant "did not have a right to refuse mandatory parole."[1233]

Reversing the lower court, the court of appeals held that Staael had no right to a hearing before the standard conditions were imposed, and thus that his parole was properly revoked after he broke the two standard conditions.[1234] The court did not reach the issue of whether a hearing is required before imposition of special conditions because the issue was irrelevant to Staael's situation.[1235]

(B) official detention for a felony or for extradition

. . . .

ALASKA STAT. § 11.56.310(a)(1)(B) (1989).

1225. *Stores*, 816 P.2d at 209.

1226. The court referred to Webster's New World Dictionary definition of "for" as "with regard to." *Id.* at 210.

1227. *Id.* at 210-11 n.4.

1228. *Id.* at 212.

1229. 807 P.2d 513 (Alaska Ct. App. 1991).

1230. *Id.* at 514. Parole can consist of general, standard, and/or special conditions under Alaska Statutes section 33.16.150(a). The general condition requires that the parolee refrain from conduct punishable by imprisonment. The standard conditions are 12 conditions routinely imposed. The two standard conditions which were broken by Staael were: (1) the parolee must report to his parole officer the next working day after being released; and (2) the parolee must obtain permission to travel out of state. Special conditions are other restrictions imposed at the discretion of the board on a case-by-case basis. *Id.* at 514 n.1.

1231. *Id.* at 514.

1232. *Id.*

1233. *Id.*

1234. *Id.* at 519.

1235. *Id.* at 516. In addition, the court noted that they were notified at oral argument of the adoption of new Parole Board regulations and were hopeful that the new regulations will make "this particular scenario unlikely to be repeated." *Id.*

The court also affirmed the lower court's holding that Staael did not have a right to refuse mandatory parole.[1236] Staael argued that because probation may be refused if the conditions are more onerous than serving the sentence, then parole may also be refused under similar circumstances.[1237] The court rejected the argument. First, a parolee is subject to a variation on the sentence imposed, while a probationer agrees to an alternative punishment.[1238] Second, the court noted that when a parolee is released from prison he is given his liberty back.[1239] Therefore, he is always better off than he was while he was in prison, no matter what the conditions of parole.[1240]

In *Lepley v. State*,[1241] the court of appeals affirmed Lepley's conviction of first-degree sexual abuse of a minor because he failed to prove that fellatio was among the least serious offenses included in the definition of the crime.[1242] Alaska Statutes section 11.81.900(b)(53) includes fellatio as a form of sexual penetration,[1243] and the court noted that "when the Legislature has defined several methods of committing the same crime, each method is deemed of equal seriousness with the others."[1244] Moreover, the court stated that a defendant convicted of first-degree sexual assault or first-degree sexual abuse of a minor cannot claim his offense is of a less serious nature because "he inflicted little or no physical injury upon his victim."[1245]

In *Bibbs v. State*,[1246] the court of appeals reversed a conviction for sexual abuse of a minor in the second degree. The court held that evidence critical to showing the reasonableness of the defendant's belief in the victim's age[1247] should have been reviewed *in camera* pursuant to

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1236. *Id.* at 519.

1237. *Id.* at 516.

1238. *Id.* at 518.

1239. *Id.*

1240. *Id.* at 518-19.

1241. 807 P.2d 1095 (Alaska Ct. App. 1991).

1242. *Id.* at 1098-99.

1243. Lepley asserted that fellatio was less serious than other crimes defined in Alaska Statutes section 11.81.900(b)(53) because no physical penetration occurred. *Id.* at 1097. Alaska Statutes section 11.81.900(b)(53) provides: "'sexual penetration' means (A) genital intercourse, cunnilingus, fellatio . . . ." ALASKA STAT. § 11.81.900(b)(53) (1989).

1244. *Lepley*, 807 P.2d at 1097 (citing Adams v. State, 718 P.2d 164 (Alaska Ct. App. 1986); Walsh v. State, 677 P.2d 912 (Alaska Ct. App. 1984)).

1245. *Id.* at 1098.

1246. 814 P.2d 738 (Alaska Ct. App. 1991).

1247. A reasonable belief that the victim was over sixteen years of age is an affirmative defense to sexual abuse of a minor in Alaska. *See id.* at 740 n.3; ALASKA STAT. § 11.41.445(b) (1989).

Alaska's rape shield statute.[1248] The court decided that the trial court should have permitted an *in camera* examination of the victim, a thirteen year old girl, concerning the information she gave the defendant during a telephone conversation.[1249]

In *Echols v. State*,[1250] the court of appeals overruled its decision in *Bowell v. State*,[1251] concluding that Alaska's accomplice liability statute requires a showing of intentional rather than reckless conduct. The defendant was charged based on an incident where her husband beat their daughter with an extension cord.[1252] The husband was convicted of assault under Alaska Statutes section 11.41.200(a)(1).[1253] Echols argued that Alaska Statutes section 11.16.110(2), the accomplice liability statute, required the state to prove that she intended her daughter to suffer serious physical injury.[1254] The superior court, relying on *Bowell*,[1255] rejected this argument, finding that she needed only to have acted recklessly, not intentionally.[1256]

The court of appeals overruled its holding in *Bowell* and reversed the defendant's conviction.[1257] Based on the plain language of the statute and the legislative history, the court found that Alaska Statutes section 11.16.110 requires that the state show the defendant *intended* to promote the offense; merely showing recklessness toward the possibility of the offense is insufficient.[1258] The concurrence noted that the defendant could have been charged and convicted of first-degree assault as a

1248. *Bibbs*, 814 P.2d at 740-41; *see* ALASKA STAT. § 12.45.045 (1990).

1249. *Bibbs*, 814 P.2d at 741.

1250. 818 P.2d 691 (Alaska Ct. App. 1991).

1251. 728 P.2d 1220 (Alaska Ct. App. 1986), *overruled by* 818 P.2d 691 (Alaska Ct. App. 1991).

1252. *Id.*

1253. *Id.* The statute provides: "(a) A person commits the crime of assault in the first degree if (1) that person recklessly causes serious physical injury to another by means of a dangerous instrument." ALASKA STAT. § 11.41.200(a)(1) (1989).

1254. *Echols*, 818 P.2d at 693. The statute provides that one is legally accountable for the conduct of another if "with intent to promote or facilitate the commission of the offense, the person (A) solicits the other to commit the offense; or (B) aids or abets the other in planning or committing the offense." ALASKA STAT. § 11.16.110(2) (1989).

1255. 728 P.2d at 1220.

1256. *Echols*, 818 P.2d at 693.

1257. *Id.* at 695.

1258. *Id.* at 694-95.

principal, not an accomplice,[1259] since Alaska's assault statute[1260] encompasses reckless conduct that causes serious physical injury.[1261]

In *J.R.N. v. State*,[1262] the court of appeals reversed the superior court's waiver of juvenile jurisdiction due to a failure to comply with Alaska Delinquency Rule 7(b).[1263] Upon J.R.N.'s arrest, the police detained him for over four hours, and eventually obtained a confession from him, but failed to notify his parents pursuant to Rule 7(b).[1264]

Relying on *Copelin v. State*,[1265] the court noted the clear and unambiguous language of Rule 7(b), stating that "'immediately' means just that."[1266] The court also held that Rule 7(b) should be construed analogously to similar rules in other states which indicate that "a fundamental purpose of immediate parental notice requirements is to maximize the opportunity for parental presence during custodial interrogation of juveniles."[1267] While this requirement is not absolute, but instead subject to reasonability and flexibility,[1268] the court found no conflict between Rule 7(b) and the investigative needs of the police in this case. Thus, the court suppressed the evidence obtained in violation of Rule 7(b).[1269]

In *Noblit v. State*,[1270] the court of appeals held that under the crime of hindering prosecution, a defendant is strictly liable regarding the "legal classification of the crime committed by the assisted person."[1271] The court noted that pursuant to Alaska Statutes section 11.56.770, the "requirement of a specific intent to hinder the prosecution of a person who has committed a crime necessarily presupposes the defendant's knowledge that the underlying crime has been committed."[1272] Nevertheless, the statute "dispense[s] with any requirement of awareness as to the legal

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1259. *Id.* at 695 (Bryner, C.J., concurring).

1260. ALASKA STAT. § 11.41.200(a)(1) (1989); *see also supra* note 1253.

1261. *Id.*

1262. 809 P.2d 416 (Alaska Ct. App. 1991), *on appeal*, No. S-4528 (argued Feb. 11, 1992).

1263. *Id.* at 421. Rule 7(b) provides in part: "[i]f a juvenile is arrested . . . . The arresting officer shall immediately notify the parents . . . ." ALASKA DELINQUENCY R. 7(b).

1264. *Id.* at 417.

1265. 659 P.2d 1206 (Alaska 1983), *appeal after remand*, 676 P.2d 608 (Alaska Ct. App. 1984), *cert. denied*, 469 U.S. 1017 (1984).

1266. *J.R.N.*, 809 P.2d at 418 (quoting *Copelin*, 659 P.2d at 1211).

1267. *Id.* (citations omitted).

1268. *Id.* at 420.

1269. *Id.* at 420-21.

1270. 808 P.2d 280 (Alaska Ct. App. 1991), *reh'g granted*, (May 31, 1991).

1271. *Id.* at 282; *see* ALASKA STAT. § 11.56.770 (1989).

