YEAR IN REVIEW

ALASKA SUPREME COURT YEAR IN REVIEW 1989

I. INTRODUCTION

This Year in Review is intended to provide practicing attorneys with a brief summary of every decision published by the Alaska Supreme Court in 1989. Due to the sheer volume of cases, space does not permit a thorough discussion and critique of each decision. Rather, we have attempted to highlight those decisions which represent a departure from prior law or resolve issues of first impression. Other cases are necessarily discussed in a more cursory fashion.

For easy reference, the opinions have been grouped according to the general subject matter of their holding rather than the nature of the underlying claim. There are twelve categories: administrative law, Alaska Native law, business law, constitutional law, criminal law, employment law, family law, fish and game law, procedure, property, tax law and torts. Within each of these categories, to the extent practicable, the cases have been subdivided into more specific legal areas.

Please note that while we attempt to provide a thorough picture of the state of the law in a particular field at the time of the court's decisions, it is possible that some holdings may have become partially obsolete by the date of this note's publication due to subsequent rulings or legislative action. The primary purpose of this note is to inform the practitioner which cases were decided in 1989, which substantive areas of law were addressed, which statutes or prior common law principles were interpreted and what was the essence of each of the holdings. Attorneys are advised not to use the information contained in this note without further reference to the cases cited.

II. ADMINISTRATIVE LAW

In the area of administrative law, the court decided nine cases challenging agency actions or regulations on a variety of procedural, statutory and constitutional grounds. Two of the cases are tax related

and are presented in the tax section.[1] In deciding these cases, the court continued to show deference to the state's rule-making authority except in cases involving extreme constitutional infringement.

A case which involved such an infirmity was *Thorne v. Department of Public Safety,*[2] which arose when the state erased the videotapes of Thorne's field sobriety tests prior to an administrative review of the revocation of his license for driving while intoxicated. The court remanded the case to the hearing officer with directions to presume that the videotape would have been favorable to Thorne. In reaching this decision, the court analyzed two primary issues.

First, the court held that Thorne's due process rights at the revocation hearing were violated by the state's failure to preserve the videotape. The court stated that "the same procedural safeguards apply in civil driver's license revocation proceedings for driving while intoxicated as apply in criminal prosecutions for that offense."[3] Because Thorne would have been entitled to have the videotape available to him in a criminal trial had he been charged with the crime of driving while intoxicated, he was entitled to have the tape in an administrative hearing.[4] The court noted that considerations of fundamental fairness dictate that where the burden of preservation is so slight, evidence which is potentially relevant to an issue of central importance at the revocation proceeding should be preserved.[5]

Second, the court rejected Thorne's argument that his right to confront and cross-examine witnesses was violated by the state's failure to preserve the videotape.[6] Although it acknowledged the accused's right to confront and cross-examine witnesses in a license revocation hearing,[7] the court held that this right was not violated because the officer testifying against Thorne did not base his testimony upon the results of the videotaped tests.[8]

In *Messerli v. Department of Natural Resources,*[9] the court upheld the conditions imposed on a preference right in land which had been granted by the Alaska Department of Natural Resources ("DNR") to Messerli in settlement of his claim that the state had wrongfully taken land from him. Messerli argued that the grant was invalid because the DNR Policy and Procedures Manual, which allegedly influenced the

1. *See infra* notes 815-26 and accompanying text.
2. 774 P.2d 1326 (Alaska 1989).
3. *Id.* at 1329 (citing Barcott v. Dept. of Pub. Safety, 741 P.2d 226, 228 (Alaska 1987)).
4. *Id.* at 1330.
5. *Id.*
6. *Id.* at 1332-33.
7. *Id.* at 1332.
8. *Id.* at 1332-33.
9. 768 P.2d 1112 (Alaska 1989).

DNR's disposition of the case, constitutes a regulation which was not promulgated in accordance with the Alaska Administrative Procedure Act ("AAPA").[10] The court disagreed, concluding that the Manual falls within the scope of the "internal management exception" to the AAPA since it merely lists statutory procedures for the adjudicator to follow.[11] The court further held that the DNR had not exceeded its discretion by limiting the preference right to certain Alaska lands for two reasons. First, the limitations were in accordance with the intent of the preference right statute to allow fair compensation consistent with the best interests of the state.[12] Second, because Messerli was able to locate, within the assigned lands, a parcel of "equal value" to the original tract of land when he first took possession of it under the federal homestead law, he could not claim any loss.[13]

In *Malone v. Anchorage Amateur Radio Club,*[14] the court considered a decision of the Commissioner of Revenue which prohibited the operation of coin-activated computerized bingo games under charitable gambling statutes. Applying the standard of *North Slope Borough v. LeResche,*[15] the court upheld the decision because it was not "arbitrary, unreasonable, or an abuse of discretion."[16] The court based its holding on findings that the computerized number generator used in the games did not comport with the statutory requirements that numbered objects be "drawn from a receptacle,"[17] and that bingo games be conducted substantially as they were before January 1, 1959.[18]

The next two decisions in the field of administrative law have narrower implications and are largely confined to their facts. In *Miners Advocacy Council, Inc. v. Department of Environmental Conservation,*[19] the supreme court considered the validity of a 0.2 milliliter/liter settleable solids standard imposed by the Alaska Department of Environmental Conservation in certifying a group of National Pollution Discharge Elimination System ("NPDES") permits issued to placer

10. *Id.* at 1117. Administrative Procedures Act, ALASKA STAT. §§ 44.62.010-44.62.650 (1989).

11. *Messerli,* 768 P.2d at 1118. The statutory "internal management exception" provides that a rule adopted by a state agency which relates to the internal management of the agency is not a regulation under the AAPA. ALASKA STAT. § 44.62.640 (1989).

12. *Messerli,* 768 P.2d at 1119-20 (citing ALASKA STAT. § 38.05.035(e) (1989)).

13. *Id.* at 1119-21.

14. 781 P.2d 576 (Alaska 1989).

15. 581 P.2d 1112 (Alaska 1978).

16. *Malone,* 781 P.2d at 578 (citing *LeResche,* 581 P.2d at 1115).

17. ALASKA STAT. § 05.15.210(3) (1989)..

18. ALASKA STAT. § 05.15.180(b) (1989).

19. 778 P.2d 1126 (Alaska 1989), *cert. denied,* — U.S. —, 110 S. Ct. 1127 (1990).

gold miners by the United States Environmental Protection Agency.[20] In considering the validity of the permits, the court examined whether the 0.2 milliliter/liter standard "reasonably assured" compliance with Alaska's water quality standard for settleable solids.[21] The court ruled that the certification was invalid as to those permit holders who had utilized most or all of the flow of streams in which their mining operation would take place, since the record did not support the finding that a settleable solids effluent limit of 0.2 milliliter/liter would "reasonably assure" that the mining operations would comply with state water quality standards.[22] The certification of permits issued to miners who had not utilized most or all of the flow of their streams, however, was deemed valid because the record contained substantial evidence that dilution and other factors would assure compliance with Alaska's water quality standard.[23]

In *Tachick Freight Lines, Inc. v. Department of Labor,*[24] the court upheld a decision of the Commissioner of Labor that certain individuals performing services for Tachick were employees rather than independent contractors, and that Tachick was therefore liable for unemployment insurance premiums. The court held that the Commissioner had not abused his broad discretion in deciding that an employment relationship existed, because Tachick did not produce clear evidence meeting the independent contractor exception to the statutory definition of employment.[25]

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20. Under federal regulations implementing the Clean Water Act, 33 U.S.C. §§ 1251-1387 (1986), states must include within a draft NPDES certification "a statement that there is a reasonable assurance that the activity will be conducted in a manner which will not violate applicable water quality standards." 40 C.F.R. § 121.2(a)(3).

