YEAR IN REVIEW

ALASKA SUPREME COURT YEAR IN REVIEW 1990

I. INTRODUCTION

Year in Review contains a brief summary of every decision published by the Alaska Supreme Court in 1990. Due to the volume of cases, space does not permit a thorough discussion and critique of each decision. We have attempted however, to highlight decisions representing a departure from prior law or resolving issues of first impression. Other cases are necessarily discussed in a more cursory manner.

For easy reference, the opinions have been grouped into twelve categories according to the general subject matter of their holdings rather than the nature of the underlying claims: administrative law, business law, constitutional law, criminal law, employment law, family law, fish and game law, procedure, property, tax law and torts. In some instances, these categories have been further divided into subcategories representing more specific legal areas.

The primary purpose of Year in Review is to inform the practitioner of cases decided in 1990, the substantive areas of law addressed, the statutes or prior common law principles interpreted, and the essence of each of the holdings. Additionally, where necessary, Year in Review provides some additional background information.

II. ADMINISTRATIVE LAW

The Alaska Supreme Court heard seven cases in the area of administrative law in 1990 and resolved each case on a strict literal reading of the statutes involved. The cases arose in the varied contexts of: municipal government, payment of permanent fund dividends, environmental law, utility rates, Medicaid payments and administrative decisions by the Department of Corrections. Each case will be discussed in turn.

McCormick v. Smith[1] involved a petition for a recall vote of several school board members. The Alaska Supreme Court adopted the

1. 793 P.2d 1042 (Alaska 1990) ("*McCormick I*").

appellants' literal interpretation of both Alaska Statutes sections 29.26.260(a)(3), which requires that an application for a petition state grounds for recall with particularity,[2] and 29.26.300, which provides for a six-month waiting period if a petition for recall is rejected as insufficient before a new application may be filed.[3] The court held that the application, not the petition itself, was insufficient in this situation, and that the six-month waiting period is "not triggered when a petition for recall is rejected because a municipal clerk erroneously accepted" an earlier application that did not sufficiently set the grounds for recall as required by section 20.26.260(a)(3).[4] The court noted that the purpose of the waiting period, to avoid harassment of an official by repeated attempts to throw him out of office, was not undermined by a situation such as this where the deficiency was an error by the municipal clerk.[5]

The school official who sought to have the election enjoined in *McCormick I* filed a motion for reconsideration of the award of attorney's fees and costs to the defendants, claiming that she was a public interest litigant.[6] Applying the four-pronged test used in *Southeast Alaska Conservation Council, Inc. v. State*,[7] the Alaska Supreme Court agreed with Smith's argument that the case concerned strong public policy and that many people would benefit from the outcome.[8] The court also considered it important that only a private party could be expected to file a petition for recall, and that the official involved served without pay and thus prevention of her recall provided no economic incentive to file. Accordingly, the award of attorney's fees and costs to the defendants was vacated.[9]

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2. The statute provides: "(a) An application for a recall petition shall be filed with the municipal clerk and shall contain . . . (3) a statement in 200 words or less of the grounds for recall stated with particularity." ALASKA STAT. § 29.26.260(a)(3) (Supp. 1990).

3. The statute provides: "A new application for a petition to recall the same official may not be filed sooner than six months after a petition is rejected as insufficient." ALASKA STAT. § 29.26.300 (1986).

4. *McCormick I*, 793 P.2d at 1046-47.

5. *Id.* at 1047.

6. McCormick v. Smith, 799 P.2d 287 (Alaska 1990) ("*McCormick II*").

7. 665 P.2d 544, 553 (Alaska 1983). The four prongs of the test are whether "(1) the case was designed to effectuate strong public policies, (2) numerous people would have benefitted had [the plaintiff] prevailed, (3) only a private party could have been expected to bring the suit, and (4) [the plaintiff] did not otherwise have a sufficient economic incentive to file suit." *McCormick II*, 799 P.2d at 287.

8. *Id.* at 288. The court wrestled with the fact that in challenging the petition Smith actually sought to impede voting. Ultimately, however, the court held that the issue litigated should be determinative — not the particular stance of the party claiming to be a "public interest" litigant — so long as the suit is not frivolous. *Id.*

9. *Id.*

State Department of Revenue v. Gazaway[10] concerned the denial of permanent fund dividends[11] to children who divided their year between their mother's home in Oklahoma and their father's home in Alaska. The Department of Revenue had concluded that the children's absences from the state were not allowable under either section 23.460(j) or section 23.665(j) of title 15 of the Alaska Administrative Code.[12] The Department of Revenue reasoned that only absences that are shorter than the time actually spent in Alaska are allowable under these provisions.[13] The Alaska Supreme Court found that the children's absences were not temporary in nature or duration, and therefore the children were not entitled to permanent fund dividends during the relevant period.[14]

In *Trustees for Alaska v. State Department of Natural Resources*,[15] five environmental groups (the "Trustees") sought to overturn the competitive sale of oil and gas leases by the Alaska Department of Natural Resources ("DNR"). The Alaska Supreme Court held that the Trustees had been given sufficient opportunity to comment on the DNR's finding that the proposed sale was in the state's best interests.[16]

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10. 793 P.2d 1025 (Alaska 1990).

11. "The 'permanent fund' is an account established by the Alaska Constitution into which is placed a portion of the money paid to the state by developers of Alaska's natural resources. Each year a portion of the earnings of the fund is distributed as 'dividends' to qualified Alaska residents who apply to receive them." *Id.* at 1026 n.1 (citing ALASKA STAT. § 37.13.020 (1988)).

12. *Id.* at 1027. Title 15 of the Alaska Administrative Code provides twelve circumstances in which absence from the state during the six month period prior to applying for the dividend will be excused. ALASKA ADMIN. CODE tit. 15, §§ 23.460, 23.665 (Oct. 1988). Of the enumerated reasons, the court held that only two would potentially apply to the Gazaway children. *Gazaway*, 793 P.2d at 1027. Those sections are:

> An absence for any other purpose will, in the department's discretion, be allowed by the department if the nature and duration of the absence are temporary and are consistent with an intent to return to the state and remain permanently in the state.

ALASKA ADMIN. CODE tit. 15, § 23.460(j) (repealed 1989) (relating to 1982 permanent fund dividends).

> An absence . . . will, in the department's discretion, be allowed by the department if the nature and duration of the absence are temporary and are consistent with an intent to return to the state and remain permanently in the state.

ALASKA ADMIN. CODE tit. 15, § 23.665(j) (repealed 1989) (relating to 1983 and subsequent permanent fund dividends).

13. *Gazaway*, 793 P.2d at 1027.

14. *Id.* at 1027-28.

15. 795 P.2d 805 (Alaska 1990).

16. *Id.* at 809. The DNR's "best interest" finding was made available to the public for comment twenty-one days prior to the DNR's final decision, in accordance with ALASKA STAT. § 38.05.035(e) (Supp. 1990), and public notice of the sale was made

The court, however, remanded the case to the DNR for a more thorough consideration of the environmental risks presented by the transportation of oil from platforms in Camden Bay, which is adjacent to the Arctic Natural Wildlife Refuge, in the event that Congress does not open the Refuge to allow offshore support facilities to be constructed.[17] The agency was not required, however, to demonstrate the economic feasibility of development, provided that the state benefits from the lease.[18]

The court did reverse one part of the DNR's decision. The DNR had performed its own "consistency review" to insure that the leases were consistent with the Alaska Coastal Management Program ("ACMP"), which operates to protect the environment of Alaska's coastal zone.[19] The court held that Alaska Statutes section 44.19.145(a)(11) requires the Office of Management and Budget ("OMB") to perform the consistency review, and that OMB could not delegate that duty to the DNR.[20] Under the plain language of the statute,[21] the court found that OMB must render the consistency determination since the project in question required two or more state leases.[22]

In *Alaska Consumer Advocacy Program v. Alaska Public Utilities Commission,*[23] the Alaska Supreme Court held that the Alaska Public Utilities Commission ("APUC") did not have the authority to consider Alascom's interstate revenue in setting intrastate telephone rates.[24] Alascom filed a request with APUC for an intrastate rate increase because it had an intrastate revenue deficiency of $29 million.[25] During the APUC proceedings, the Alaska Consumer Advocacy Program ("ACAP") argued that Alascom's excess revenues derived from an interstate agreement with AT&T should be used to offset the intrastate deficiency, and thus intrastate rates should actually be reduced.[26]

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thirty days prior to sale, in accordance with ALASKA STAT. § 38.05.945(b) (Supp. 1990). *Trustees for Alaska,* 795 P.2d at 808-09.

17. *Id.* at 810-11.

18. *Id.*

19. *See* ALASKA STAT. §§ 46.40.010-210 (1987 & Supp. 1990).

20. *Trustees for Alaska,* 795 P.2d at 811-12.

21. The statute provides, in pertinent part, that the OMB shall

> (11) render, on behalf of the state, all federal consistency determinations and certifications authorized by 16 U.S.C. [§]1456 (§ 307, Coastal Zone Management Act of 1972), and each conclusive state consistency determination when a project requires a permit, lease, or authorization from two or more state resource agencies.

ALASKA STAT. § 44.19.145(a)(11) (Supp. 1990).

22. *Trustees for Alaska,* 795 P.2d at 812.

23. 793 P.2d 1028 (Alaska 1990).

24. *Id.* at 1032.

25. *Id.* at 1030.

26. *Id.*

However, because the revenues derived from the agreement between AT&T and Alascom were interstate revenues, the supreme court held that APUC had no jurisdiction over these agreements.[27] Thus, APUC could not consider any excess interstate revenues during intrastate ratemaking proceedings.[28]

City of Cordova v. Medicaid Rate Commission[29] involved overpayment made to two hospitals for care rendered under Medicaid. The superior court permitted the state to recoup the overpayment as an offset against the next year's payments.[30] The supreme court reversed, refusing to permit the Commission to recover retroactively alleged overpayment to hospitals.[31] The court held that Alaska Statutes section 47.07.070, which sets out the prospective payment scheme, did not authorize the Commission to consider audit reports of past transactions in determining the prospective payment rates for the current fiscal year.[32]

The court also held that because Alaska Statutes sections 47.07.120-130 requires that the members of the Commission be appointed by the governor,[33] the participation of a designee of the Commissioner of the Department of Health and Human Services in the Commission hearings was unlawful.[34]

The Alaska Supreme Court in *Hertz v. Carothers*[35] affirmed the dismissal of an inmate plaintiff's request for review of the Department of Correction's policy to purchase prisoner commissary items from a certain local store.[36] The superior court had dismissed the case on the grounds that under the Administrative Procedure Act, it has no jurisdiction over administrative decisions made by the Department of Corrections.[37]

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27. *Id.* at 1032.
28. *Id.*
29. 789 P.2d 346 (Alaska 1990).
30. *Id.* at 349.
31. *Id.* at 350.
32. *Id.*; *see* ALASKA STAT. § 47.07.070 (1990).
33. *Id.* at 352; *see* ALASKA STAT. §§ 47.07.120-130 (1990).
34. *Id.* at 352-53.
35. 784 P.2d 659 (Alaska 1990) (per curiam).
36. *Id.* at 660.
37. *Id*; *see* ALASKA STAT. §§ 22.10.010(d) (1988), 44.62.330 (1989). The supreme court noted, however, that state courts could review decisions of the Department of Corrections "in major disciplinary proceedings where issues of constitutional magnitude are raised." *Hertz,* 784 P.2d at 660.

III. BUSINESS LAW

In 1990, the court decided sixteen cases in the area of business law. The cases have been classified under three subheadings: insurance, securities and contracts.

A. Insurance

Litigation involving insurance companies involved a broad variety of issues in 1990. The Alaska Supreme Court dealt with the liability of secondary insurers, the liability of municipalities for water main breaks, contractor and surety insurers, and automobile insurance.

The extent of the liability of a secondary insurer was the principal issue in *Alaska Rural Electric Cooperative Association v. INSCO, Ltd.*[38] Matanuska Electric Association was a member of the Alaska Rural Electric Cooperative Association ("ARECA"). ARECA had purchased policies for its various members from Ambassador Insurance Company as its primary insurer, and INSCO as a secondary insurer.[39]

In 1980, Matanuska made two claims arising from a single occurrence that exceeded its self-insured amount by $205,000.[40] While Ambassador, as primary insurer, ordinarily would have paid the full amount of the claim, it did not do so because without paying Matanuska's claim, it went into receivership in 1983 and was liquidated in 1987. ARECA, the policy owner, requested that INSCO, as its secondary insurer, "drop down" and cover the deficiency, a request which INSCO refused.[41] ARECA sought a declaratory judgment requiring INSCO to cover the deficiency, but the superior court granted INSCO's summary judgment motion, holding that INSCO did not have an obligation to assume the insolvent primary carrier's obligations.[42]

The Alaska Supreme Court held that the issue was one of first impression in Alaska, although it did refer to two cases dealing with similar issues.[43] In affirming the decision of the superior court, the supreme court reiterated the principle that an insurance contract, because it is a contract of adhesion, is to be construed according to the

38. 785 P.2d 1193 (Alaska 1990).
39. *Id.* at 1194.
40. *Id.*
41. *Id.*
42. *Id.*
43. *Id.* at 1193 & n.1. The court referred to Hamrick v. Shishaldin Fisheries, Inc., 708 P.2d 705 (Alaska 1985) (secondary insurer not required to cover primary insurer's portion of a settlement following primary insurer's insolvency) and Providence Wash. Ins. Co. v. Alaska Pac. Assurance Co., 603 P.2d 899 (Alaska 1979) (secondary insurance is not triggered when primary insurance fully covered settlement amount).

reasonable expectations of the parties involved.[44] According to the court, since neither ARECA nor INSCO had expected the insolvency of Ambassador, and therefore had not factored consequently, the risk of such insolvency into the cost of the coverage, absent policy language to the contrary, INSCO was not required to "drop down" upon the insolvency of Ambassador.[45] The court found the language of the policy unambiguous in its intent to cover Matanuska only after it incurred a loss in excess of the primary insurer's coverage.[46]

ARECA argued that the provision in the INSCO policy for "other insurance"[47] included the Ambassador policy as "other insurance" that was not "valid and collectible" under the policy, requiring INSCO to cover Ambassador's deficiency.[48] The Alaska Supreme Court specifically rejected this claim, finding that "the term 'collectible' in another insurance clause does not create an ambiguity as to the excess insurer's coverage in the case of the primary insurer's insolvency."[49]

State Farm Fire & Casualty Co. v. Municipality of Anchorage[50] arose out of the breaking of a water main which damaged the homes of two of the plaintiff's insured homeowners.[51] The homeowners sued the municipality of Anchorage under negligence and strict liability theories. The homeowners' insurance company, State Farm, was substituted as the real party in interest after paying the homeowners' theories.[52] Testimony showed that the break was most likely caused by frost-jacking.[53] Although there are several methods to prevent frost-jacking,[54] there was no evidence that the defendant took any measures to protect against such an event.[55] The trial judge refused to apply

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44. *INSCO*, 785 P.2d at 1194 (citing State v. Underwriters at Lloyds, 755 P.2d 396, 400 (Alaska 1988)). The court also noted that "[i]t is not unfair to leave the risk of insolvency with the insured since the insured selected the primary carrier." *Id.*

45. *Id.*

46. *Id.* at 1195.

47. The clause provided that:

> If other valid and collectible insurance, which is written by another insurer is available to the Insured covering a loss also covered by this policy, other than insurance that is in excess of this policy, the insurance afforded by this policy shall be in excess of and shall not contribute with such other insurance.

Id. at 1196.

48. *Id.*

49. *Id.*

50. 788 P.2d 726 (Alaska 1990).

51. *Id.* at 727.

52. *Id.* at 728.

53. Frost-jacking occurs when moist soil freezes around the pipes, pushing them upwards as the soil below freezes. *Id.* at 727 n.1.

54. *Id.*

55. *Id.* at 728.

strict liability against the municipality and refused, over State Farm's objection, to instruct the jury on *res ipsa loquitur*. The jury found no negligence on the part of the municipality.[56]

The Alaska Supreme Court affirmed the lower court's refusal to apply strict liability, finding that water distribution is not an ultrahazardous activity[57] because water delivery, unlike explosives, could be made safe by the application of reasonable care.[58] In doing so, the court observed that it joined the majority of American jurisdictions.[59]

State Farm argued that the court should impose strict liability because a utility is best able to insure against water main breaks and is able to distribute the costs among all the system's users.[60] Although the court had applied strict liability for such reasons in products liability litigation,[61] it refused to do so for water main breaks, reasoning that homeowners can insure against such losses and, in Alaska, the many small, private water utilities would be unduly burdened by the imposition of strict liability.[62] The court noted, however, that State Farm had not argued that strict liability should apply to the municipality under either the common law doctrine of lateral or subadjacent support, or the takings clause of the Alaska Constitution.[63]

The supreme court did reverse the trial judge's refusal to instruct the jury on *res ipsa loquitur*.[64] Following its earlier holding in *Widmyer v. Southeast Skyways Inc.*,[65] the supreme court held that State Farm had introduced sufficient evidence to support all three elements[66] of the *res ipsa* test.[67] The court thus remanded the case as it was appropriate that the municipality, as owner and installer of the

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56. *Id.*

57. *Id.* at 728-29. The court specifically refused to apply Fletcher v. Rylands, 1 L.R.-Ex. 265 (Ex. 1866), *aff'd* 3 L.R.-E. & I. App. 330 (1868) (imposing strict liability for the release of impounded water), noting that *Fletcher* concerned "non-natural" uses of land, such as dams, whereas "water lines are neither as risky nor as unusual as earthen dams." *Id.* at 728.

58. *Id.* at 729.

59. *Id.* (citing as examples: Interstate Sash & Door Co. v. City of Cleveland, 148 Ohio St. 325, 74 N.E.2d 239 (1947) and Midwest Oil Co. v. City of Aberdeen, 69 S.D. 343, 10 N.W.2d 701 (1943)).

60. *Id.*

61. *See* Caterpillar Tractor Co. v. Beck, 593 P.2d 871, 881 & n.25, 882 n.34 (Alaska 1979); Clary v. Fifth Ave. Chrysler Center, Inc., 454 P.2d 244, 247 (Alaska 1969).

62. *State Farm*, 788 P.2d at 729.

63. *Id.* at 729 n.6.

64. *Id.* at 731.

65. 584 P.2d 1 (Alaska 1978).

66. The elements of the *res ipsa loquitur* test are: "(1) the accident is one which ordinarily does not occur in the absence of someone's negligence; (2) the agency or instrumentality is within the exclusive control of the defendant; [and] (3) the injurious

broken pipe, bear the burden of establishing whether or not the pipe was installed negligently.[68]

In *Alaska Pacific Assurance Co. v. Collins*,[69] the defendants Alaska Pacific Assurance Company and Insurance Company of North America (collectively "ALPAC") appealed a jury award providing compensatory and punitive damages against it for: (1) negligently depriving the plaintiff Collins of the benefit of an insurance agreement; (2) violating the implied covenant of good faith and fair dealing in denying the benefits; and (3) breaching its contractual duty to provide the plaintiff insurance and defend him in court.[70] The claim arose out of Collins' construction and sale of a house. The homeowners demanded their money back when the house was severely damaged as it settled into the permafrost.[71] Collins refused, and the dispute resulted in a non-jury trial at which compensatory and punitive damages were awarded against him.[72]

Collins had notified ALPAC of the buyers' claim against him well before the suit was actually filed, seeking coverage and defense under the terms of his insurance policy. ALPAC denied his claim under the "completed work" exception to the Comprehensive General Liability portion of the policy.[73] Following the judgment against him, Collins brought suit against ALPAC. ALPAC later appealed summary judgment rulings and a jury verdict in Collins' favor.[74]

The Alaska Supreme Court first held that ALPAC was estopped from relying on a "products" exclusion in its appeal since it had relied on a "completed work" exclusion throughout the earlier litigation.[75] The court then dealt with whether the superior court had erred when

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condition or occurrence was not due to any voluntary action or contribution on the part of the plaintiff." *State Farm*, 788 P.2d at 730 (quoting *Widmyer*, 584 P.2d at 11).

67. *Id.* at 731.

68. *Id.* at 730-31. In dissent, Justice Compton argued that Alaska's climate is "less kind than most to water mains" and that "where there is evidence that in the locality a particular type of accident frequently occurs as the result of unpredictable natural forces, *res ipsa loquitur* should not apply." *Id.* at 731 (Compton, J., dissenting) (quoting City of Houston v. Church, 554 S.W.2d 242, 244 (Tex. Ct. App. 1977), and citing *Widmyer*, 584 P.2d at 13-14).

69. 794 P.2d 936 (Alaska 1990).

70. *Id.* at 937.

71. *Id.* at 938.

72. *Id.* at 939.

73. *Id.* at 938. The exclusion denied "coverage with respect to 'completed operations' for property damage to work performed by [Collins] arising out of such work or any portion thereof, or out of such materials, parts or equipment furnished in connection therewith." *Id.*

74. *Id.* at 939-40.

75. *Id.* at 942. ALPAC had originally denied the claim under both the "products" and the "completed work" exclusions, but prior to any legal action ALPAC had determined that the "products" exclusion did not apply to Collins' claim. *Id.* at 938.

it concluded that the "completed work" exception did not apply to the homeowners' claim against Collins. The court reiterated its policy of honoring the reasonable expectations of parties to an insurance contract[76] and construing any ambiguities against the insurer.[77] In construing the "completed work" exception, the court held that "where a house is built by an insured contractor, coverage will exist to the extent that damage is caused by external forces, and not by forces arising out of the insured's own work."[78] The court found that there was a material issue as to whether the damage to the house arose out of Collins' work or from external forces and thus the issue was one for the jury.[79] The superior court had therefore erred in granting summary judgment on the matter.

The court also found that a material issue existed as to whether the damages were done by someone other than Collins, specifically, a subcontractor. According to the court, if this were the case, the "completed work" exception would not exclude protection.[80]

The supreme court next addressed the issue of the superior court's grant of summary judgment on the matter of ALPAC's breach of duty to defend Collins. The court ruled that a reasonable investigation of Collins' claim would have indicated to ALPAC that the "completed work" exception did not apply.[81] Since the record revealed no indication of the extent of ALPAC's investigation, the court ruled that the facts were inadequate to support the superior court's grant of summary judgment.[82]

The court then turned to the issue of Collins' entitlement to collect from ALPAC in tort for ALPAC's negligence in performing contractual duties (investigating the claim) and for breach of implied covenant of good faith and fair dealing. The court ruled that the jury instructions concerning ALPAC's tort liability were erroneous in that they were given following an erroneous grant of summary judgment against ALPAC for breach of contract.[83] The court further determined that tort damages for "negligence" in performing contractual duties were inappropriate ALPAC's duties arose from the insurance contract, so the action sounded in contract, not in tort.[84]

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76. *Id.* (citing O'Neill Investigations, Inc. v. Illinois Employers Ins., 636 P.2d 1170, 1177 (Alaska 1981)); *see supra* note 44 and accompanying text.

77. *Alaska Pac. Ins. Co.*, 794 P.2d at 942 (citing Starry v. Horace Mann Ins. Co., 649 P.2d 937, 939 (Alaska 1982)).

78. *Id.* at 942-43.

79. *Id.* at 944.

80. *Id.*

81. *Id.* at 945.

82. *Id.*

83. *Id.* at 945-46.

84. *Id.* at 946-47.

Although it was proper for the superior court to allow Collins to recover tort damages based upon the implied covenant of good faith and fair dealing, the court reversed the award in this case since the jury should have first been presented with the issues handled on summary judgment.[85]

The court upheld the trial court's summary judgment ruling against Collins on his claim of fraudulent misrepresentation in the sale of the insurance policy.[86] Such a claim is viable only if the plaintiff can establish " 'an affirmative misrepresentation or an omission where there is a duty to disclose.' "[87] The failure of the ALPAC agent to disclose that this specific type of claim was not covered did not amount to a misrepresentation or omission because, while the agent's statements did "not clearly inform Collins of the coverage exclusions, it also [did] not constitute a representation that Collins' work would be covered in a situation similar to the one involved here."[88]

Finally, "to provide guidance for the retrial," the court discussed damages that Collins might be entitled to on remand.[89] Since the judgment against him in the prior litigation was satisfied by a bond, the court found that Collins could not be entitled to damages based on any money paid in the previous litigation since it was not a loss that he had incurred.[90] The court further ruled that Collins was not entitled to attorney's fees other than those authorized under Alaska Rule of Civil Procedure 82.[91] The court left open the possibility that Collins might recover for: "(1) mental and emotional anxiety; (2) impairment of credit rating; (3) impairment of reputation; (4) impairment of ability to obtain insurance and bonding; and (5) loss of earnings."[92]

In *Burton v. State Farm Fire & Casualty Co.*,[93] the plaintiff, Burton, purchased a policy from State Farm, which provided both liability coverage, and uninsured and underinsured motor vehicle coverage. The policy covered both Burton and permissive drivers of his vehicle, but excluded liability coverage for bodily injury to any insured person.[94] Four months after obtaining coverage, Burton was injured while he was a passenger in his own vehicle. He sought damages from

85. *Id.* at 947.
86. *Id.* at 948.
87. *Id.* at 947 (quoting Matthews v. Kincaid, 746 P.2d 470, 471 (Alaska 1987)).
88. *Id.* at 948.
89. *Id.*
90. *Id.*
91. *Id.* at 949. The trial court had, in addition to awarding Collins attorney's fees under Civil Rule 82, allowed the jury to award attorney's fees as damages. *Id.* at 948-49.
92. *Id.* at 949.
93. 796 P.2d 1361 (Alaska 1990).
94. *Id.* at 1362.