1272. *Noblit*, 808 P.2d at 282.

classification of the crime committed by the assisted person."[1273] The court found this construction to be compatible with the intent of the Alaska Legislature, Model Penal Code section 242.3, and decisions of other courts.[1274] Furthermore, the court held that due process concerns were satisfied since Alaska Statutes section 11.56.770 required a finding that Noblit intentionally hindered prosection with knowledge of wrongdoing.[1275] It distinguished the statute in question, which imposed strict liability as to an element of the crime, from precedent indicating that "the imposition of criminal sanctions on the basis of strict liability" violated due process.[1276] Concluding that "Noblit's guilt should not depend on his own knowledge of the potential legal consequences stemming from [the felon's] conduct,"[1277] the court affirmed his conviction.[1278]

In *Patterson v. Municipality of Anchorage*,[1279] the court of appeals held that a defendant can only be convicted of refusal to submit to a breath test if the prosecution proves that he was actually driving.[1280] The defendant in this case was originally charged with driving while intoxicated, driving while license revoked and refusal to submit to a chemical test of his breath.[1281] The defendant was an occupant of a van that hit another car. Since the occupants got out of the van before the police arrived, it was impossible to prove beyond a reasonable doubt that the defendant had actually been driving.[1282] Thus, the prosecution dismissed the charges, and the defendant was tried and convicted solely on the refusal charge.[1283]

The court of appeals noted that the trial court had correctly recognized that an arrest for DWI based on probable cause needed to be shown before evidence of refusal to submit to the breath test could be admitted.[1284] The trial court erred, however, in ruling that the question of whether the

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1273. *Id.*

1274. *Id.* at 283-84 (citing People v. Young, 555 P.2d 1160 (Colo. 1976) (en banc); MODEL PENAL CODE § 242.3 commentary at 239 (1980) (noting that "it is not necessary that the defendant know the law of the crime for which the other is sought").

1275. *Id.* at 284.

1276. *Id.*

1277. *Id.* at 286.

1278. *Id.*

1279. 815 P.2d 390 (Alaska Ct. App. 1991).

1280. *Id.* at 394. The court distinguished its decision from Brown v. State, 739 P.2d 182 (Alaska Ct. App. 1987), on the grounds that in *Brown* the defendant had acknowledged his control of the vehicle. *Patterson*, 815 P.2d at 393.

1281. *Id.* at 391.

1282. *Id.*

1283. *Id.*

1284. *Id.* at 392.

defendant was actually driving needed to be considered *only* in connection with the probable cause question.[1285]

Peterson v. State[1286] involved clarification of the "informer's privilege." The defendant was charged with three counts of misconduct involving a controlled substance.[1287] The first count was for delivering a package of marijuana to an airport cargo office. Two airport employees became suspicious, opened the package, and called the police. After a "controlled delivery" to the addressee, the police obtained the name and address of the defendant, and arranged a sale to undercover officers. This sale resulted in the second and third counts, delivery of marijuana and possession with intent to deliver.

The defendant moved to compel discovery of the names and addresses of the employees who opened the package at the airport.[1288] After an *in camera* hearing, the judge overruled the state's "informer's privilege"[1289] objection and held that disclosure of the identities was required if the state continued to pursue the first count, but not for the second and third counts. The state then dismissed the first count,[1290] and the defendant was subsequently found guilty on the latter two counts.[1291]

The court of appeals rejected the defendant's argument that the informer's privilege did not encompass airline personnel performing their work-related duties.[1292] Based on the plain language of the rule and its commentary, the court concluded that "a governmental agency may protect any informant who perceives a need for anonymity."[1293] In determining the extent of the informer's privilege, the court of appeals held that the trial court must employ a balancing test that weighs the public's interest in effective law enforcement against the individual's right to prepare a defense.[1294]

1285. *Id.* The court discussed that criminal liability hinges on implied consent to submit to a breath test; implied consent arises from actually operating the vehicle. *Id.* at 392.

1286. 813 P.2d 685 (Alaska Ct. App. 1991).

1287. *Id.* at 686-87.

1288. *Id.* at 687.

1289. The informer's privilege is found in Alaska Rule of Evidence 509(a). The rule provides:

> The United States, the State of Alaska and sister states have a privilege to refuse to disclose the identity of a person who has furnished information relating to or assisting in an investigation of a possible violation of law to a law enforcement officer or member of a legislative committee or its staff conducting an investigation.

ALASKA R. EVID. 509(a).

1290. *Peterson*, 813 P.2d at 687.

1291. *Id.* at 688.

1292. *Id.* at 689.

1293. *Id.*

1294. *Id.* at 688.

The court of appeals upheld the trial court's *in camera* hearing to preserve the informants' anonymity, but allowed the defendant to see the transcript of the *in camera* hearing with the identities of the employees redacted.[1295] The court stated that the informer's privilege protects only the identity of informers, but does not protect the contents of the information.[1296]

In *O'Brannon v. State*,[1297] the defendant, who was charged with multiple counts of criminal contempt, first argued that the trial judge erred in allowing the Assistant Attorney General to sit at the counsel table with the District Attorney who was prosecuting the case.[1298] The trial judge ruled that the Assistant Attorney General could testify in the case and remain in the courtroom, but that he could not "argue, advocate, question or perform" any of the functions of trial counsel.[1299] The court of appeals relied on the California case of *People v. Superior Court*[1300] in upholding the trial court. In that case the appellate court held that the trial court erred in recusing the entire prosecutorial office of the district attorney because one district attorney might be called as a witness. It was clear, however, that a prosecutor conducting a trial could not be called as a witness.[1301]

The Alaska Court of Appeals also rejected the defendant's argument that the assistant's participation in the case biased the prosecution of the case against her, noting that the jury was aware of the assistant's role as a witness, not a prosecutor.[1302]

The court in *De Nardo v. State*[1303] affirmed De Nardo's conviction of carrying a concealed weapon, holding that the defendant's act of carrying a knife in his briefcase constituted a violation of the statute.[1304] The court reasoned that the statutory phrase "on the person" could encompass weapons concealed in a briefcase or purse for several reasons: the phrase had been so interpreted by other states using the phrase in

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1295. *Id.* at 690.

1296. *Id.*

1297. 812 P.2d 222 (Alaska Ct. App. 1991).

1298. *Id.* at 226.

1299. *Id.*

1300. 150 Cal. Rptr. 156 (Cal. Ct. App. 1978).

1301. *O'Brannon*, 812 P.2d at 226-27.

1302. *Id.* at 227.

1303. 819 P.2d 903 (Alaska Ct. App. 1991).

1304. *Id.* at 908. The statute provides: "A person commits the crime of misconduct involving weapons in the third degree if [he] . . . knowingly possesses a deadly weapon, other than an ordinary pocket knife, or a defensive weapon that is concealed on the person." ALASKA STAT. § 11.61.220(a)(1) (Supp. 1991).

similar statutes,[1305] the Alaska definition of "on the person" was sufficiently broad to yield the same result as "about the person,"[1306] and the legislative history and intent clearly supported the interpretation of "on the person" to include purses, briefcases, backpacks, and other containers that can be carried in contact with the body or were "readily available for use."[1307]

In *Perotti v. State*[1308] the court of appeals held that, where a victim is placed in fear of serious physical injury during a struggle for control of a rifle, actual possession of the rifle is not a prerequisite to commission of an assault "by means of" a dangerous instrument.[1309] During an attempted escape from the Fairbanks Correctional Facility, Perotti unsuccessfully tried to take a rifle away from a correctional officer.[1310] Perotti was charged with attempted escape in the first degree and assault in the second degree under Alaska Statutes section 11.41.220(a)(1).[1311] Although Perotti argued that he could not have placed the officer in imminent fear of injury without first gaining control of the rifle, the court found the officer's fear that Perotti might gain control of the rifle statutorily sufficient.[1312] The court of appeals thus affirmed Perotti's conviction and sentence.[1313]

1305. *DeNardo*, 819 P.2d at 905-06 (citations omitted).

1306. *Id.* at 906.

1307. *Id.* at 906-07 (citations omitted).

1308. 818 P.2d 700 (Alaska Ct. App. 1991).

1309. *Id.* at 701-02.

1310. Perotti actually gained control of the officer's pistol, but the state did not base the assault charge on this because the officer knew the pistol was unloaded and was not in fear of injury by means of it. *Id.* at 701 n.1.

1311. Alaska Statutes section 11.41.220(a)(1) provides:

> (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[.]

ALASKA STAT. § 11.41.220(a)(1) (1989).

1312. *Perotti*, 818 P.2d at 702. The court was persuaded by the construction of similar statutes in State v. Lewis, 184 Neb. 111, 165 N.W.2d 569 (1969) and State v. Hill, 298 Or. 270, 692 P.2d 100, 105 (1984).

1313. Perotti argued that his consecutive sentence of three and one-half years for the attempted escape and one and one-half years for the assault was excessive. In upholding the sentence, the court applied the "clearly mistaken" standard developed in Upton v. State, 749 P.2d 386, 388 (Alaska Ct. App. 1988), and McClain v. State, 519 P.2d 811, 813-14 (Alaska 1974). *Perotti*, 818 P.2d at 703-04.

C. Criminal Procedure

The following fifteen cases summarize the Alaska Supreme Court and Court of Appeals' decisions concerning criminal procedure in 1991. The bulk of the cases deal with a defendant's right to counsel and *Miranda* rights. This section begins with a self-incrimination case; it continues through proceedings pro se, right to counsel and *Miranda* cases; it ends with cases involving miscellaneous procedural issues.

In *State v. Hofseth,*[1314] the court of appeals affirmed the trial court's grant of the defendant's motion to suppress certain evidence on the ground that it was obtained through the state's release of incriminating financial information in violation of Alaska Statutes section 18.85.120.[1315] Hofseth was charged with various offenses relating to his alleged collection of insurance on an automobile falsely reported stolen.[1316] The challenged evidence, a DeLorean automobile, which Hofseth had reported stolen in 1987, was discovered after the state released incriminating information from Hofseth's Pre-Trial Services ("PTS") file.[1317] The file had been compiled when Hofseth sought court-appointed counsel for unrelated matters on the basis of indigency.[1318] In moving to suppress the discovered DeLorean, Hofseth relied primarily on the language of Alaska Statutes section 18.85.120, stating that the district court violated the

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1314. 822 P.2d 1376 (Alaska Ct. App. 1991).