21. *Miners.* 778 P.2d at 1131-34. There shall be "no increase in concentrations of sediment, including settleable solids, above natural conditions." ALASKA ADMIN. CODE tit. 18, § 70.020 (Oct. 1988).

22. *Miners.* 778 P.2d at 1136-38 (citing 33 U.S.C. § 1341(a)(1) (1986)).

23. *Id.* at 1136.

24. 773 P.2d 451 (Alaska 1989).

25. *Id.* at 453-54. The independent contractor exception to the statutory definition of employment is delineated in section 23.20.525 of the Alaska Statutes, which states:

> Employment defined. (a) In this chapter, unless the context otherwise requires, "employment" means . . . (10) service performed by an individual

The court decided two cases in the field of municipal law in 1989. *Finkelstein v. Stout,*[26] an appeal from an election recount brought pursuant to section 15.20.510(2) of the Alaska Statutes,[27] required the court to consider the validity of several Special Masters' recommendations concerning disputed ballots. The court held, inter alia,[28] that an absentee ballot witnessed by two non-official witnesses on different dates was invalid under Alaska's statutory election scheme.[29] In reaching this decision, the court noted that the objective of the provision which allows two non-officials to witness a ballot, like the objective of the provision allowing one official witness to witness a ballot, is to insure that the voter marks his or her own ballot and that the vote is uncoerced.[30] "Because the requirements of [Alaska Statute section] 15.20.081(d) serve both to protect the essence of free and intelligent voting and to safeguard the integrity of the ballot process, the requirements should be regarded as mandatory."[31] The fact that ambiguous

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whether or not the common-law relationship of master and servant exists, unless and until it is shown to the satisfaction of the department that

(A) the individual has been and will continue to be free from control and direction in connection with the performance of the service, both under the individual's contract for the performance and in fact;

(B) the service is performed either outside the usual course of the business for which the service is performed or is performed outside of all the places of business of the enterprise for which the service is performed; and

(C) the individual is customarily engaged in an independently established trade, occupation, profession, or business of the same nature as that involved in the service performed.

ALASKA STAT. § 23.20.525(a)(10) (1984).

26. 774 P.2d 786 (Alaska 1989).

27. ALASKA STAT. § 15.020.510(2) (1988).

28. The court also considered the validity of the following classes of disputed ballots: absentee ballots enclosed in envelopes that suggested no permanent Alaska residence; absentee ballots lacking witness signatures; absentee ballots with undated witness signatures; absentee ballots with incomplete voter signatures; absentee ballots without postmarks received after the election; absentee ballots of unregistered voters; ballots of voters who had signed post-election affidavits demonstrating non-residency; ballots of voters who had listed military post office boxes as their residences; and ballots containing punchmarks in the box for each candidate.

29. The pertinent statute provides, in part:

Upon receipt of an absentee ballot by mail, the voter, in the presence of [an official] . . . may proceed to mark the ballot in secret, to place the ballot in the small envelope, to place the small envelope in the larger envelope, and to sign the voter's certificate on the back of the larger envelope in the presence of an official listed in this subsection who shall sign as attesting official and shall date the signature. If none of the officials listed in this subsection is reasonably accessible, an absentee voter shall have the ballot witnessed by two persons over the age of 18 years . . . .

ALASKA STAT. § 15.20.081(d) (1988).

30. *Finkelstein,* 774 P.2d at 789. *See* ALASKA STAT. § 15.20.081(d) (1988).

31. *Finkelstein,* 774 P.2d at 791.

voting instructions may have contributed to the voters' failure to properly cast these ballots was deemed inconsequential. Despite the fact that other courts have generally recognized the importance of counting "illegal" votes when the source of the defect lies with election officials, the court reasoned that the public has a "supervening public interest" in fundamentally sound elections in cases where "the vote violates provisions designed to insure the integrity of the electoral process."[32]

In dissent, Justices Rabinowitz and Moore argued that the Special Master was correct in counting these ballots, as the voters and witnesses had been given unclear instructions concerning the witness certificate. Citing *Fischer v. Stout,*[33] they argued that the fundamental right to vote should not be denied where defective ballots are the result of the error of election officials.[34]

Anchorage School District v. Anchorage Daily News,[35] the second municipal law case decided in 1989, arose when the Daily News brought an action against a school district seeking declaratory and injunctive relief granting access to settlement documents in a case in which the school district was a party. In spite of the fact that the settlement agreement contained a confidentiality provision,[36] the court held that Alaska's public records disclosure statutes[37] required disclosure: "The people of this state, through their elected representatives, have stated in the clearest of terms that it is more important that they have access to this type of information than that it remain confidential."[38]

The court also rejected the school district's argument that a federal district court order deprived the court of jurisdiction over the Daily News' disclosure claim.[39] The court held that the superior court had personal and subject matter jurisdiction because the Daily News was not a party to the federal litigation, and because the federal court had not addressed the confidentiality issue when the superior court entered its judgment.[40]

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32. *Id.* at 791-92.
33. 741 P.2d 217 (Alaska 1987).
34. *Finkelstein,* 774 P.2d at 794 (Rabinowitz, J., dissenting).
35. 779 P.2d 1191 (Alaska 1989).
36. *Id.* at 1192.
37. ALASKA STAT. §§ 09.25.110, 09.25.120 (1983).
38. *Anchorage School Dist.,* 779 P.2d at 1193.
39. *Id.* at 1193-95.
40. *Id.* at 1194.

III. ALASKA NATIVE LAW

While the court decided only one case involving Alaska Native law in 1989, this case addressed an important issue pertaining to the Indian Reorganization Act ("the Act").[41] *In re Delinquent Property Taxes Owed to Nome*[42] arose when the city filed a general foreclosure proceeding against two lots owned by a group of Eskimos for its failure to pay property taxes. The court rejected the city's attempted foreclosure, holding that the broad terms of section 16 of the Act require tribal consent before a city can foreclose on land owned by Alaska Natives organized under the Act.[43]

Justice Rabinowitz argued in dissent that the majority's broad construction of section 16 was incorrect in view of the legislative history of that section:[44] "[I]n enacting section 16 Congress entertained a specific, narrow purpose — to stop the then prevalent Indian Service practice of appropriating tribal lands or selling tribal assets to pay the Indian Service's routine administrative costs."[45]

IV. BUSINESS LAW

The area of business law was a busy one for the court in 1989. The decisions fall into four categories: insurance, secured transactions, contracts and general business.

A. Insurance

Litigation involving insurance companies is typically fact-specific and frequently results in holdings limited to the terms of the particular policy involved. The issues addressed by the court this year relate primarily to the scope of insurance policies, the assignment of liability among multiple insurers, the duty of insurers to settle claims, indemnity and automobile insurance.[46]

With respect to the scope of insurance policies, the court generally views insurance policies as contracts of adhesion.[47] It recognizes

41. 25 U.S.C. §§ 471-479 (1983 & Supp. 1989).

42. 780 P.2d 363 (Alaska 1989).

43. *Id.* at 367. Section 16 of the Act empowers groups organized under the Indian Reorganization Act "to prevent the sale, disposition, lease or encumbrance of tribal lands, interests in lands, or other tribal assets without the consent of the tribe." 25 U.S.C. § 476(e) (1983 & Supp. 1989).

44. *In re* Delinquent Property Taxes Owed to Nome, 780 P.2d 368-70 (Rabinowitz, J., dissenting).

45. *Id.* at 369.

46. *See infra* notes 681-90 and accompanying text for discussion of another case involving, inter alia, an automobile insurance issue.

47. Whispering Creek Condominium Owners Ass'n v. Alaska Nat'l Ins. Co., 774 P.2d 176, 177 (Alaska 1989).

the fact that insurance companies dictate the terms of the policies.[48] As a result, the court construes insurance policies "so as to provide that coverage which a layperson would have reasonably expected from a lay interpretation of the policy terms."[49] This frequently results in the court upholding the claims of the insured party in construing the terms of the policy.