State Farm, reasoning that he fit within the underinsured provision as the policy's liability limit of $100,000 was less than his actual damages.[95] Burton argued that the limiting language in the liability and underinsured motor vehicle coverage of his policy was contrary to public policy, in that it provided him with less underinsured motor vehicle coverage than is required by statute.[96]

The Alaska Supreme Court agreed, finding that Burton's vehicle was an underinsured vehicle for purposes of Alaska Statutes section 28.40.100(a)(16) and that the policy violated the requirement of section 21.89.020(c).[97] The court noted that section 28.22.231(1) provides that uninsured and underinsured coverage does not protect an insured while occupying an uninsured vehicle owned by the insured or by a relative.[98] The court then found it implicit that if an insured is occupying an insured vehicle owned by him, he is protected.[99] Finding that State Farm had failed to provide coverage where the insured vehicle was an underinsured vehicle, the court ruled that the statute provided no such exclusion.[100] Having invalidated the exclusion in Burton's policy, the court found State Farm's liability limited to the statutory minimum.[101]

In *Loyal Order of Moose, Lodge 1392 v. International Fidelity Insurance Co.*,[102] the plaintiff Moose Lodge contracted with Darling Enterprises for the construction of a new facility in Fairbanks.[103] Pursuant to this contract, Darling obtained performance and payment bonds from International Fidelity Insurance Company ("IFI"), naming Moose Lodge as "obligee."[104]

Following an unresolved contractual dispute, Moose Lodge declared Darling in default and requested IFI either to complete the contract or guarantee payment of damages incurred by the Lodge in

95. *Id.*

96. *Id.* at 1362-63.

97. *Id.* at 1363. The statute requires that insurance companies offering automobile insurance offer uninsured and underinsured motor vehicle coverage with limits at least equal to those of the liability coverage. ALASKA STAT. § 21.89.020(c) (1984 & Supp. 1990).

98. *Burton,* 796 P.2d at 1363.

99. *Id.*

100. *Id.* The court held that although Alaska Statutes section 28.22.301 permits insurers to include exclusionary clauses in their policies, the legislature did not intend to permit insurers to rewrite the definition of "underinsured motor vehicle." *Id.*

101. *Id.* at 1364.

102. 797 P.2d 622 (Alaska 1990).

103. *Id.* at 623.

104. *Id.* The performance bond provided that if Darling defaulted, IFI would either complete the contract or hire another contractor to do so. The payment bond provided that any unpaid subcontractor could sue on the bond for payment. *Id.* at 624.

completing construction. Instead of complying with this request, IFI encouraged settlement or arbitration of the dispute between Moose Lodge and Darling.[105] Moose Lodge rejected these suggestions and brought a tort claim of bad faith inaction against IFI.[106] The superior court granted summary judgment for IFI, holding that a legitimate dispute existed between Darling and Moose Lodge and that until that dispute was settled, IFI was not required to complete the project or respond in damages.[107]

The supreme court reversed, reasoning that "failure by a surety minimally to investigate its principal's alleged default may constitute bad faith if that investigation would confirm the obligee's allegations in material part."[108] In concluding that an implied covenant of good faith and fair dealing existed between the surety and its obligee,[109] the court found the relationship between a surety and its obligee more analogous to that of an insurer and its insured than to that of an insurer and its incidental third-party beneficiary.[110] Consequently, the court found that a surety may "satisfy its duty of good faith to its obligee by acting reasonably in response to a claim by its obligee, and by acting promptly to remedy or perform the principal's duties where default is clear."[111] Because there was insufficient evidence as to whether IFI fulfilled this duty, the supreme court held that the superior court's grant of summary judgment was in error.[112] The supreme court upheld, however, the superior court's ruling that IFI may require Moose Lodge to submit to arbitration.[113] The court declined to consider whether the surety's participation in arbitration proceedings was mandatory.[114]

State Department of Transportation v. Houston Casualty Company[115] arose out of a wrongful death action involving the insurance

105. *Id.* at 625.
106. *Id.* at 625-26.
107. *Id.*
108. *Id.* at 628.
109. *Id.* at 626. The court relied partially on State Farm Fire & Casualty Co. v. Nicholson, 777 P.2d 1152, 1154 (Alaska 1989) ("[t]he tort of bad faith in the insurance context can be traced to the covenant of good faith and fair dealing"), and partially on Dodge v. Fidelity & Deposit Co., 161 Ariz. 344, 346, 778 P.2d 1240, 1241 (1989) ("there is a legal duty implied in an insurance contract that the insurance company must act in good faith in dealing with its insured on a claim" (quoting Noble v. National Am. Life Ins. Co., 128 Ariz. 188, 190, 624 P.2d 866, 868 (1981))). *Loyal Order of Moose, Lodge 1392,* 797 P.2d at 626-27.
110. *Id.* at 628.
111. *Id.* (footnote omitted).
112. *Id.* at 628.
113. *Id.* at 629.
114. *Id.* at 629 n.18.
115. 797 P.2d 1200 (Alaska 1990).

company's primary insured, Ryan Air, Inc. ("Ryan"). In February 1985, Clarence Douglas was killed by a landing Ryan aircraft while he was crossing a closed portion of the Koyuk Airport on a snow machine. On behalf of Ryan, Houston Casualty Company ("Houston"), entered into a settlement agreement with Douglas' estate. Under the agreement, Houston gave the estate $200,000 outright and made a $600,000 "loan" to the estate which would be repaid out of the proceeds, if any, of an action by the estate against the Department of Transportation (the "DOT") who operated the airport. When, in accordance with the terms of the settlement agreement, Douglas' estate brought suit against the DOT for negligence in the design and maintenance of the airport, the DOT brought this action against Houston.[116] The DOT contended that, under the terms of the insurance policy issued by Houston as required by the leases between Ryan and the DOT,[117] Houston's denial of the DOT's request for defense was a breach of contract and the arrangement with Douglas' estate was invalid.[118]

First, the supreme court held that, contrary to Houston's argument, the DOT was an "insured" under the policy issued to Ryan and thus could claim coverage.[119] Nevertheless, absent a severability

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116. *Id.* at 1201.

117. *Id.* Ryan had entered into a series of leases with the DOT to use DOT facilities at various airports in Alaska, however, there was no lease between Ryan and DOT covering Koyuk Airport. *Id.* at 1202.

The leases required that Ryan obtain " 'insurance to protect both [DOT] and [Ryan] against comprehensive public liability, products liability (where applicable) and property damage,' and to indemnify and hold DOT harmless for any injuries 'arising out of any acts of commission or omission by [Ryan], [Ryan's] agents, employees, or customers, or arising from or out of [Ryan's] occupation or use of the Premises or privileges granted.' " *Id.* (quoting the lease agreements).

The lease agreements also required that the insurance policy waive Houston's right of subrogation against the DOT. *Id.*

118. *Id.* at 1201. The DOT also argued that the "loan-receipt agreement" between Houston and Douglas' estate impermissibly circumvented the underlying policies of the Alaska Uniform Contribution Among Tortfeasors Act. The act provides, in part:

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

ALASKA STAT. § 09.16.010(d) (1983) (repealed 1987). The court did not reach this issue in deciding the case. *See infra* note 123.

119. *Houston Casualty,* 797 P.2d at 1204. Even though the policy did not specify the DOT as an "additional insured," the certificate of insurance clearly expressed the parties' "objective, reasonable intention" that the coverage would extend to the DOT. *Id.* The majority cited a number of cases holding that the absence of specific language in an insurance policy will not alter the nature of the bargain obviously intended. *Id.*

The majority also noted that although there was no specific lease covering the Koyuk facility, the policy's language defined "Premises or Operations covered" as "*all*

clause in the policy, the DOT's coverage was co-extensive with Ryan's. The court agreed with Houston that the "premises exclusion" in the policy — which excluded coverage for bodily injury caused by any aircraft owned or operated by Ryan — applied to all insureds, and thus precluded the DOT's claim.[120]

Even though the DOT could not claim coverage under the policy for liability arising from Douglas' death, the majority agreed that the DOT could enforce the "no subrogation" clause, but only if, on remand, the superior court found that Ryan was in fact covered for the accident.[121] If Ryan is covered, "Houston may not indirectly subrogate against the State a claim for which the State could reasonably expect Ryan to be insured."[122] Should the superior court find that Houston attempted improper subrogation, it should invalidate the terms of the settlement agreement that require repayment of the "loan."[123]

Concurring in the result, but criticizing the majority's analysis, Chief Justice Matthews and Justice Burke took issue with the majority's interpretation of the term "aircraft of the insured" used in the policy's "premises exclusion."[124] The majority's reading the phrase to mean "aircraft of the named insured [Ryan] or the additional insured seeking coverage [DOT]," resulted in the exclusion being applied to the DOT. Justice Matthews interpreted the phrase instead as "aircraft of the insured seeking coverage," which — because the DOT did not own the aircraft — would not have allowed the exclusion to apply to the DOT.[125] The majority's narrower reading goes against the court's

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airport premises and operations within the State of Alaska." Id. at 1203 (emphasis added).

120. *Id.* at 1203-04. The "premises exclusion" applies only to coverage extended under the "premises liability provision" of the policy. *Id.* at 1203. Although this exclusion would presumably apply to Ryan as well as the DOT, the court held that: "The proper inference on summary judgement is that Houston may have satisfied the estate's claim against Ryan Air under the bodily injury or other provision of the policy" that did not contain an exclusion. *Id.* at 1204-05. Because the DOT did not seek coverage under these other provisions of the policy at trial, it waived such an argument in the appeal. *Id.* at 1204 n. 5.

121. *Id.* at 1204-05; *see supra* note 120 for a discussion of how Ryan might be covered although DOT would not be, even though Ryan and DOT receive co-extensive coverage under the policy.

122. *Id.* at 1205 (citing Marathon Oil Co. v. Mid-Continent Underwriters, 786 F.2d 1301, 1304 (5th Cir. 1986)).

123. *Id.* at 1205 n.11. In anticipation of such an outcome, the supreme court did not address the issue of whether "loan-receipt agreements" were valid in the context of joint tortfeasors. *Id.*; *see supra* note 118.

124. *Id.* at 1205-06 (Matthews, C.J., concurring). Chief Justice Matthews agreed with the result on the ground that the policy should not be construed to apply to airports not covered by a lease between Ryan and the DOT. *Id.* at 1206.

125. *Id.* at 1205.

tradition of resolving ambiguities in insurance contracts in favor of providing coverage and is contrary to the reasonable expectations of the parties.[126]

In *Petersen v. Mutual Life Insurance Company*,[127] the final insurance case decided by the Alaska Supreme Court in 1990, the court held that the trial judge had properly admitted evidence of the insured's failure to disclose alcoholism and a suicide attempt on his policy application.[128] Based on this nondisclosure, Mutual Life Insurance Company ("Mutual") denied plaintiff's claim for the proceeds of the policy although the insured died of a ruptured aorta, a condition unrelated to either suicide or alcoholism. The supreme court reasoned that the evidence of nondisclosure was admissible because Mutual would not have issued the policy had it known of these facts.[129]

B. Securities

The court dealt with only one securities case in 1990. In *Caucus Distributors, Inc. v. State*,[130] the Alaska Supreme Court interpreted Alaska's "blue sky" laws[131] to determine when notes are within the statutory definition of covered "securities."[132]

Caucus Distributors ("Caucus") was a not-for-profit corporation incorporated in New York and engaged in distributing the works of Lyndon LaRouche.[133] Caucus raised its funds through loans, contributions and sales of publications. Neither Caucus nor any of its agents were registered with the Division of Securities pursuant to the Alaska Securities Act.[134] The litigation arose out of complaints by two Alaska widowers, Thompson and Drew.[135] At a hearing before the Division of Securities, the hearing officer found that Thompson and

126. *Id.* at 1205-06 (Matthews, C.J., concurring).
127. 803 P.2d 406 (Alaska 1990).
128. *Id.* at 409.
129. *Id.*
130. 793 P.2d 1048 (Alaska 1990).
131. ALASKA STAT. §§ 45.55.010-270 (1986 & Supp. 1990).
132. A "security" is defined as:

> a note; . . . evidence of indebtedness; . . . investment of money or money's worth including goods furnished or services performed in the risk capital of a venture with the expectation of some benefit to the investor where the investor has no direct control over the investment or policy decision of the venture; or, in general, any interest or instrument commonly known as a "security". . . .

ALASKA STAT. § 45.55.130(12) (1986).
133. *Caucus Distrib.*, 793 P.2d at 1050-51.
134. *Id.* at 1051.
135. *Id.*

Drew had made loans to Caucus believing the loans to be sound financial investments.[136] Based on this and other evidence, the hearing officer found the promissory notes executed in connection with the loans to be securities within the meaning of the "blue sky" laws.[137] He also found that Caucus' agents had misrepresented the nature of the transaction and had failed to disclose material facts[138] in violation of Alaska Statutes section 45.55.010.[139] The officer found that Caucus had failed to qualify for an exemption under section 45.55.140(a)(ii)[140] because it had failed to file the required notice and documentation with the Division of Securities.[141] The Division ordered Caucus to cease and desist from any further securities activity involving the offer

136. *Id.* at 1052.

137. *Id.*

138. *Id.* The officer found that the widowers were not given specific information about management, revenue sources, or Caucus' current financial position. He also found that the widowers were not told of the probability that neither interest on the principal nor the principal itself would ever be repaid. *Id.*

139. The statute provides:

> It is unlawful for a person, in connection with the offer, sale, or purchase of a security, directly or indirectly, to
>
> (1) employ a device, scheme, or artifice to defraud;
>
> (2) make an untrue statement of a material fact or omit to state a material fact necessary in order to make the statements made, in the light of the circumstances under which they are made, not misleading; or
>
> (3) engage in an act, practice, or course of business which operates or would operate as a fraud or deceit upon a person.

ALASKA STAT. § 45.55.010 (1986).

140. The statute provides in relevant part:

> (a) The following securities are exempted from [Alaska Statutes section] 45.55.070:
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> . . .
>
> (ii) a security issued by a person organized and operated not for private profit but exclusively for religious, educational, benevolent, charitable, fraternal, social, athletic, or reformatory purposes, or as a chamber of commerce or trade or professional association . . . .

ALASKA STAT. § 45.55.140 (1986 & Supp. 1990).

141. The Code provides in relevant part:

> The following governs exemptions under the Act relating to securities and transactions:
>
> (1) not-for-private-profit issuers shall file a notice with the administrator at least 15 days before making any offers or sales of securities; the notice must contain a ruling or determination by the U.S. Internal Revenue Service recognizing the issuer's exempt status under section 501(c)(3) or 501(e) of the Internal Revenue Code of 1954 (26 USC 501) or other documentation the administrator may require including, but not limited to, proposed offerring [sic] circular, certified financial statement, bylaws and articles of incorporation, plan of financing, plan of operation, use of proceeds, background of officers and directors (or principals if unincorporated) . . . .

ALASKA ADMIN. CODE tit. 3, § 08.910(1) (Supp. Jan. 1991).

and sale of unregistered securities, and from any further fraudulent behavior.[142] The superior court affirmed this order and Caucus appealed, arguing that the notes in question were not securities within the meaning of Alaska's "blue sky" laws.[143]

The court, noting the analogous definitions of securities under the state and federal law, reasoned that federal case law provided "a reasonable basis to conclude that an offering is a security within [Alaska law]."[144] Therefore, if the notes were securities under federal law, then the hearing officer could reasonably find that they were securities under state law.[145]

In *Reves v. Ernst & Young,*[146] the United States Supreme Court resolved the issue of how the federal securities statutes should be applied to notes. *Reves* requires the definition of a security to be interpreted broadly,[147] but sets forth a list of notes that are not considered securities: notes for consumer financing, notes for mortgages on a home, short-term notes secured by a business or its assets, character loans to a bank customer, short-term notes secured by an assignment of accounts receivable or notes formalizing an open-account debt incurred in the normal course of business.[148] The *Reves* test begins with a presumption that every note is a security.[149] An issuer can rebut this presumption if it can show that the note is on the exclusion list or that it bears a "strong family resemblance" to a note on the list.[150]

In *Caucus Distributors,* the hearing officer applied the *Reves* test and concluded that the notes issued by Caucus were securities.[151] The Alaska Supreme Court agreed, finding that the notes issued to Thompson and Drew did not bear a resemblance to any of the commercial transactions on the *Reves* list.[152]

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142. *Caucus Distrib.,* 793 P.2d at 1053.

143. *Id.*

144. *Id.*

145. *Id.* The Alaska Supreme Court dealt with the definition of a security in American Gold & Diamond Corp. v. Kirkpatrick, 678 P.2d 1343, 1345-47 (Alaska 1984) and in Hentzner v. State, 613 P.2d 821, 823-24 (Alaska 1980). In both cases, the court relied on federal securities cases to provide assistance in interpreting Alaska's statutory provisions. *Caucus Distrib.,* 793 P.2d at 1053.

146. —U.S.—, 110 S. Ct. 945 (1990). The Court followed the "literal" or "family resemblance" test of the Second Circuit as articulated in Exchange National Bank of Chicago v. Touche Ross & Co., 544 F.2d 1126, 1137 (2d Cir. 1976), *modified,* 726 F.2d 930 (2d Cir. 1984). *Reves,* —U.S. at —, 110 S. Ct. at 951.

147. *Id.* at __, 110 S. Ct. at 949.

148. *Id.* at __, 110 S. Ct. at 951 (quoting *Exchange Nat'l Bank,* 554 F.2d at 1138).

149. *Id.*

150. *Id.*

151. *Caucus Distrib.,* 793 P.2d at 1055.

152. *Id.* at 1055-56.

Caucus further argued that, because it is a political organization, the application of the "blue sky" laws to its fundraising efforts violated the first amendment.[153] The court rejected Caucus' contention that its political purposes excuse fraudulent practices, holding that a "state has a compelling interest in protecting the public from fraudulent practices, even where the purpose underlying those fraudulent practices is protected by the First Amendment."[154] The court also rejected Caucus' argument that the registration and disclosure requirements of the "blue sky" laws were unduly burdensome to Caucus' political activities.[155] The Alaska statute did not require divulgence of contributors' identities, but only divulgence of any borrower's identity and proof of the method of repayment.[156] The court concluded that these requirements passed constitutional scrutiny.[157]

C. Contracts

The Alaska Supreme Court dealt with a broad variety of contract disputes during 1990. Perhaps most importantly, the court was twice called upon to clarify its holding in *State v. Northwestern Construction, Inc.*,[158] in which the court permitted the limited use of Blue Book rental rates to determine the cost of construction equipment usage.

A dispute over equipment damages was the focus in *Southeast Alaska Construction Co. v. State Department of Transportation.*[159] The case arose out of a project to improve the airport runway in Ruby, Alaska.[160] The contractor ("SEACO"), unable to complete the project because of design and material problems, filed a claim against the Department of Transportation ("DOT") for compensation for extra work, and the DOT counterclaimed, seeking liquidated damages.[161] The superior court ruled that the measure of SEACO's damages for extra work should be its out-of-pocket expenses plus reasonable compensation for using SEACO-owned equipment, calculated at the actual bid rates rather than at Blue Book rates, as well as reasonable amounts for overhead and profit.[162] The superior court also ruled that

153. *Id.* at 1057. *See generally* U.S. CONST. amend. I.
154. *Caucus Distrib.*, 793 P.2d at 1057.
155. *Id.*
156. *Id.* at 1058.
157. *Id.* The court compared the Alaska statute in question to a similar North Carolina statute that the United States Supreme Court found unconstitutional in Riley v. National Fed'n of the Blind, 487 U.S. 781 (1988), and concluded that the statute was sufficiently narrow in its requirements to be constitutional. *Id.*
158. 741 P.2d 235 (Alaska 1987).
159. 791 P.2d 339 (Alaska 1990).
160. *Id.*
161. *Id.* at 339-40.
162. *Id.* at 340.

the DOT was entitled to liquidated damages for the period of time between the extended contract deadline and the date on which a bankruptcy court deemed SEACO to have abandoned the contract.[163] The superior court entered final judgment for the DOT in the amount that its liquidated damages exceeded SEACO's maximum damages.[164]

The Alaska Supreme Court affirmed the superior court's rulings. In an earlier case, the court had approved an award of equipment costs based on Blue Book rates.[165] The court held, however, that Blue Book rates do not govern the determination of equipment costs unless the contract specifically calls for such a measure.[166] Since this contract did not compel recovery at Blue Book rates, the court upheld the superior court's decision to employ a different measure that more accurately reflected the parties' intent.[167]

The supreme court also upheld the partial summary judgment in favor of the DOT on the issue of SEACO's damages. SEACO had invited the DOT to calculate SEACO's expenses on the project, but when later challenging the DOT's figures, SEACO failed to produce specific evidence tending to call DOT's calculations into doubt.[168] Finally, as there were no genuine issues of material fact remaining as to SEACO's liability, the court upheld the summary judgment enforcing the contract's liquidated damages provision since it was enforceable under the standard set forth in *Arctic Contractors v. State*.[169]

Fairbanks North Star Borough v. Kandik Construction, Inc.[170] involved a contract for the construction of roads in a local subdivision. Fairbanks North Star Borough ("Fairbanks") employed Roen Design Associates, Inc. ("Roen") to prepare an environmental impact study and a feasibility study, and also to survey and design roads for the subdivision.[171] Based on these plans, Fairbanks contracted with Kandik Construction, Inc. & Associates ("Kandik") to clear, excavate and develop the roads. Kandik encountered difficulty in performing according to the plans and finally terminated the contract, citing

163. *Id.*

164. *Id.* at 341.

165. State v. Northwestern Constr. Inc., 741 P.2d 235, 237-38 (Alaska 1987).

166. *Southeast Alaska Constr. Co.*, 791 P.2d at 341.

167. *Id.* at 341-42.

168. *Id.* at 343.

169. *Id.* (citing Arctic Contractors v. State, 564 P.2d 30, 49 (Alaska 1977) (Liquidated damages provisions are enforceable if the liquidated amount is a reasonable forecast of compensation for the harm caused by the breach and the harm caused is difficult to assess accurately.)).

170. 795 P.2d 793 (Alaska 1990) (*reh'g granted*, No. S-2772 (April 17, 1990) (on Roen's petition only)).

171. *Id.* at 796.