1315. The statute provides in part:

> (b) In determining whether a person is indigent and in determining the extent of the person's inability to pay, the court shall consider such factors as income, property owned, outstanding obligations, and the number and ages of dependents. Release on bail does not preclude a finding that a person is indigent. *In each case, the person, subject to the penalties for perjury, shall certify under oath, and in writing or by other record, material factors relative to the person's ability to pay that the court prescribes.*
>
> . . . .
>
> (d) As a condition of receiving services under this chapter, a person shall affirm indigency under oath to the court and execute a general waiver authorizing the release to the court of income information regarding any income source the person had for a period of three years immediately preceding the person's first court appearance in connection with each cause. At the conclusion of all services by the public defender to the person, *the court shall upon request release to the attorney general all information received under this subsection except information that might incriminate or tend to incriminate the person.*

ALASKA STAT. § 18.85.120 (1991) (emphasis added).

1316. *Hofseth*, 822 P.2d at 1379.

1317. *Id.*

1318. Hofseth was denied court-appointed counsel for an unrelated matter in January of 1988, but the trial judge indicated that he would reconsider the denial if Hofseth agreed to answer questions about his financial condition. *Id.* at 1378-79. Hofseth then testified that he did not own any vehicles or property, and that all property was in Brodsky's name, to whom he had been remarried in 1985. *Id.* at 1379. In April of 1988, Hofseth again requested court-appointed counsel on an unrelated matter, which led to a PTS check and eventually to the discovery of the DeLorean on Brodsky's property. *Id.*

terms of the statute by releasing incriminating information. Additionally, he argued that reading the statute to allow the release of the information would violate his right against self-incrimination.[1319]

In affirming the trial court's suppression order, the court of appeals discussed the state's arguments in turn. The court first addressed the state's argument that Hofseth's statements were not "compelled" as they were false, and therefore not entitled to the protection of the Fifth Amendment's privilege against self-incrimination.[1320] The court initially noted that the state was not barred by the statute or the Fifth Amendment from prosecuting Hofseth for perjury.[1321] In order to prosecute any crimes based on the revelation of subsidiary information in the indigency application, however, the state must first show that the basic claim of indigency was untruthful. If it is so shown, then the defendant could not be considered to have been compelled to reveal information supporting the application as he was not compelled to declare indigency in order to obtain counsel.[1322] In this case, where the defendant himself was uncertain as to whether he qualified for court-appointed counsel, and the state never demonstrated that Hofseth fraudulently applied for assistance knowing himself to be unqualified, the state's argument failed.[1323]

The court of appeals next rejected the state's argument that even if the release of the financial information was improper under the statute, the relationship between the disclosure and the seizure of the DeLorean was too attenuated for the seizure to be illegal.[1324] The court noted however, that if, in the course of a *perjury* investigation, the state discovered a crime *unrelated* to the information in the PTS files, the attenuation doctrine would apply and the crime could be prosecuted.[1325]

In *Evans v. State*,[1326] the court of appeals reversed the conviction of the defendant, holding that he did not knowingly and intelligently relinquish his right to counsel.[1327] The court of appeals determined that the record of the superior court did not satisfy the minimum requirements of *James v. State*,[1328] which held that before a court may grant a

1319. *Id.* at 1380.

1320. *Id.* at 1381 (citing United States v. Wong, 431 U.S. 174, 178 (1977)).

1321. *Id.*

1322. *Id.* at 1381-82.

1323. *Id.* at 1382.

1324. *Id.* at 1384.

1325. *Id.* at 1384-85.

1326. 822 P.2d 1370 (Alaska Ct. App. 1991).

1327. *Id.* at 1371.

1328. 730 P.2d 811, *modified on reh'g*, 739 P.2d 1314 (Alaska Ct. App. 1987), *appeal after remand*, 754 P.2d 1336 (Alaska Ct. App. 1988). *James* reiterated the well-established requirement that a waiver of counsel be "knowing and intelligent." *See* Faretta v.

defendant's request to proceed pro se, the court must "first establish that the defendant can represent himself in a 'rational and coherent manner' and then determine whether 'the prisoner understands precisely what he is giving up by declining the assistance of counsel.'"[1329] The record revealed that, in an attempt to replace his court-appointed attorney, the defendant indicated that if he could not get another attorney, he would "just go ahead and represent himself."[1330] At the hearing to determine the defendant's competency to proceed without counsel, the judge asked why he thought he could represent himself.[1331] The defendant indicated that he did not believe he could adequately represent himself, but that he could do a better job than his attorney who wanted him to plead guilty.[1332] After further questioning, the judge gave Evans the choice of either representing himself or using the appointed attorney. Evans chose to represent himself,[1333] and was convicted.[1334]

Finding the record wholly inadequate, the court of appeals noted that it is possible in some cases to infer a valid waiver circumstantially, but distinguished this situation from that addressed in *James*, in which the defendant had extensive prior experience with counsel, was fully apprised of the functions of an attorney, and demanded to represent himself.[1335] The defendant in *Evans* was not familiar with the judicial process in such a way and his waiver was equivocal.[1336] As the record did not indicate a knowing, intelligent, and voluntary waiver of the right to counsel, the court of appeals reversed Evans' conviction.[1337]

In *Abdullah v. State*,[1338] the court of appeals affirmed the trial judge's denial of defendant's motion to dismiss his indictment and suppress

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California, 422 U.S. 806, 821 (1975).

1329. *James*, 730 P.2d at 813-14 (quoting McCracken v. State, 518 P.2d 85, 91 (Alaska 1974)).

1330. *Evans*, 822 P.2d at 1372.

1331. *Id.* The judge also inquired into Evans' educational and vocational background. *Id.*

1332. *Id.*

1333. *Id.* at 1373. Notwithstanding the defendant's choice, the judge directed the appointed attorney to remain present at trial. *Id.*

1334. *Id.* The jury sent a note to the judge stating that they "fe[lt] the defense was not adequate, that Mr. Evans was not competent to represent himself, and that he had a difficult time communicating his point of view. Should that play a significant part in the basis of our decision?" *Id.* The judge answered that it should not. *Id.*

1335. *Id.* at 1374-75.

1336. *Id.* at 1375.

1337. *Id.* at 1376. The court further suggested that the circumstances required a higher level of scrutiny by the trial court assessing the defendant's competency to proceed *pro se*. As a result, the court of appeals indicated that the trial court had to make the defendant aware of the disadvantages of a *pro se* defense. *Id.*

1338. 816 P.2d 1386 (Alaska Ct. App. 1991).

evidence of defendant's statements to Anchorage authorities.[1339] The defendant already was formally charged with possession of cocaine when the police caught him selling drugs to an undercover officer.[1340] The court rejected Abdullah's argument that his right to counsel for the prior charge extended to his ongoing drug-dealing activities, since these activities were distinct from the possession charge and were not a "critical stage" of the proceedings when the undercover officer contacted him.[1341] The court explained that "[t]he fact that Abdullah had counsel appointed to represent him on the charge of possession of cocaine that arose in Kodiak did not serve to shield him so that he could sell drugs in Anchorage without fear of police interference."[1342] As no right to counsel had been violated, the court of appeals ruled that the trial court acted properly in refusing to suppress defendant's statements and to dismiss the drug-dealing charges.[1343]

In *Babb v. Municipality of Anchorage*,[1344] the court of appeals held that denying a DWI arrestee his request to confer with counsel before an independent blood-alcohol test is conducted does not violate Alaska Statutes section 12.25.150(b), when the arrestee has previously been given a reasonable opportunity to contact an attorney.[1345] The court opined that an independent blood-alcohol test did not constitute a "critical stage" of the proceedings and thus was not protected by the constitutional right to counsel.[1346] Consequently, the court found that only a statutory right to counsel exists before the test, and once the reasonable time and opportunity elements of Alaska Statutes section 12.25.150 are satisfied, the overriding concern is to avoid delay in the administration of the test.[1347]

In *Lively v. State*,[1348] the court of appeals affirmed the defendant's conviction for refusal to take a breath chemical test. Relying on its

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1339. *Id.* at 1386.

1340. *Id.* at 1387.

1341. *Id.* The trial court and appeals court based their decisions on Maine v. Moulton, 474 U.S. 159 (1985) and McLaughlin v. State, 737 P.2d 1361 (Alaska Ct. App. 1987).

1342. *Abdullah*, 816 P.2d at 1387.

1343. *Id.* at 1386.

1344. 813 P.2d 312 (Alaska Ct. App. 1991).

1345. *Id.* at 313-14. Alaska Statutes section 12.25.150(b) provides:

> [i]mmediately after an arrest, a person shall have the right to telephone or otherwise communicate with the prisoner's attorney and any relative or friend, and any attorney at law entitled to practice in the courts of Alaska shall, at the request of the prisoner or any relative or friend of the prisoner, have the right to immediately visit the person arrested.

ALASKA STAT. § 12.25.150(b) (1990).

1346. *Babb*, 813 P.2d at 313.

1347. *Id.* at 313-14.

1348. 804 P.2d 66 (Alaska Ct. App. 1991).

decision in *Anderson v. State*,[1349] the court held that an arresting officer has no duty to inform the arrestee of his right to have counsel present prior to taking a breathalyzer test, as it is not a "critical stage" of a proceeding at which the right to counsel attaches.[1350]

Relying on *Graham v. State*,[1351] the defendant argued that the officer erroneously did not inquire into his reasons for refusing to take the test. The defendant in *Graham* was read her *Miranda* rights and then was asked to submit to a breathalyzer test. The defendant refused and later successfully argued that she had been confused about her rights and whether she had to respond to the request to take the test. There, the supreme court held that in that situation, the arresting officer "'must inquire into the nature of the refusal and advise . . . that the rights contained in the *Miranda* warning do not apply to the breathalyzer examination.'"[1352] The court of appeals in the instant case held that *Graham* did not apply because the defendant had not been read his *Miranda* rights at the time he was asked to take the breathalyzer test. Since no *Miranda* warnings had been given, the officer did not need to ask if those warnings had confused Lively as to his rights.[1353]

Finally, the defendant argued that he had an affirmative defense of subsequent consent.[1354] Reviewing the authority in other states, the court noted a split of authority on the question of whether subsequent consent can cure an initial refusal. A minority of the courts allow subsequent consent in some circumstances[1355] on the basis that the rule is fair to the arrestee and furthers the purpose of the implied consent statutes by encouraging chemical tests in as many cases as possible.[1356] In contrast, a majority of states do not allow subsequent consent in any circumstance[1357] due to concerns about the reliability of the test as time passes, and the unreasonableness of having the arresting officer remain available for an undetermined amount of time.[1358] After considering the opposing positions, the court of appeals adopted the minority view

1349. 713 P.2d 1220, 1221 (Alaska Ct. App. 1986).