In *Estes v. Alaska Insurance Guaranty Association,*[50] the court addressed the validity of a suit brought by an insured party who had failed to comply with a policy provision requiring that any suit on the policy be commenced within one year after the loss occurs. Relying upon *Weaver Bros. v. Chappel,*[51] the majority held that time limit clauses like the one at issue should be reviewed on the basis of whether their application in a particular case advances the purpose for which they were included in the policy.[52] Arguing that the provision had been included to prevent prejudice to the insurer and that a material question of fact existed as to whether the insurer would be prejudiced by non-enforcement of the time limit clause, the court decided that summary judgment in favor of the defendant was improper.[53] Justice Moore took issue with this holding in a strongly worded dissent, arguing that courts should uphold time limit clauses because they prevent the revival of stale claims, help to prevent the loss of evidence, encourage plaintiffs to use diligence in enforcing their rights and prevent fraud.[54]

In *Whispering Creek Condominium Owners Association v. Alaska National Insurance Co.*[55] the court considered whether a badly rotted, yet still standing, building had "collapsed" under the terms of an insurance policy. In view of undisputed evidence that the condominium involved was in a life-threatening condition and in imminent danger of collapse, the court concluded that "the damage producing this less than total collapse is covered under the collapse provision of the policy."[56] The court found the policy's exclusion of loss caused by "wet or dry rot" was inapplicable because the policy's coverage explicitly extended to collapse caused by hidden decay.[57]

48. Estes v. Alaska Ins. Guar. Ass'n, 774 P.2d 1315, 1317 (Alaska 1989).
49. United States Fire Ins. Co. v. Colver, 600 P.2d 1, 3 (Alaska 1979).
50. 774 P.2d 1315 (Alaska 1989).
51. 684 P.2d 123, 125 (Alaska 1984) ("In the absence of prejudice, . . . there is no justification for excusing the insurer from its obligation under the policy. We recognize the strong societal interest in preserving insurance coverage for accident victims so long as the preservation is equitable for all parties involved.").
52. *Estes,* 774 P.2d at 1318.
53. *Id.*
54. *Id.* at 1322 (Moore, J., dissenting).
55. 774 P.2d 176 (Alaska 1989).
56. *Id.* at 180.
57. *Id.*

In *State v. Oriental Fire & Marine Insurance Co.*[58] the court was required to decide whether the state was a third-party insured under a policy issued to Korean Air Lines ("KAL") in the context of a KAL jet crash at the Anchorage International Airport. Construing the policy's language very narrowly, the court concluded that the policy's reference to KAL's terminal space lease agreement effectively limited coverage to the state's interests relating to the lease of terminal space. Therefore coverage did not extend to losses associated with KAL's use of the airport's runways and taxiways.[59] Consequently, the court held that Oriental's waiver of subrogation in the policy did not prevent Oriental from suing the state for alleged negligence in the design and operation of the airport which may have contributed to the crash.[60]

Two of the court's 1989 decisions concern the assignment of liability among multiple insurers. *Providence Washington Insurance Co. of Alaska v. Fireman's Fund Insurance Companies*[61] involved a dispute between a primary insurer and a secondary insurer over liability for post-judgment interest. A "supplementary payments" clause included in the policy of Providence Washington, the primary insurer, provided that the company would pay "all interest on the entire amount of any judgment . . . which accrues after entry of the judgment and before the company has paid or tendered . . . that part of the judgment which does not exceed the limit of the company's liability thereon."[62] Affirming the lower court's decision, the court held that Providence Washington was obligated to pay post-judgment interest on the entire judgment.[63] The court also found that Providence Washington had not "tendered" its payment by stating that it was in a position to pay its portion of the judgment, holding that "tender" means giving up control of the payment by making a deposit into the settlement trust fund.[64]

Another case involving the assignment of liability among multiple insurers, *Horace Mann Insurance Co. v. Colonial Penn Insurance Co.*,[65] arose when two policies covering a woman involved in an auto accident provided for conflicting methods of payment. A Colonial Penn policy issued to the woman's parents provided coverage for any person using the car, but limited it to a pro rata share of the loss when

58. 776 P.2d 776 (Alaska 1989). *See infra* notes 79-83, 618-28 and accompanying text for discussion of two cases arising from the same airport accident.

59. *Id.* at 778-80.

60. *Id.* at 780.

61. 778 P.2d 200 (Alaska 1989).

62. *Id.* at 201.

63. *Id.* at 203.

64. *Id.* at 204.

65. 777 P.2d 1162 (Alaska 1989).

other insurance is available to cover the loss.[66] The Horace Mann policy, issued to the woman herself, also provided for pro rata coverage, but stated that such coverage was to be considered excess coverage when applied to non-owned automobiles for which there is other insurance available to cover the loss.[67] A conflict therefore arose: Colonial Penn's policy required proration between the two companies, while Horace Mann's policy required that Colonial Penn pay all of the claim because the Horace Mann policy was not "available insurance" but "excess coverage."[68] Relying upon *Werly v. United Services Automobile Association,*[69] the court disregarded the "other insurance" provisions of both policies, and prorated the loss between the two insurance companies.[70]

The issue of whether a first party insured can recover punitive damages for the insurer's breach of the duty to act in good faith when settling a claim was addressed by the court for the first time in *State Farm Fire & Casualty Co. v. Nicholson.*[71] The court held that such actions sound in tort, and that consequently punitive damages are available.[72] Statutory remedies provided by the Alaska Insurance Code[73] do not preempt common law punitive damages awards, because the language of the statutes as well as the limited damages allowable under the statutes indicate that the legislature did not intend to change the common law.[74] The *Nicholson* court also held that an insurer could be required to pay prejudgment interest on a compensatory damages award in an action based on the insurer's alleged bad faith failure to settle the insured's claim, absent a showing that such interest payment constitutes double recovery.[75]

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66. *Id.* at 1163.

67. *Id.*

68. *Id.* at 1164.

69. 498 P.2d 112, 117 (Alaska 1972) (adopting the rule promulgated by the Oregon Supreme Court in Lamb-Weston, Inc. v. Oregon Automobile Insurance Co., 219 Or. 110, 341 P.2d 110 (Or. 1959), that conflicting "other insurance" clauses should be rejected *in toto,* causing losses to be "prorated between the insurers up to the respective policy limits").

70. *Horace Mann,* 777 P.2d at 1164-65.

71. 777 P.2d 1152 (Alaska 1989).

72. *Id.* at 1156-57.

73. *E.g.,* ALASKA STAT. §§ 21.03.060, 21.36.320, 21.90.020 (1984). *See* ALASKA STAT. § 21.36.125 (1984) (delineating what are unfair claim settlement practices); *and see* ALASKA STAT. § 21.90.020 (1984) which provides:

> *General Penalty.* A person determined by the director, following an appropriate hearing as provided in [sections] 21.06.170-21.06.230 [of the Alaska Statutes], to have violated a provision of this title or a regulation adopted under it, for which violation if greater penalty is not provided in this title, is subject to a civil penalty of not more than $2,500.

74. *Nicholson,* 777 P.2d at 1157-58.

75. *Id.* at 1158.