Roen's defective design specifications and Fairbanks' lack of cooperation and failure to satisfy a payment deadline.[172]

Kandik filed suit against Fairbanks for breach of express and implied warranties of design specifications, breach of the covenant of good faith and fair dealing, and for business destruction resulting from Kandik's loss of bonding capacity and damaged reputation.[173] Fairbanks counterclaimed, charging that Kandik breached the contract by improperly disposing of organic waste and by failing to complete the contract in a timely manner.[174] At trial, the jury found that both Kandik and Fairbanks had breached the contract, but only Kandik had suffered damages from the breach. The jury also concluded that Roen was not required to indemnify Fairbanks.[175]

On appeal, the Alaska Supreme Court held that the jury had been properly instructed that Kandik could recover if it demonstrated its reasonable reliance on the defective plans and specifications.[176] The court reiterated that a project owner who furnishes plans and specifications to a contractor impliedly warrants their sufficiency, and the contractor is entitled to recover any additional expenses incurred as a result of defective specifications.[177]

The court did find, however, that the superior court committed reversible error in allowing evidence of Kandik's total cost without instructing the jury as to the specific damages recoverable for a breach of contract.[178] While mathematical precision was not required, Kandik could recover only those damages that were caused by the faulty plans.[179] Thus, while the total cost approach is a permissible starting point for assessing damages, the plaintiff must still demonstrate that his increased costs were proximately caused by defendant's breach.[180]

The supreme court further ruled that the superior court had erred in instructing the jury that Kandik could recover under a theory of *quantum meruit*.[181] When an express contract exists covering the

172. *Id.*
173. *Id.*
174. *Id.*
175. *Id.* at 797.
176. *Id.* at 797-98.
177. *Id.* at 797 (citing Northern Corp. v. Chugach Elec. Ass'n, 523 P.2d 1243, 1246-47 (Alaska 1974), *appeal after remand*, 562 P.2d 1053 (Alaska 1977), *aff'd on rehearing*, 563 P.2d 883 (Alaska 1977)).
178. *Id.* at 798-99.
179. *Id.* at 798 (citing State v. Northwestern Const., 741 P.2d 235, 237 (Alaska 1987)).
180. *Id.* (citing U.S. Indus. v. Blake Constr. Co., 671 F.2d 539 (D.C. Cir. 1982); F.H. McGraw & Co. v. United States, 130 F. Supp. 394 (Ct. Cl. 1955); Laburnum Constr. Corp. v. United States, 325 F.2d 451 (Ct. Cl. 1963)).
181. *Id.* at 800.

services in question, relief under a theory of *quantum meruit* is not available.[182] The jury instruction had failed to distinguish between work within the scope of the original contract, for which Kandik could not recover in *quantum meruit*, and work outside the scope of the original contract, for which Kandik could conceivably have recovered.[183] Because of the superior court's errors regarding the total cost approach and the instructions on *quantum meruit*, the supreme court determined that Fairbanks was entitled to a new trial on the issue of damages.[184]

The court further found that the superior court erred in permitting the jury to award equipment costs to Kandik based on Blue Book values rather than on prevailing costs in the Fairbanks area.[185] Here again, the aggrieved party had relied on *State v. Northwestern Construction, Inc.*[186] As it had in *Southeast Alaska Construction Co. v. State,*[187] the court held that Blue Book rates govern the determination of equipment costs only if the contract specifically provides for such a measure.[188] The contract here explicitly provided for just the opposite: the use of rates prevailing in the Fairbanks area.[189] By instructing the jury that it could consider either Blue Book or prevailing rates, the superior court ignored an express contractual provision and thus committed reversible error.[190]

The supreme court dealt next with Kandik's business destruction claim. The court ruled that the superior court properly permitted Kandik Construction[191] to join the case as party plaintiff shortly before trial, since Fairbanks had notice of the claim and adequate time to prepare its defense.[192] The superior court erred in failing to instruct the jury on the separate identities of Kandik and Kandik Construction, however, and in failing to advise the jury on the theory of liability.[193] In light of these deficiencies, the court reversed and remanded the award of damages for the destruction of business.[194]

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182. *Id.* at 799 (citing Mitford v. de LaSala, 666 P.2d 1000, 1006 n.1 (Alaska 1983); B.B. & S. Constr. Co. v. Stone, 535 P.2d 271, 275 n.8 (Alaska 1975)).

183. *Id.* at 800.

184. *Id.*

185. *Id.*

186. 741 P.2d 235, 237-38 (Alaska 1987).

187. 791 P.2d 339 (Alaska 1990); *see supra* notes 159-69 and accompanying text.

188. *Kandik Constr.*, 795 P.2d at 800.

189. *Id.*

190. *Id.* at 800.

191. Kandik Construction, Inc. & Associates ("Kandik") was "a joint venture composed of Kandik Construction, Inc., and Carroll Vondra, Inc., d/b/a Yutan Construction Company." *Id.* at 796.

192. *Id.* at 802.

193. *Id.*

194. *Id.* at 803.

Finally, the court turned to Fairbanks' indemnity claim against Roen. Fairbanks claimed that principles of comparative fault apply to common law indemnity claims between contracting parties. Roen, on the other hand, argued that the jury had been properly instructed that Fairbanks was entitled to indemnification only if it was completely free from fault.[195] Declining to decide whether principles of comparative fault apply to contractual implied indemnity claims, the court found that, since Fairbanks had argued causes of action against Roen in both tort and contract, the indemnity claim added nothing to the relief available.[196] As such, the jury should have been permitted to determine recovery under either or both of the tort and contract theories.[197]

In *Estate of E. Donald Arbow v. Alliance Bank*,[198] a loan of $700,000 had been granted by Alliance Bank to Alaska Laser Knights, Inc. ("ALK"), upon the condition that all of ALK's shareholders guarantee the loan. Each of the shareholders agreed to guarantee the loan personally on the assumption that ALK's president assumed similar obligations, but the president's close ties to the lender prohibited the bank from accepting his personal guarantee.[199] The supreme court dismissed the shareholders' allegations of unilateral mistake, misrepresentation and statute of fraud violation as being without merit because the court found that the president had executed a guaranty.[200] Restricting itself to interpreting the shareholder agreement, the court upheld a summary judgment ruling that all the individual guarantees were binding.[201]

In *Zuelsdorf v. University of Alaska, Fairbanks*[202] the court addressed the contract rights of non-tenured faculty in state schools. The plaintiffs' letters of appointment specified that their employment would be governed by the university policies and regulations in force at the date of the appointment. At the time the plaintiffs accepted their appointments, the governing personnel regulation[203] entitled a full-time tenure track assistant professor with three or more years of service to fifteen months notice if her appointment was not to be renewed. Under this policy, the University was required to notify the

195. *Id.*
196. *Id.* at 804.
197. *Id.*
198. 790 P.2d 1343 (Alaska 1990).
199. *Id.* at 1344-45.
200. *Id.* at 1346 n.5.
201. *Id.* at 1345.
202. 794 P.2d 932 (Alaska 1990).
203. *Id.* at 933 n.1.

plaintiffs of their termination by March 31, 1986 if it did not intend to renew their contracts for the 1987-88 school year.[204]

On December 12, 1985, the Board of Regents amended the policy to require the University to notify an employee by June 30, 1986, if he or she was not to be hired for the 1987-88 school year. While the amendment was originally not to become effective until July 1, 1986, a fiscal crisis led the Regents to advance the effective date to May 19, 1986.[205] On May 19 and 23, 1986, plaintiffs were notified that they would not be hired for the 1987-88 school year. Following a university grievance procedure and an administrative appeal, the aggrieved professors commenced a civil suit against the University, asserting that the University breached their employment contracts by failing to provide timely notice under the personnel policy. The University countered that notice was timely under the amended policy.[206] On cross-motions for summary judgment, the superior court granted summary judgment in favor of the University, and the plaintiffs appealed.[207]

The supreme court found that the relationship between a university and its non-tenured faculty is governed by principles of contract law.[208] The court also reaffirmed an earlier holding that a personnel handbook promulgated by an employer can modify the terms of an at-will employment agreement.[209] In this case, the court held that the University policies in force at the time of the plaintiffs' appointments constituted a legally enforceable part of the employment contract, creating a vested right in the employees.[210] Since the University amended its policy after notice was due to the plaintiffs under the policies at the time of their appointment, the plaintiffs' right to employment in the 1987-88 school year had vested, and the superior court erred both in entering summary judgment for the University and in refusing to enter partial summary judgment for the plaintiffs.[211]

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204. *Id.* at 933.

205. *Id.*

206. *Id.* at 934.

207. *Id.* at 933.

208. *Id.* at 934.

209. *Id.* (citing Jones v. Central Peninsula Gen. Hosp., 779 P.2d 783 (Alaska 1989)). In *Jones,* the Alaska Supreme Court endorsed the reasoning of the Michigan Supreme Court in Toussaint v. Blue Cross & Blue Shield, 408 Mich. 579, 292 N.W.2d 880 (1980). *Jones,* 779 P.2d at 787. The Michigan court held that an employer statement of policy can create contractual rights in an employee even though such policies were not negotiated and can be amended unilaterally by the employer without notice. *Toussaint,* 408 Mich. at 613-15, 292 N.W.2d at 892. *See also* Perspective, *Employment At Will in Alaska: The Question of Public Policy Torts,* 6 ALASKA L. REV. 269, 277-79 (1989) (authored by Thomas P. Owens III).

210. *Zuelsdorf,* 794 P.2d at 935.

211. *Id.*

The effect of a promissory note upon an estate was the central issue in *Jensen v. Ramras*.[212] The decedent, Dorothy Ramras, had been a shareholder of Alaska Culinary Management, Inc. ("ACM"), which was owned by a group of investors who had purchased a restaurant in 1985.[213] To finance the purchase, the group signed a promissory note in favor of the seller, Restaurants Unlimited, Inc., and entered into a cross-indemnity agreement.[214]

Ramras died in 1986 and Restaurants Unlimited filed a contingency claim[215] against her estate for her liability as a co-maker of the promissory note.[216] The estate sought indemnification from the other shareholders, and upon the shareholders' refusal to indemnify, the estate filed suit. Anticipating a probate court order detailing the shareholders' duty to perform under the agreement, the superior court ordered specific performance of the cross-indemnification agreement.[217]

The Alaska Supreme Court reversed, finding that the superior court's order was premature and substantively flawed. Looking to the plain, unambiguous language of the cross-indemnity agreement, the

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212. 792 P.2d 668 (Alaska 1990).

213. *Id.* at 668.

214. *Id.* at 668-69. The agreement provided in relevant part:

> If one or more of the undersigned is required to pay any portion of the debts owed by the corporation for the purchase of [the restaurant], we agree that each of us who pays less than his full proportionate share of such debt shall indemnify the paying shareholder to the extent of that share, and pay on demand the amount due to the indemnified shareholder. For the purposes of this agreement a shareholder's "full proportionate share" is the same as his percentage of the issued and outstanding stock of the corporation which he owns . . . . (footnote omitted).

Id. at 669.

215. Restaurants Unlimited filed its claim pursuant to Alaska Statutes sections 13.16.460 and 13.16.495. The latter provides:

> (a) If a claim which will become due at a future time or a contingent or unliquidated claim becomes due or certain before the distribution of the estate, and if the claim has been allowed or established by a proceeding, it is paid in the same manner as presently due and absolute claims of the same class.
>
> (b) In other cases the personal representative or, on petition of the personal representative or the claimant in a special proceeding for the purpose, the court may provide for payment as follows:
>
> > (1) if the claimant consents, the claimant may be paid the present or agreed value of the claim, taking any uncertainty into account;
> >
> > (2) arrangement for future payment, or possible payment, on the happening of the contingency or on liquidation may be made by creating a trust, giving a mortgage, obtaining a bond or security from a distributee, or otherwise.

ALASKA STAT. § 13.16.495 (1990).

216. *Jensen*, 792 P.2d at 669.

217. *Id.* at 670.

court found that the indemnification provision was triggered only when the estate was actually required to pay a portion of the corporation's debt.[218] Here, there was no default and the estate had not been required to pay anything. Therefore, the cause of action had not ripened, and might never ripen, making the lower court's order of specific performance premature.[219]

The supreme court also found that the lower court had misinterpreted Alaska Statutes section 13.16.495.[220] Requiring the estate to post security for a debt under the statute would not constitute a "payment" of the debt under the cross-indemnity agreement.[221] Until the debtor defaults and Restaurants Unlimited executes its security, the estate would not need to make any payments; therefore the cross-indemnity agreement would not be triggered.[222]

In *Helstrom v. North Slope Borough*,[223] the court confronted allegations of duress and unconscionability in a settlement agreement. In February 1986, North Slope Borough suspended Helstrom from his job as a mechanic because he falsified overtime hours. At a meeting with the Borough District Attorney following his suspension, Helstrom was informed that the Borough intended to bring several claims against him.[224] Helstrom's thrift account, controlled by the Borough, was frozen, and a later civil suit attached all personal property, effectively preventing Helstrom from leaving Barrow.[225]

Helstrom later insisted to the district attorney that he needed to settle the claims against him immediately so he could tend to a desperately ill daughter in Fairbanks. Helstrom then signed a confession of judgment authorizing the Borough to cash in his thrift plan and to keep all the tools seized by the Borough.[226] The confession of judgment also provided for liquidated damages if Helstrom breached any part of the settlement and for indemnification of any claims against the Borough arising out of the agreement.[227] The Borough reduced the agreement to judgment shortly thereafter.[228]

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218. *Id.*
219. *Id.*
220. *See supra* note 215.
221. *Jensen*, 792 P.2d at 670.
222. *Id.* at 670-71.
223. 797 P.2d 1192 (Alaska 1990).
224. *Id.* at 1194.
225. *Id.* at 1195.
226. *Id.*
227. *Id.* at 1196.
228. *Id.*

After leaving Barrow, Helstrom moved to set aside the judgment on the ground of duress.[229] The superior court granted Helstrom's motion, vacating the judgment and allowing the litigation to proceed from the Borough's complaint. The Borough then amended its complaint, seeking specific enforcement of the liquidated damages provision of the agreement, and moved for summary judgment. The superior court granted the Borough's motion, finding that Helstrom had not established duress under Alaska law.[230]

The supreme court reversed, citing a three-part standard for duress: "1) one party involuntarily accepted the terms of another, 2) circumstances permitted no other alternative and 3) such circumstances were the result of coercive acts of the other party."[231] The court found that Helstrom could satisfy the first two prongs by showing that he had no "reasonable alternative," and that the existence of a "reasonable alternative" was a question of fact for a jury.[232]

The court then turned to Helstrom's allegation that the liquidated damages provision was unconscionable. The court noted that on remand, Helstrom should be granted a motion for summary judgment on this issue as it found the provision to be closer to a penalty clause than to a true liquidated damages clause.[233] The court stated that "the settlement agreement in this case appears to provide for 'liquidated damages' on top of actual damages," and thus should be held unconscionable on remand.[234]

In 1990 the supreme court also addressed contracts in a bailment context. In *Gillen v. Holland*[235] the plaintiff obtained a contract with the U.S. Army to install carpeting, and entered into a second contract with the defendant to obtain the necessary carpet. When the carpet was destroyed by fire in the defendant's warehouse, a dispute arose over which party had assumed the risk of loss. While the defendant admitted telling the plaintiff he was insured, he denied having promised to procure insurance or indemnify the plaintiff in the event of a

229. *Id.*; *see* ALASKA R. CIV. P. 60(b) (allowing court to relieve a party of a final judgment for reasons justifying relief).

230. *Helstrom,* 797 P.2d at 1196-97. The court held that duress would void the agreement only if Helstrom could demonstrate that he had "no reasonable alternative to agreeing to the other party's terms, or as it is often stated, that he had no adequate remedy if the threat were carried out." *Id.* (quoting Totem Marine Tug & Barge, Inc. v. Alyeska Pipeline Serv. Co., 584 P.2d 15, 22 (Alaska 1978)).

231. *Id.* at 1197 (quoting *Totem Marine,* 584 P.2d at 21).

232. *Id.* The adequacy of the alternative is determined by a practical standard considering the victim's particular situation: the victim's belief is assessed subjectively while the reasonableness of the alternative is judged by an objective standard. *Id.* at 1197-98.

233. *Id.* at 1200.

234. *Id.* (citing Arctic Contractors v. State, 564 P.2d 30 (Alaska 1977)).

235. 797 P.2d 646 (Alaska 1990).

loss.[236] Amidst considerable confusion over the pleadings, the superior court held that the plaintiff had voluntarily dismissed his bailment claim and had failed to make out a prima facie case for breach of the insurance contract.[237] The court granted defendant's motion for summary judgment and issued a final judgment in his favor.[238]

The Alaska Supreme Court reversed, finding that the superior court misconceived the nature of the plaintiff's cross-claim, that the plaintiff had never intended to dismiss its bailment claim, and that the defendant was liable for loss of goods as the bailee.[239] In examining the bailment claim, the court noted that it had earlier recognized the right of the parties in a bailment contract to shift liability, either by express contractual agreement or by implication, if one party agreed to provide full insurance coverage for the benefit of both parties.[240] In the present case, the defendant admitted that his insurance was intended to benefit both parties.[241] By assuming the responsibility of insuring the goods, Holland thus assumed the risk of their loss.[242]

In *Donnybrook Building Supply v. Interior City Branch, First National Bank,*[243] the defendant bank ("ICB") approved three home construction loans to Executive Builders, a construction firm, that obtained some of its building supplies from the plaintiff Donnybrook.[244] When Executive Builders received the loan funds from ICB, it used part of the money to pay Donnybrook for outstanding debt incurred by Executive Builders on previous projects financed by ICB.[245] Following a dispute over payment, Donnybrook issued a stop-payment order[246] to ICB, but ICB continued to disburse loan

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236. *Id.* at 647.

237. *Id.* at 648.

238. *Id.*

239. *Id.* at 649-50.

240. *Id.* at 650 (citing Dresser Indus. v. Foss Launch & Tug Co., 560 P.2d 393, 395 (Alaska 1977)).

241. *Id.*

242. *Id.* The court further noted that in bailment situations

> a party does not have to establish an agreement to insure in order to shift the risk of loss of the goods. A bailor or a bailee's agreement to purchase insurance for the benefit of both parties is sufficient to shift to it the risk of loss for the bailed goods.

Id. (footnotes omitted).

243. 798 P.2d 1263 (Alaska 1990).

244. *Id.* at 1265.

245. *Id.*

246. *Id.* The court noted that then-Alaska Statutes section 34.35.062(a)(2) authorized:

> a construction materials supplier to issue a stop-payment notice to financiers after twenty days where the project's financing is not at least 50% bonded and the builder falls thirty days in arrears if there is no payment due date, or more than twenty days late where the contract specifies a payment due date.

funds to Executive Builders.[247] All three parties entered into a written agreement clarifying Executive Builders' obligation to Donnybrook, but ICB refused to guarantee Executive Builders' payment.[248] Within a few months, Executive Builders filed for bankruptcy and Donnybrook sued ICB. At trial, the superior court held that ICB's representations to Donnybrook concerning Executive Builders' financial condition were negligent rather than intentional, that the misrepresentations were not material breaches, and that the agreement among the three parties did not guarantee that ICB would pay Donnybrook for lost profits.[249] The superior court further held that Donnybrook had received more from Executive Builders' in the form of profits from the sale of one of the homes built than it would have received from damages on its stop-payment claim.[250]

On appeal, the Alaska Supreme Court held that the superior court did not err in finding ICB's breaches of the agreement immaterial.[251] Donnybrook claimed that ICB had warranted as correct the erroneous information it provided on Executive Builders and that ICB allowed payments and claims in violation of the agreement by shifting funds among three ongoing projects.[252] The court held that, in the absence of an explicit guarantee in the agreement, ICB did not warrant that the information provided therein would be correct.[253] The court noted that ICB had explicitly refused to make such a guarantee.[254] The supreme court also found that the trial court had relied on sufficient evidence in finding that ICB's account-shuffling did not materially contribute to the non-completion of the projects.[255]

A lender who disburses loan funds despite a stop-payment notice becomes liable for the amount disbursed or the actual debt, whichever is less.

Id. at 1265 n.1 (citing ALASKA STAT. § 34.35.062(a)(2) (1990) (amended 1986)).

The court also noted that then-Alaska Statutes section 34.35.062 (a)(5) provided that "[s]ums withheld under a stop-payment notice may not be disbursed by the lender except under the terms of a written agreement signed by the claimant, owner and general contractor or by order of a court of competent jurisdiction." *Id.* at 1265 n.2 (quoting ALASKA STAT. § 34.35.062(a)(5) (1990) (amended 1986)).

247. *Id.* at 1265.

248. *Id.*

249. *Id.*

250. *Id.* at 1266.

251. *Id.*

252. *Id.*

253. *Id.* at 1267.

254. *Id.* In considering the absence of the rejected terms in the agreement, the court relied on Restatement (Second) of Contracts § 214(c) (1981) and on its earlier holding in Alaska Diversified Contractors v. Lower Kuskokwim School Dist., 778 P.2d 581, 584 (Alaska 1989), *cert. denied*, — U.S. —, 110 S. Ct. 725 (1990).

255. *Donnybrook*, 798 P.2d at 1266-67.

The court also rejected Donnybrook's attempt to recover on an equitable theory, restating the position of the Alaska courts that equitable relief is not available when there is an adequate remedy at law.[256] Finally, the court held that the superior court had not abused its discretion when it awarded ICB attorney's fees and costs even though ICB's application for such was untimely.[257]

The final contracts case, *Sea Lion Corp. v. Air Logistics*[258] involved corporate ratification of a contract signed by an agent. The president of the defendant company, Air Logistics, signed an agreement to provide flight service to the plaintiff, Sea Lion Corp., despite the fact that the president was without authority as the corporation's agent to sign the agreement. The court held that Air Logistics was bound by the agreement in light of its failure to disavow the agreement promptly after learning of the president's act.[259] The court held that formal approval of the agent's actions by the board of directors was not necessary; acquiescence was sufficient to bind the corporation.[260]

IV. CONSTITUTIONAL LAW

In the area of constitutional law, the Alaska Supreme Court decided only two cases in 1990. In an equal protection case, the court employed a familiar sliding scale analysis, and focused on the state rather than the federal constitutional claims because Alaska's equal protection clause affords individuals a higher degree of protection than does its federal counterpart. The second case discussed the press' right of access to public documents. The court required release of all the documents involved, noting the public's fundamental right of access to the documents.

In *Sonneman v. Knight*,[261] a postal service employee who resigned his position to begin law school was denied unemployment benefits by the Employment Security Division of the Department of Labor ("ESD"). The ESD denied the benefits on the ground that voluntarily leaving work to attend school is not "good cause" under Alaska Statutes section 23.20.379. The ESD also denied the benefits on the ground that law school is not vocational school under Alaska Statutes section 23.20.382, attendance at which would not render him ineligible

256. *Id.* at 1268 (citing Knaebel v. Heiner, 663 P.2d 551, 553 (Alaska 1983)).

257. *Id.* The court noted that Alaska Civil Rule 94 permits some latitude. The rule provides 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 aderence [sic] to them will work injustice." ALASKA R. CIV. P. 94.

258. 787 P.2d 109 (Alaska 1990).

259. *Id.* at 119.

260. *Id.* at 118.

261. 790 P.2d 702 (Alaska 1990).

for benefits, but is instead academic training under Alaska Statutes section 23.20.378, attendance at which would render him ineligible for benefits. The plaintiff's claim that distinguishing between vocational and academic training for the purpose of unemployment benefits violated the equal protection and due process clauses was rejected by the Alaska Supreme Court under the federal and state constitutions.[262]

The court analyzed the equal protection issue under the state constitution's "sliding scale" test, which had been adopted in *State v. Erickson*[263] and refined in *Alaska Pacific Assurance Co. v. Brown*.[264] Under this test, the state had shown that the distinction between vocational and academic training bears a fair and substantial relationship to the Employment Security Act's purpose of assisting the least employable among Alaska's population.[265] The court also found no substantive due process violation because of this legitimate purpose of the Act.[266] Finally, the court found that law school is an "institution of higher education" and not a "vocational school."[267]

Municipality of Anchorage v. Anchorage Daily News,[268] the second constitutional case decided by the supreme court in 1990, involved three consolidated appeals relating to the Anchorage Daily News' requests for certain municipality documents. Despite the fact that the appeals were mooted by the publication of the requested documents, the court agreed to review the matter under the "public interest" exception to mootness.[269]

In the first case, the municipality appealed a court order requiring the release of employee performance evaluations by the Anchorage Library Advisory Board ("Library Board"). The Alaska Supreme Court affirmed the lower court, ruling that the Library Board was a public entity acting in an official capacity.[270] Therefore, its report was a public record to which the Anchorage Daily News was entitled access under the Alaska Public Records Act[271] and the Open Meetings Act.[272]

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262. *Id.* at 704.
263. 574 P.2d 1, 12 (Alaska 1978).
264. 687 P.2d 264, 269 (Alaska 1984).
265. *Sonneman,* 790 P.2d at 706.
266. *Id.*
267. *Id.* at 707.
268. 794 P.2d 584 (Alaska 1990).
269. *Id.* at 588. For applications of the public interest exception to mootness, see Falke v. State, 717 P.2d 369, 371 (Alaska 1986) and Kentopp v. Anchorage, 652 P.2d 453, 457-58 (Alaska 1982).
270. *Anchorage Daily News,* 794 P.2d at 589.
271. Act of Jan. 1, 1963, ch. 101, 1962 Alaska Sess. Laws 89 (codified as amended at ALASKA STAT. §§ 09.25.110-120 (1983)).
272. Act of Aug. 31, 1972, ch. 98, 1972 Alaska Sess. Laws 1 (codified as amended at ALASKA STAT. §§ 44.62.310-312 (1989)).