1350. *Lively*, 804 P.2d at 68.

1351. 633 P.2d 211 (Alaska 1981).

1352. *Lively*, 804 P.2d at 68 (quoting *Graham*, 633 P.2d at 215).

1353. *Id.* at 68-69.

1354. *Id.* at 69. About ten minutes after the arresting officer had brought the defendant to the jail, and after the defendant spoke with his brother and smoked a cigarette, the defendant asked if he could take the breathalyzer test. *Id.* at 67.

1355. *Id.* at 69 (citations omitted).

1356. *Id.* at 69-70.

1357. *Id.* (citations omitted).

1358. *Id.*

allowing subsequent consent in certain circumstances.[1359] The court, however, did not allow the defense to be used in this case because of the overly broad manner in which Lively proposed it.[1360]

The court in *Kochutin v. State*[1361] ruled that once a defendant invokes the right to consult with counsel, the police may not initiate contact unless defendant's counsel is present. The defendant, who had already been incarcerated for unrelated offenses,[1362] came under suspicion for murder and sexual abuse of a minor, and was transferred to a more secure prison facility. Aware of the reason behind his transfer, he spoke with his attorney, who subsequently advised the district attorney that the defendant was not interested in speaking with authorities about the homicide investigation.[1363]

The case remained unresolved and a year later the district attorney advised the police officers to contact the defendant and attempt to interview him without first notifying his attorney.[1364] The police advised the defendant of his *Miranda* rights, reminded him that he had an attorney, and interviewed him in jail without notifying his attorney.[1365] Over the course of five separate days and as many interviews, the defendant confessed to the sexual abuse and murder of the victim along with the sexual abuse of another boy in an unrelated case.[1366]

The defendant invoked the rule of *Edwards v. Arizona*,[1367] in which the United States Supreme Court expanded *Miranda v. Arizona*[1368] by holding that once a suspect invokes his *Miranda* right to consult with counsel, the police are barred from any subsequent effort to initiate further interrogation until the suspect has been given the opportunity to consult with counsel.[1369] The Alaska Court of Appeals noted that "under the *per se* rule of *Edwards*, police-initiated reinterrogation is prohibited even when the suspect, upon being recontacted, expressly waives his *Miranda* rights."[1370]

1359. *Id.*
1360. *Id.* at 70-71.
1361. 813 P.2d 298 (Alaska Ct. App. 1991) (per curiam).
1362. *Id.* at 300.
1363. *Id.*
1364. *Id.* at 301.
1365. *Id.*
1366. *Id.* at 302.
1367. 451 U.S. 477 (1981).
1368. 384 U.S. 436 (1966).
1369. *Kochutin*, 813 P.2d at 303.
1370. *Id.*

The state argued that *Edwards* was inapplicable because once a defendant is given the opportunity to consult with counsel, the *Edwards* prohibition does not apply anymore, and the police may again initiate contact.[1371] The court of appeals rejected the state's argument, expressly relying on the United States Supreme Court's decision in *Minnick v. Mississippi*,[1372] which held that once a suspect invokes the right to consult with counsel, the police may not initiate any contact unless the person's attorney is present.[1373] The court also rejected the state's argument that *Edwards* did not apply because the defendant had been in custody for unrelated offenses. In determining that the defendant had been in continuous custody, the court found it immaterial that he was being detained for unrelated offenses. Additionally, the court found no reason why the *Edwards* rule should be affected by the mere passage of time.[1374]

The second part of the court's holding emphasized that even if *Edwards* were not applicable, the totality of the circumstances indicated that the defendant's *Miranda* waivers were not voluntary.[1375] The court qualified this aspect of its decision by refusing to hold that in all cases a person who requests counsel may never afterward voluntarily waive his *Miranda* rights; rather, the court limited its determination that the waiver was not voluntary to the facts of this case.[1376]

The dissent in this case argued that the state did not violate the *Edwards* rule,[1377] since the defendant's confinement in prison did not necessarily establish that he was in continuous custody for *Miranda* purposes.[1378] Because the defendant was confined solely as a sentenced prisoner with no charges pending against him, the "anxiety and uncertainty that support *Miranda*'s finding of inherent coercion" did not exist.[1379] The dissent suggested that the defendant's *Miranda* custody ended when the authorities transferred him to a less secure facility before the interrogations occurred.[1380] Additionally, the dissent failed to see how

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1371. *Id.* at 303-04.

1372. 111 S.Ct. 486 (1990).

1373. *Kochutin*, 813 P.2d at 304.

1374. *Id.* at 304-05.

1375. *Id.* at 305.

1376. *Id.* at 306. Additionally, the court noted that the prosecutor violated the Alaska Code of Professional Responsibility by knowingly bypassing the defendant's attorney. The court considered this violation significant in determining the voluntariness of the waiver. *Id.* at 306-07; *see* ALASKA CODE OF PROFESSIONAL RESPONSIBILITY DR 7-104(A)(1).

1377. *Kochutin*, 813 P.2d at 308 (Bryner, J., dissenting).

1378. *Id.* at 309 (Bryner, J., dissenting).

1379. *Id.* (Bryner, J., dissenting).

1380. *Id.* at 310 (Bryner, J., dissenting).

the state had acted improperly when it took advantage of the defendant's known propensity to waive his *Miranda* rights in the absence of counsel and then confess to unrelated crimes.[1381]

In *McCollum v. State*,[1382] the court of appeals held that statements McCollum made to a police officer were admissible despite the absence of *Miranda* warnings.[1383] Consistent with Alaska Supreme Court and United States Supreme Court precedent,[1384] the court held that *Miranda* warnings were not required in this case because the "circumstances surrounding the stopping, in their totality, were [not] substantially more coercive than those of a typical traffic stop,"[1385] and there was no "'actual indication of custody.'"[1386]

The defendant in *Moss v. State*[1387] contended, and the court of appeals agreed, that he was in "custody" during the time the police searched his trailer for drugs, and therefore the police were required to inform him of his *Miranda* rights before questioning him.[1388] Ten officers served the warrant wearing marked raid gear and entered the trailer with weapons drawn, pursuant to their usual procedure in drug cases.[1389] The police found four people present, including Moss, and directed them to sit on a couch while they searched the trailer. A uniformed officer was stationed at the door, but the officer in charge later stated that he would have given anyone permission to leave during the search.[1390] The officer told the people that they were not under arrest, and that as soon as they finished searching the trailer, the police would be gone.[1391] The officer in charge spoke with Moss several times in private, during which Moss confessed that there was cocaine on the premises and that a piece of paper the police found had notations of drug transactions on it.[1392]

Relying on the Alaska Supreme Court's standard of the objective, reasonable person's perspective for determining custody,[1393] the court of

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1381. *Id.* at 311 (Bryner, J., dissenting).

1382. 808 P.2d 268 (Alaska Ct. App. 1991).

1383. *Id.* at 269.

1384. *Id.* (citing Berkemer v. McCarty, 468 U.S. 420 (1984); Blake v. State, 763 P.2d 511 (Alaska Ct. App. 1988)).

1385. *Id.*

1386. *Id.* at 269-70 (quoting Hunter v. State, 590 P.2d 888, 895 (Alaska 1979)).

1387. 823 P.2d 671 (Alaska Ct. App. 1991).

1388. *Id.* at 673, 675.

1389. *Id.* at 672.

1390. *Id.*

1391. *Id.*

1392. *Id.*

1393. *Id.* at 673. The standard was set out in Hunter v. State, 590 P.2d 888 (Alaska 1979).

appeals found that, despite the fact that Moss was told he was not under arrest, the force with which the police entered and maintained control of the trailer would indicate to a reasonable person that he was in police custody.[1394] The court therefore reversed the trial court's denial of Moss' motion and remanded the case to the superior court.[1395] Judge Bryner dissented, noting that:

> Moss was in his own home, all weapons initially displayed by the police had been put away, and Moss had been expressly told that he was not under arrest, that the sole purpose of the police presence was to perform a search of the premises pursuant to a warrant, and that the police would depart as soon as the search was completed.[1396]

In *Tagala v. State*,[1397] the defendant argued that his conviction for first-degree murder and tampering with physical evidence should be overturned because he was not advised of his *Miranda* rights.[1398] The court of appeals affirmed the trial court's ruling that the defendant was not in custody during the first interview and need not have been advised of his rights. In reaching this conclusion, the court considered whether a reasonable person would have believed that he or she was not free to leave.[1399] The events surrounding the interview indicated that the defendant was not in custody: the defendant was not physically restrained; he voluntarily agreed to come to the police station; he entered the station unaccompanied by an officer; and he was told that he was free to leave at any time.[1400]

At a second interview later in the day a police officer read the defendant his *Miranda* rights.[1401] The court of appeals affirmed the trial court's restriction of the use of the statements concerning the sale of drugs after the defendant requested counsel in response to a question about his sale of drugs.[1402] The court held that a defendant may make an unambiguous and limited assertion of the right to counsel. Any subsequent statements about the specific matter within the scope of the assertion will then be suppressed.[1403]

1394. *Id.* at 674.
1395. *Id.* at 675.
1396. *Id.* at 676 (Bryner, C.J., dissenting).
1397. 812 P.2d 604 (Alaska Ct. App. 1991).
1398. *Id.* at 606-07.
1399. *Id.* at 608-09.
1400. *Id.* at 609.
1401. *Id.*
1402. *Id.*
1403. *Id.* at 610.