Two insurance cases decided in 1989 involve indemnification agreements. *Duty Free Shoppers Group Ltd. v. State*[76] arose when the state, as a lessor under an airport concession lease, sued the lessee for indemnification of the state's cost of settling the personal injury claims of the lessee's employee. In affirming the superior court's holding that the state was entitled to indemnification, the court rejected the lessee's argument that indemnification is inappropriate where the lessee reasonably expected that the state would seek indemnity from the occupant upon whose premises the accident occurred.[77] "The fact that an indemnity plaintiff is entitled to indemnity from a third party is simply not a defense to an indemnity claim."[78]

The court addressed the issue of whether an indemnification clause may provide an affirmative defense to negligence in *State v. Korean Air Lines Co.*[79] The case arose when the airline sued the state for negligence that allegedly caused an airplane accident, and the state raised its rights under an indemnification clause of the airline's airport lease as an affirmative defense.[80] Relying upon the explicit legislative recognition of the importance of providing safe air travel to the public,[81] the court held that the indemnity agreement fell within the "public duty exception" to the general rule that an agreement which indemnifies a party for its own negligence does not violate public policy.[82] The indemnity agreement was therefore held inapplicable to the case.[83]

The final two cases presented here involve automobile insurance policies, a more personal aspect of insurance law. Ironically, this is the one area where the court has been more disposed toward a narrow construction of the policy in issue in favor of the insurance company. In the first case, *State Farm Fire & Casualty Co. v. Jin Ku Chung,*[84] the court examined whether uninsured motorists' coverage may be construed as providing coverage against underinsured motorists as well. By a bare majority, the court decided in favor of the insurer, holding that an insured could reasonably expect coverage under an

76. 777 P.2d 649 (Alaska 1989).

77. *Id.* at 653.

78. *Id.* (citing Alyeska Pipeline Serv. Co. v. H.C. Price Co., 694 P.2d 782, 787-88 (Alaska 1985)).

79. 776 P.2d 315 (Alaska 1989).

80. *Id.* at 315-16.

81. *Id.* at 319 (citing ALASKA STAT. §§ 02.15.010, 02.15.090(a) (1988)).

82. *Id.* at 317-19 (quoting Manson-Osberg Co. v. State, 552 P.2d 654 (Alaska 1976) ("There are, however, instances when a court will not give effect to a contractual provision indemnifying the indemnitee's own negligence. These are cases where the indemnity clause tends to promote breach of a duty owing to the public at large.")).

83. *Id.* at 319-21.

84. 778 P.2d 586 (Alaska 1989).

uninsured motorist policy only if there was no other applicable insurance to compensate him for injuries suffered in an accident.[85] In dissent, Chief Justice Matthews argued that the reasonable expectation of one who purchases uninsured motorist coverage is instead that there will be insurance available at least equal to the amount of the stated coverage, regardless of whether the other motorist is underinsured.[86]

In *National Indemnity Co. v. Sherman,*[87] the court was asked to decide whether the terms of a certificate of insurance or the underlying insurance policy governed which vehicles are covered under the policy. National Insurance had issued a certificate of insurance to Sherman, which was filed with the Department of Motor Vehicles in compliance with the Alaska Motor Vehicle Safety Responsibility Act ("MVSRA").[88] The certificate indicated that the coverage extended to both currently owned vehicles and any "replacement" vehicles; the insurance policy, however, covered only listed vehicles. The issue was whether damage to Sherman's "replacement" vehicle was covered under the terms of the policy.[89] Citing *Paulson v. National Indemnity Co.,*[90] the court held that the insurance policy, and not the certification required by MVSRA, defines the scope of coverage of the policy.[91] The court acknowledged that this rule fails to ensure that drivers offering proof of financial responsibility under the MVSRA will be properly insured, but asserted that the language of the MVSRA precludes any other interpretation.[92]

Also addressed in *Sherman* was Sherman's claim that National Indemnity should be estopped from denying coverage because it had not notified the state of previous changes of vehicles insured under the policy. On this issue, the court held that an insurer is not obligated to

85. *Id.* at 589.

86. *Id.* at 589-90 (Matthews, C.J., dissenting).

87. 777 P.2d 663 (Alaska 1989).

88. ALASKA STAT. § 28.20.410 (1989) provides:

> Proof of financial responsibility for the future may be furnished by filing with the department the written certificate of an insurance carrier authorized to do business in this state certifying that there is in effect a motor vehicle liability policy for the benefit of the person required to furnish proof of financial responsibility. The certificate must give the effective date of the motor vehicle liability policy, which must be the same as the effective date of the certificate, and must designate by description or appropriate reference all vehicles covered by it, unless the policy is issued to a person who is not the owner of a motor vehicle.

89. *National Indemnity Co.,* 777 P.2d at 665.

90. 498 P.2d 731, 735 (Alaska 1972) ("the Safety Responsibility Act specifically provides that the certificate of insurance shall designate by description or appropriate reference all of [the vehicles] covered" by the insurance policy).

91. *Sherman,* 777 P.2d at 667.

92. *Id.* at 667-68.

notify the state of changes of vehicles originally covered by an insurance policy and listed on the certificate of insurance filed with the state.[93] Because the insurer had no duty to notify the state, Sherman's estoppel argument necessarily failed.

B. Secured Transactions

Although the supreme court was faced with only one case in 1989 dominated by questions involving secured transactions,[94] the court addressed several legal theories in resolving that case. In *Northern Commercial Co. v. Cobb,*[95] a secured creditor brought an action to recover its collateral, a tractor, which the debtor had sold to a third party. The court considered three different arguments before reversing the trial court's grant of summary judgment in favor of the third party.

First, the court considered whether the secured creditor had consented to the sale of collateral to the third party, thus destroying its security interest in the collateral.[96] Reversing the lower court, the court held that the creditor had not consented to the sale.[97] The court determined that a provision in the filed financing statement, which retained a security interest in the proceeds of any sale of the collateral, did not in itself constitute an authorization of the sale.[98] Similarly, the court held that the mere absence of a restriction on sale in the security agreement did not constitute an implied authorization to sell, because Alaska law places no burden on a secured party to restrict resale in the security agreement.[99] The court held that the creditor's explicit consent to the sale upon the debtor's promise to pay the proceeds to the creditor did not constitute "authorization" under the Alaska statute.[100]

The court then examined whether the third party was a buyer in the ordinary course of business, and therefore protected from the security interest created by the debtor.[101] Holding that a material question of fact still existed as to whether the debtor was in fact a dealer in

93. *Id.* at 667.

94. *See infra* notes 737-45 and accompanying text for discussion of another case involving, inter alia, secured transaction issues.

95. 778 P.2d 205 (Alaska 1989).

96. *Id.* at 207-08.

97. *Id.* at 207-09.

98. *Id.* at 207-08.

99. *Id.* at 208.

100. *Id. See* ALASKA STAT. § 45.09.306(b) (1986).

101. *Northern Commercial,* 778 P.2d at 209 (interpreting ALASKA STAT. § 45.01.201(9) (1986), which defines a "buyer in the ordinary course of business" as one who "in good faith, and without knowledge that the sale to that person is in violation of the ownership rights or security interest of a third party in the goods, buys in ordinary course from a person in the business of selling goods of that kind").

heavy equipment, the court concluded that summary judgment was inappropriate on this issue.[102]

Finally, the court considered whether the creditor's sale of the tractor to itself after it had repossessed the tractor qualified as a commercially unreasonable sale.[103] Because used tractors are not customarily sold in a recognized market with standard price quotations, the court held that the creditor's private sale of the tractor was prohibited as commercially unreasonable.[104] The court remanded this issue to give the creditor an opportunity to rebut the resulting presumption that the true value of the tractor equals the amount of the outstanding debt.[105]

C. Contracts

During 1989, the court responded to numerous challenges to decisions in the area of contract law. The non-insurance contract issues addressed by the court this year relate to the parol evidence rule, the incorporation of contract terms by reference to other documents, bid abstracts, damages, good faith and ratification.