In the second case, the municipality appealed the lower court's order that the municipality disclose a Fiscal Policy Committee report. The Alaska Supreme Court affirmed the lower court's ruling, holding that the Blue Ribbon Fiscal Panel was a municipal agency subject to the public records disclosure laws.[273] The court also noted that the public had a fundamental right of access to such governmental records, in contrast with the municipality's de minimis interest in keeping the records confidential.[274]

In the final case, the Anchorage Daily News appealed the lower court's order permitting the municipality to depose certain Daily News employees as a prerequisite to the government's release of the Blue Ribbon Fiscal Report. The Alaska Supreme Court reversed the lower court, holding that a governmental agency is not entitled to delay access to public documents through the use of depositions where it has failed to present a prima facie defense to the release.[275] The municipality here had failed to present such a prima facie defense.[276]

V. CRIMINAL LAW

The Alaska Supreme Court decided only four criminal law cases during 1990, three of which concerned the rights of defendants in drunk driving cases. The fourth case concerned the need for a criminal defendant to testify in order to preserve for review a claim of improper impeachment by prior conviction.

The Alaska Supreme Court first recognized the due process right to challenge breath test results in *Lauderdale v. State*.[277] There, the court held that due process bars the introduction into evidence of breath test results, unless the police give defendants a reasonable opportunity to challenge the results through independent testing.[278] The issue in *Gundersen v. Municipality of Anchorage*[279] was whether notice of the right to an independent test combined with a simultaneous offer of assistance in obtaining the test is a constitutionally adequate substitute for preserving the breath test sample for later testing by the defendant.

The officer who administered Gundersen's breathalyzer test read him a "Notice of Right to an Independent Test," but Gundersen told

273. *Anchorage Daily News*, 794 P.2d at 592.
274. *Id.* at 593.
275. *Id.* at 593-94; *see* Doe v. Alaska Superior Court, 721 P.2d 617, 626 (Alaska 1986) (the entity claiming the privilege has the initial burden of presenting evidence justifying denial of release of public documents).
276. *Anchorage Daily News*, 794 P.2d at 594.
277. 548 P.2d 376 (Alaska 1976).
278. *Id.* at 381.
279. 792 P.2d 673 (Alaska 1990).

the officer he did not wish to have his own independent test.[280] Emphasizing that "clear and express" notice of the right to independent testing is required, the court concluded that Gundersen's due process rights had not been violated because the procedure used by the arresting officer was an adequate substitute for breath sample preservation.[281] Gundersen's waiver was effective despite his intoxication, so long as " 'he knew what he was doing.' "[282] The court upheld Gundersen's conviction.[283]

In *Zsupnik v. State,*[284] the Alaska Supreme Court reversed the defendant's drunk driving conviction. The defendant had been arrested and brought to the police station for driving while intoxicated. During a twenty minute observation period before the administration of a breath test, the police refused the defendant's four requests to telephone her uncle.[285] The court held that Alaska Statutes section 12.25.150(b)[286] unambiguously gives a prisoner the right to telephone immediately both relatives and an attorney.[287] The court specifically rejected the balancing test employed by the lower court, which

280. *Id.* at 674. The text of the "Notice of Right to an Independent Test" reads:

> You are . . . under arrest for the offense of driving while intoxicated. You have provided a sample of your breath for analysis on the Intoximeter 3000. You also have a right to obtain an independent test of your blood alcohol level. If you wish to have an independent test you will be transferred to a local medical facility where a sample of your blood will be drawn by qualified personnel at no charge to you. The blood sample will be stored at the medical facility for a period of 60 days. It will be your responsibility to make arrangements for analysis of your blood sample. The analysis itself will be done at your own expense. At this time you must decide whether or not you want an independent test performed. A refusal to decide will be taken [as] a waiver of your right to obtain an independent test.

Id.

281. *Id.* at 677 (citing Municipality of Anchorage v. Serrano, 649 P.2d 256 (Alaska Ct. App. 1982)). The dissent would require the state to preserve all breath samples for a defendant's later use because "[i]n cases where intoxication is an essential element of the crime charged, such as driving while intoxicated, the probability of an involuntary waiver of the accused's due process rights is high." *Id.* at 679 (Burke, J., dissenting).

282. *Id.* at 677 (quoting Thessen v. State, 454 P.2d 341, 345 (Alaska 1969)).

283. *Id.* at 678.

284. 789 P.2d 357 (Alaska 1990).

285. *Id.* at 358.

286. The statute sets forth the rights of prisoners after arrest:

> Immediately after an arrest, a prisoner 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 friends of the prisoner, have the right to immediately visit the person arrested.

ALASKA STAT. § 12.25.150(b) (1990).

287. *Zsupnik,* 789 P.2d at 360.

weighed the defendant's right to communication against the state's interest in acquiring a prompt and reliable breath test.[288] The supreme court found that talking with a friend or relative would not jeopardize the state's interest and was required by the plain language of the statute; thus, the results of the breath test were tainted and had to be excluded at retrial.[289]

The Alaska Supreme Court considered the effect of previous convictions for driving while intoxicated on the plaintiff's license revocation in *Wik v. State.*[290] Wik had been arrested for DWI in September of 1987 and convicted in December of 1987. Wik argued that under Alaska Statutes section 28.15.181[291] the date of conviction should be used to determine if within the preceding ten years he had been convicted of a similar offense, while the Department of Motor Vehicles interpreted the statute using the date of arrest, thereby requiring a ten year revocation of his license. The court noted that the issue was one of statutory interpretation: "what date does [section 28.15.181] contemplate in calculating whether a person convicted of DWI or refusal to submit to a breathalyzer test has been previously convicted of a similar offense . . . in the preceding ten years."[292] The supreme court ruled that the date of the latest arrest, rather than the latest conviction, should be used in this calculation.[293] Therefore Wik's DWI conviction of October 1977 required a ten year revocation of his license.

The supreme court held in *State v. Wickham*[294] that a criminal defendant must testify at trial in order to preserve for review the denial of his *in limine* motion to exclude evidence of a prior conviction for

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288. *Id.*

289. *Id.* at 361. The court rejected the state's argument that Zsupnik's sole remedy should be criminal sanctions against the arresting officer. *Id.*; *see* ALASKA STAT. § 12.25.150(c) (1990) (providing for the possibility of criminal sanctions for violations of § 12.25.150(b) rights).

290. 786 P.2d 384 (Alaska 1990).

291. The statute provides that license privileges cannot be granted during the following periods:

> (2) not less than one year if, within the preceding 10 years, the person has been previously convicted of one offense
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> (A) described in (a)(5) [(driving while intoxicated)] or (8)[(refusal to submit to a chemical test)] . . .
>
> . . . .
>
> (3) not less than 10 years if, within the preceding 10 years the person has been previously convicted of more than one of following offenses or has more than once been previously convicted of one of the following offenses:
>
> (A) an offense described in (a)(5) or (8) of this section . . .

ALASKA STAT. § 28.15.181 (1989).

292. *Wik*, 786 P.2d at 385 (footnote omitted).

293. *Id.* at 387.

294. 796 P.2d 1354 (Alaska 1990).

impeachment purposes.[295] In doing so, the court adopted the holding of *Luce v. United States*,[296] despite the fact that *Luce* is not binding on the states.[297] The Supreme Court's unanimity in *Luce*, and the number of other states that have adopted the *Luce* rule, persuaded the Alaska Supreme Court to follow suit.[298] The purpose of the *Luce* rule is to create concrete records for use by the appellate courts in reviewing the trial court decisions to admit evidence of prior convictions for purposes of impeachment.[299] The court reasoned that the "factual vacuum" caused by the absence of a defendant's testimony created an unacceptable level of speculation in making a determination of error.[300]

The court chose, however, to adopt the *Luce* rule prospectively, and therefore permitted review of Wickham's case despite his decision not to testify.[301] The court reasoned that defendants like Wickham might have "altered their trial tactics had they known that *Luce* would become law."[302]

VI. EMPLOYMENT LAW

The Alaska Supreme Court decided many cases in employment law during 1990. The field has been divided into three subcategories: wrongful discharge, workers' compensation, and miscellaneous issues including the respondeat superior doctrine, comparable worth, unfair labor practice and arbitration.

A. Wrongful Discharge

Two wrongful discharge cases were decided by the supreme court in 1990. In one, the court continued the trend noted in 1989's Year in Review toward "preserv[ing] or expand[ing]" the rights of discharged employees.[303] In the second case, a matter of statutory interpretation, the court followed a literal interpretation of the relevant statute, thereby precluding plaintiff's recovery.[304]

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295. *Id.* at 1358.

296. 469 U.S. 38 (1984).

297. Because the Supreme Court adopted the *Luce* rule pursuant to its advisory power, the rule is not binding on the states. *Wickham*, 796 P.2d at 1357 (citing People v. Collins, 42 Cal. 3d 378, 385, 722 P.2d 173, 177, 228 Cal. Rptr. 899, 903 (1986)).

298. *Id.* at 1357 & n.5.

299. *Id.* at 1359.

300. *Id.* at 1358.

301. *Id.* at 1359.

302. *Id.*

303. 7 ALASKA L. REV. 87, 118 (1990).

304. For an analysis of Alaska law in the area of wrongful discharge, see Perspective, *Employment at Will in Alaska: The Question of Public Policy Torts*, 6 ALASKA L. REV. 269 (1989) (authored by Thomas P. Owens III); Perspective, *Shelter from the*

In *Beard v. Baum,*[305] a former employee of the State Department of Transportation ("DOT") alleged constructive wrongful discharge, intentional infliction of emotional distress, denial of due process, defamation and violation of 42 U.S.C. § 1983, claiming he was pressured to resign after making public allegations of corruption within the DOT.[306] The superior court dismissed the first three claims on the grounds that the employee was first required to exhaust his remedies under his collective bargaining agreement, and granted summary judgment for the defendants on the latter two.[307] The Alaska Supreme Court reversed the lower court on the issues of wrongful discharge and intentional infliction of emotional distress, holding that the plaintiff was excused from exhausting his contractual remedies since, as he could not procure the required representation of his union representative, such remedies were clearly futile.[308] The court upheld the dismissal of plaintiff's due process claim, rejecting the argument that plaintiff was entitled to a pre-termination hearing.[309]

On the issue of defamation, the supreme court upheld summary judgment for the state, finding that the plaintiff had become a public figure by seeking out the press to make his allegations of corruption, but had failed to prove the requisite "actual malice" on the part of his supervisor.[310] The court reversed the superior court's grant of summary judgment on the section 1983 action, however, holding that under the balancing test adopted by the United States Supreme Court in *Pickering v. Board of Education,*[311] the plaintiff's criticism of the DOT was a matter of public concern and therefore protected speech.[312]

In *Zoerb v. Chugach Electric Association, Inc.,*[313] the plaintiff alleged that his employer's decision to terminate him was made at a closed meeting in violation of the open meeting requirements of Alaska Statutes section 10.25.175 and that the jury was improperly

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Storm: The Need for Wrongful Discharge Legislation in Alaska, 6 ALASKA L. REV. 321 (1989) (authored by Mark A. Redmiles).

305. 796 P.2d 1344 (Alaska 1990).

306. *Id.* at 1347.

307. *Id.*

308. *Id.* at 1349.

309. *Id.* at 1350.

310. *Id.* at 1353.

311. 391 U.S. 563 (1968).

312. *Beard,* 796 P.2d at 1352. The *Pickering* balancing test has been defined by the Alaska Supreme Court to be as follows: "[A] government employer [may] limit the First Amendment rights of an employee only if it can demonstrate that its legitimate interest in promoting efficiency in its operation outweighs the interests of the employee in commenting upon matters of public concern." *Id.* at 1351 (quoting Wickwire v. State, 725 P.2d 695, 700 (Alaska 1986)).

313. 798 P.2d 1258 (Alaska 1990).

instructed as to "good cause" for his firing.[314] The Alaska Supreme Court held that he lacked standing to bring a claim under Alaska Statutes section 10.25.175, which governs the procedures of electrical cooperatives and requires that meetings of the board of directors be open to members of the cooperative.[315] The court found that the plaintiff was an employee, not a member, of the cooperative, and that employees were ineligible to attend the board meetings.[316] The court further held that the trial court's instructions adequately informed the jury that it was to consider the true motivation behind the plaintiff's dismissal in concluding that the plaintiff was terminated for "good cause."[317]

B. Workers' Compensation

Twelve supreme court decisions — the bulk of the employment law cases decided this past year — concerned workers' compensation. As is customary, the cases here are discussed in the order in which the issues presented would be encountered by a practitioner in the course of a typical case: scope of liability, benefit calculation, exclusivity of workers' compensation as a remedy, employers' offsets based on recovery from a third party and reimbursement of health insurance companies under the Alaska Workers' Compensation Act.

The initial and fundamental inquiry that a practitioner must make in a workers' compensation case is whether an employment relationship exists at all. The issue decided in *Alaska Pulp Corp. v. United Paperworkers International Union*[318] was whether the claimant had an employer-employee relationship with the union while striking and picketing against his employer. While receiving temporary total disability benefits for a work-related back injury, the plaintiff participated in picketing activity against his employer, during which he suffered a heart attack. The plaintiff then applied for permanent total disability, based only on his previous back injury. The defendant claimed that the plaintiff's heart attack was a subsequent intervening injury which occurred while the plaintiff was employed by the union, thus making the union responsible for workers' compensation under the "last injurious exposure" rule.[319] Relying on a 1989 decision of the Alaska

314. *Id.* at 1259; *see* ALASKA STAT. § 10.25.175 (1989).

315. *Zoerb,* 798 P.2d at 1261.

316. *Id.* at 1260-61.

317. *Id.* at 1263.

318. 791 P.2d 1008 (Alaska 1990).

319. *Id.* at 1009. "The last injurious exposure rule applies when work for successive employers combines to produce an employee's disability. The rule imposes full liability on the most recent employer." *Id.* at 1009 n.2 (citing 4 A. LARSON, THE LAW OF WORKMEN'S COMPENSATION § 95.20 (1986)).

Supreme Court,[320] the Alaska Workers' Compensation Board ("Board") found no employer-employee relationship between the claimant and the union since there was no express or implied employment contract.[321] In considering the circumstances of the employee-union relationship, as required by *Childs*, the court accepted the Board's finding that strike benefits are not compensation: the benefits were not paid in proportion to the amount of time spent in the picket line, but were a flat weekly benefit paid to everyone on strike.[322] Further, in the absence of a contract, the court upheld the Board's decision not to apply the "relative nature of the work" test to determine employment status,[323] reasoning that this test is used only to distinguish between employees and independent contractors once an employment relationship has already been established.[324]

In *Robinett v. Enserch Alaska Construction and Employers Casualty Co.*,[325] the Alaska Supreme Court reversed the Board's decision against the plaintiff. The court found that the Board erred in applying the "Larson test"[326] retroactively to the plaintiff's actions since the statute does not provide for the application of the test to injuries suffered before July 1, 1988.[327] Under this test, "an employee's willful and knowing false representations of his or her physical condition may bar recovery of statutory workers' compensation."[328] The court declined to infer that the statute was intended to bar the plaintiff's claim, despite his deliberate misrepresentations on a pre-employment medical questionnaire.[329] The Board also erred in finding that the plaintiff's evidence failed to establish the necessary preliminary link between his employment and his injury.[330] The court ruled that the threshold

320. Childs v. Kalgin Island Lodge, 779 P.2d 310 (Alaska 1989).

321. *Alaska Pulp Corp.*, 791 P.2d at 1010 (citing *Childs*, 779 P.2d at 313).

322. *Id.*

323. The court adopted this test in Kroll v. Reeser, 655 P.2d 753 (Alaska 1982) to "distinguish between employees and independent contractors for the purpose of determining whether an individual is an 'employee,' and thus eligible for workers' compensation benefits, under the Act." *Kroll*, 655 P.2d at 755.

324. *Alaska Pulp Corp.*, 791 P.2d at 1012 (citing *Kroll*, 655 P.2d 753, 755 (Alaska 1982)).

325. 804 P.2d 725 (Alaska 1990).

326. *Id.* at 727 (citing 1C A. LARSON, WORKMEN'S COMPENSATION LAW § 47.53, 393-94 (1986)). The "Larson test" was used by the Board in analyzing Robinett's responses to the employee questionnaire. *Id.* The test has been essentially codified at Alaska Statutes section 23.30.022. *Id.*

327. *Id.* at 727-29.

328. *Id.* at 727.

329. *Id.* at 728.

330. *Id.* at 729.

showing for this link is minimal, requiring only "some evidence," and that the plaintiff had met this minimal burden.[331]

In *Hagel v. King Steel, Inc.*,[332] the supreme court affirmed a decision by the Board that plaintiff had not suffered a new injury while employed by the defendant. Plaintiff, an iron worker, suffered a compensable back injury in a previous job and returned to work against the advice of his doctor. While employed by the defendant, plaintiff claimed to have suffered a new injury during a fall. The Board and the court rejected his claim, ruling that he had neither received a new injury nor aggravated the pre-existing injury.[333] The court affirmed the Board's application of the "last injurious exposure" rule.[334] Under this rule, King Steel would be responsible for Hagel's compensation only if employment with King Steel "aggravated, accelerated, or combined with" his pre-existing condition and, if so, the aggravation was a "legal cause" of Hagel's disability.[335] Under Alaska Statutes section 23.20.120(a)(1), in the absence of substantial evidence to the contrary, such aggravation must be presumed. The Board found that King Steel then produced "substantial evidence" to overcome the presumption that it was responsible for compensation, and Hagel then failed to show that he suffered a compensable injury.[336]

In *Cortay v. Silver Bay Logging*,[337] the supreme court ruled that an employee was improperly denied temporary total disability benefits. The plaintiff-worker was denied benefits because he had cared for his sick wife during the time he was unable to work due to his disability. Relying on *Estate of Ensley v. Anglo Alaska Construction, Inc.*,[338] the court held that a disabled employee should not be denied disability benefits simply because he chooses to engage in an activity that renders him unavailable for work.[339] Although *Estate of Ensley* involved unavailability for work due to medical reasons, the court reasoned that the same remedial policy of the Workers' Compensation Act governed this case.[340] The court also held that in order to ensure competent counsel for injured workers in the future, claimants seeking disability

331. *Id.* at 728. The court noted that the testimony of Robinett's co-workers as to their observations of Robinett's condition before and after the alleged injury was sufficient to meet this burden. *Id.*

332. 785 P.2d 1207 (Alaska 1990).

333. *Id.*

334. *Id.* at 1209; *see supra* note 319.

335. *Hagel*, 785 P.2d at 1209 (quoting Ketchikan Gateway Borough v. Saling, 604 P.2d 590, 596 (Alaska 1979)).

336. *Id.*

337. 787 P.2d 103 (Alaska 1990).

338. 773 P.2d 955, 959-60 (Alaska 1989).

339. *Cortay*, 787 P.2d at 108.

340. *Id.*

should receive full reasonable attorney's fees rather than the statutory minimum.[341]

In *Metcalf v. Felec Services,*[342] the plaintiff was denied workers' compensation payments after refusing treatment for headaches suffered after a work-related accident. The supreme court affirmed the Board's finding that refusal of treatment in this case was unreasonable, but held that the Board had overstepped its authority when it permitted the defendant-carrier to suspend payments to the plaintiff before the Board issued an order.[343] While the Board may suspend future payments to a claimant, it cannot retroactively suspend payments of benefits.[344]

In *Lake v. Construction Machinery, Inc.,*[345] the supreme court addressed whether, in the case of an injured employee, the employer is one of the parties among whom the finder of fact must allocate fault pursuant to the rule of modified joint and several liability found in Alaska Statutes section 09.17.080. The court ruled that evidence of the employer's negligence was relevant, but the court limited the use of such evidence by the jury solely to prove that the employer was either entirely at fault or the employer's fault was a superseding cause of the injury.[346] Since the statute does not explicitly include statutorily immune employers in the group among whom total liability must be allocated, the court refused to alter the statutory scheme governing employers' rights and liabilities for workplace accidents.[347] Therefore, the court was willing to admit evidence of an employer's negligence only when a third party tortfeasor seeks to prove that the employer was completely at fault or that the employer's negligence was a superseding cause of the accident.[348] The finder of fact may thus allocate all or none of the total fault to the employer, but cannot allocate a portion of the total fault to the employer.[349]

In *Wrangell Forest Products v. Alderson,*[350] the only 1990 case discussing the mathematical calculation of disability benefits, the supreme court affirmed the Board's award of benefits based on the injured worker's salary during the period immediately preceding his injury, rather than on the previous two years as is normally done.

341. *Id.* at 108-09 (relying on Wise Mechanical Contractors v. Bignell, 718 P.2d 971, 973 (Alaska 1986)); *see* ALASKA STAT. § 23.30.145(a) (1990).
342. 784 P.2d 1386 (Alaska 1990).
343. *Id.* at 1388-89.
344. *Id.* at 1388.
345. 787 P.2d 1027 (Alaska 1990).
346. *Id.* at 1031.
347. *Id.*
348. *Id.*
349. *Id.*
350. 786 P.2d 916 (Alaska 1990).

Alaska Statutes section 23.30.220(a)(2) permits such a calculation when the usual method of averaging the employee's income over the previous two years would produce an inequitable result.[351] In a series of cases beginning with *Johnson v. RCA-OMS, Inc.*,[352] the court recognized the availability of this alternative method of calculation. The court here agreed that the Board had appropriately used this alternative method in light of the employee's inability to work during part of the last two years.[353]

In 1990, the supreme court twice rejected employers' arguments that workers' compensation is the exclusive remedy for injured workers. In *King v. Brooks*,[354] the court ruled that the lower court erred in granting summary judgment in an employment case where the plaintiff charged intentional infliction of emotional distress by his supervisor.[355] The court held that workers' compensation is not the exclusive remedy " 'when an employee commits an intentional tort on a fellow worker.' "[356] Whereas the lower court ruled the harassment insufficient to subject the defendant to liability, the supreme court ruled that summary judgment was improper as a question of fact existed whether the harassment was sufficiently severe.[357]

Department of Public Safety v. Brown[358] arose when a state employee injured on a state vessel brought suit against the state alleging liability under the Jones Act[359] for the negligence of the vessel's master and under the admiralty doctrines of unseaworthiness, maintenance and cure.[360] The employee had already received state workers' compensation benefits. The court held that the Workers' Compensation Act is exclusive as to state claims only, and therefore the claimant was entitled to pursue a federal maritime remedy as well.[361]

In *Gossett v. Era Meyeres Real Estate*,[362] the plaintiff filed a workers' compensation claim against his employer and a tort action against third-party defendants for injuries sustained in the same accident. The

351. *Id.* at 917.
352. 681 P.2d 905 (Alaska 1984).
353. *Wrangell*, 786 P.2d at 918.
354. 788 P.2d 707 (Alaska 1990).
355. *Id.* at 711.
356. *Id.* at 709 (quoting Elliot v. Brown, 569 P.2d 1323, 1327 (Alaska 1977)).
357. *Id.* at 711.
358. 794 P.2d 108 (Alaska 1990).
359. 46 U.S.C. § 688 (1988).
360. *Brown*, 794 P.2d at 109. The court disregarded the state's sovereign immunity claim, relying on the Claims Against the State Act, ALASKA STAT. § 09.50.250 (Supp. 1990), and State v. Stanley, 506 P.2d 1284, 1290-91 n.9 (Alaska 1973). *Brown*, 794 P.2d at 109-10.
361. *Id.* at 110.
362. 787 P.2d 1025 (Alaska 1990).

plaintiff's wife joined the tort action, asserting a claim of loss of consortium. In the tort action, the plaintiff and his wife accepted a settlement contingent upon the wife voluntarily dismissing her claim for loss of consortium.[363] When the plaintiff then claimed workers' compensation benefits for the loss arising from the accident at issue in the settled tort action, the plaintiff's employer sought to offset the settlement against the employer's workers' compensation obligations pursuant to Alaska Statutes section 23.30.015(g).[364] The Alaska Supreme Court held that since part of the settlement included resolution of the wife's claim for loss of consortium, the Board would have to apportion the damage settlement and offset only that portion that was in settlement of the plaintiff's tort claim.[365]

In *Caspersen v. Alaska Workers' Compensation Board*,[366] the supreme court reversed an administrative decision by the Board and held that the social security offset provided for in the Alaska Statutes,[367] which became effective in 1977, does not apply to a worker injured prior to the effective date of the statute.[368] The court based its decision on its observation in *Hood v. Workers' Compensation Board*[369] that workers' compensation acts " 'should be liberally construed in favor of the employee . . . . [S]tatutes are presumed to operate prospectively and will not be given a retroactive effect, unless by express terms or necessary implication, it clearly appears that that was the legislative intent.' "[370] The court found no such legislative intent.[371]

In *Sherrod v. Municipality of Anchorage*,[372] the supreme court reversed the Board's refusal to adjudicate the claim of the plaintiff's health insurer, Aetna, for reimbursement of medical bills paid following a work-related injury. The Board erroneously concluded that the

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363. *Id.* at 1025.