The defendant also challenged the prosecutor's use of the law enforcement computer system to run criminal background checks on prospective jurors,[1404] arguing that the use of the system for this purpose violated Alaska Statutes section 12.62.030(a).[1405] The court noted that this was the first time the issue had been raised in Alaska and held that since the records may be used to challenge for cause, the prosecutor did not violate the statute.[1406] Nonetheless, the court concluded that, upon request, the prosecutor should disclose the criminal records of jurors in cases where the prosecutor intends to rely on them.[1407]

In *Bostic v. State*,[1408] the supreme court disagreed with the court of appeals as to which party should bear the burden of showing prejudice to a defendant who was not notified that a particular witness would be called. The court held that a party violating Alaska Rule of Criminal Procedure 16(b)(1)(i)[1409] "has the burden of showing that the non-offending party has not been prejudiced in the manner he specifically claims."[1410] At Bostic's trial for allegedly sexually abusing his daughter, the state called Bostic's psychiatric social worker as a rebuttal witness. The defendant objected, claiming that the state had violated Rule 16(b)(1)(i) by not notifying him that the witness would be called.[1411] The defendant

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1404. *Id.* at 611.

1405. *Id.* Alaska Statute section 12.62.030(a) provides in part:

> Except as provided in (b) and (c) of this section and in [Alaska Statutes section] 12.62.035, access to specified classes of criminal justice information in criminal justice information systems is available only to individual law enforcement agencies according to the specific needs of the agency under regulations adopted by the commission under [Alaska Statutes section] 12.62.010. Criminal justice information may be used only for law enforcement purposes or for those additional lawful purposes necessary to the proper enforcement or administration of other provisions of law as the commission may prescribe by regulations adopted under [Alaska Statutes section] 12.62.010.

ALASKA STAT. § 12.62.030(a) (1990).

1406. *Tagala*, 812 P.2d at 611-12.

1407. *Id.* at 612.

1408. 805 P.2d 344 (Alaska 1991).

1409. The rule provides:

> (b) Disclosure to the Accused.
>
> (1) Information Within Possession or Control of Prosecuting Attorney. Except as is otherwise provided as to matters not subject to disclosure and protective orders, the prosecuting attorney shall disclose the following information within his possession or control to defense counsel and make available for inspection and copying:
>
> (i) The names and addresses of persons known by the government to have knowledge of relevant facts and their written or recorded statements or summaries of statements.

ALASKA R. CRIM. P. 16(b)(1)(i).

1410. *Bostic*, 805 P.2d at 345.

1411. *Id.* The state admitted on appeal that Bostic should have been notified of the witness' appearance under Rule 16(b)(1)(i), after initially claiming that the rule did not apply to rebuttal witnesses. *Id.* at 346.

moved the court either to preclude the witness' testimony or to grant a mistrial, claiming that he was irrevocably committed to a planned defense and could not change his strategy in mid-trial as a response to the surprise witness.[1412] The defendant did not request a continuance, his alternative motions were denied, and he was convicted. The court of appeals affirmed, holding that Bostic had failed to show that the violation of the rule prejudiced his defense.[1413]

The supreme court reversed, finding that the state's violation of Rule 16(b)(1)(i) thwarted each of the purposes of Rule 16: to "'provide adequate information for informed pleas, expedite trial, minimize surprise, afford opportunity for effective cross-examination, and meet the requirements of due process.'"[1414] The court further found that it would be "manifestly unjust" to burden the non-offending party with proving that the violation was prejudicial to him.[1415] The court held that the intent of the party violating Rule 16 was irrelevant and concluded that a violation of Rule 16(b)(1)(i) is "presumptively prejudicial to the non-offending party."[1416]

While a continuance is normally the appropriate remedy for a discovery violation, the court held that a mistrial would be proper if the state failed to meet the burden of showing that the defendant was not prejudiced and the state could not proceed without the witness' testimony.[1417] The case was remanded to the superior court to determine whether the state overcame the presumption of prejudice resulting from its violation of Rule 16(b)(1)(i).[1418]

In *State v. Jeske*,[1419] the court of appeals held that, for the purposes of Alaska Rule of Criminal Procedure 45, a judge setting a trial date for a continuance may rely on the fact that the rule is tolled during the continuance until "it is clear that the defendant has not consented and will not consent to the continuance." At this point, the Rule 45 stopwatch should be restarted.[1420] The court interpreted this situation in light of *Snyder v. State*,[1421] in which the supreme court held that Rule 45 rights were not fundamental, and that a judge therefore was entitled to grant continuances upon requests from the defendant's attorney when the

1412. *Id.*
1413. *Id.*
1414. *Id.* at 347 (quoting ALASKA R. CRIM. P. 16(a)).
1415. *Id.*
1416. *Id.* at 347-48.
1417. *Id.* at 345.
1418. *Id.* at 349.
1419. 823 P.2d 6 (Alaska Ct. App. 1991).
1420. *Id.* at 19.
1421. 524 P.2d 661 (Alaska 1974).

defendant was absent.[1422] Accordingly, in *Jeske*, the court found that the defendant's lack of consent to the continuance remained subjective until it was brought to the attention of the court, and thus Rule 45 remained tolled.[1423] The court noted that any other application of the rule would "give rise to an unacceptable potential for manipulation of the rule," since defendants could otherwise wait to voice their lack of consent to a continuance until the Rule 45 period had expired.[1424]

In *Cox v. State*,[1425] the court of appeals reversed Cox's sexual abuse conviction based on the trial court's failure to allow the defendant surrebuttal.[1426] One of the state's expert witnesses, Dr. Turner, testified that since the alleged victim related her story consistently and with detail, she was telling the truth.[1427] Following this testimony, the trial judge denied Cox's request for surrebuttal, the essence of which would have been testimony that "children can and do lie about sexual abuse."[1428]

The court of appeals found that Turner's testimony was prejudicial, and that Cox should have been given a chance to rebut this testimony with the use of another expert witness.[1429] The court held that although Turner should have been able to testify whether the victim's statements were consistent with the kinds of reports of other abuse victims, his testimony inferring that the victim's statements were factual were clearly prejudicial.[1430] Specifically, the court noted that this case turned on the credibility of the witnesses and that Dr. Turner's testimony clearly improved the victim's credibility, thus having "a significant impact on the case."[1431] The court stated, "we believe that the trial court was under a duty to give counsel every opportunity to combat the improper testimony."[1432]

In *Evans v. State*,[1433] the court of appeals affirmed the lower court's denial of the defendant's habeas corpus petition contesting his extradition

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1422. *Id.* at 664.

1423. *Jeske*, 823 P.2d at 9.

1424. *Id.* at 10.

1425. 805 P.2d 374 (Alaska Ct. App. 1991).

1426. *Id.* at 379.

1427. *Id.* at 377. Turner in fact never examined the victim. *Id.* at 376.

1428. *Id.* at 377.

1429. *Id.* at 379.

1430. *Id.* at 378-79.

1431. *Id.*

1432. *Id.* at 379. Chief Judge Bryner wrote a concurring opinion in which he urged that the outcome should not hinge on Turner's testimony being plain error. *Id.* (Bryner, C.J., concurring). Bryner explained that since Turner's testimony was important, Cox should have been allowed to offer his own expert unless some compelling reason prevented rebuttal. *Id.* (Bryner, C.J., concurring).

1433. 820 P.2d 1098 (Alaska Ct. App. 1991).

to Montana.[1434] Pursuant to Montana's petition under the Uniform Criminal Extradition Act,[1435] the governor of Alaska issued a warrant for Evans' arrest and extradition to Montana. Upon denial of his habeas corpus action in superior court, Evans appealed, arguing that the Montana extradition documents failed to comply with Alaska's extradition statute.[1436]

The court of appeals rejected Evans' first argument that the documents were inadequate for not showing that any judicial officer of Montana found probable cause to believe that Evans was in the state at the time of the offense. The court noted that the statute does not require a finding of probable cause, but only an allegation. Once the governor issued the extradition warrant, a presumption arose that Evans was present in Montana when the crime was committed.[1437] Furthermore, the court stated that even if the presumption was not created by law, the extradition request from Montana included a document signed by Evans waiving his right to a preliminary examination to determine probable cause on the charges. These documents, the court found, would satisfy any requirement of showing probable cause for believing that Evans was in Montana at the time of the alleged offense.[1438]

Evans also argued that the extradition request was invalid under the second subsection of the statute as the information filed against him was not supported by an affidavit sworn in front of a magistrate.[1439] The court rejected this interpretation of the statute, noting that courts have interpreted this section of the Uniform Criminal Extradition Act "in the disjunctive: the three types of supporting documentation[1440] are

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1434. *Id.* at 1099.

1435. ALASKA STAT. §§ 12.70.010-.290 (1990). The Alaska statute was derived from the Uniform Extradition Act.

1436. *Id.* The statute setting forth the required form of the extradition request for a person who has been accused but not yet convicted of a crime in the requesting state reads in part:

> Form of Demand. (a) No demand for the extradition of a person accused but not yet convicted of a crime in another state shall be recognized by the governor of this state unless made in writing and containing the following:
>
> (1) an allegation that the accused was present in the demanding state at the time of the commission of the alleged crime and that thereafter the accused fled the demanding state . . . [and]
>
> (2) a copy of an indictment found or an information supported by affidavit in the state having jurisdiction of the crime or by a copy of a complaint, affidavit, or other equivalent accusation made before a magistrate there . . . .

ALASKA STAT. § 12.70.020(a) (1990).

1437. *Evans*, 820 P.2d at 1099.

1438. *Id.* at 1099-1100.