In *Alaska Diversified Contractors, Inc. v. Lower Kuskokwim School District,*[106] the supreme court refused to reconsider its prior decision in *Lower Kuskokwim School District v. Alaska Diversified Contractors, Inc.*[107] that the contracts involved were integrated and therefore not subject to variation by prior agreements under the parol evidence rule. The court rejected plaintiffs' argument that the parol evidence rule has become a "dead letter" in Alaska,[108] citing its recent explicit recognition of the effectiveness of the parol evidence rule in *Alaska Northern v. Alyeska Pipeline Service Co.*[109] The court also denied admission of the parol evidence to show an enforceable promise supported by detrimental reliance, concluding that the parol evidence rule discharges prior agreements based on detrimental reliance just as it discharges prior agreements based on consideration.[110]

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102. *Id.* at 210.

103. *Id.* at 210-11. *See* ALASKA STAT. § 45.09.504(c) (1986) (authorizing a secured party to purchase collateral at a private sale, so long as the goods are of a type customarily sold in a recognized market or of a type which is the subject of widely distributed standard price quotations).

104. *Northern Commercial,* 778 P.2d at 211.

105. *Id.*

106. 778 P.2d 581 (Alaska 1989).

107. 734 P.2d 62 (Alaska 1987).

108. *Alaska Diversified Contractors,* 778 P.2d at 583.

109. 666 P.2d 33, 37-40 (Alaska 1983), *cert. denied,* 464 U.S. 1041 (1984).

110. *Alaska Diversified Contractors,* 778 P.2d at 585-86 (citing Peoples Nat'l Bank v. Bryant, 774 F.2d 682, 684 (5th Cir. 1985); Ansam Assoc., Inc. v. Cola Petroleum, Ltd., 760 F.2d 442, 447 (2d Cir. 1985); Philadelphia Mfrs. Mutual Ins. Co. v. Gulf Forge Co., 555 F. Supp. 519, 522 (S.D. Tex. 1982)).

Two cases decided by the court concerned the effect of references, in an underlying contract, to collateral documents. In *Prichard v. Clay,*[111] the court held that the mere reference in a contract to another document does not incorporate the terms of the document unless the contract clearly says so and, then, only to the extent indicated.[112] Prichard entered into a purchase agreement with Clay whereby Clay would assign his leasehold in return for Prichard's agreement to assume the existing mortgage on the building and the financial obligations of Clay's land lease. The purchase agreement noted that Prichard had reviewed the terms of the land lease, but did not explicitly assume any provisions of the lease beyond those pertaining to financial obligations.[113] Since the lease terms were not incorporated, the court found that the lower court erred in ruling that the parol evidence rule precluded extrinsic evidence of the intentions underlying the references to the lease in the purchase agreement.[114]

The court then addressed the question of whether obtaining a lessor's consent to assignment is a condition precedent to a contract assigning the lease. Since the purchase agreement specifically called for Clay to obtain the lessor's consent to the assignment and the terms of Clay's leasehold did not permit its assignment without the consent of his lessor, the court held that obtaining this consent was a condition precedent to the purchase agreement between Clay and Prichard.[115] Even though it was Clay's duty under the agreement to procure the lessor's consent, the court remanded the case for a determination as to whether Prichard's actions were the cause of Clay's inability to gain the lessor's consent.[116]

Where two contracts do not conflict directly, and the second is silent on an issue addressed by the first, the first contract will control.[117] In *Jackson v. Barbero,*[118] two parties had agreed in a property lease that the prevailing party in any legal dispute relating to the property should be entitled to reasonable attorney's fees. The parties later signed an agreement to purchase the property, the terms of which varied materially from the original lease and did not address attorney's

111. 780 P.2d 359 (Alaska 1989).

112. *Id.* at 360.

113. *Id.* at 361-62.

114. *Id.* at 362.

115. *Id.* at 362-63 ("Construing Clay's obligation as a condition precedent is the only construction which implements the clear intentions of the parties, for neither side reasonably could have contemplated consummation of the deal without the lease assignment.").

116. *Id.*

117. Jackson v. Barbero, 776 P.2d 786, 788 (Alaska 1989).

118. 776 P.2d 786 (Alaska 1989).

fees.[119] Stating that "the plain meaning of a contract provision prevails over any limitation otherwise imposed by [Alaska Rule of Civil Procedure] 82,"[120] the court held that since the two contracts "were not directly contradictory" and the subsequent agreement did not address the matter of attorney's fees, the terms of the lease pertaining to attorney's fees would be enforced. The court remanded for determination of a reasonable amount of attorney's fees.[121]

Municipality of Anchorage v. Tatco[122] dealt with the rights of third party suppliers under a contract between the municipality and Tatco. Tatco had contracted to supply clean fill to the municipal landfill. When Tatco failed to pay its suppliers, they brought suit against the municipality as third party beneficiaries to the contract under two alternative theories of liability.

First, the suppliers claimed that the contract incorporated, by reference, municipal contracting guidelines that would have required Tatco to post a payment bond to protect the suppliers. Because Anchorage failed to enforce the bond requirement, the suppliers contended that the municipality should bear responsibility for their losses.[123] The court dismissed this argument on the grounds that the terms of the contract specifically waived the payment bond requirement.[124] Any conflict between the contract terms and the terms of a document incorporated by reference must be resolved in favor of the contract terms because they best represent the reasonable expectations of the parties.[125]

Next, the suppliers argued that the contract was subject to the Little-Miller Act,[126] which requires the posting of a payment bond. The court dismissed this argument, holding that the contract was not covered by the Act. It was merely a supply contract and not a contract "for the construction, alteration, or repair of a public building or public work."[127]

Two cases discussed the bidding process for public contracts. The normal procedure is for the state to solicit bids and then to notify

119. *Id.* at 787.

120. *Id.* at 788 (citing Ursin Seafoods, Inc. v. Keener Packing Co., 741 P.2d 1175, 1180-81 (Alaska 1987)).

121. *Id.* at 788.

122. 774 P.2d 207 (Alaska 1989).

123. *Id.* at 209-11.

124. *Id.* at 210.

125. *Id.*

126. *Id.* at 209. *See* ALASKA STAT. § 36.25.010 (1989) (The Little-Miller Act's bonding provisions provided some protection from non-payment to the suppliers of government contractors where the contract is "for the construction, alteration, or repair of a public building or public work.").

127. *Tatco,* 774 P.2d at 211; *see* ALASKA STAT. § 36.25.010 (1989).

the apparent successful bidder by means of a bid abstract. The bid abstract also serves as a conditional acceptance of the bid until a formal contract is executed.

In *State v. Johnson,*[128] the court addressed the issue of when acceptance occurs in public contract bidding. After soliciting bids for a contract to supply diesel fuel to the state's ferry fleet, the state sent a bid abstract to all bidders showing Texaco as the apparent low bidder and stating that the other bidders had five days to appeal.[129] Texaco's bid was later deemed nonresponsive, leaving Alaska Petroleum ("AP") as the next lowest bidder.[130] However, before a bid abstract was issued in AP's favor, the state determined to rebid the contract because current fuel prices were lower than AP's bid.[131] AP later filed suit, claiming that two letters it had previously received from state officials constituted acceptance of its bid.[132]

Reversing the lower court, the court held that no contract existed between the state and AP for several reasons. First, the statute then in effect,[133] which regulated the award of public contracts, allowed the state to cancel solicitations of bids prior to the issuing of a binding bid abstract if it was found to be in the state's best interest. Furthermore, the abstract showing Texaco as the lowest bidder explicitly reserved the right to amend the award and instructed the low bidder not to proceed until a contract document was executed.[134] Finally, the court held that both letters referred to future actions required by the state before the award would be final.[135] Because a bid abstract had never been issued in AP's favor, AP could not reasonably believe that a final award had been granted.[136]

The court faced a similar issue regarding bid abstracts in *Dick Fischer Development No. 2, Inc. v. Department of Administration.*[137] The state had solicited bids for the construction of an office complex in Anchorage. Dick Fischer Development No. 2, Inc. ("Fischer") was

128. 779 P.2d 778 (Alaska 1989).
129. *Id.* at 778-79.
130. *Id.* at 779.
131. *Id.*
132. *Id.* The first letter stated that AP was the apparent low bidder and that upon AP's furnishing of proof of insurance, which was needed for the state to determine AP's responsibility as a bidder, "a final notice of award of contract [would] be issued." *Id.* The second letter stated that AP was the next lowest bidder and that AP would be contacted by the Division of General Services and Supply "to make the contract award." *Id.*
133. ALASKA STAT. § 37.05.240(a) (repealed 1986); *see Johnson,* 779 P.2d at 780 n.3.
134. *Johnson,* 779 P.2d at 781 n.4.
135. *Id.* at 782.
136. *Id.*
137. 778 P.2d 1153 (Alaska 1989).

deemed the lowest bidder and the bid abstract sent to Fischer stated that it served as final notice of the award provided no appeals were filed within five days.[138] Timely bid protests were filed and the project was cancelled prior to the resolution of the protests.[139] Fischer claimed that a binding contract existed and sought damages for breach of contract.