364. The statute provides:

> If the employee or the employee's representative recovers damages from a third person, the employee or representative shall promptly pay to the employer the total amounts paid by the employer . . . insofar as the recovery is sufficient after deducting all litigation costs and expenses. Any excess recovery by the employee or the representative shall be credited against any amount payable by the employer thereafter.

ALASKA STAT. § 23.30.015(g) (1990).

365. *Gossett*, 787 P.2d at 1026.

366. 786 P.2d 914 (Alaska 1990) (per curiam).

367. ALASKA STAT. § 23.30.225 (1990).

368. *Caspersen*, 786 P.2d at 915.

369. 574 P.2d 811 (Alaska 1978).

370. *Caspersen*, 786 P.2d at 915 (quoting *Hood*, 574 P.2d at 813-14).

371. *Id; see* ALASKA STAT. § 01.10.090 (1990) ("No statute is retrospective unless expressly declared therein.").

372. 803 P.2d 874 (Alaska 1990).

plaintiff lacked a legally cognizable interest in the controversy and implicitly denied the plaintiff's petition to require Aetna to be joined as a party.[373] The supreme court held that under the Alaska Administrative Code[374] any person who might have relief should be joined as a party.[375] Because Aetna did not intend to waive its claim for reimbursement, it could be joined regardless of its professed unwillingness to hire local counsel.[376] The court further found that as long as the plaintiff remained potentially liable to Aetna, the plaintiff was an "interested party" for purposes of the Workers' Compensation Act[377] and was therefore entitled to a hearing before the Board.[378]

C. Miscellaneous

Four additional cases decided in the area of employment law address a variety of substantive areas. *Doe v. Samaritan Counseling Center*[379] arose out of the plaintiff's sexual relationship with her counselor, an employee of the defendant. On the issue of respondeat superior, the court held that as long as the "tortious conduct arises out of and is reasonably incidental to the employee's legitimate work activities," the employer could be held liable even though the employee's acts are not motivated by a desire to serve the employer.[380] Although the conduct in question took place in part after the counseling had terminated and away from the employer's premises, the court found that the employer could be held liable because the intercourse was sufficiently connected to the tortious misuse of the counseling sessions.[381]

State Commission for Human Rights v. Department of Administration[382] involved the interpretation of Alaska Statutes section 18.80.220(a)(5), which prohibits employers from discriminating "in the payment of wages as between the sexes . . . for work of a comparable character . . . ."[383] The Commission for Human Rights interpreted the statute to require equal pay for jobs of *comparable value to the employer.*[384] The court disagreed with the Commission and held that the "comparable character" language of the statute required equal pay

373. *Id.* at 875.
374. ALASKA ADMIN. CODE tit. 8, § 45.040(c) (Oct. 1988).
375. *Sherrod,* 803 P.2d at 875.
376. *Id.* at 875-76.
377. *See* ALASKA STAT. § 23.30.110 (1990).
378. *Sherrod,* 803 P.2d at 876.
379. 791 P.2d 344 (Alaska 1990); *see* Note, *Bad Samaritans Make Dangerous Precedent: The Perils of Holding an Employer Liable for an Employee's Sexual Misconduct,* 8 ALASKA L. REV. 181 (1991).
380. *Samaritan,* 803 P.2d at 348.
381. *Id.* at 349.
382. 796 P.2d 458 (Alaska 1990).
383. ALASKA STAT. § 18.80.220(a)(5) (Supp. 1990).
384. *State Comm'n for Human Rights,* 796 P.2d at 459.

for substantially equal work.[385] The court further interpreted subsection (a)(5) as prohibiting intentional discrimination in the payment of wages.[386]

In *Public Safety Employees Association v. State*,[387] the Public Safety Employees Association ("PSEA") filed an unfair labor practices charge based upon the reclassification of certain state trooper recruits following a breakdown in contract negotiations. The Alaska Labor Relations Agency ("Agency") found for the PSEA and granted back pay and a cease and desist order preventing further reclassification.[388] The superior court reversed, but the Alaska Supreme Court reversed the superior court, remanding the case for a determination of whether substantial evidence supported the Agency's conclusions.[389]

The court found that the Agency's refusal to defer to the grievance procedures outlined in the collective bargaining agreement was justified under the circumstances. The Agency had noted that the Commissioner of Public Safety indicated that in his view the dispute was not arbitrable, therefore deference to those procedures would have been futile for the PSEA.[390] Alaska Statutes section 23.40.210[391] does not absolutely require the exhaustion of contract grievance procedures but permits the Agency some discretion in determining the most efficient path toward resolution of charges of unfair labor practices.[392]

In a related case, *State v. Public Safety Employees Association*,[393] the state appealed from an arbitrator's award assigning certain state job classifications to collective bargaining agreement pay ranges, arguing that the arbitrator grossly overreached his authority in concluding that the assignment of the positions to pay ranges was a mandatory subject of bargaining.[394] Both the superior court and the supreme court upheld the arbitrator's award. Since the parties both agreed to submit the question to the arbitrator, the court awarded great deference to the arbitrator's decision, applying an "arbitrary and capricious

385. *Id.* at 461-62.

386. *Id.* at 461.

387. 799 P.2d 315 (Alaska 1990).

388. *Id.* at 316-17.

389. *Id.* at 325.

390. *Id.* at 322-23.

391. The statute provides, in relevant part:

> The [collective bargaining] agreement shall include a grievance procedure which shall have binding arbitration as its final step. Either party to the agreement has a right of action to enforce the agreement by petition to the labor relations agency.

ALASKA STAT. § 23.40.210 (1990).

392. *Public Safety Employees Ass'n*, 799 P.2d at 323.

393. 798 P.2d 1281 (Alaska 1990).

394. *Id.* at 1282.

standard" of review.[395] The court then announced its intention to apply the same standard to all cases reviewing awards in compulsory interest arbitration.[396]

VII. FAMILY LAW

The court considered various issues in the family law area in 1990, deciding fourteen cases. These cases are presented here in four categories: jurisdiction, property division, child support and custody, and parental rights.

A. Jurisdiction

The court decided two cases regarding Alaska jurisdiction in child custody disputes. While jurisdiction was granted in one and denied in the other, the court's general willingness to defer jurisdiction to the other state in these cases was evident.[397]

In *Baumgartner v. Baumgartner,*[398] the supreme court dealt with the court's jurisdiction over a child custody order under the Alaska version of the Uniform Child Custody Jurisdiction Act ("UCCJA")[399] when the child and the custodial parent have left Alaska but the noncustodial parent has remained in the state. The court affirmed its holding in *Szmyd v. Szmyd*[400] that jurisdiction to modify custody must exist at the time of the motion to modify, regardless of the jurisdiction of the original custody decree.[401] Here, because the children had lived outside Alaska for four years, the jurisdictional prerequisites for custody were not met and the judgment of the superior court was reversed for lack of jurisdiction.[402]

In *Wanamaker v. Scott,*[403] the original custody decree and a custody modification order were obtained in the state of Washington, but the child lived with her father in Alaska from 1981 to 1987, going to Washington only to visit her mother. In 1987 the mother filed for custody modification in the Alaska Superior Court. The court rejected the father's argument that the UCCJA required the Alaska court to defer to Washington's continuing jurisdiction,[404] holding that, under

395. *Id.* at 1287-88.
396. *Id.*
397. This trend was also noted in Note, *Alaska Supreme Court Year in Review 1989,* 7 ALASKA L. REV. 87, 129 (1990).
398. 788 P.2d 38 (Alaska 1990).
399. ALASKA STAT. §§ 25.30.010-910 (1983 & Supp. 1990).
400. 641 P.2d 14 (Alaska 1982).
401. *Baumgartner,* 788 P.2d at 40.
402. *Id.*; *see* ALASKA STAT. § 25.30.020 (1983) (enumerating the conditions that must be met in order for the court to have jurisdiction to modify custody).
403. 788 P.2d 712 (Alaska 1990).
404. *Id.* at 713. The UCCJA provides:

the statute, Washington would not claim jurisdiction since Alaska had the more significant ties to the child at the time of the motion.[405]

The plaintiff also challenged the superior court's award of attorney's fees as part of the modification order granting child custody to his former wife. The supreme court reversed the superior court's award of attorney's fees on the basis of the plaintiff's "bad faith and vexatious conduct" in opposing the motion for the change of custody,[406] holding that the plaintiff's conduct did not amount to bad faith sufficient to warrant sanctions.[407]

B. Property Division

In *Lewis v. Lewis,*[408] an appeal and cross-appeal arose from a dispute over the distribution of marital property in a divorce action, particularly the distribution of 600,000 shares of stock in a closely held corporation. The supreme court reversed the lower court, ruling that the shares of stock purchased during the marriage with the husband's pre-marital assets were marital property and subject to distribution.[409] The court found that the shares were held in the names of both parties and that, in the absence of any evidence to the contrary, the husband had intended the property to be marital.[410]

The court also ruled that the husband's contingent stock in his employer was a marital asset subject to distribution,[411] electing to treat this asset as if it were a non-vested pension, and ruling that the wife was entitled to half of that amount that would have accrued during the time the couple was married.[412]

(a) If a court of another state has made a custody decree, a superior court of this state may not modify that decree unless (1) it appears to the court of this state that the court which rendered the decree does not now have jurisdiction under jurisdictional prerequisites substantially in accordance with this chapter or has declined to assume jurisdiction to modify the decree, and (2) the court of this state has jurisdiction.

ALASKA STAT. § 25.30.130(a) (1983); *see also* Smyzd v. Smyzd, 641 P.2d 14, 16-17 (Alaska 1982).

405. *Wanamaker,* 788 P.2d at 714-15 (citing In re Custody of Thorensen, 46 Wash. App. 493, 506-07, 730 P.2d 1380, 1388 (1987)).

406. *Wanamaker,* 788 P.2d at 715.

407. *Id.* at 716 (citing L.L.M. v. P.M., 754 P.2d 262, 265 (Alaska 1988) (attorney's fees will be assessed only against litigants who have acted willfully and without just cause)).

408. 785 P.2d 550 (Alaska 1990).

409. *Id.* at 555.

410. *Id.*

411. *Id.* at 556.

412. *Id.*

The Alaska Supreme Court upheld the lower court, however, finding that the husband's employment contract was not a marital asset and therefore not subject to distribution.[413] The supreme court remanded for further explanation from the lower court on why it had subtracted temporary alimony from the final amount owed the wife in the distribution of the marital assets.[414]

In *Murray v. Murray*,[415] the parties had cohabitated for five and one half years before marriage. During this time, they shared a checking account and co-mingled some of their assets.[416] On appeal from the superior court's division of marital property, the supreme court noted that property can be deemed marital even if acquired before the date of marriage and that nothing prevents a trial court from reaching a party's separate pre-marital assets if equity so requires.[417]

The Alaska Supreme Court partially affirmed the superior court's unequal division of marital property in *Oberhansly v. Oberhansly*.[418] The lower court permissibly based its division in part on the husband's conduct during the separation, particularly his conduct in allowing several marital debts to go into arrears.[419] The supreme court partially reversed the division, however, because the lower court failed to consider the tax consequences to the husband of removing funds from his retirement account.[420] Where the division of property will create an immediate and specific tax liability, the trial court must consider that liability in deciding on an equitable distribution.[421]

In *Bandow v. Bandow*,[422] the husband challenged the superior court's determination that an annuity, given in settlement of the husband's medical malpractice claim, was marital property subject to division.[423] The supreme court reversed and remanded, holding that the annuity was marital property only insofar as it compensated for loss to the marital estate by replacing pre-divorce lost earnings.[424] To the extent that it replaced post-divorce lost earnings or compensated for

413. *Id.* at 558.

414. *Id.* at 554. The lower court treated the money going toward the wife's interim support as marital property. Because the relationship of temporary alimony to marital property is not clear in Alaska, the supreme court required the lower court's rationale before reaching a decision on abuse of discretion. *Id.* at 553.

415. 788 P.2d 41 (Alaska 1990).

416. *Id.* at 41.

417. *Id.* at 42.

418. 798 P.2d 883, 888 (Alaska 1990).

419. *Id.* at 885.

420. *Id.* at 887.

421. *Id.* (citing Weinberg v. Weinberg, 67 Cal. 2d 557, 432 P.2d 709, Cal. Rptr. 13 (1967)).

422. 794 P.2d 1346 (Alaska 1990).

423. *Id.* at 1347.

424. *Id.* at 1348.

the husband's pain and suffering, the annuity was not marital property, and therefore not subject to division.[425] The court further held that the lower court was entitled to use its discretion in apportioning the annuity among these functions and that the spouse seeking a portion of the annuity as separate property bore the burden of proving what portion of the annuity compensated for loss of separate property.[426]

The supreme court in *Gilboe v. Gilboe*[427] held that the wife had no compensable interest in the goodwill of a hotel that had been sold three years before the divorce, with the sale proceeds used in joint living expenses.[428] The court also found that the superior court had erred in invading the separate property of the husband on the theory that the wife should be compensated for the difference between the amount of her earning capacity and the amount of support actually provided during the marriage.[429]

C. Child Support and Custody

Smith v. Department of Revenue,[430] the only 1990 case strictly concerning child support, involved a consolidated appeal in which two appellants, both Alaska inmates, challenged the child support awards entered against them by the Child Support Enforcement Division. The supreme court rejected their arguments, holding that they had received a fair hearing,[431] that income derived from work in prison was not insulated from payment of child support,[432] that the use of the inmates' earnings did not deny them their constitutional right of access to a rehabilitation program,[433] and that the attachment of the prisoner's accounts did not violate their right to due process.[434]

In *Nichols v. Mandelin*,[435] a custody dispute, the supreme court affirmed the principle recognized in *S.N.E. v. R.L.B.*[436] that a change of custody from the father to the mother could not be decreed absent a

425. *Id.* at 1348-49.
426. *Id.* at 1350.
427. 789 P.2d 343 (Alaska 1990).
428. *Id.* at 345.
429. *Id.* at 345-46.
430. 790 P.2d 1352 (Alaska 1990).
431. *Id.* at 1353.
432. *Id.* Alaska Statutes section 33.32.050 provides the commissioner of corrections with a method for calculating and disbursing prisoner earnings. Under subsection (c), support of the prisoner's dependents is given the highest disbursement priority. ALASKA STAT. § 33.32.050 (1986).
433. *Smith,* 790 P.2d at 1354.
434. *Id.*
435. 790 P.2d 1367 (Alaska 1990).
436. 699 P.2d 875 (Alaska 1985).

finding of "substantial change in circumstances."[437] The noncustodial parent must show not only a change in circumstances, but also that a modification would be in the child's best interests.[438] Under the circumstances of this case, the court held that there had been a substantial change in circumstances in light of the noncustodial parent's remarriage, full-time employment since 1982 and sustained control of a drinking problem.[439] The court affirmed the lower court's decision that the change in custody would be in the child's best interests and that the father should not be awarded joint custody. Factors leading to this decision included the father's failure to 1) consult the mother on important issues concerning the child, 2) encourage visitation by the mother, and 3) exercise good judgment in the rearing of the child in general.[440]

Recognizing that a custodial parent's removal of a child from the state constitutes a change in circumstances, the court in *Lee v. Cox*[441] emphasized that the noncustodial parent still must bear the burden of showing that a modification would be in the child's best interests.[442] According to the court, the custodial mother's decision to move to Washington state was insufficient to warrant a change of custody without any other indications of change.[443] The court also ruled that the lower court had erred in ordering the mother to reimburse the child for all permanent funds received on his behalf. The father asserted that the parents had agreed to set aside the child's permanent fund dividends as part of the divorce decree, but, absent evidence of that agreement, the court refused to order reimbursement.[444]

Hermosillo v. Hermosillo[445] arose as a result of the defendant mother's unilateral imposition of conditions on the plaintiff father's supervised visits with his children. Believing his ex-wife to be in contempt, the plaintiff filed a motion for order to show cause and a motion for a change of venue. The superior court dismissed both motions.[446] The supreme court reversed and remanded, holding that the conditions imposed by the defendant could substantially interfere

437. *Nichols,* 790 P.2d at 1371.

438. *Id.* at 1372 n.10 (citing Veazey v. Veazey, 560 P.2d 382, 386 (Alaska 1977), and Horutz v. Horutz, 560 P.2d 397, 401 (Alaska 1977)).

439. *Id.* at 1372.

440. *Id.* at 1373.

441. 790 P.2d 1359 (Alaska 1990).

442. *Id.* at 1361 (citing House v. House, 779 P.2d 1204, 1208 (Alaska 1989)).

443. *Id.* at 1363.

444. *Id; see also,* L.A.M. v. State, 547 P.2d 827, 832-33 n.13 (Alaska 1976) (among the "parental rights" protected by the constitution is the "right to control and manage" a minor child's earnings and property); ALASKA STAT. § 43.23.005(c) (1990) (parent may claim permanent fund dividend on behalf of minor).

445. 797 P.2d 1206 (Alaska 1990).

446. *Id.* at 1208.

with the plaintiff's visitation rights and were thus a change of circumstances that required a modification by the court.[447] The court emphasized that only a court has the authority to modify a noncustodial parent's visitation rights.[448]

The child involved in *In the Matter of A.B.*[449] was in the custody of the Department of Health and Social Services, Division of Family and Youth Services ("Department") as a result of her father's neglect.[450] Contrary to the state social worker's recommendation, the superior court ordered the Department to permit visitation between the father and his daughter under the supervision of a priest.[451] The supreme court first held that the proper standard of review of superior court decisions restricting visitation is a preponderance of the evidence.[452] The court then found that the lower court's decision was supported by a preponderance of the evidence because the Department had failed to show that its proposed restriction on visitation would serve the child's best interests.[453] The court also ruled that the superior court's order for release of records concerning the case to parties providing services to the family was within the discretion of the lower court to order sharing of records among all parties to the suit.[454]

In *Bell v. Bell*,[455] the father appealed the trial court's award of primary custody to the mother and disputed the court's calculation of child support and property division.[456] Recognizing the legislative preference for joint custody,[457] the supreme court found that the parties' disagreement over the issue of day care did not demonstrate an inability to cooperate, and thus joint custody was possible.[458] The

447. *Id.* at 1209.
448. *Id.*
449. 791 P.2d 615 (Alaska 1990).
450. *Id.* at 616-17.
451. *Id.* at 617.
452. *Id.* at 618 n.3.
453. *Id.* at 618-19.
454. *Id.* at 620. Alaska Statutes section 47.10.090(a) provides, in relevant part:

> All information and social records pertaining to a minor and prepared by an employee of the court or by a federal, state or city agency in the discharge of the employee's or agency's official duty . . . are privileged and may not be disclosed directly or indirectly to anyone without the court's permission. However, a state or city law-enforcement agency shall disclose information regarding a case which is needed by the person or agency charged with making a preliminary investigation for the information of the court.

ALASKA STAT. § 47.10.090(a) (1990). Court discretion to order the disclosure of records in a "child in need of aid" proceeding has previously received judicial acknowledgement. *See* Clifton v. State, 758 P.2d 1279, 1284 (Alaska Ct. App. 1988).
455. 794 P.2d 97 (Alaska 1990).
456. *Id.* at 97.
457. *Id.* at 99.
458. *Id.* at 100.

court remanded the issues of child support and division of property for a more accurate assessment of the father's monthly income, and required a division of property in line with the three-step analysis set forth in *Wanberg v. Wanberg* and *Merrill v. Merrill*.[459] This analysis requires the identification of specific property available for distribution, determination of the value of this property and determination of the most equitable division of this property, with a presumption that equal division is most equitable.[460] The alternative method of property distribution in Alaska employed in *Rose v. Rose*[461] was not used in this case because the parties commingled assets during the marriage. The *Rose* analysis is typically used when the marriage is of short duration, and there has been no significant commingling of assets.[462]

D. Parental Rights

In *In re D.J.A. a/k/a M.R.E.*,[463] the lower court granted a petition for adoption to L.A., the father's second wife, over the objection of the child's natural mother.[464] This order was reversed by the Alaska Supreme Court.[465] L.A. had successfully argued to the lower court that the natural mother's consent to the petition was not required because she had failed to communicate with the child for more than one year.[466] The natural mother responded that she had had justifiable cause for her failure to communicate. In reversing the lower court's order, the Alaska Supreme Court ruled that L.A. had failed to prove by clear and convincing evidence that the natural mother lacked legally sufficient justification for her failure to communicate, and therefore she had not forfeited her right to consent to the adoption of her child.[467]

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459. *Id.* at 103 (citing Wanberg v. Wanberg, 664 P.2d 568, 570, 574-75 (Alaska 1983); Merrill v. Merrill, 368 P.2d 546, 547-48 n.4 (Alaska 1962)).

460. *Id.* at 101.

461. 755 P.2d 1121 (Alaska 1988). Under this alternative, property division is treated "as an action in the nature of recession, aimed at placing the parties in . . . the financial position they would have occupied had no marriage taken place." *Id.* at 1125.

462. *Bell*, 794 P.2d at 102.

463. 793 P.2d 1033 (Alaska 1990).

464. *Id.* at 1035.

465. *Id.* at 1039.

466. *Id.* at 1035; *see* ALASKA STAT. § 25.23.050(a) (Supp. 1990) ("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 . . . .").

467. *D.J.A.*, 793 P.2d at 1037. Under the Alaska Supreme Court's decision in D.L.J. v. W.D.R., 635 P.2d 834 (Alaska 1981), the adoptive parent carries the burden

VIII. FISH AND GAME LAW

The Alaska Supreme Court decided six cases involving fish and game law during 1990. Several of the cases touched on constitutional law, but are included in this category because aspects of the cases are unique to fish and game law.

Set-net fishers in *Carney v. Board of Fisheries*[468] sought declaratory and injunctive relief from a regulation established by the Alaska Board of Fisheries limiting the distance from the shore that set-netters may fish in the Combine Flats and Ekuk areas of the Nushagak district.[469] The purpose of the regulation was to allocate fishing resources between set-net and drift-net fishers because there had been numerous reports of "gear conflicts" between the two groups in areas believed to be traditionally drift-net areas.[470] The set-netters challenged the regulation on the ground that it was adopted in violation of the state's conflict of interest statute.[471]

On the conflict of interest issue, the Alaska Supreme Court applied common law principles instead of a statutory analysis, reasoning that Alaska Statutes section 39.50.090 does not extinguish common law rights and remedies previously recognized.[472] The court found that several board members who participated in the adoption of the regulation were heavily involved in drift-net fishing in the areas covered by the regulation. Three board members held entry permits for a drift-net fishery in the area; another member was a crewman in the same fishery.[473] The court noted that under the principles of *Consumers Union of United States v. California Milk Producers Advisory Board*,[474] these board members could have voted on gear conflicts in general, but should have abstained from decisions affecting areas in

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of proving a failure of communication under Alaska Statutes section 25.23.050(a)(2)(A). If the natural parent can show evidence of just cause for that failure, the adoptive parent must then prove by clear and convincing evidence that the failure was unjustifiable. *D.L.J.*, 635 P.2d at 837.

468. 785 P.2d 544 (Alaska 1990).

469. *Id.* at 545; *see* ALASKA ADMIN. CODE tit. 5, § 06.331(n) (Jan. 1991) (repealed 1985).

470. *Carney*, 785 P.2d at 546.

471. ALASKA STAT. § 39.50.090(a) (1987). The set-netters also challenged the regulation on equal protection grounds, under article VIII of the Alaska Constitution, which govern the state's use of its natural resources. *Carney*, 785 P.2d at 547; *see* ALASKA CONST. art. VIII, §§ 1, 2, 13-14, 16-17. The court found it unnecessary to reach those claims as the regulation was invalid under common law. *Carney*, 785 P.2d at 549.

472. *Id.* at 548.

473. *Id.* at 546-47.