1439. *Id.*

1440. Subsection (2) of the Alaska Statutes section 12.70.020(a) provides three alternative methods of supporting an extradition request: (1) by a copy of an indictment from the state having jurisdiction; (2) by a copy of an information supported by an affidavit from the state

independent of each other, each sufficient to support extradition."[1441] Montana's extradition request was valid as it sent an information supported by an affidavit, thereby meeting the second type of supporting documentation.[1442] Additionally, the court noted that under Montana law an information cannot be filed unless there is a finding of probable cause that the defendant committed the crime charged.[1443] The court concluded that Evans' waiver of a determination of probable cause "must be given conclusive effect on the limited issue of whether, for purposes of proceedings under the Uniform Criminal Extradition Act, there is probable cause to believe that the charge pending against him in Montana is well-founded."[1444]

D. Sentencing

The Alaska Supreme Court and Court of Appeals issued several opinions regarding sentencing in 1991. The supreme court emphasized that sentences should be imposed only with consideration of the particular facts of each case. Furthermore, it reaffirmed that such sentences can be modified only with proper respect for the statutory scheme and only under a "clearly mistaken" standard of review.

In *State v. Wentz*,[1445] the defendant was convicted of first-degree assault for beating his wife severely while he was in a state of intoxication,[1446] and was sentenced to fifteen years in prison with three years suspended. The defendant appealed the sentence as too severe. The trial court had considered two aggravating factors in sentencing Wentz: the offense was committed against his spouse, and the defendant knew that his spouse was particularly vulnerable to his attack as she had a heart condition and was deaf.[1447]

The Alaska Court of Appeals, relying on the ten-year rule in *Pruett v. State*,[1448] reversed the trial court's sentence and remanded for imposition

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having jurisdiction; or (3) by a copy of a complaint, affidavit or other equivalent "accusation from a state having jurisdiction and executed before one of its magistrates." *Id.* (citing ALASKA STAT. § 12.70.020(a) (1990)).

1441. *Id.* (footnote added) (citations omitted).

1442. *Id.*

1443. *Id.* at 1100-01.

1444. *Id.* at 1102.

1445. 805 P.2d 962 (Alaska 1991).

1446. *Id.* at 962-63.

1447. *Id.* These factors were included in Alaska's aggravating factors statute. *See* ALASKA STAT. § 12.55.155(c)(18)(A), (5) (Supp. 1991).

1448. 742 P.2d 257 (Alaska Ct. App. 1987). In *Pruett*, the court of appeals held that for class A felonies, sentences of more than ten years should be given only to offenders who

of a new sentence "not exceeding fifteen years with five years, rather than three, suspended."[1449] The supreme court reversed, holding that the court of appeals' ten-year rule set out in *Pruett* "is both inconsistent with the statutory scheme established by the legislature and contrary to our prior decisions concerning the proper role of the appellate courts in reviewing sentencing decisions."[1450] While the court noted that it was not categorically prohibiting the court of appeals from adopting sentencing standards,[1451] the supreme court did emphasize that "*[t]he court of appeals . . . has no authority to promulgate general rules of practice and procedure in* [the lower] *courts.* Only [the supreme] court has such authority."[1452]

The supreme court also found that the court of appeals' reversal was "at odds with the 'clearly mistaken' standard of review established long ago by [the supreme] court . . . ."[1453] The "clearly mistaken" standard implies that there exists a permissible range of sentences that will not be modified on review.[1454] By following the ten-year rule, the court of appeals undercut the principle that the imposition of a sentence requires consideration of the particular facts of the case.[1455] The court cited with approval the court of appeals' "*Austin* rule," which provides that "first felony offenders convicted of offenses for which no presumptive term is specified should normally receive more favorable sentences than the presumptive term for second felony offenders convicted of like crimes."[1456] The supreme court applied this rule to the facts before it, and found the circumstances exceptional enough to justify imposing a sentence on Wentz more severe than the presumptive sentence for a second

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either have "a proven record of recidivism, or those whose conduct involved premeditated attempts to kill or seriously injure." *Id.* at 264.

1449. *Wentz*, 805 P.2d at 964 (citing Wentz v. State, 777 P.2d 213, 216-17 (Alaska Ct. App. 1989), *rev'd*, 805 P.2d 962 (Alaska 1991)). The court of appeals concluded that Wentz did not fall under either exception to the ten-year limitation set out in *Pruett*. *Wentz*, 777 P.2d at 216.

1450. *Wentz*, 805 P.2d at 965. The court also noted that the court of appeals' limitation of aggravating factors to the two set out in *Pruett* directly conflicted with the legislature's enumeration of twenty-six aggravating factors. *Id.* at 965 (citing ALASKA STAT. § 12.55.125 (1990); ALASKA STAT. § 12.55.155(c)(1)-(26) (1991)).

1451. *Wentz*, 805 P.2d at 965.

1452. *Id.* at 966 n.6 (citations omitted) (emphasis in original).

1453. *Id.*

1454. *Id.* (citing McClain v. State, 519 P.2d 811, 813-14 (Alaska 1974)).

1455. *Id.* at 966.

1456. Id. at 967 (citing Austin v. State, 627 P.2d 657, 657-58 (Alaska Ct. App. 1981)).

time offender.[1457] The court thus reversed and remanded for reinstatement of the trial court's sentence.[1458]

In *Williams v. State*,[1459] the court of appeals reversed Williams' sentence of forty-one years unsuspended time because the term was not justified under Alaska Statutes section 12.55.005(1).[1460] Williams' sentence, based on his rape conviction, was brought before the court for reconsideration in light of *State v. Wentz*.[1461]

The court of appeals approved of the trial court's use of the forty-year benchmark pursuant to Alaska Statutes section 12.55.005(1). However, the court of appeals went on to conclude that although the sentencing court had considered five of the six factors of Alaska Statutes section 12.55.005, the court's analysis did not justify the imposition of a sentence which "significantly exceeded" those sentences received by many prior similarly situated offenders.[1462] Moreover, the sentencing court seemed to overlook the absence of aggravating factors which were apparent in cases imposing similar sentences.[1463] The court of appeals found that the legislature's expansion of the maximum sentence for sexual assault and abuse most likely affected only kidnapping cases because of the "constancy of the maximum penalty for the more serious offense of kidnapping . . . ."[1464]

In *State v. Bumpus*,[1465] the supreme court held that the reduction of a jail sentence from twenty-three years to a maximum of fifteen years was unjustified because the court of appeals did not "indicate in what way the aggravating factors justified fifteen years, but no more."[1466] The trial court had sentenced Bumpus to an unsuspended term of twenty-three years,

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1457. *Id.* The court considered, among other things, the fact that the victim was particularly vulnerable, that she was injured so severely that she spent 112 days in the hospital, that Wentz failed to obtain medical attention for his wife until seven hours after he beat her, and that Wentz previously had been convicted of alcohol-related offenses that included beating his wife. *Id.* at 967-68.

1458. *Id.* at 968.

1459. 809 P.2d 931 (Alaska Ct. App. 1991).

1460. The court of appeals initially ruled that Williams' sentence was excessive because it was greater than 40 years unsuspended time. *Id.* at 932. Alaska Statutes section 12.55.005(1) provides: "[i]n imposing sentence, the court shall consider (1) the seriousness of the defendant's present offense in relation to other offenses. ALASKA STAT. § 12.55.005(1) (1990).

1461. 805 P.2d 962 (Alaska 1991). *Wentz* discouraged the use of benchmarks, instead of adhering to the notion that every sentence should be based on case-specific facts and considerations.

1462. *Id.* at 935.

1463. *Id.* at 936 & n.5.

1464. *Id.* at 937.

1465. 820 P.2d 298 (Alaska 1991).

1466. *Id.* at 304.

a time period well within the guidelines of Alaska Statutes section 12.55.125(d).[1467] The court of appeals reversed, finding that the goals of "rehabilitation, deterrence, and reaffirmation of societal norms" did not justify a sentence of twenty-three years.[1468] The supreme court, in turn, reversed, holding reduction of the sentence improper under *State v. Wentz*.[1469]

The supreme court reversed the court of appeals' limitation on sentencing because it was "not moored to any principle."[1470] The court found that the fifteen-year limitation was not justified because: (1) it was fifty percent longer than the sentence given to Bumpus' leader and co-conspirator; (2) it did not consider the fact that Bumpus aided the police in apprehending his co-conspirators; and (3) it was not based on a psychiatric evaluation of Bumpus.[1471] The court noted that the "'permissible range of reasonable sentences'" mentioned in *McClain v. State*[1472] was a function of "the presence of aggravating factors, the psychological make-up of the defendant, the need for isolation, and the sentences imposed in comparable cases . . . ." The court stated that "[w]ithout articulated findings concerning the factors that determine the range of reasonable sentences, a sentence of fifteen years is as arbitrary and unsupportable as a sentence of twenty-three years."[1473]

In *Buoy v. State*,[1474] the defendant pleaded no contest to a count of criminally negligent homicide, a class C felony punishable by a maximum sentence of five years.[1475] As he was a first offender, the defendant was not subject to presumptive sentencing. The case did, however, fall under the *Austin* rule.[1476] The court noted that this rule should only be deviated from in exceptional circumstances.[1477] Exceptional circumstances were delineated in *Brezenoff v. State*[1478] as significant aggravating factors from Alaska Statutes section 12.55.155(c).[1479]

1467. *Id.* at 301 n.4; *see* ALASKA STAT. § 12.55.125(d) (1990).

1468. *Bumpus*, 820 P.2d at 302.

1469. 805 P.2d 962 (Alaska 1991). The court held in *Wentz* that "it is no longer appropriate for courts to rigidly define the length of sentence that can be justified by any particular criterion, provided that the sentence is ultimately within the range allowed by the legislature." *Bumpus*, 820 P.2d at 302.

1470. *Id.* at 303.

1471. *Id.* at 304.

1472. 519 P.2d 811, 813 (Alaska 1974).

1473. *Bumpus*, 820 P.2d at 305.

1474. 818 P.2d 1165 (Alaska Ct. App. 1991).

1475. *Id.* at 1166.

1476. *Id.* at 1166. *See supra* note 1456 and accompanying text.

1477. *Id.*

1478. 658 P.2d 1359 (Alaska Ct. App. 1983).