The court held that no contract had been formed because the bid abstract created a condition of acceptance: any bid protests must be resolved prior to the final awarding of the contract.[140] Since the project was cancelled prior to the adjudication of the bid protests, the condition of acceptance was not satisfied.[141]

In *Clark v. Greater Anchorage, Inc.*,[142] Clark had entered into a contract with Greater Anchorage, Inc. ("GAI") whereby Clark agreed to provide a fireworks display for a festival sponsored by GAI. The agreement required Clark to purchase insurance and to name GAI as a covered entity.[143] Clark purchased the policy, but did not list GAI as a covered entity. When a spectator injured during the display brought suit against GAI, GAI sought indemnification from Clark.[144] Clark argued that the insurance clause in the contract was not an indemnity agreement and was also unenforceable because it was indefinite.[145]

The court held that although the contract was not an indemnity agreement, it was a valid contract for the procurement of insurance which had been breached by Clark.[146] The contract did not fail for indefiniteness because all the necessary elements could be inferred from "the past dealings of the parties, their conversations, and business custom."[147]

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138. *Id.* at 1155.

139. *Id.* at 1154-55.

140. *Id.*

141. *Id.* (The court did not determine whether the condition was a condition precedent or a condition subsequent. In either case, the state was not liable for damages because the former constituted nonfulfillment of a condition precedent and the latter constituted fulfillment of a condition subsequent, rendering acceptance incomplete.).

142. 780 P.2d 1031 (Alaska 1989).

143. *Id.* at 1033.

144. *Id.*

145. *Id.* at 1034. The insurance clause in the contract read, "API [Clark] agrees to provide insurance for the event and to provide a certificate of insurance naming GAI as a covered entity." *Id.* at 1035.

146. *Id.* at 1034. "The rather cryptic agreement 'to provide insurance for the event and to provide a certificate of insurance naming GAI as a covered entity' does not clearly and unequivocally express the requisite intent for an indemnity agreement." *Id.*

147. *Id.* at 1035 (citing Howarth v. First Nat'l Bank of Anchorage, 596 P.2d 1164, 1168 (Alaska 1979)). *Howarth* provided the requisite elements of a contract for the procurement of insurance, which are: showing (1) the subject matter of the contract,

The more notable holding in the case pertained to the appropriate measure of damages. The court held, sua sponte, that if further proceedings in the superior court showed that GAI would have been covered under Clark's liability policy had GAI been named as a covered entity, then Clark would be liable for any damages which GAI and its insurer had to pay.[148] The court chose not to follow other jurisdictions, which hold that in situations where a promisor breaches a promise to purchase insurance, causing a loss to the promisee who is covered by another insurer, there is no damage to the promisee since his loss is fully reimbursed by his own insurer.[149]

The final issue before the court in *Clark* was whether the trial court had improperly amended the jury verdict by increasing the damage award in response to GAI's motion for a new trial.[150] The practice of increasing an inadequate jury damage award when the defendant consents to the increase or where the damages are undisputed as an alternative to granting a motion for new trial is called "additur."[151] In situations where additur denies a party's seventh amendment right to a jury trial, it has been held unconstitutional in federal courts.[152] However, since the seventh amendment does not extend to the states,[153] the court was free to proceed with an analyis under the Alaska Constitution.[154] The court held that when there is no dispute as to damages, as was the case here, a jury trial solely on the issue of damages would be a mere formality.[155] Under these circumstances, additur does not violate a party's right to jury trial and is therefore not unconstitutional.[156]

In *Hagans, Brown & Gibbs v. First National Bank of Anchorage,*[157] the court held, as a matter of first impression, that the duty of good faith between contracting parties requires that a client, who has signed a contingent fee agreement with an attorney, exercise his control over the outcome of the dispute in a manner consistent

(2) the risk insured against, (3) the amount of coverage, (4) the duration of the coverage and (5) the premiums to be paid. *Howarth,* 596 P.2d at 1167-68.

148. *Clark,* 780 P.2d at 1035-36.

149. *Id.* at 1036 n.8.

150. *Id.* at 1036.

151. *Id.* at 1036, 1037 n.11.

152. *Id.* at 1036.

153. *Id.* n.10.

154. *Id.* at 1037. The court noted that even in jurisdictions where additur is unconstitutional in some situations, it "does not contravene a party's right to trial by jury when there is no genuine issue of fact as to damages." *Id.* (citing 6A J. MOORE, W. TAGGART & J. WICKER, MOORE'S FEDERAL PRACTICE ¶ 59.08[8] at 59-217 (1989)).

155. *Clark,* 780 P.2d at 1037.

156. *Id.*

157. 783 P.2d 1164 (Alaska 1989).

with the reasonable expectations of the parties.[158] A client's decision not to accept a settlement offer, the court held, does not breach a contingent fee agreement unless the decision was made with the intention of taking advantage of the attorney.[159] Where the client refuses to accept a settlement offer unless the attorney reduces his fee, the client breaches the duty of good faith where he would have accepted the offer absent the desire to renegotiate the attorney's fee.[160]

The remaining two decisions in the field of contracts are largely confined to their facts. In *Apex Control Systems v. Alaska Mechanical,*[161] the court upheld the trial court's interpretations of two contracts between a contractor and a subcontractor after determining that neither interpretation was clearly erroneous.[162] With respect to the first contract, the court found ample testimony to support an industry-recognized distinction between "chiller controls" and "chilled water system controls" in a subcontract to provide refrigeration systems.[163] In the second contract, the court found it reasonable to conclude that approval by a contractor's foreman of "extra work" invoices entitled the subcontractor who performed the work to additional compensation.[164] The court also affirmed the trial court's designation of Alaska Mechanical as the prevailing party at trial for purposes of awarding attorney's fees, despite the fact that Apex Control Systems received some affirmative recovery, because Alaska Mechanical prevailed on the main issue at trial.[165]

In *Sea Lion Corp. v. Air Logistics of Alaska, Inc.,*[166] the court examined whether a corporation should be held liable for the unauthorized signature of the corporation's president. Relying upon the doctrine of ratification by silence, the court affirmed the trial court's decision binding the corporation.[167] The doctrine of ratification by silence, articulated in *Bruton v. Automatic Welding Supply Corp.,*[168] holds that a principal is liable for the acts of a second party purporting to act for the principal when the principal manifests an intent to be

158. *Id.* at 1167 (citing Carrico v. Delp, 141 Ill. App. 3d 684, 689, 490 N.E.2d 972, 976 (Ct. App. 1986)).

159. *Id.* at 1168.

160. *Id.*

161. 776 P.2d 310 (Alaska 1989).

162. *Id.* at 311-14.

163. *Id.* at 313.

164. *Id.* at 314.