474. 82 Cal. App. 3d 433, 147 Cal. Rptr. 265 (Cal. Ct. App. 1978).

which they had a specific and narrow interest.[475] Adopting the *Consumers Union* rationale, the supreme court held that the regulation was invalid because the majority of votes cast to pass the regulation were tainted by self-interest.[476]

In *Matson v. Commercial Fisheries Entry Commission,*[477] the supreme court upheld the Commission's regulations governing the qualification for entry permits for gill-net fishing. Under the regulations, applications for entry permits are judged on a points system, taking into account such criteria as dependence on income from fishing and past participation in fishing.[478] The court held that it was reasonable for the Commission to apply the same standard of hardship to both set-netters and gill-netters.[479] The court also found that the regulations did not deny set-netters equal protection, even though the unitary standard had the effect of favoring gill-netters because they derived a greater percentage of their income from fishing.[480] Under Alaska's sliding scale analysis of state equal protection claims, the court held that the right to engage in an economic endeavor is an important right,[481] and that an application procedure interfering with that right should be closely scrutinized.[482] The *Matson* court also found that "[t]he challenged regulation is closely related to the 'legislative purpose of preventing unjust discrimination because it seeks to protect those having the most to lose by exclusion from the fishery.' "[483] However, the court ruled that, as a matter of procedural due process, the plaintiff should have been heard on the question of whether he was ninety percent dependent on income from fishing, and the court remanded for consideration of this issue.[484]

Riley v. Simon[485] was a class action suit against the Commercial Fisheries Entry Commission ("CFEC") on behalf of Alaska Natives who were unable to complete the application and meet the deadlines for limited entry fishing permits due to geographic location, language barriers, cultural background, or race.[486] The class sought injunctive

475. *Carney,* 785 P.2d at 548.
476. *Id.* at 549.
477. 785 P.2d 1200 (Alaska 1990).
478. ALASKA ADMIN. CODE tit. 20, § 5.600 (Oct. 1988).
479. *Matson,* 785 P.2d at 1204.
480. *Id.* at 1204-05.
481. *Id.* at 1205; *see* State v. Enserch Alaska Constr., 787 P.2d 624, 632 (Alaska 1989).
482. *Matson,* 785 P.2d at 1205.
483. *Id.* (quoting Commercial Fisheries Entry Comm'n v. Apokedak, 606 P.2d 1255, 1268 (Alaska 1980)).
484. *Id.* at 1206.
485. 790 P.2d 1339 (Alaska 1990).
486. The number of people entering the commercial fisheries of Alaska may be regulated. ALASKA STAT. § 16.43.010 (1987). The Commercial Fisheries Entry

relief extending the deadline and requiring the CFEC to provide assistance to applicants.[487] The supreme court upheld the trial court's exclusion of the plaintiffs from the class. The court held that because these individual plaintiffs had decided for personal reasons not to apply for permits, they were not within the class that was defined as people unable to complete the application.[488]

In another class action suit, *Carlson v. Commercial Fisheries Entry Commission*,[489] class members challenged the state's regulation charging non-resident fishermen three times the fee charged resident fishermen for commercial licenses and limited entry permits.[490] The supreme court found that "commercial fishing is a sufficiently important activity to come within the purview of the Privileges and Immunities Clause, and license fees which discriminate against nonresidents are *prima facie* a violation of it."[491] If, however, the fee structure charged non-residents more because residents were indirectly charged extra by foregoing participation in some of the state's oil revenues, the fee structure would be valid.[492] The court remanded to the superior court for a determination of whether the higher fees were excessive for this purpose, which requires " 'a fairly precise fit between remedy and classification.' "[493] The court rejected the plaintiff's challenge to the Commission's authority to promulgate regulations concerning the fee schedule, reasoning that Alaska Statutes section 16.43.110(a) is a broad delegation of power by the legislature to the Commission to adopt "necessary and proper" regulations to implement the purposes of the Limited Entry Act.[494]

In *Gilbert v. Department of Fish and Game*,[495] the fishermen plaintiffs challenged an amended Board of Fisheries' ("Board") regulation that limited the total harvest of Chignik-bound sockeye salmon in the Stepovak fishery.[496] The supreme court agreed with the plaintiffs that the Board's "mixed stock" fishing policy was a regulation and

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Commission may establish a deadline for applying for entry to the fisheries. *Id.* § 16.43.260.

487. *Riley*, 790 P.2d at 1340.

488. *Id.* at 1343.

489. 798 P.2d 1269 (Alaska 1990).

490. ALASKA STAT. § 16.43.160(b) (1987).

491. *Carlson*, 798 P.2d at 1274 (citations omitted); *see* U.S. CONST. art. IV, § 2.

492. *Id.* at 1278. The court equated oil revenues spent on conservation with "taxes which only residents pay." *Id.*

493. *Id.* (quoting Taylor v. Conta, 106 Wis. 2d 321, 316 N.W.2d 814, 823 n.17 (1982)).

494. *Id.* at 1278-79; *see* Act of Aug. 30, 1973, ch. 79, 1973 Alaska Sess. Laws 1 (codified as amended at ALASKA STAT. §§ 16.43.010-990 (1987 & Supp. 1990)).

495. 803 P.2d 391 (Alaska 1990).

496. *Id.* at 392.

thus was invalid because it had not been adopted pursuant to the Administrative Procedures Act.[497] However, the court ruled that striking down the "policy" did not automatically invalidate regulations adopted pursuant to the policy.[498] The supreme court reiterated that " 'regulation,' under [Alaska Statutes section] 44.62.640(a)(3), 'encompasses many statements made by administrative agencies, including policies and guides to enforcement.' "[499] Because the Board failed to comply with the requirements of the Administrative Procedures Act in adopting the policy, the policy was invalid.[500] The court then recognized that a regulation enacted pursuant to this policy might still be valid as long as the regulation was " 'reasonable and not arbitrary, based on the total information before the Board at the time [it] was adopted.' "[501] Under this standard, the court found the regulation reasonable in the context of the Board's responsibility for conservation and development of fish resources.[502]

The court also rejected the plaintiffs' procedural challenge involving inadequate notice[503] and their constitutional objection involving the uniform application clause of article VIII, section 17 of the Alaska Constitution.[504] According to the court, the Board's pre-hearing notice was sufficiently informative to comply with the notice statute;[505] before the meeting in which the Board established the limit, the Board published notice of the meeting in several state newspapers and made available to the public a packet containing the proposal.[506] In addressing the fishermen's constitutional claim, the court ruled that the uniform application clause of article VIII, section 17 was inapplicable because the Stepovak and Igvak fisheries were not "similarly situated" as to their biological spawning patterns.[507]

In *State v. Hebert*,[508] herring sac roe fishermen challenged their conviction under Alaska Administrative Code title 5, section

497. *Id.* at 395-97.

498. *Id.* at 397.

499. *Id.* (quoting Kenai Peninsula Fisherman's Co-op v. State, 628 P.2d 897, 905 (Alaska 1981)).

500. *Id.*

501. *Id.* (quoting *Kenai Peninsula,* 628 P.2d at 907).

502. *Id.*

503. *Id.* at 394; *see* ALASKA STAT. § 44.62.200(a) (1989).

504. *Gilbert,* 803 P.2d at 398; *see* ALASKA CONST. art. VIII, § 17 ("Laws and regulations governing the use or disposal of natural resources shall apply equally to all persons similarly situated with reference to the subject matter and purpose to be served by the law or regulation.")

505. *Gilbert,* 803 P.2d at 395.

506. *Id.* at 393.

507. *Id.* at 399.

508. 803 P.2d 863 (Alaska 1990).

27.987,[509] which established two "superexclusive" use fisheries in the central Bering Sea and prohibits any fisherman who operates in one of the superexclusive fisheries from participating in any other herring sac roe fishery.[510] The supreme court affirmed the Board's authority to promulgate the superexclusive use regulations, and held that neither the federal constitution[511] nor the state constitution[512] had been violated.[513] The court adopted the reasoning of the court of appeals concerning the federal constitutional issues and the state equal rights issue, but it examined the state constitutional claims in more depth.[514]

In determining petitioners' state equal rights claims, the court distinguished *State v. Enserch Alaska Construction, Inc.*,[515] which held unconstitutional a statute that provided a public works hiring preference for residents of economically distressed locales.[516] The court ruled in this case that the goal behind the superexclusive fisheries regulations is to benefit local residents but that, in contrast to *Enserch*, there was no discrimination between residents and non-residents.[517] The superexclusive use regulations have the same effect on everyone, forcing members of either group to choose between fishing either inside or outside the designated zones.[518]

The supreme court also rejected the petitioners' contention that the superexclusive use districts are too small for effective participation by large operators and thus discriminate based on the scale of the operation.[519] The court noted that " 'time and area restrictions,' like gear size limitations," have long been recognized as permissible to achieve optimum catch levels.[520]

Regarding petitioners' article VIII challenges, the supreme court acknowledged that the regulation was partly an allocation decision

509. ALASKA ADMIN. CODE tit. 5, § 27.987 (July 1988).

510. *Hebert*, 803 P.2d at 867.

511. *Id.* at 864. Specifically, the petitioners' federal constitutional claims concerned the privileges and immunities clause of article IV, section 2; the commerce clause of article I, section 8; and the equal protection clause of the 14th amendment.

512. *Id.* Specifically, the petitioners' state constitutional claims concerned the equal rights clause of article I, section 1; the common use clause of article VIII, section 3; the prohibition against exclusive fishing rights of article VIII, section 15; and the equal application clause of article VIII, section 17.

513. *Id.* at 865.

514. *Id.*

515. 787 P.2d 624 (Alaska 1989). The court based its decision on state equal rights grounds, holding that the disparate treatment of workers in different areas in order to benefit one group was not a legitimate legislative goal. *Id.* at 634.

516. *Id.*

517. *Hebert*, 803 P.2d at 865.

518. *Id.*

519. *Id.* at 866.

520. *Id.* at 865-66 (quoting Glenovich v. Noerenberg, 346 F. Supp. 1286, 1288 (D. Alaska 1972), *aff'd* 409 U.S. 1070 (1972)).

which divided the herring resource between competing subgroups of commercial fishermen.[521] However, the court found that these regulations did not violate article VIII's prohibition against exclusive or special privileges to take fish or wildlife,[522] as interpreted in *McDowell v. State*.[523] The "exclusive registration" simply restricted fishing in more than one district in any one year, and, as such, resembled restrictions on salmon fishing that were common when the framers of the constitution met in 1956. Because "there [was] no suggestion in the debates of the delegates to the Constitutional Convention that this regulating device was meant to be prohibited by the article VIII equal access clauses," the court determined that the constitution did not prohibit this method of regulation.[524]

IX. PROCEDURE

As in 1989, the Alaska Supreme Court faced a variety of procedural challenges during 1990. Many of these cases involved substantive questions in other areas, but because the procedural issues predominate, these cases are presented in this section under four broad categories: discovery, preclusion, summary judgment, and attorney's fees and costs. Cases falling outside the scope of these categories are discussed under the "miscellaneous" heading at the end of this section.

A. Discovery

In *Jones v. Jennings*,[525] the plaintiff brought charges of assault, false imprisonment and civil rights violations against the Municipality of Anchorage and two of its police officers. The plaintiff sought discovery of one of the officer's personnel records and other documents relating to internal investigations of citizen complaints against the municipality's police officers.[526] The supreme court determined that the documents were not privileged under the Anchorage Municipal Code,[527] and thus "the trial court properly ordered the documents discoverable subject to prior *in camera* inspection for the purpose of screening particularly sensitive files."[528]

521. *Id.* at 866.
522. *Id.*
523. 787 P.2d 1 (Alaska 1989).
524. *Hebert*, 803 P.2d at 866-67.
525. 788 P.2d 732 (Alaska 1990).
526. *Id.* at 733.
527. ANCHORAGE, ALASKA, MUNICIPAL CODE § 03.90.040 (1985).
528. *Jones*, 788 P.2d at 737. The supreme court noted with approval that the trial court had excluded from discovery information related to the officer's family, address and personal finances. *Id.*

The court also held that the discovery order did not violate the Alaska Constitution's guarantee of a right to privacy.[529] The court adopted a three-prong test that balanced a legitimate expectation that the information would not be disclosed against a compelling state interest in favor of such disclosure. If disclosure were deemed necessary, then the court would inquire into whether the disclosure had been done in the least intrusive manner.[530] In this case, the court found that the police officer's expectation of confidentiality was outweighed by the public's interest in having free access to the workings of government and in ensuring the effective operation of the judiciary.[531] Because the trial court had conducted an *in camera* inspection of the documents, the discovery proceedings satisfied the least intrusive manner requirement and thus did not violate the police officer's constitutional right to privacy.[532]

In *Central Construction Co. v. Home Indemnity Co.*,[533] the supreme court established that the fraud exception to the attorney-client privilege should be broadly interpreted.[534] This case concerned the discovery of several documents from the insurer in connection with the handling of an insurance claim.[535] The superior court denied the insured's motion to compel discovery in relation to its cross-claim, holding that the insured must make a prima facie showing of civil fraud before it could overcome the insurer's claim of privilege.[536] The supreme court reversed, holding that "services sought by a client from an attorney in aid of any crime or a *bad faith breach* of duty are not protected by the attorney-client privilege."[537] The court then adopted a new standard of proof that strikes a balance between allowing *in camera* review based on a party's unsupported assertions of fraud, and holding a party to the high standard of proof necessary to overcome the attorney-client privilege.[538] Applying the standard developed by the United States Supreme Court in *United States v. Zolin*,[539] the Alaska Supreme Court concluded that the insured had presented an adequate factual basis on which a reasonable person might believe in good faith that an *in camera* review of the disputed materials may

529. *Id.* at 739. The Alaska Constitution provides that "[t]he right of the people to privacy is recognized and shall not be infringed." ALASKA CONST. art. I, § 22.

530. *Jones*, 788 P.2d at 738.

531. *Id.* at 739.

532. *Id.*

533. 794 P.2d 595 (Alaska 1990).

534. *Id.* at 598.

535. *Id.* at 596-97.

536. *Id.* at 597.

537. *Id.* at 598.

538. *Id.* at 598-99.

539. 491 U.S. 554 (1989).

reveal evidence to establish that the crime-fraud exception to attorney-client privilege applies.[540]

B. Preclusion[541]

Holmberg v. State Division of Risk Management[542] established that the determinations by one state agency can have preclusive effect on proceedings before another state agency.[543] Holmberg filed a claim for permanent disability benefits with the Alaska Workers' Compensation Board ("AWCB"). The AWCB denied her claim for permanent disability benefits, and Holmberg appealed to the superior court.[544] While this appeal was pending, a separate state agency, the Public Employees' Retirement Board ("PERB"), found that Holmberg was permanently and totally disabled and thus awarded her occupational disability benefits. After the superior court affirmed the AWCB decision, Holmberg appealed to the supreme court, contending that the PERB decision should be given binding effect in the AWCB proceedings.[545]

The court determined that there was, in general, "no substantial reason not to give PERB determinations preclusive effect in AWCB proceedings."[546] However, the court held that the PERB decision should not be given such preclusive effect in this case for two reasons. First, the state was not in privity with any real party in interest in the PERB proceedings and thus the plea of collateral estoppel could not be asserted against the state.[547] Second, the AWCB decision remained the first final judgment because it did not lose any of its preclusive effect while being appealed. Original decisions lose their preclusive effect only if they are reversed on appeal, which, according to the court, suggests that a stay in a second proceeding pending an appeal in the first may be appropriate.[548] To rule otherwise would encourage relitigation of an issue, and thus be "completely at odds with the purpose of collateral estoppel to prevent relitigation of issues that already have been decided."[549]

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540. *Central Constr.*, 794 P.2d at 600.

541. This heading encompasses not only issues of res judicata and collateral estoppel, but also claims that are untimely for failing to conform to statutes of limitation and other deadlines.

542. 796 P.2d 823 (Alaska 1990).

543. *Id.* at 825.

544. *Id.* at 824.

545. *Id.*

546. *Id.* at 827.

547. *Id.* at 829.

548. *Id.*

549. *Id.* In fact, if all the requirements of collateral estoppel were satisfied, Holmberg's claim against the PERB could have been precluded by the prior AWCB decision. *Id.* at 830.

In *Nelson v. Jones,*[550] the supreme court acknowledged that divorce proceedings present a narrow exception to the court's traditional interpretation of res judicata, ruling that the compulsory counterclaim principles articulated in Alaska Rule of Civil Procedure 13(a) did not require interspousal tort claims to be litigated in divorce proceedings.[551] However, the court held that the husband was collaterally estopped from litigating the issue of sexual abuse,[552] which had been previously litigated during the divorce proceedings and "explicitly determined . . . adversely to [him]."[553]

In *Palmer v. Borg-Warner Corporation,*[554] the court took a restrictive view of when the statute of limitations in wrongful death actions begins to run. The question in this case was when the two-year statute of limitations for wrongful death actions[555] began to run: on September 8, 1986, when the plaintiff's husband was killed in an airplane crash; on September 11 of that same year when the plaintiff was informed of the death; or in July, 1987, when the National Transportation Safety Board finished investigation of the crash, creating a legal right of access to the wreckage for the first time. Palmer's estate filed its claims against Borg-Warner Corporation on September 20, 1988.

The court held that the statute expired two years after the estate had been notified of Palmer's death (September 11) because, upon notification of the crash, "a reasonable person has, as a matter of law, enough information to be alerted that she 'should begin an inquiry' concerning a potential cause of action against the pilot, the carrier or the manufacturer."[556] The court reasoned, against strong objections by Justices Compton and Rabinowitz,[557] that the proper focus was when a potential claimant has sufficient information reasonably to know that a possible claim existed, not when such a claimant has knowledge of the precise cause of an injury.[558]

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550. 787 P.2d 1031 (Alaska 1990).

551. *Id.* at 1034.

552. *Id.* at 1036. The ex-wife alleged during the divorce proceedings that the plaintiff had sexually abused their daughter. *Id.* at 1032.

553. *Id.* at 1036.

554. 800 P.2d 920 (Alaska 1990), *reh'g pending* No. S-3318 (1990).

555. *See* ALASKA STAT. § 9.55.580(a) (1990).

556. *Palmer,* 800 P.2d at 922.

557. *Id.* at 925 (Compton, J. and Rabinowitz, J., dissenting). The dissent claimed that mere knowledge of an accident does not give notice of possible negligent conduct, but, rather, such knowledge depends on whether the specific facts and circumstances permit one to obtain the relevant information surrounding the accident so that one may accurately assess the actual causes of the accident. *Id.* at 926 (citing First Interstate Bank of Fort Collins, N.A. v. Piper Aircraft Corp., 744 P.2d 1197, 1201 (Colo. 1987)).

558. *Id.* at 922 & n.3.

Beavers v. Alaska Construction, Inc.[559] affirmed the superior court's refusal to accept a late appeal from a decision of the Alaska Workers' Compensation Board.[560] Although the plaintiff argued that his attorney had misled him into believing that a timely appeal had been filed, the court, in keeping with well-established precedent, rejected the plaintiff's plea that he not be held accountable for his attorney's conduct.[561]

In *Magestro v. State*,[562] the supreme court held that a riverboat operator, injured in a collision with a submerged railcar, was not time-barred from amending his complaint under Alaska Rule of Civil Procedure 15(a).[563] The original complaint alleged vicarious liability; the amendment alleged negligence on the part of the state and added an allegation based on state ownership of the riverbed.[564] In allowing the amendment, the supreme court determined that failure to give the state timely notice of an alternative legal theory would not defeat a motion under Alaska Rule of Civil Procedure 15(c) when "the original complaint gave the State notice of the facts of the underlying occurrence prior to the running of the two year statute of limitations."[565]

In *Smith by Smith v. Marchant Enterprises, Inc.*,[566] the court addressed the issue of whether the lower court correctly applied the doctrine of quasi-estoppel[567] to the plaintiff's appeal from the dismissal of one of her claims by the Workers' Compensation Board.[568] "[A]ppellant [was] estopped to continue prosecuting the appeal because she accepted the benefits of the Compensation Board decision of which she seeks review."[569] Relying on *Hoss v. Purinton*,[570] the supreme court held that the theory of quasi-estoppel did not apply to

559. 787 P.2d 643 (Alaska 1990).

560. *Id.* at 643. The notice of appeal was filed thirty-six days beyond the last day permissible for appeal under Alaska Rule of Appellate Procedure 602(a)(2). *Id.*

561. *Id.* at 645 (citing Hartland v. Hartland, 777 P.2d 636 (Alaska 1989); Rill v. State, 669 P.2d 573 (Alaska 1983); Mely v. Morris, 409 P.2d 979 (Alaska 1966)).

562. 785 P.2d 1211 (Alaska 1990).

563. *Id.* at 1213.

564. *Id.* at 1212.

565. *Id.* at 1214.

566. 791 P.2d 354 (Alaska 1990).

567. The doctrine of quasi-estoppel is applied in situations where "the existence of facts and circumstances make[s] the assertion of an inconsistent position unconscionable." Jamison v. Consol. Utilities, Inc., 576 P.2d 97, 102 (Alaska 1978).

568. *Smith*, 791 P.2d at 356. Smith filed a claim against four defendants: Glacier, MEI, Stockton and Marchant. She reached a Board-approved settlement with Stockton, and at the hearing, the Board found that Glacier and Marchant were liable for compensation and benefits. Smith also settled with Marchant. MEI was found not liable, which decision Smith appealed to the superior court. *Id.* at 355.

569. *Id.* at 356.

570. 229 F.2d 104 (9th Cir. 1955), *cert. denied*, 350 U.S. 997 (1956).

Smith's claim and allowed her claim to go forward.[571] The court reasoned that Smith did not offer inconsistent evidence or pleadings, and that the overlapping of her equitable remedies against MEI with her statutory ones under the Workers' Compensation Act did not make her claims inconsistent.[572]

In *Integrated Resources Equity Corporation v. Fairbanks North Star Borough,*[573] the court reaffirmed its holding in *Alaska State Housing Authority v. Riley Pleas, Inc.*[574] that a party may not raise on appeal possible prejudicial misconduct by an arbitrator unless counsel objects to such conduct during the arbitration proceedings.[575] As in *Riley Pleas,* the court rejected the argument that an objection should not be required when counsel feels that such an objection would serve only to further alienate the arbitrator.[576] The court also held that under Alaska Rule of Civil Procedure 82(a)(1), in a proceeding under Alaska Statutes section 09.43.110 to confirm an arbitration award, a trial judge may award only the attorney's fees associated with the confirmation trial, not those incurred during arbitration.[577]

C. Summary Judgment

In *Murat v. F/V Shelikof Strait,*[578] the owners and operators of fishing vessels brought an action against a corporation to recover for bounced checks written to purchase king crabs in 1981. In 1984, the trial court entered a default judgment against the corporation based on its willful failure to comply with the court's discovery order.[579] In 1986, the trial court pierced the corporate veil and entered summary judgment against the officers of the corporation, Joseph Murat and Chester Hummel, holding them personally responsible for the judgment against the corporation.[580] Murat appealed both decisions.