1479. *Buoy*, 818 P.2d at 1166. According to Alaska Statutes section 12.55.155(c), an

The trial judge found that Alaska Statutes section 12.55.155(c)(10) applied, and as the defendant's conduct amounted to manslaughter, which is a more serious class of crime, the judge sentenced Buoy to five years with three suspended, thus exceeding the two-year presumptive term for an offender convicted of a second class C felony.[1480] In vacating the sentence, the court of appeals held that the standard of evidence necessary to find an exception to the *Austin* rule is clear and convincing evidence, rather than a preponderance of the evidence.[1481] The court noted that a lesser standard would undermine the purpose of the *Austin* rule, as "it would inevitably allow some first offenders to receive sentences more severe than would have been permissible had they been subject to presumptive sentencing by virtue of a prior felony conviction."[1482]

In *Harlow v. State,*[1483] the defendant was convicted of two class C felonies[1484] and treated as a second felony offender for purposes of presumptive sentencing on the basis of two previous class C felony convictions in Oregon for unauthorized use of a vehicle.[1485] Harlow argued on appeal that the Oregon offense does not have "elements similar to those of a felony defined as such under Alaska law" as required by Alaska Statutes section 12.55.145(a)(2),[1486] and thus, that his Oregon convictions should not count as prior felonies for the purposes of presumptive sentencing.[1487]

The court of appeals agreed, finding that "where the Oregon statute did not require the state to prove a prior offense and the Alaska statute required

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aggravating factor may be found when "the conduct constituting the offense was among the most serious conduct included in the definition of the offense." ALASKA STAT. § 12.55.155(c)(10) (1990 & Supp. 1991).

1480. *Buoy*, 818 P.2d at 1166.

1481. *Id.* at 1167.

1482. *Id.*

1483. 820 P.2d 307 (Alaska Ct. App. 1991).

1484. Harlow was convicted of theft in the second degree under Alaska Statutes section 11.46.130 and misconduct involving weapons in the first degree under Alaska Statutes section 11.61.200. *Id.* at 307.

1485. *Id.* at 308.

1486. The statute provides in part:

> (a) For purposes of considering prior convictions in imposing sentence under [the presumptive sentencing provisions of the revised criminal code]
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> . . .
>
> (2) 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).

1487. *Harlow*, 820 P.2d at 308. The defendant argued that in order for joyriding to qualify as a felony under Alaska law, an additional element not found in the Oregon law is required: the defendant must have been previously convicted within seven years of a similar joyriding offense. *Id.*

the state to prove a prior offense, we cannot conclude that the Oregon and Alaska offenses have similar elements."[1488] The court relied on its reasoning in *Garroutte v. State*[1489] in focusing on the elements of the prior conviction.[1490] The court recognized that the former version of Alaska Statutes section 12.55.145, under which *Garroutte* was decided, required a strict standard of "substantial identity" between the elements of the offenses, but nevertheless found that the elements of the offense in this case did not meet the standard of "similarity" required in the current version of the statute. The court therefore reversed the sentence and remanded for resentencing.[1491]

In *Collins v. State*,[1492] the court of appeals held that judges are bound by the rule in *Hartley v. State*[1493] when considering aggravating or mitigating factors in non-presumptive sentencing cases involving the *Austin* rule.[1494] The *Hartley* rule requires the court to permit introduction of evidence concerning aggravating factors when those factors are raised sua sponte by the court.[1495] The court noted that although most aggravating factors raised by the court are known to the defendant and are therefore foreseeable,[1496] the *Hartley* rule should be extended because of the possibility of differing interpretations and perceptions.[1497] Upon remand, the court also found that the defendant should be allowed to present evidence "on the issue of whether a defendant's experience of being sexually abused as a child might provide insight into his sexually assaultive behavior as an adult."[1498]

In *Wiley v. State*,[1499] the court of appeals affirmed the superior court's denial of the defendant's motion to withdraw his plea of no contest. The defendant argued that the judge who heard the defendant's change of plea hearing erred in indicating to him that the presumptive sentence in the case would be eight years instead of ten years.[1500] He argued that the

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1488. *Id.* at 309.

1489. 683 P.2d 262 (Alaska Ct. App. 1984).

1490. *Harlow*, 820 P.2d at 309.

1491. *Id.*

1492. 816 P.2d 1383 (Alaska Ct. App. 1991).

1493. 653 P.2d 1052 (Alaska Ct. App. 1982).

1494. *Collins*, 816 P.2d at 1384. *See supra* note 1456 and accompanying text.

1495. *Id.* at 1385.

1496. In this case, the aggravating factors of sexual assault with a knife and the defendant's past criminal record were well known to the defendant since in his plea of no contest he expressly stated he used a knife and he was aware of his own prior record. *Id.*

1497. *Id.*

1498. *Id.* at 1385 n.1.

1499. 822 P.2d 940 (Alaska Ct. App. 1991).

1500. *Id.* at 941. The eight-year sentence was the standard presumptive sentence for a first offender of first-degree sexual assault and ten years was the presumptive term for a

court breached its duty to inform him "'of the mandatory minimum punishment, if any, and the maximum possible punishment provided by the statute defining the offense . . .'" prior to accepting his plea of no contest.[1501] The court of appeals disagreed, holding that while the rule does require the court to advise the defendant of any "mandatory minimum or statutory maximum term applicable," it does not explicitly mandate that the court give information concerning the specific presumptive term.[1502] The court also stated that having a system of presumptive sentencing does not make the presumptive term equivalent to a mandatory minimum sentence because the presumptive term is subject to adjustment in light of aggravating and mitigating factors.[1503]

After a change of plea hearing held prior to sentencing, it is often impossible for the court to give specific information about any presumptive sentence because several mitigating or aggravating factors are typically resolved after the change of plea hearing, but prior to sentencing.[1504] The court explained, however, that if a defendant is misinformed or inadequately advised about the "overall workings" of presumptive sentencing, he may have a fair and just reason for withdrawing a plea[1505] and that such misinformation might, in some instances, amount to manifest injustice requiring a post-sentence plea withdrawal.[1506] The court concluded that in the present case there was no evidence of the existence of such circumstances.[1507]

The defendant in *Graybill v. State*[1508] was convicted of fish and game violations and sentenced to seven years with five and one-half suspended, fined, and, pursuant to the judge's oral pronouncement, placed on probation for five years.[1509] The written judgments issued a few days later indicated that the defendant was on probation until February 25, 1987.[1510] The judge stayed the "jail time" portion of the sentence while Graybill appealed his conviction and sentence.[1511]

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first offender who used a dangerous instrument or caused serious injury. *Id.*

1501. *Id.* (quoting ALASKA R. CRIM. P. 11(c)(3)(i)).

1502. *Id.* at 942.

1503. *Id.*

1504. *Id.* at 942-43.

1505. *Id.* at 943 (citing ALASKA R. CRIM. P. 11(h)(2)).

1506. *Id.* (citing ALASKA R. CRIM. P. 11(h)(1)).

1507. *Id.* at 943-45.

1508. 822 P.2d 1386 (Alaska Ct. App. 1991).

1509. *Id.* at 1387. Additionally, the defendant had his hunting license revoked for forty-two years. *Id.*

1510. *Id.*

1511. *Id.* The court of appeals affirmed his conviction but vacated his sentence. Graybill v. State, 672 P.2d 138, 143-44 (Alaska Ct. App. 1983). The supreme court reversed the

Although his sentence was reduced on remand, the judgment papers continued to designate February 25, 1987 as the end of his probation despite the judge's oral pronouncement. On September 30, 1988, however, the state filed a petition to revoke Graybill's probation, alleging he had violated one of the specified conditions,[1512] and to correct the written judgments indicating that Graybill's probation expired on February 27, 1987, contending that the defendant's original sentence had been stayed pursuant to Alaska Rule of Appellate Procedure 206(a)(3) while he appealed his case.[1513] The state argued that the court could amend the judgments under Alaska Rule of Criminal Procedure 36 to show that the defendant's probation expired five years after the reduction of his sentence, i.e., pursuant to the judge's oral pronouncement, instead of on February 25, 1987, as indicated in the written record.[1514] The lower court granted the state's motion and amended the probation termination date to reflect the trial judge's original oral pronouncement.[1515] Graybill appealed, arguing that the amendment violated his due process and double jeopardy rights and that the order staying his jail sentence pursuant to appeal did not stay the running of his probation.[1516]

The court of appeals rejected these arguments, noting that probation does not begin to run until the defendant has served the unsuspended portion of his sentence.[1517] Furthermore, when a conflict arises between an oral pronouncement of sentence and a written judgment, it is well settled that the oral pronouncement governs.[1518] Thus the five-year probation given by the lower court controlled over the inconsistent written date.[1519]

The court also rejected the defendant's argument that, because he believed he was on probation and complied with the conditions of probation, he should be awarded probationary credit. The court noted that there was no formal state action to suggest to Graybill that he was on

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court of appeals and reinstated the original sentence. State v. Graybill, 695 P.2d 725, 731 (Alaska 1985).

1512. *Graybill*, 822 P.2d at 1387.

1513. *Id.* The rule provides: "[a]n order placing the defendant on probation shall be stayed if an appeal is taken." ALASKA R. APP. P. 206(a)(3).

1514. *Graybill*, 822 P.2d at 1387. The rule provides that "[c]lerical mistakes in judgments, orders or other parts of the record, and errors in the record arising from oversight or omission, may be corrected by the court at any time and after such notice, if any, as the court orders." ALASKA R. CRIM. P. 36.

1515. *Graybill*, 822 P.2d at 1387.

1516. *Id.* at 1387-88.

1517. *Id.* at 1388.

1518. *Id.* (citing Burrell v. State, 626 P.2d 1087, 1089 (Alaska Ct. App. 1981)).