165. *Id.* (citing Alaska Placer Co. v. Lee, 553 P.2d 54, 63 (Alaska 1976) (holding that a litigant may be the prevailing party if successful with regard to the main issue, even if the other party receives some affirmative recovery)).

166. Sea Lion Corp. v. Air Logistics of Alaska, Inc., No. 3537 (Alaska Dec. 8, 1989).

167. *Id.* slip op. at 14-20.

168. 513 P.2d 1122, 1126-28 (Alaska 1973).

bound by the acts of the second party.[169] Because the corporation was aware of the unauthorized signature at issue, and did not inform the third party of its intent not to be bound, the court stated that the "apparent authority" of the president bound the corporation under the doctrine of ratification by silence.[170]

D. General Business

Four additional cases decided by the supreme court in 1989 do not fit readily into more specific areas of business law. The first of these, *Robson v. Smith,*[171] involved the rights of a corporation's unsecured creditors. In *Robson,* unsecured creditors challenged a decision by the directors of the corporation to prefer a secured creditor, who was also an officer and shareholder of the corporation, over the unsecured creditors.[172] The court held that the officer's secured debt had valid priority over the debt of unsecured creditors because the officer had made loans in good faith to a solvent corporation.[173] The state statute requiring directors to make provision for all known debts before distributing assets to shareholders during the liquidation of a corporation was found inapplicable[174] because the corporation involved had been neither de jure nor de facto liquidated.[175]

Land Title Co. of Alaska v. Anchorage Printing, Inc.[176] arose when an escrow agent failed to secure a copy of a corporate resolution authorizing a transfer of real estate prior to transferring the property.[177] The trial court had found the escrow agent jointly and severally liable for the corporation's costs in setting aside the unauthorized transaction, holding that the agent had been negligent in failing to seek

169. *Sea Lion,* No. 3537, slip op. at 15-19 (Alaska Dec. 8, 1989) ("In *Bruton,* this court outlined two requirements for an otherwise unauthorized act to be ratified by the principal's silence. The first is that the act sought to be ratified, as with any theory of ratification, must be done by someone who held himself out to the third party as an agent for the principal. . . . Second, the principal must then have failed to act in response under circumstances which 'according to the ordinary experience and habits of men, one would naturally be expected to speak if he did not consent.' ")(citations omitted)).

170. *Id.* slip op. at 21-22.

171. 777 P.2d 659 (Alaska 1989).

172. *Id.* at 660.

173. *Id.* at 661-63. The court set forth the following factors to consider in judging the validity of loans to insiders: (1) the essentiality of the loans made, (2) whether the loans benefit the corporation and help preserve assets, (3) the extent to which loans were for basic corporate business, (4) the good faith nature of the loans and (5) the solvency of the corporation. *Id.* at 662 (citing Foster v. Arata, 74 Nev. 143, 153, 325 P.2d 759, 764 (1958)).

174. *Id.* at 662. *See* ALASKA STAT. § 10.05.216(c) (repealed 1988).

175. *Robson,* 777 P.2d at 662-63.

176. 783 P.2d 767 (Alaska 1989).

177. *Id.* at 768.

the corporate resolution of authorization before transferring the land.[178] The Alaska Supreme Court overturned this decision, finding that there was insufficient evidence that the escrow agent had actually agreed to obtain the corporate resolution in addition to performing those contractual duties specifically "found in the escrow instructions of the buyer and seller."[179] Since the court did not find that the escrow agent had undertaken this additional obligation, it was unnecessary for the court to address the underlying theory of liability relied upon by the trial court. The court declined to decide whether a third party could be "liable in tort for economic losses for its failure to perform a gratuitous undertaking made in addition to its contractual duties."[180]

In *Bibo v. Jeffrey's Restaurant,*[181] a minority shareholder brought an action against controlling shareholders, alleging that they had caused the corporation to engage in various transactions which benefitted the controlling shareholders to the prejudice of the corporation and the minority shareholder. Overruling the trial court's summary judgment for the defendant, the court held that there existed a genuine issue of material fact as to whether the controlling shareholders' actions constituted a breach of a fiduciary duty;[182] and it held that the claims were not barred by laches even though the suit was brought five years after events giving rise to the claims, because the defendants did not suffer prejudice as a result of the delay.[183] The court also held that the claims were not barred by the two-year statute of limitations for tort claims,[184] because actions against corporate directors for breach of fiduciary duty sound in contract, and are therefore governed by the six-year statute of limitations for contract claims.[185]

Finally, in a decision governed by Hawaiian partnership law, *Alaska Continental Bank v. Anchorage Commercial Land Associates,*[186] the court held that a limited partnership may implicitly ratify an unauthorized transaction of the general partner, and therefore may be bound by the general partner's action.[187] Such implied ratification

178. *Id.*

179. *Id.* at 769.

180. *Id.*

181. 770 P.2d 290 (Alaska 1989).

182. *Id.* at 294.

183. *Id.* at 293-95.

184. ALASKA STAT. § 09.10.050 (1983).

185. *Bibo,* 770 P.2d at 295-96; ALASKA STAT. § 09.10.050 (1983). *See* Hughes v. Reed, 46 F.2d 435, 440 (10th Cir. 1931) (holding that a suit by a corporation against directors for breach of their fiduciary duties is governed by the statute of limitations pertaining to implied contracts).

186. 781 P.2d 562 (Alaska 1989).

187. *Id.* at 565.

occurs when a limited partnership "accepts the benefits of the unauthorized acts of the partner, with actual or constructive knowledge of all the material facts . . . ."[188]

V. CONSTITUTIONAL LAW

In 1989, the court was faced with eight cases dominated by questions of law under the federal and Alaska constitutions.[189] The court generally adopted a conservative view of the constitutional provision involved in six of these cases, holding against the plaintiff and finding the challenged action or statute to be constitutional. Both cases which invalidated the challenged laws were accompanied by strong dissenting opinions.

One of the most controversial and far-reaching decisions was *Luedtke v. Nabors Alaska Drilling.*[190] This case arose when two former employees charged their employer with violating their right to privacy by discharging them for their refusal to submit to urinalysis screening for drug use. The court upheld the validity of the drug tests, finding that summary judgment for the defendant was appropriate for several reasons.

First and most importantly, the court held that the employer's drug testing program did not violate the employees' right to privacy under the Alaska Constitution[191] because the constitutional right to privacy was not intended to reach the actions of private parties.[192]

Second, the court held that the employer's actions had not breached the implied covenant of good faith and fair dealing.[193] Recognizing the strong public policy supporting the protection of employee privacy, the court found for the first time that it *is* possible for an employer to breach the implied covenant of good faith and fair dealing by violating the privacy of an employee.[194] In this case, however, the court concluded that the competing public concern for employee safety precluded a holding that the employer's actions

188. *Id.* (citing *In re* WPMK Corp., 59 Bankr. 991, 997 (D. Haw. 1986)).

189. *See infra* notes 779-91 and accompanying text for discussion of a case involving the constitutionality of a state tax law.

190. 768 P.2d 1123 (Alaska 1989).

191. The Alaska Constitution provides:

> *Right of Privacy.* The right of the people to privacy is recognized and shall not be infringed. The legislature shall implement this section.

ALASKA CONST. art I, § 22.

192. *Luedtke,* 768 P.2d at 1130 ("Absent a history demonstrating that the amendment was intended to proscribe private action, or a proscription of private action in the language of the amendment itself, we decline to extend the constitutional right to privacy to the actions of private individuals.").

193. *Id.* at 1130.