Although the supreme court affirmed the default judgment on the grounds that the corporation was provided with reasonable notice of the impending judgment as well as an opportunity to respond to it,[581] it reversed the grant of summary judgment on two grounds. First, the

571. *Smith,* 791 P.2d at 358.
572. *Id.*
573. 799 P.2d 295 (Alaska 1990).
574. 586 P.2d 1244 (Alaska 1978).
575. *Integrated Resources,* 799 P.2d at 298; *Riley Pleas,* 586 P.2d at 1248.
576. *Integrated Resources,* 799 P.2d at 298.
577. *Id.* at 300.
578. 793 P.2d 69 (Alaska 1990).
579. *Id.* at 71.
580. *Id.* at 72.
581. *Id.* at 73. The fact that the corporate officers were served, rather than the attorney of record, did not render the notice inadequate; minor noncompliance with Alaska Rule of Civil Procedure 5(b) would not be sufficient to vacate a judgment. *Id.*

trial court erred in rejecting the defendant's evidentiary objection, which was based on the requirement of Alaska Rule of Civil Procedure 56(e) that summary judgments be supported only by admissible evidence.[582] The supreme court explained that an opposing party need only object to proffered evidence on the ground that the evidence in question is not authenticated; the party does not carry the burden of raising doubt as to whether the documentary evidence is in fact authentic.[583] Secondly, the court reversed on the ground that summary judgment was unwarranted where there were genuine issues of material fact concerning whether to pierce the corporate veil and hold the defendant personally liable for corporate debts.[584]

D. Attorney's Fees and Costs

Frazier v. H.C. Price/CIRI Construction JV[585] created an exception to the rule established in *Commercial Union Companies v. Smallwood,*[586] which required the party introducing a written report in evidence before the Alaska Workers' Compensation Board to bear the cost of providing the opportunity for cross examination.[587] Although the Board's regulations currently reflect *Smallwood's* holding,[588] the regulations also contain a hearsay exception based on the Alaska Rules of Evidence:[589] "a statement is not hearsay if [it] is offered against a party and is . . . a statement by a person authorized by him to make a statement concerning the subject."[590] Based on this standard, the supreme court determined that the right to cross examine a report's author did not apply as the cross-examining party had essentially vouched for the credibility and competence of the author by requesting him to write the report.[591] The court found that as the cross-examining party had vouched for the author and no urgent need to impeach existed, the employee was not required to pay the costs of the cross-examination.[592]

Childs v. Tulin[593] involved a challenge to the superior court's award of attorney's fees to employers who were named as individual

582. *Id.* at 74-75.
583. *Id.* at 75.
584. *Id.* at 78-79.
585. 794 P.2d 103 (Alaska 1990).
586. 550 P.2d 1261 (Alaska 1976).
587. *Frazier,* 794 P.2d at 104.
588. *See* ALASKA ADMIN. CODE tit. 8, § 45.120 (Oct. 1988).
589. *Frazier,* 794 P.2d at 105; *see* ALASKA R. EVID. 801.
590. *Id.* at 105 (citing ALASKA R. EVID. 801(d)(2)(c)).
591. *Id.*
592. *Id.* at 106.
593. 799 P.2d 1338 (Alaska 1990).

appellees in an appeal from an adverse decision of the Alaska Workers' Compensation Board. The supreme court affirmed, holding that such an award is within the court's discretion if the claimant's position is "frivolous, unreasonable, or taken in bad faith."[594] The court found that the claimant actually had a non-frivolous claim, but he had failed to raise the claim in his opening brief and thereby abandoned the claim.[595] Because the claimant failed to argue the non-frivolous claim or dismiss the appellees from the appeal, it was reasonable for the superior court to award the attorney's fees.[596]

The supreme court in *Alaska Federal Savings and Loan Association of Juneau v. Bernhardt*,[597] addressed for the first time the question of whether prevailing pro se litigants may recover attorney's fees, and reversed the lower court's decision awarding such fees. The court cited several policy reasons for its decision: the difficulty in valuing non-attorney's time spent on legal tasks, the danger of encouraging frivolous filings, the express language of Civil Rule 82 specifying "*attorney's* fees," and the argument that where the litigant incurs no actual fees the award amounts to a penalty to the losing party.[598]

The pro se defendant also sought Civil Rule 11 sanctions alleging bad faith in the filing of the complaint because the plaintiff allegedly knew at the time of filing that the pro se defendant was not the owner of the cable system and therefore not the proper party.[599] Because several reasonable inferences concerning ownership could have been drawn from the initial discovery information, the court found that the trial court had not abused its discretion in denying Rule 11 sanctions.[600]

In *Anchorage Daily News v. Anchorage School District*,[601] the supreme court held that "a public interest litigant is entitled to the full amount of its attorney's fees . . . despite whatever minimal private interest the litigation may have had in the outcome of its suit."[602] The court determined that the Daily News had "vindicated an important public right" when it sued to "compel the school district to disclose information required by law to be available to the public."[603] While

594. *Id.* at 1338.
595. *Id.* at 1340 (citing State v. O'Neill Investigations, 609 P.2d 520 (Alaska 1980)).
596. *Id.* at 1341.
597. 788 P.2d 31 (Alaska 1990), *published as corrected*, 794 P.2d 579 (Alaska 1990).
598. *Bernhardt*, 794 P.2d at 581.
599. *Id.* at 582.
600. *Id.* at 582-83.
601. 803 P.2d 402 (Alaska 1990).
602. *Id.* at 403.
603. *Id.* at 404.

the court rejected the suggestion that *any* newspaper engaged in litigation to obtain information for public dissemination was a public litigant, it found that the Daily News had met the public interest criteria set forth in *Murphy v. City of Wrangell*,[604] and that, as such, it was entitled to the full amount of its reasonable attorney's fees despite other benefits it might have received from the litigation.[605]

In *T&G Aviation, Inc. v. Footh*,[606] the supreme court held that the trial court did not abuse its discretion in awarding attorney's fees on a request filed seventy days after the entry of judgment. The court held that the request was filed within a reasonable time, and felt it was significant that the appellees could not show "substantial prejudice as a result of the delay."[607]

In *Van Dort v. Culliton*,[608] the trial court awarded the plaintiffs seventy-five percent of their attorney's fees following their acceptance of the defendants' offer of judgment under Alaska Rule of Civil Procedure 68.[609] The trial court awarded this amount pursuant to a determination that the defendants had been "vexatious" in their handling of the litigation.[610] The supreme court found that it was within the discretion of the lower court to award fees in excess of the presumptive fees established in Civil Rule 82(a)(1),[611] but reversed and remanded the award, agreeing with the defendants that the lower court's consideration of past settlement negotiations in its finding of vexatiousness conflicted with prior supreme court rulings.[612]

In *Farr v. Stepp*,[613] Tom Farr sued Stephan/Northern ("S/N") for over $250,000 of unpaid wages, rental equipment, interest, costs and attorney's fees.[614] In its original answer, S/N filed no counterclaim, but later added one seeking $70,000 for unpaid equipment rental charges and damages for fraud. While the motion to amend was pending, S/N made an offer of judgment of $60,000, making no reference to the counterclaim. Farr refused, and the court later accepted S/N's counterclaim amendment.[615]

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604. 763 P.2d 229, 233 (Alaska 1988).
605. *Anchorage Daily News,* 803 P.2d at 404.
606. 792 P.2d 671 (Alaska 1990).
607. *Id.* at 672.
608. 797 P.2d 642 (Alaska 1990).
609. *Id.* at 643.
610. *Id.*
611. *Id.* at 645.
612. *Id.* (citing Day v. Moore, 771 P.2d 436 (Alaska 1989); Myers v. Snow White Cleaners & Linen Supply, 770 P.2d 750 (Alaska 1989)).
613. 788 P.2d 35 (Alaska 1990).
614. *Id.* at 36.
615. *Id.*

At trial, Farr was awarded $70,000, which was offset by a $30,000 award to S/N on its counterclaim.[616] The trial court then imposed penal costs and sanctions on Farr pursuant to Alaska Rule of Civil Procedure 68(b)(1)[617] since Farr had rejected a settlement offer and received a net gain of less at trial.[618] Farr appealed.

The supreme court reversed the imposition of costs and sanctions, asserting that the trial court erred in assuming that S/N's offer of judgment had included the counterclaim since the offer made no reference to the counterclaim.[619] The court indicated that the superior court was essentially penalizing Farr for rejecting what S/N had never offered.[620] Since Farr's unreduced award exceeded the amount offered in settlement, the penal sanctions were reversed.[621]

E. Miscellaneous

In *Farmer v. State*,[622] the supreme court held that a claim was not time-barred even though the plaintiff failed to discover the name of the defendant within the applicable statute of limitations. This case expanded the scope of constructive notice under Alaska Rule of Civil Procedure 15(c) and strictly construed the definition of an indispensable party under Alaska Rule of Civil Procedure 19(c). The dispute arose when two state troopers confiscated and tagged forty-three house logs in response to allegations that Farmer had harvested logs belonging to the Dineega Corporation. Just before two years passed, Farmer brought suit against the two officers charging violations of his state and federal constitutional rights.[623] The first officer was named in the complaint, but the second was listed as "John Doe," as Farmer did not know his true identity. Six months after filing, Farmer amended the complaint to name the previously unknown officer.[624]

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616. *Id.*

617. The rule provides:

> (b) If the judgment finally rendered by the court is not more favorable to the offeree than the offer, the prejudgment interest accrued up to the date judgment is entered shall be adjusted as follows:
>
> (1) if the offeree is the party making the claim, the interest rate will be reduced . . . and the offeree must pay the costs and attorney's fees incurred after the making of the offer . . . .

ALASKA R. CIV. P. 68(b).

618. *Farr*, 788 P.2d at 37.

619. *Id.*

620. *Id.*

621. *Id.* at 38.

622. 788 P.2d 43 (Alaska 1990).

623. *Id.* at 44.

624. *Id.* at 44-45.

Holding that a two year statute of limitations[625] period was applicable to only the 42 U.S.C. section 1983 claims,[626] the court declared the state constitutional claims timely because the second defendant was served within the three-year statute of limitations period applicable to actions against peace officers.[627] The court also held the federal claims timely, reasoning that the second defendant had constructive notice within the relevant two-year statute of limitations period.[628] The court concluded that the notice requirements of Civil Rule 15 are satisfied when the following conditions are met: the new and old parties share the same attorney and therefore imputed notice can be found; the plaintiff, through no fault of his own, was unaware of the true identity of the defendant when the pleading was filed; and the defendant is not prejudiced by the action.[629] Since each of these conditions was met, the action was not barred.[630]

Finally, the court declared that the Dineega Corporation was not an indispensable party and thus the trial court had abused its discretion in ordering joinder under Civil Rule 19(a).[631] The court explained that the state did not have the right to assert that a third party's interests were threatened when the third party has expressly disavowed any desire to litigate those interests.[632]

In *Princiotta v. Municipality of Anchorage*,[633] the Alaska Supreme Court reversed the lower court's dismissal of appellant's Civil Rule 60(b)(5) motion to set aside two confessions of judgment without action. Due to a clerical error, the appellant had not had sufficient notice of the execution of the judgments and thus the supreme court held his motion to set them aside was still timely.[634]

In *Rapoport v. Tesoro Alaska Petroleum Co.*,[635] the supreme court affirmed the lower court's refusal to set aside a default judgment

625. *See* ALASKA STAT. § 09.10.070 (1990).

626. 42 U.S.C. § 1983 (1988).

627. *Farmer*, 788 P.2d at 46; *see* ALASKA STAT. § 09.10.060(a) (1990).

628. *Farmer*, 788 P.2d at 50.

629. *Id.* at 49-50.

630. *Id.*

631. *Id.* at 51-52 (citing ALASKA R. CIV. P. 19(a)). The state had moved to join Dineega as a "person needed for just adjudication" under Civil Rule 19(a). *Farmer*, 788 P.2d at 51.

632. *Id.* at 50. The court noted that it was not necessary to join Dineega as a party in order to determine the central issue of whether Farmer had a property interest in the logs. Instead, the state could simply subpoena Dineega as a witness. *Id.*

633. 785 P.2d 559 (Alaska 1990).

634. *Id.* at 561.

635. 790 P.2d 1374 (Alaska 1990) ("*Rapoport I*"); *see also* Rapoport v. Tesoro Alaska Petroleum Co., 794 P.2d 949 (Alaska 1990) ("*Rapoport II*") (holding that decision in *Rapoport I* collaterally estopped defendant from asserting the same excuse in subsequent litigation).

against the defendant for satisfaction of a corporate debt. Defendant argued that he had not appeared to defend against the original suit because a car accident had left him incapable of dealing with complicated business matters.[636] The court reiterated its position that a denial to vacate a default judgment will be reversed only if the supreme court is " 'left with the definite and firm conviction on the whole record that the trial judge has made a mistake.' "[637] The supreme court found that the lower court had not erred in finding that the defendant's conduct between his receipt of service and the date of trial strongly indicated his competence to defend the motion.[638]

The issue facing the supreme court in *Rapoport v. Tesoro Alaska Petroleum Co. ("Rapoport II")*[639] was whether the decision in *Rapoport I* collaterally estopped the plaintiff from asserting the same excuse which was rejected in *Rapoport I.* The supreme court held that the three requirements for application of the doctrine of collateral estoppel applied: the parties were identical; the issue to be precluded was identical; and a final judgment on the merits was issued.[640]

In *Trobough v. French*,[641] the supreme court reversed the trial court's grant of a new trial and attorney's fees to the plaintiff in a personal injury suit. The lower court cited four incidents preceding and during trial that had a "combined prejudicial effect"[642] on the plaintiff, although the plaintiff had never objected to them at the time.[643] The supreme court reversed, ruling that the plaintiff had waived any objection to these incidents and that none of the incidents resulted in "unfair prejudice or injustice."[644]

X. PROPERTY

Twelve property cases were decided by the Alaska Supreme Court in 1990. These cases have been subdivided into three subcategories: eminent domain, landlord-tenant transactions and miscellaneous issues, including preference rights and adverse possession.

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636. *Rapoport I,* 790 P.2d at 1375.
637. *Id.* at 1377 (quoting Corso v. Comm'r of Education, 563 P.2d 246, 248 (Alaska 1977) (footnote omitted)).
638. *Id.*
639. 794 P.2d 949 (Alaska 1990).
640. *Id.* at 951.
641. 803 P.2d 384 (Alaska 1990) (per curiam).
642. *Id.* at 384 (quoting trial court).
643. *Id.* at 385.
644. *Id.* at 386.

A. Eminent Domain

In *State v. Lewis*,[645] the state appealed a jury verdict granting over half a million dollars in damages to a landowner in an inverse condemnation case. The land was bisected when the state condemned a portion of it to build a highway.[646] In calculating compensation for the landowner, the jury drew two inconsistent conclusions: that the remaining portion of land was worth more after the condemnation than the entire parcel had been before it and that the remaining portion of land received no special benefit from the highway project. The inconsistencies rendered the verdict faulty because any special benefit to the remaining property would be offset against any compensation owed to the property owner.[647] The court determined that the original condemnation action did not create the basis for an objectively reasonable reliance on the state's building of a frontage road, and therefore the landowner was not entitled to compensation for the state's failure to build the road.[648] The court held, however, that the landowner was entitled to compensation for the value of the land actually taken and compensation for the diminution in value of his land caused by the state's highway project, offset by any special benefits conferred by the construction project.[649]

Vezey v. State[650] arose out of a dispute over land condemned pursuant to the realignment of the Nome-Council Road. Vezey, the owner of the condemned land, disputed the state's appraisal of the land's value, arguing that the state had failed to consider the value of the property's subsurface mineral resources, particularly gold and gravel.[651] The supreme court held that the lower court appropriately denied plaintiff's request under Alaska Rule of Civil Procedure 72(k) for an interim award of drilling expenses to determine whether or not the land in question contained gold.[652] The court held, with the support of previous holdings, that under Rule 72(k) the condemnee risks these expenses when challenging the state's estimation of just compensation and can recover these expenses only if the resulting award is ten percent higher than the original estimate.[653]

The court also held that the lower court properly ruled that the value of the plaintiff's "land could not be established by evidence of

645. 785 P.2d 24 (Alaska 1990).
646. *Id.* at 25.
647. *Id.* at 27; *see* ALASKA STAT. § 09.55.310(a)(3) (1983).
648. *Lewis*, 785 P.2d at 28.
649. *Id.*
650. 798 P.2d 327 (Alaska 1990).
651. *Id.* at 328.
652. *Id.* at 331.
653. *Id.* (citing City of Anchorage v. Scavenius, 539 P.2d 1169, 1175-76 (Alaska 1975) and State v. Salzwedel, 596 P.2d 17, 20 (Alaska 1979)).

the value to the [s]tate of the gravel taken for . . . use in realigning the Nome-Council road."[654] However, the supreme court found that the lower court improperly excluded evidence of gravel demand for other independent state projects because such evidence might have helped determine just compensation.[655]

The court also reversed the denial of plaintiff's motion to compel discovery on the issue of the state's gravel needs.[656] The court concluded, however, that the lower court correctly denied the state's claimed offset resulting from vacating a pre-existing right-of-way.[657] " '[T]he rule in Alaska is that special benefits to the remainder can only be used to offset severance damages to the remainder. In the event that special benefits exceed severance damages, the landowner is still entitled to receive the full market value of the portion actually taken.' "[658]

Finally, on the issue of costs and fees, the court held that the state's request for an offset against Vezey's claimed costs and attorneys' fees was not authorized under Civil Rule 72(c), and that Vezey's award of costs and attorneys' fees was to be reconsidered on remand to the superior court.[659]

In *Homeward Bound, Inc. v. Anchorage School District,*[660] the Municipality of Anchorage designated the plaintiff's land as the future site of an elementary school. A year after the designation, the plaintiff sued to force the school board to consummate the purchase or to pay the plaintiff damages equal to the property's diminution in value resulting from the temporary designation.[661] The court upheld the trial court's award of summary judgment in favor of the city reasoning that the "mere designation of the property as a [potential] school site" did not constitute a compensable taking.[662] The designation of the property "did not amount to a concrete indication . . . [of an] inten[tion] to

654. *Id.* at 332. *See* Gackstetter v. State, 618 P.2d 564, 566 (Alaska 1980) ("just compensation is determined by what the owner has lost and not by what the condemnor has gained").

655. *Vezey,* 798 P.2d at 332-34 (citing State v. Alaska Continental Dev. Corp., 630 P.2d 977 (Alaska 1980); City of Valdez v. 18.99 Acres, More or Less, 686 P.2d 682 (Alaska 1984); State v. Arnold, 218 Or. 43, 341 P.2d 1089 (1959) ("*Arnold I*")). The court adopted the rationale of *Arnold I,* stating that "[i]n estimating the value of the property it is entirely proper to consider the state's need for it . . . ." *Arnold I,* 218 Or. at 50, 341 P.2d at 1093 (quoted in *Vezey,* 798 P.2d at 333).

656. *Vezey,* 798 P.2d at 334.

657. *Id.* at 335.

658. *Vezey,* 798 P.2d at 335 (quoting Dash v. State, 491 P.2d 1069, 1072 n.6 (Alaska 1971) (interpreting ALASKA STAT. § 09.55.310)).

659. *Id.* at 335-36.

660. 791 P.2d 610 (Alaska 1990).

661. *Id.* at 611.

662. *Id.* at 614-15.

condemn the property."[663] The taking was a mere potentiality.[664] The court ruled that the plaintiff could not compel the school district to consummate the sale because the district had discretion to make the final site selection.[665]

In *22,757 Square Feet, More or Less v. State*,[666] the dispute emerged over compensation for land condemned under the state "quick take" provisions.[667] The controversy centered around the interpretation of Alaska Statutes section 09.55.450[668] in light of the fact that the property owners had continued to use the land after title vested in the state. The Alaska Supreme Court held that the property owners were entitled to prejudgment interest, accruing from the date title vested in the state,[669] that is, the date on which the initial filing and deposit was made by the state.[670] The Alaska Supreme Court also ruled that as the property owners possessed the land, without giving the state any consideration, for the period between the state's filing of its complaint and its seizure of possession, the state was entitled to an offset for this period.[671] Justice Rabinowitz dissented, arguing that "Alaska Statute[s] [section] 09.55.450(a) is designed to prevent a condemnee from receiving both interest on the money equivalent of the property taken and the continued use of the property by the condemnee."[672]

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663. *Id.* at 614. The court stressed that "the objective manifestations of the government's intention to take the property are critical to the decision whether there was a taking." *Id.*

664. *Id.* (citing Selby Realty Co. v. City of San Buenaventura, 10 Cal. 3d 110, 118, 514 P.2d 111, 116, 109 Cal. Rptr. 799, 804 (1973) (no "concrete indication" that plaintiff's land would be condemned for school use after mere enactment of general plans)).

665. *Id.* at 613. The court relied on its holding in Tunley v. Municipality of Anchorage School District, 631 P.2d 67 (Alaska 1981) that the school board had independent legal responsibilities distinct from those of the municipality. *Id.* The court reasoned that, as controller of the school budget, only the school could make the ultimate decision to purchase the land selected. *Id.*

666. 799 P.2d 777 (Alaska 1990).

667. ALASKA STAT. §§ 09.55.420-460 (1983); *see* Arco Pipeline Co. v. 3.60 Acres, More or Less, 539 P.2d 64, 71 (1975) (holding that ALASKA STAT. §§ 09.55.420-450 "were clearly intended to authorize a more summary and less judicially dependent exercise of the power of eminent domain.").

668. Alaska Statutes section 09.55.450(a) requires that the right of entry shall not be granted to the state until after the running of the time for petitioner to file an objection, or until after the hearing on any objection made within time allowed by law. If the party in possession withdraws any part of the compensation award and remains in possession, the court may fix a reasonable rental during the time of such possession. ALASKA STAT. § 09.55.450(a) (1983).

669. *22,757 Sq. Ft.*, 799 P.2d at 799-80.

670. *Id.* at 799 (citing ALASKA STAT. § 09.55.440(a) (1983)).

671. *Id.* at 781.

672. *Id.* at 782 (Rabinowitz, J., dissenting).

In *Ehrlander v. State*,[673] the plaintiff sought inverse condemnation when his request to subdivide certain real property was delayed by the Department of Transportation (the "DOT").[674] The supreme court held that even though formal condemnation proceedings had not begun, the plaintiff would be entitled to compensation if he was denied the economic advantages of ownership.[675]

> Once the State manifested its unequivocal intent to appropriate the . . . property, [the owners] were precluded from exercising their business judgment and selling the property before the market fell further. Moreover, [the owners] were precluded from taking any steps to counteract the market decline by making improvements on the land or otherwise changing its use. Thus, [the owners] were deprived of the most important incidents of ownership, the rights to use and alienate property.[676]

The plaintiff also claimed that the DOT was liable for the borough platting board's denial of his request for subdivision.[677] The court affirmed the grant of summary judgment for the DOT on this issue since Ehrlander had not shown any evidence that the DOT had urged the board's denial.[678]

B. Landlord-Tenant Law

In reversing the lower court's grant of summary judgment for the landlord in *Berrey v. Jeffcoat*,[679] the supreme court held that the tenant's withholding of rent over a repair dispute may have been an appropriate self-help remedy.[680] Although the lease did not require the tenant to make off-premises repairs, the court held that landlords have an obligation to make repairs necessary to make the property suitable for its contemplated use.[681] Failure to do so may give rise to the availability of self-help remedies.[682] The court remanded the case because genuine issues of material fact existed concerning whether the premises were unsuitable for their contemplated use.[683]

The court's continued reliance on *City of Kenai v. Ferguson*[684] is noteworthy. In *Berrey*, the court reiterated the principle outlined in *Ferguson* that the court is capable of writing into the terms of a lease

673. 797 P.2d 629 (Alaska 1990).
674. *Id.* at 630-32.
675. *Id.* at 635.
676. *Id.* (quoting Lange v. State, 86 Wash. 2d 585, 595, 547 P.2d 282, 288 (1976)).
677. *Id.*
678. *Id.* at 635-36.
679. 785 P.2d 20 (Alaska 1990).
680. *Id.* at 22-23.
681. *Id.* at 22 (citing RESTATEMENT (SECOND) OF PROPERTY § 5.4 (1977)).
682. *Id.*
683. *Id.*
684. 732 P.2d 184, 187 (Alaska 1987).

renegotiation those terms upon which the parties themselves cannot agree if the parties had previously agreed to renegotiate these terms in the future.[685]

In *Gordon v. Foster, Garner & Williams,*[686] a landlord-tenant dispute arose when the tenant vacated the leased premises after being unable to negotiate commercially reasonable insurance coverage. The lease was contingent upon the tenant's ability to negotiate such coverage, and, although the landlord offered to waive the insurance requirement, the tenant elected to abandon the lease.[687] The landlord sued for breach of contract, and the superior court granted summary judgment in his favor, holding that the insurance contingency was not a condition precedent to the lease, but even if it were, the tenant breached the lease because the landlord had waived the requirement.[688]

The supreme court reversed and remanded, holding that the landlord had not waived the insurance requirement, that the requirement was a condition precedent to performance of the lease, and that there were genuine issues of material fact as to whether the tenant had acted in good faith in attempting to negotiate insurance coverage.[689]

C. Miscellaneous

Olson v. State[690] overruled a 1989 case, *Messerli v. Department of Natural Resources,*[691] that employed a "reasonable basis" standard of review in reviewing preference rights decisions of the Department of Natural Resources ("DNR").[692] The *Olson* court decided that a deferential "arbitrary and capricious" or "abuse of discretion" standard was proper in appeals of discretionary agency actions not requiring formal procedures.[693] *Olson* arose from a decision of the DNR denying the plaintiffs' preference rights in connection with the Chase III homestead land disposal. The plaintiffs, having been successful in the Chase III lottery, argued that their losses in the invalidation of Chase III[694] entitled them to preference rights to purchase their Chase III parcels.[695] The DNR refused to grant such a preference, and the

685. *Berrey,* 785 P.2d at 24 (quoting *Ferguson,* 732 P.2d at 187).
686. 785 P.2d 1196 (Alaska 1990).
687. *Id.* at 1198.
688. *Id.*
689. *Id.* at 1199-1200.
690. 799 P.2d 289 (Alaska 1990).
691. 768 P.2d 1112 (Alaska 1989).
692. *Id.* at 1120.
693. *Olson,* 799 P.2d at 293.
694. *See* Alaska Survival v. State, 723 P.2d 1281 (Alaska 1986) (invalidating the Chase III disposal program lottery).
695. *Olson,* 799 P.2d at 290-91.

plaintiffs appealed. Applying the abuse of discretion standard, the supreme court affirmed the DNR ruling.[696]

The appeal in *Nome 2000 v. Fagerstrom*[697] followed a jury verdict that the defendants satisfied the requirements of adverse possession and therefore could not be evicted from plaintiff's land as the defendants had been in adverse possession of the land. Alaska Statutes section 09.10.030 provides that if a party adversely possesses real property for ten consecutive years, an action cannot be maintained to recover the property, effectively vesting title in the adverse possessor.[698] To establish title through adverse possession, a party must prove by clear and convincing evidence that " 'his use of the land was continuous, open and notorious, exclusive and hostile to the true owner' " for the ten years.[699] The supreme court held that although the physical acts necessary to establish continuous, open and notorious possession vary with the nature of the land in dispute, an adverse possessor need only use the land as an average owner of similar property would use it.[700] Where the land is rural, as in this case, a lesser degree of dominion and control may be reasonable.[701] Based on these requirements and the factual findings implicit in the jury's verdict, the court found that the defendants had established continuous, open and notorious possession for ten years prior to the suit.[702]