1519. *Id.*

probation.[1520] Moreover, "his unilateral decision to comply with the conditions of probation did not automatically entitle him to receive credit against his probationary term," since such conditions were only "minimally restrictive."[1521] The court thus affirmed the trial court's extension of the defendant's probationary term, as well as the subsequent order revoking probation.[1522]

In *Capwell v. State*,[1523] the court of appeals held that the term "maximum sentence" means maximum term of imprisonment, regardless of whether parole eligibility is restricted.[1524] Although defendant's prior conviction for attempted sexual abuse of a minor in the first degree[1525] was completely unrelated to the appellee's current offenses, the prior offense was more serious than the appellee's current negligent homicide conviction, and therefore was properly considered by the sentencing judge as an aggravating factor under Alaska Statutes section 12.55.155(c)(7).[1526] Moreover, the court reaffirmed that although "use of a dangerous instrument is not a necessary element of negligent homicide,"[1527] rare instances do exist in which a defendant can be held liable for a homicide absent the use of a dangerous instrument. Thus, a car could be properly considered a dangerous instrument the use of which was an aggravating factor in negligent homicide cases under Alaska Statutes section 12.55.155(c)(4).[1528]

In *Johnson v. State*,[1529] the court of appeals held that Alaska Rule of Appellate Procedure 215[1530] and the supreme court's decision in *Wharton v. State*[1531] permit sentence appeals only for defendants that receive a sentence of forty-five days or greater.[1532] Additionally, the

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1520. *Id.* at 1387-88. Graybill was never assigned a probation officer, was never required to report to the probation office, and was never formally supervised. *Id.*

1521. *Id.* at 1388.

1522. *Id.*

1523. 823 P.2d 1250 (Alaska Ct. App. 1991).

1524. *Id.* at 1256.

1525. *See* ALASKA STAT. § 11.41.434 (Supp. 1991).

1526. *Graybill*, 823 P.2d at 1255.

1527. *Id.*

1528. *Id.*

1529. 816 P.2d 220 (Alaska Ct. App. 1991).

1530. Alaska Rule of Appellate Procedure 215(a) provides:

> At the time of imposition of any sentence of imprisonment of 45 days or more, the [sentencing] judge shall inform the defendant . . . [t]hat the sentence may be appealed on the ground that it is excessive . . . .

ALASKA R. APP. P. 215(a).

1531. 590 P.2d 427 (Alaska 1979).

1532. *Johnson*, 816 P.2d at 222. Although the court declined to reconcile Alaska Rule of Appellate Procedure 215(a), *Wharton*, and chapter 12 of the 1980 Alaska Session Laws, it did note that Rule 215(a) should not be interpreted to refer only to defendants that must

court found that unless the defendant could show "surprise or injustice" pursuant to Appellate Rule 521, the court could not review a sentence of under forty-five days' imprisonment.[1533] Applying a different reading of *Wharton*, Judge Coats dissented, arguing that the supreme court and court of appeals have jurisdiction to hear any sentence appeal.[1534] Judge Coats opined that the language of Rule 215 only requires a judge to notify a defendant of the right to appeal his sentence, and does not limit appellate review to sentences of forty-five days or more.[1535]

In *Allain v. State*,[1536] the defendant was convicted of two counts of sexual abuse of a minor in the second degree.[1537] The court of appeals held that the two counts should have been merged into one because the conduct involved was closely related, arising from a single criminal episode.[1538] In addition, the court stated that neither double jeopardy nor due process would bar resentencing on the second count after the first count was vacated and deemed to merge with count I.[1539] The court explained that the dismissal of the first count due to its merger with the second count would not impugn the legitimacy of the jury decision that the defendant was guilty of the conduct in count I: "[c]ount II now comprehends the totality of the conduct for which Allain was originally sentenced."[1540] Additionally, the sentencing judge clearly had asserted that his use of consecutive sentences was appropriate because he viewed the episode as a single instance of criminal misconduct.[1541] The court held that the superior court could resentence the defendant as long as the new sentence did not exceed the original total sentence; there would be no appearance of vindictiveness if the sentence were the same.[1542]

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be *notified* of their right to appeal. *Id.*

1533. *Id.* Alaska Rule of Appellate Procedure 521 provides:

> These rules are designed to facilitate business and advance justice. They may be relaxed or dispensed with by the appellate courts where a strict adherence to them will work surprise or injustice.

ALASKA R. APP. P. 521.

1534. *Johnson*, 816 P.2d at 222-23 (Coats, J., dissenting).

1535. *Id.*

1536. 810 P.2d 1019 (Alaska Ct. App. 1991).

1537. *Id.* at 1020. Count I involved touching the minor with his hand and count II involved touching the minor's genitals with his genitals. *Id.* at 1021.

1538. *Id.*

1539. *Id.*

1540. *Id.*

1541. *Id.* at 1022.

1542. *Id.*

In *DeGross v. State*,[1543] the court of appeals held that: (1) a young first-time offender could be classified as a worst offender;[1544] but that (2) a composite sentence of fifty years of unsuspended time was clearly unjustified because the sentencing judge did not consider sentences of "'offenders convicted of like crimes,'"[1545] and gave too much emphasis to the expert witness' finding that DeGross' antisocial personality disorder prevented successful rehabilitation.[1546] The court stated that although DeGross could properly be classified as a worst offender because of the significant violence evident in the commission of his crimes, this alone would not justify the fifty-year sentence.[1547] Likewise, the court held that DeGross' antisocial personality disorder was also not enough to justify the excessive term because although this disorder may prevent his rehabilitation, it has relatively little effect on the sentence's deterrent effect.[1548] Moreover, the court held that "the diagnosis of an antisocial personality disorder is in itself an unreliable and inaccurate predictor of future behavior."[1549]

Subsequently, the court determined that a thirty-year composite sentence in this case was justifiable under prior sentencing cases that suggested a twenty-year sentence, but from which DeGross' case was distinguishable due to its extreme violence.[1550]

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1543. 816 P.2d 212 (Alaska Ct. App. 1991) (appealing remand of DeGross v. State, 768 P.2d 134 (Alaska Ct. App. 1989)).

1544. *Id.* at 217-18.

1545. *Id.* at 219 (quoting *DeGross*, 768 P.2d at 141). The court found that the sentencing judge had not followed the direction of the prior appellate court to consider sentences for like crimes. *Id.* The court noted further that the consideration of like-crime sentences was relevant for uniformity reasons. *Id.* at 219; *see also* ALASKA STAT. § 12.55.005(1) (1990).

1546. *DeGross* 816 P.2d at 218. DeGross' fifty-year sentence was based on his twice being convicted for first-degree robbery and third-degree assault. *Id.* at 215.

1547. *Id.* at 218.

1548. *Id.*

1549. *Id.*

1550. *Id.* at 220.

APPENDIX A

CASES OMITTED FROM 1991 YEAR IN REVIEW

ALASKA SUPREME COURT

Agostinho v. Fairbanks Clinic Partnership, 821 P.2d 714.
Brosnan v. Brosnan, 817 P.2d 478.
Carter v. Broderick, 816 P.2d 202.
Cedergreen v. Cedergreen, 811 P.2d 784.
Commercial Fisheries Entry Comm'n v. Baxter, 860 P.2d 1373.
Diagnostic Imaging Center Assocs. v. H & P, 815 P.2d 865.
Disciplinary Matter Involving West, 805 P.2d 351.
Farrell v. Farrell, 819 P.2d 896.
Ferguson v. State Dep't of Corrections, 816 P.2d 134.
T. Ferguson Const., Inc. v. Sealaska Corp., 820 P.2d 1058.
Flisock v. State Div. of Retirements & Benefits, 818 P.2d 640.
Grainger v. Alaska Workers' Compensation Bd., 805 P.2d 976.
Gudschinsky v. Hartill, 815 P.2d 851.
Hinman v. Sobocienski, 808 P.2d 820.
Holl v. Holl, 815 P.2d 379.
K.L.F. v. State, 820 P.2d 1076.
Kendler v. Kendler, 816 P.2d 193.
Keogh v. W.R. Grasle, Inc. 816 P.2d 1343.
Kim v. State, 817 P.2d 467.
Klosterman v. Hickel Inv. Co., 821 P.2d 118.
Long v. Long, 816 P.2d 145.
Louisiana Pacific Corp. v. Koons, 816 P.2d 1379.
Mack v. Mack, 816 P.2d 197.
Matter of Benson, 816 P.2d 200.
Matter of K.L.J., 813 P.2d 276.
Moffitt v. Moffitt, 813 P.2d 674.
Murphy v. Murphy, 812 P.2d 960.
Native Village of Stevens v. Gorsuch, 808 P.2d 261.
Otis Elevator Co. v. Garber, 820 P.2d 1072.
Parker v. Mat-Su Council on Prevention of Alcoholism & Drug Abuse, 813 P.2d 665.
Smith v. Sampson, 816 P.2d 902.

COURT OF APPEALS

Aiken v. State, 821 P.2d 1371.
Beagel v. State, 813 P.2d 699.
Buening v. State, 814 P.2d 1373.
Burnette v. Municipality of Anchorage, 823 P.2d 10.
Canders v. State, 809 P.2d 424.
Dementieff v. State, 814 P.2d 745.
Dimascio v. Municipality of Anchorage, 813 P.2d 696.
Dunkin v. State, 818 P.2d 1159.
Erickson v. State, 824 P.2d 725.
Gargan v. State, 805 P.2d 998, *cert. denied*, 111 S.Ct. 2808 (1991).
Jones v. State, 812 P.2d 613.
Kosbruk v. State, 820 P.2d 1082.
Leavitt v. State, 806 P.2d 342.
Mitchell v. State, 818 P.2d 688.
Pointer v. Municipality of Anchorage, 812 P.2d 232.
Ross v. State, 808 P.2d 290.
S.R.D. v. State, 820 P.2d 1088.
Salvato v. State, 814 P.2d 741.
State v. Green, 810 P.2d 1023.
State v. Malone, 819 P.2d 34.
State v. Silverly, 822 P.2d 1389.
Stephan v. State, 810 P.2d 564.
Walstad v. State, 818 P.2d 695.
Wilburn v. State, 816 P.2d 907.
Yearty v. State, 805 P.2d 987.

APPENDIX B

CURRENT COURT OF APPEALS CASES GRANTED CERTIORARI IN THE ALASKA SUPREME COURT

J.R.N. v. State, 809 P.2d 416, *on appeal*, No. S-4528 (argued Feb. 11, 1992).