The court also rejected the plaintiff's claims that the defendants were not "hostile" because, as Native Americans, they thought of themselves as stewards of the land rather than as owners.[703] The court reiterated the principle that "[h]ostility is instead determined by application of an *objective* test which simply asks whether the possessor 'acted toward the land as if he owned it.' "[704] In short, the court found all the elements of adverse possession for the portion of the land which the defendants actively used,[705] but remanded for consideration the issue of whether the defendants had established adverse possession of the entire parcel.[706] The court noted that using woodland paths in some areas and picking up litter was insufficient to establish adverse possession, as was marking off the land with boundary posts.[707]

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696. *Id.* at 295.
697. 799 P.2d 304 (Alaska 1990).
698. ALASKA STAT. § 09.10.030 (1983).
699. Smith v. Krebs, 768 P.2d 124, 125 (Alaska 1989) (quoting Hubbard v. Curtiss, 684 P.2d 842, 848 (Alaska 1984)).
700. *Fagerstrom*, 799 P.2d at 309.
701. *Id.* at 310.
702. *Id.* at 311.
703. *Id.*
704. *Id.* at 310 (quoting *Hubbard*, 684 P.2d at 848).
705. *Id.*
706. *Id.* at 311.
707. *Id.*

Finally, the court supported the trial court's award of attorney's fees to the defendants over the argument of the plaintiff that the award was inappropriate under *Sjong v. State*[708] as he was defending an important right.[709] The court did, however, vacate the award of fees until the trial court determined the boundaries of the defendants' property, and therefore determined the appropriate prevailing party.[710]

In *Graeber v. Hickel Investment Co.*,[711] the supreme court held that under the Ship Mortgage Act[712] "an attaching creditor prevails over the unrecorded interests of a prior purchaser of the debtor's vessel."[713] The court read the language of the statute literally and found no compelling reasons for reaching a contrary result.[714] Hickel sued Klosterman, its debtor, obtaining a prejudgment attachment against Klosterman on February 3, 1988. Eight days later, Klosterman sold his ship to Briske, who sold the ship to Graeber in June 1988. Neither of these sales were recorded as required by the Ship Mortgage Act.[715] The court noted in affirming the lower court decision that although Graeber had an equitable interest in the ship, Congress' intent to allow parties to rely upon recordation of title was paramount.[716]

Knedlik v. State[717] dealt with an appeal from a decision of the Alaska Real Estate Commission denying Knedlik reimbursement from the Real Estate Surety Fund for a failed sale closure. The sale negotiations involved several exchanges of money, part of which was earnest money, part a down payment and part consideration for an extension of the closing date.[718] As it was unclear what portion of the money was intended to be refundable, the supreme court reversed and remanded for a specific finding on whether the money was intended by the parties to be refundable in the event of a breach.[719] The court noted that if the money was meant to be nonrefundable, the Surety Fund, to avoid payment, would have the opportunity to prove that the plaintiff's damages resulting from the breach were less than the partial payment received.[720]

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708. 622 P.2d 967 (Alaska 1981).
709. *Fagerstrom,* 799 P.2d at 312.
710. *Id.* at 313.
711. 803 P.2d 871 (Alaska 1990).
712. 46 U.S.C.A. § 921 (West 1975) (repealed 1988).
713. *Graeber,* 803 P.2d at 872.
714. *Id.* at 873-74.
715. *Id.* at 871-72.
716. *Id.* at 874.
717. 803 P.2d 400 (Alaska 1990).
718. *Id.* at 400-01.
719. *Id.* at 402.
720. *Id.*

In *von Gemmingen v. First National Bank of Anchorage*,[721] the plaintiff appealed an adverse grant of summary judgment in a suit in which he sought to satisfy a judgment against his former employers for unpaid real estate commissions by attaching their escrow accounts maintained at defendant bank.[722] The supreme court reversed, holding that the property liable to execution included not only the accounts, but also the "rights and duties owed to judgment debtors pursuant to the terms of those accounts."[723] The court reasoned that the bank, acting as the escrow agent, possessed the property of the judgment debtors and that the bank's failure to surrender the property resulted in liability for the value of the deposits made by plaintiff's former employers since the execution of the writ.[724]

XI. TAX

Only two tax cases were decided by the Alaska Supreme Court in 1990. In *City of Valdez v. State*,[725] the supreme court affirmed the lower court's ruling that it was a violation of Alaska Statutes section 43.56.010(b)[726] for the city to impose a higher tax mill rate on oil and gas property than on other property in the city.[727] The city of Valdez had imposed the higher tax on oil and gas property to raise money to pay for oil pollution control services.[728] The court noted that the two statutes conflicted, and restated its position that, when two statutes are in conflict, the more specific statute governs.[729] As section 43.56.010(b) dealt specifically with the subject of tax rates on oil and gas property, the court held that it governed and thus invalidated the tax.[730]

In *Union Oil Co. v. State*,[731] the supreme court discussed the appropriate formula for calculating tax exempt income and actual tax liability. A Union Oil subsidiary was granted a tax exempt certificate

721. 789 P.2d 353 (Alaska 1990).
722. *Id.* at 354.
723. *Id.* at 355-56.
724. *Id.* at 356-57.
725. 793 P.2d 532 (Alaska 1990).
726. Under section 43.56.010(b), the municipality may tax oil and gas property only "at the rate of taxation that applies to other property taxed by the municipality. The tax shall be levied at a rate no higher than the rate applicable to other property taxable by the municipality." ALASKA STAT. § 43.56.010(b) (1990).
727. *City of Valdez*, 793 P.2d at 533-34.
728. *Id.* at 532. The city argued that under Alaska Statues section 29.45.580, the disparate tax was allowable, "so long as the oil and gas property receive[d] a higher level of city services." *Id.* at 533; *see* ALASKA STAT. § 29.45.580 (1986).
729. *City of Valdez*, 793 P.2d at 533 (citing Sprague v. State, 590 P.2d 410, 415 (Alaska 1979); State v. Green, 586 P.2d 595, 602 (Alaska 1978)).
730. *Id.* at 533-35.
731. 804 P.2d 62 (Alaska 1990) ("*Union II*").

under the Alaska Industrial Incentive Act.[732] Union Oil applied this certificate in determining the tax liability of the entire company under the formulary apportionment method.[733] In an administrative decision, the Department of Revenue ("DOR") determined that the separate accounting method[734] should have been utilized instead and that the amount so determined could only be applied, using the formulary approach, against the subsidiary's tax liability, not against Union Oil's tax liability.[735] The DOR's decision was upheld by the Alaska Supreme Court in an earlier decision.[736] Union Oil paid the tax and then sued for a refund. After the DOR and the superior court ruled against Union Oil in the tax refund suit, Union Oil appealed to the supreme court.[737]

The supreme court first stated that the appropriate standard of review of the DOR's decision was that of a reasonable basis, in part because the interpretation of the tax statute involved "policy questions within the DOR's area of expertise that are inseparable from the facts underlying the DOR's decision."[738]

In affirming, the court noted that DOR had correctly focused on the source of the income and that separate accounting was the most appropriate method to make the distinction between sources and activities.[739] Finally, the court noted that in the future, the separate accounting method must be utilized to calculate exempt income, and that formulary apportionment should be used to determine actual liability.[740]

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732. ALASKA STAT. § 43.25, *repealed by* 1986 Alaska Sess. Laws § 63 ch. 37.

733. *Union II*, 804 P.2d at 63.

734. The court noted that:

> Separate accounting takes the gross income of the business and deducts all allowable business expenses to arrive at a net taxable income. The net taxable income is multiplied by the applicable tax schedule rate to determine the tax liability. For purposes of the industrial income tax exemption Certificate, the tax liability is deemed a tax credit, zeroing out tax liability.
>
> Under formulary apportionment '[t]he property, payroll and sales fractions ('factors' under the statute) are averaged and an 'ideal' fraction is arrived at which reflects the degree of state connectedness of the business entity's [worldwide] income. Only this fraction of the entire income is then taxed by the state.' 'Because the apportioned income to a state depends on this world-wide apportionable income, it is not uncommon in a particular state for apportioned income to be greater or less than the income in the state if determined by the separate accounting method.'

Id. at 63 n.3.

735. *Id.* at 63.

736. Union Oil Co. v. State, 677 P.2d 1256, 1262 (Alaska 1984) ("*Union I*").

737. *Union II*, 804 P.2d at 64.

738. *Id.*

739. *Id.* at 65.

740. *Id.* at 65-66.

XII. TORTS

The court decided twelve tort cases during 1990, one involving judicial misconduct, four involving professional malpractice and seven involving negligence.

A. Judicial Misconduct

In re Inquiry Concerning a Judge[741] was decided on the basis of the American Bar Association Lawyer Sanctions.[742] The judge self-validated airline tickets through a defunct airline when he knew the agreements permitting the self-validations could be terminated at any time.[743] Despite knowing that a bankruptcy trustee had controlled the airline for nearly two years, and that a reasonable lawyer would have consulted the trustee before self-validating tickets, the judge did not verify whether the agreements were still in effect before acting.[744] The Alaska Commission on Judicial Conduct recommended that the judge be publicly reprimanded,[745] as his activities constituted a violation of Alaska Statutes section 22.30.011(a)(3)(C) and (D),[746] and of Canons 1 and 2A of the Code of Judicial Conduct.[747] In independently evaluating the judge's conduct[748] under the four-part test suggested in the

741. 788 P.2d 716 (Alaska 1990).

742. AMERICAN BAR ASSOCIATION STANDARDS FOR IMPOSING LAWYER SANCTIONS (1986), *reprinted in* ABA/BNA LAWYER'S MANUAL ON PROFESSIONAL CONDUCT, §§ 01:801-01:856 (1986) [hereinafter ABA Standards]. These standards were adopted by the court in *Disciplinary Matter Involving Buckalew*, 731 P.2d 48, 51-52 (Alaska 1986). The court used these standards by analogy instead of the American Bar Association Standards Relating to Judicial Discipline and Disability Retirement because the latter govern only a few serious offenses, none of which were at issue in the case. *Inquiry*, 788 P.2d at 723. *See* AMERICAN BAR ASSOCIATION STANDARDS RELATING TO JUDICIAL DISCIPLINE AND DISABILITY RETIREMENT (1978), *reprinted in* NATIONAL CENTER FOR PROFESSIONAL RESPONSIBILITY FOR JOINT COMMITTEE ON PROFESSIONAL DISCIPLINE, AMERICAN BAR ASSOCIATION, PROFESSIONAL DISCIPLINE FOR LAWYERS AND JUDGES (1979).

743. *Inquiry*, 788 P.2d at 721.

744. *Id.*

745. *Id.* at 722.

746. These sections provide:

> (a) The commission shall on its own motion or on receipt of a written complaint inquire into an allegation that a judge
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> . . .
>
> (3) committed an act or acts that constitute
>
> . . .
>
> (C) conduct prejudicial to the administration of justice;
>
> (D) conduct that brings the judicial office into disrepute . . . .

ALASKA STAT. §§ 22.30.011(a)(3)(C), 22.30.011(a)(3)(D) (1988 & Supp. 1990).

747. CODE OF JUDICIAL CONDUCT Canons 1, 2 (1984).

748. *Inquiry*, 788 P.2d at 722 (citing In re Hanson, 532 P.2d 303, 307-09 (Alaska 1975) (the court has the ultimate decision in judicial qualification matters)).

ABA standards,[749] the court found that the judge negligently failed to appreciate the potential risks of his actions, thereby creating an appearance of impropriety.[750] The court also found that the degree of actual or potential injury caused by the negligence was minimal.[751] Based on these findings and the presence of such mitigating factors as an unblemished record and an expression of remorse, the court held that although a private reprimand was essential, public censure was unnecessary.[752]

B. Malpractice

In *Drake v. Wickwire*,[753] the plaintiff brought a malpractice action against his attorney for allegedly inducing him to break an earnest money sale agreement.[754] The defendant advised his client, the seller, to break the agreement after the buyers' realtor stated that the buyers were "resisting the pressure to close."[755] The attorney claimed the buyers were anticipatorily repudiating the contract to buy.[756] The supreme court held that the attorney acted negligently in advising his client to engage in precipitous conduct in the face of an ambiguous statement that was insufficient to indicate anticipatory repudiation of the contract.[757]

In *Jones v. Wadsworth*[758] the Alaska Supreme Court reversed the lower court, permitting a legal malpractice action to be governed by the six-year statute of limitations for a contract action rather than the normal two-year statute of limitations for a tort action.[759] The court stated that the six-year statute of limitations would not be applicable to every case involving professional malpractice, but that this case was

749. The standards ask the following questions:

1) What ethical duty did the [judge] violate? (A duty to a client, the public, the legal system, or the profession?)

2) What was [the judge's] mental state? (Did [the judge] act intentionally, knowingly, or negligently?)

3) What was the extent of the actual or potential injury caused by the [judge's] misconduct? (Was there a serious or potentially serious injury?)

4) Are there any aggravating or mitigating circumstances?

Buckalew, 731 P.2d at 52 (quoting ABA Standards, Theoretical Framework at § 01:805-06).

750. *Inquiry*, 788 P.2d at 724.

751. *Id.*

752. *Id.* at 726.

753. 795 P.2d 195 (Alaska 1990).

754. *Id.*

755. *Id.* at 197.

756. *Id.* at 196.

757. *Id.* at 198.

758. 791 P.2d 1013 (Alaska 1990).

759. *Id.* at 1015.

premised on the nonperformance of a specific promise contained in an express contract.[760] The attorney had made a verbal commitment to "move the case to trial expeditiously" and to keep Jones "informed" of the case's progress.[761] The court found that the presence of such an express agreement made the claim a contract action rather than a tort action,[762] and distinguished this case from its earlier decision in *Van Horn Lodge, Inc. v. White,*[763] which did not involve an express agreement.[764]

Belland v. O.K. Lumber Co.[765] arose after Belland, who was hired to represent the plaintiffs in a real estate transaction, allegedly failed to discover the existence of a federal tax lien on the property before filing a deed of trust to secure a loan for the purchase of the land.[766] A jury found Belland guilty of legal malpractice, but the supreme court reversed.[767] The court found that although the defendant breached his professional duty, there was no actual damage to the plaintiffs since their security interest, a purchase-money mortgage, enjoyed priority over the federal tax lien.[768] Consequently, the court remanded for a directed verdict in favor of the defendant.[769]

The final case in this subcategory involved elements of a wrongful birth action, although the claim sounded in medical malpractice. In *Poor v. Moore,*[770] the plaintiff brought a malpractice action against a biofeedback therapist whose seduction of her during treatment resulted in her becoming pregnant.[771] The United States District Court for the District of Alaska certified questions of law to the Alaska Supreme Court.[772] The supreme court found that, despite the inappropriate sexual conduct on the part of the defendant, the plaintiff was not relieved of her statutory duty to support the child,[773] and could not recover as damages the costs of raising the child.[774]

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760. *Id.* at 1016-17.

761. *Id.* at 1016.

762. *Id.* at 1015-17 (citing Towns v. Frey, 149 Ariz. 599, 721 P.2d 147 (Ariz. Ct. App. 1986); Pittman v. McDowell, Rice & Smith, 12 Kan. App. 2d 603, 752 P.2d 711 (Kan. Ct. App. 1988)).

763. 627 P.2d 641 (Alaska 1982) *overruled by* Lee Houston & Assoc. v. Racine, No. 3668, slip op. at 16 (Alaska March 1, 1991).

764. *Jones,* 791 P.2d at 1016.

765. 797 P.2d 638 (Alaska 1990).

766. *Id.* at 639.

767. *Id.* at 642.

768. *Id.* at 641-42.

769. *Id.* at 642.

770. 791 P.2d 1005 (Alaska 1990).

771. *Id.* at 1006.

772. *Id.* at 1005.

773. *See* ALASKA STAT. § 25.20.030 (1983).

774. *Poor,* 791 P.2d at 1007. The court drew on the reasoning of the California Court of Appeals in *Barbara A. v. John G.*, which found that public policy prevents

However, the supreme court did find that the plaintiff retained a remedy in tort where she could conceivably recover damages for Moore's conduct, including medical expenses, pain and suffering, and lost wages as well as damages for emotional distress and punitive damages if warranted.[775] The court also held that, apart from any tort damages, the plaintiff was entitled to recover partial costs of actual child care expenditures, pursuant to Alaska Rule of Civil Procedure 90.3 and an award of prospective child support.[776]

C. Negligence

The cases discussed in this subcategory include two related to landlord-tenant law, while the remaining cases concern a variety of issues including liability under the dram-shop statute, damages recoverable in wrongful death actions, tolling of statutes of limitations in products liability actions, and pure negligence.

In *Coburn v. Burton*,[777] the plaintiff, a guest of the defendant's tenant, broke her ankle when she slipped and fell on ice in front of the defendant's building. According to a provision in the tenant's lease, the tenant was responsible for removing snow and ice from his own sidewalk and driveway.[778] The trial judge denied admission of evidence relating to that provision, reasoning that it was invalid under the Uniform Residential Landlord and Tenant Act, Alaska Statutes section 34.03.100(a)(2), which requires the landlord to "keep all common areas of the premises in a clean and safe condition."[779] On the defendant-landlord's appeal from a jury finding of negligence on his part, the supreme court held that the trial judge should have determined whether the area where plaintiff fell was a common area or one "occupied and used" by the tenent, and should have allowed the tenent's lease as evidence on that question.[780]

In *Babinec v. Yabuki*[781] the supreme court upheld the trial court's refusal to grant a new trial in a personal injury case. The plaintiff suffered lower back and leg injuries when a step in the stairway of her landlord's building collapsed. The jury awarded her $550,000 and her husband $50,000 on their respective negligence and

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one parent from suing the other over the wrongful birth of a child. 145 Cal. App. 3d 369, 379, 193 Cal. Rptr. 422, 449 (1983).

775. *Poor*, 791 P.2d at 1008.

776. *Id.* at 1007.

777. 790 P.2d 1355 (Alaska 1990).

778. *Id.* at 1356.

779. *Id.* (quoting ALASKA STAT. § 34.03.100(a)(2) (1990)).

780. *Id.* at 1356-58; *see* ALASKA STAT. §§ 34.03.100(a)(2) & 34.03.120(a) (1990).

781. 799 P.2d 1325 (Alaska 1990).

loss of consortium claims.[782] The majority of the case is unremarkable, but one aspect of it deserves note. The supreme court held that, for purposes of his loss of consortium claim, evidence of the husband's painful emotional past was admissible under Alaska Rules of Evidence 401 and 403 because it bore on his close relationship with his wife and was more probative than prejudicial.[783]

In *Gonzales v. Krueger*,[784] the plaintiff, an injured passenger in a single-car auto accident, appealed the trial court's grant of summary judgment for the defendant, Safeway. Safeway sold liquor to a second passenger in the car, who subsequently shared the alcohol with the driver immediately before the accident.[785] Safeway successfully argued before the trial court that it was not liable for the plaintiff's injuries because it had sold alcohol to a passenger, not the driver, and that, therefore, the transaction was not the proximate cause of the plaintiff's injuries.[786] Safeway also argued that at the time of the transaction the driver was not visibly intoxicated and therefore was not a "drunken person" at the time of the sale.[787]

On appeal, the supreme court rejected both of Safeway's arguments. It found that although the driver of the car may not have been a "drunken person" for purposes of the statute, Safeway was not immune from liability: it did sell liquor to the passenger, who was a "drunken person."[788] The court also found the question of whether the sale of liquor to the passenger was the proximate cause of the accident to be one of fact for the jury and inappropriate for summary judgment.[789]

In *Portwood v. Copper Valley Electric Association*,[790] the lower court ruled that punitive damages were not recoverable in a wrongful death action when the decedent was not survived by a spouse, child or other dependents.[791] Relying on *Tommy's Elbow Room v. Kavorkian*,[792] the court reversed, holding that the pecuniary loss limitation in the Alaska wrongful death statute is directed at the amount of *compensatory* damages recoverable when a person dies without statutory

782. *Id.* at 1326.
783. *Id.* at 1334-35.
784. 799 P.2d 1318 (Alaska 1990).
785. *Id.* at 1319.
786. *Id.* at 1320.
787. *Id; see* ALASKA STAT. § 04.21.020 (1986).
788. *Gonzales,* 799 P.2d at 1320.
789. *Id.*
790. 785 P.2d 541 (Alaska 1990).
791. *Id.*
792. 727 P.2d 1038, 1049 (Alaska 1986) (holding that punitive damages may be awarded in a wrongful death claim where the wrongdoer "acted outrageously or with reckless indifference").

beneficiaries.[793] Because punitive damages are by definition not compensatory, they are not subject to such a limitation; therefore, they are recoverable by the estate of a person who dies without beneficiaries.[794]

In *Yurioff v. American Honda Motor Co.*,[795] the supreme court upheld the superior court's award of summary judgment to the manufacturer in a products liability suit concerning a malfunctioning all-terrain vehicle, agreeing that the two-year statute of limitations had expired before the complaint was filed.[796] The court rejected plaintiff's claim that the statute of limitations was tolled for the three days he spent in bed recuperating from the accident.[797] The two-year statute of limitations begins to run when the potential plaintiff "reasonably should have begun an inquiry to protect his rights."[798] It was enough that the plaintiff knew the vehicle malfunctioned and an accident was caused.[799] The court similarly rejected plaintiff's claim that the statute was tolled by his subsequent incarceration on another matter, since he was not incarcerated at the time the cause of action accrued.[800]

In *Green v. Plutt*,[801] the supreme court reversed a jury verdict and held that the last car involved in a four-car, rear-end collision was negligent and liable to the driver of the second car in the collision.[802] The supreme court relied on its decision in *Grimes v. Haslett*,[803] on somewhat similar facts, in concluding that drivers on city streets must

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793. *Portwood*, 785 P.2d at 543. Alaska Statutes section 09.55.580(a) provides in part:

> When 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 therefor 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, and the damages therein shall be the damages the court or jury may consider fair and just. The 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) (emphasis added).

794. *Portwood*, 785 P.2d at 543.

795. 803 P.2d 386 (Alaska 1990).

796. *Id.* at 389; *see* ALASKA STAT. § 09.10.070 (1983).

797. *Yurioff*, 803 P.2d at 390.

798. *Id.* at 389 (citing Mine Safety Appliance Co. v. Stiles, 756 P.2d 288 (Alaska 1988)).

799. *Id.* at 389-90.

800. *Id.* at 390 (interpreting ALASKA STAT. § 09.10.140 (1990)).

801. 790 P.2d 1347 (Alaska 1990).

802. *Id.* at 1349.

803. 641 P.2d 813 (Alaska 1982).

anticipate sudden stops and must maintain an appropriate speed.[804] The court could "perceive of no explanation for the accident which [did] not include negligence on [the defendant's] part."[805] Accordingly, the court reversed and remanded the case for trial on the issue of damages.[806] In dissent, Justices Moore and Rabinowitz argued that *Green* was distinguishable from *Grimes* in part because the defendant in *Grimes* had admitted to following too closely.[807] The dissenters objected to the majority's conclusion that, since the defendant was unable to stop, she must, as a matter of law, have been negligent.[808]

In *Matomco Oil Co. v. Arctic Mechanical, Inc.*,[809] the supreme court upheld the denial of a directed verdict that, as a matter of law, one is liable for the acts of its independent contractor. The dispute arose as a result of the explosion of Matomco's fuel tanker while it was being repaired by an independent contractor. The explosion destroyed the property of two businesses, one of which was Arctic.[810] The jury found that Matomco was liable to the plaintiffs for damages of $441,000 and that the plaintiffs were not comparatively negligent.[811]

The lower court's denial of Matomco's motion for a directed verdict on the ground that it is not liable for the acts of its independent contractors was affirmed by the supreme court.[812] However, the court did reverse and remand on two grounds: an erroneous jury instruction on per se negligence for violating an Alaska Occupational Safety and Health Administration regulation;[813] and the erroneous submission to the jury of the issue of whether the welding, buffing or grinding of a petroleum tanker is an ultrahazardous activity when it was properly a question for the court.[814]

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804. *Green*, 790 P.2d at 1349.
805. *Id.*
806. *Id.* at 1350.
807. *Id.* at 1351 (Moore, J., dissenting) (citing *Grimes*, 641 P.2d at 819).
808. *Id.*
809. 796 P.2d 1336 (Alaska 1990).
810. *Id.* at 1338.
811. *Id.*
812. *Id.* at 1340.
813. *Id.*
814. *Id.* at 1341.