194. *Id.*

constituted such a breach.[195] The court noted that if the employer had not conducted the tests at a time reasonably contemporaneous with the employees' work times, or if the employer had failed to notify the employees of the adoption of the drug testing program, a finding of a breach of the implied covenant might have been appropriate.[196]

Finally, the court rejected the plaintiffs' claims that the drug tests gave rise to a common law cause of action for invasion of privacy, holding as a matter of first impression that the tests were not unwarranted, and therefore did not constitute an "offensive intrusion" under Alaska law.[197]

In *Barber v. Municipality of Anchorage,*[198] the court examined the validity of an Anchorage sign ordinance under the federal Constitution. Barber charged that the ordinance, which prohibits off-premises advertising signs, portable signs and roof signs,[199] violated, inter alia, his constitutional right to free speech.[200] The court disagreed, finding that the ordinance directly furthered the municipality's substantial aesthetic concerns in the least restrictive manner possible.[201] Furthermore, the court held that the ordinance did not violate Barber's equal protection rights, for the ordinance was rationally related to legitimate municipal interests in aesthetics and traffic safety.[202] The municipality's admittedly selective enforcement of the ordinance against portable signs was similarly held not to constitute a violation of equal protection, for there was no showing that the municipality had enforced the ordinance in a discriminatory manner.[203]

Another case that limited an individual's freedom of expression was *Johnson v. Tait.*[204] *Johnson* arose because the plaintiff was forced to leave an Anchorage tavern for wearing the "colors" of his club, the Hells Angels. In reversing the superior court's decision, the court held

195. *Id.* at 1130, 1133-37.

196. *Id.* at 1136-37.

197. *Id.* at 1137-38 (citing Dietemann v. Time, Inc., 449 F.2d 245, 247-48 (9th Cir. 1971); Sistok v. Northwestern Tel. Sys., Inc., 189 Mont. 82, 92-93, 615 P.2d 176, 182 (1980)).

198. 776 P.2d 1035 (Alaska 1989).

199. *Id.* at 1036 (citing ANCHORAGE MUNICIPAL CODE § 21.45.160).

200. *Barber,* 776 P.2d at 1036.

201. *Barber,* 776 P.2d at 1036-39.

202. *Id.* at 1039-40. In holding that the ordinance did not violate the plaintiff's first amendment rights, the court noted that the ordinance was not invalid merely because it might have gone further than it did. *Id.* at 1039 (citing Katzenbach v. Morgan, 384 U.S. 641, 657 (1966)).

203. *Id.* at 1040 (citing State v. Reefer King Co., Inc., 559 P.2d 56, 64 (Alaska 1976), *modified on reh'g,* 562 P.2d 702 (Alaska 1977) ("Selective enforcement of a statute violates the equal protection clause only if it is part of a deliberate and intentional plan to discriminate based on an arbitrary or unjustifiable classification.")).

204. 774 P.2d 185 (Alaska 1989).

that the plaintiff's right to freedom of expression had not been violated, because the Alaska Constitution's freedom of expression provision[205] does not apply to private establishments such as taverns.[206]

In *Property Owners Association v. City of Ketchikan,*[207] the court held, inter alia, that special assessments levies imposed by the city against taxpayers who benefitted from a local improvement district did not violate the taxpayers' federal right to due process.[208] In reaching this conclusion, the court determined that the city council's decision to impose the assessments was "legislative" and not "adjudicative,"[209] and that the council's provision of notice and an opportunity to be heard therefore satisfied due process concerns.[210]

The Alaska Constitution requires the state legislature to "adjourn from regular session no later than one hundred twenty consecutive calendar days from the date it convenes."[211] In *Alaska Christian Bible Institute v. State,*[212] the plaintiff claimed that in both 1986 and 1987, the legislative session extended into the morning hours of the 121st day,[213] in violation of the Alaska Constitution. The court held that the length of the legislative session was not unconstitutional, for the language of the constitution results in a 121-day durational limit for legislative sessions.[214]

The year's most divisive case was *McDowell v. State,*[215] which yielded two concurrences and one dissent. The court held the state's

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205. The Alaska Constitution, in relevant part, provides:

> Every person may freely speak, write, and publish on all subjects, being responsible for the abuse of that right.

ALASKA CONST. art. I, § 5.

206. *Johnson,* 774 P.2d at 190.

207. 781 P.2d 567 (Alaska 1989).

208. *Id.* at 572. The opinion also held that the Council was not estopped from charging interest on deferred assessment installments at rates higher than the eight percent rate fixed by statute, because alleged statements made concerning fixed interest rates amounted to "salesmanship," and because it would be unjust to force the city's population at large to subsidize the purchasers of lots in the local improvement district. *Id.* at 573.

209. *Id.* at 572.

210. *Id.* at 571-72 ("Where an act is deemed to be legislative, trial-type procedures need not be afforded to affected members of the public. The contrary is true where an act is deemed to be 'adjudicatory' [citations omitted].").

211. ALASKA CONST. art. II, § 8.

212. 772 P.2d 1079 (Alaska 1989).

213. *Id.* at 1079-80.

214. *Id.* at 1080-81. The court stated that the proper method of calculating the period in question is to exclude the first day; thus, day two of the session is the first day for the purposes of this provision. *Id.* at 1081.

215. 785 P.2d 1 (Alaska 1989).

rural preference provision[216] for subsistence fishermen and hunters unconstitutional under the Alaska Constitution.[217]

One purpose of the rural preference provision was to determine priority of use of the state's fish and game populations and to give a preference to rural residents over non-rural residents.[218] This preference gives subsistence uses a priority over other consumptive uses[219] if the "harvestable portion of any stock or population is not sufficient to accommodate all consumptive uses."[220] Another purpose of this law was to ensure state compliance with the Alaska National Interest Lands Conservation Act ("ANILCA").[221] Section 3114 of ANILCA requires that subsistence uses are to be given priority over the taking of fish and game on federal public lands in Alaska. ANILCA provides, however, that only rural Alaska residents be entitled to subsistence user status.[222] ANILCA requires federal management of these public lands in Alaska if these priority criteria are not followed, although it does allow for state management of the lands if the state "enacts and implements subsistence laws 'which are consistent with, and which provide for the definition, preference, and participation specified in' ANILCA."[223]

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216. ALASKA STAT. §§ 16.05.258(c), 16.05.940 (1987).

217. Specifically, the rural preference provision was found unconstitutional under Alaska Constitution art. VIII, § 3 (the common use clause), art. VIII, § 15 (no exclusive right of fishery clause) and art. VIII, § 17 (the uniform application clause). *McDowell,* 785 P.2d at 1. The provision was also challenged under the state and federal due process and equal protection clauses. *Id.*

218. *Id.* at 4.

219. Subsistence uses are defined as "the noncommercial, customary and traditional uses of wild, renewable resources by a resident domiciled in *a rural area of the state* for direct personal or family consumption as food, shelter, fuel, clothing, tools, or transportation, for the making and selling of handicraft articles out of non-edible by-products of fish and wildlife resources taken for personal or family consumption, and for the customary trade, barter, or sharing for personal or family consumption." *Id.* at 1 (emphasis added) (citing ALASKA STAT. § 16.05.940(30) (1987)). Consumptive uses include sport, personal and commercial, as well as subsistence uses. *Id.* at 2.

220. *Id.* at 2 (citing ALASKA STAT. § 16.05.258(c) (1987)).

221. 16 U.S.C.A. §§ 3101-3233 (West 1985 & Supp. 1989). The Secretary of the Interior notified the state that, following the court's holding in Madison v. Alaska Department of Fish and Game, 696 P.2d 168 (Alaska 1985), which struck down a rural residency requirement for subsistence users as inconsistent with state statute, state law was no longer consistent with ANILCA requirements and that federal management would begin if the state did not adopt laws that were consistent. With the passage of 52 SLA 1986 and its rural preference for subsistence uses, the Department of the Interior once again held that Alaska was in compliance with ANILCA. *McDowell,* 785 P.2d at 3.

222. *McDowell,* 785 P.2d at 3 n.3 (citing 16 U.S.C.A. § 3114 (West 1985)).

223. *Id.* at 3 (citing 16 U.S.C.A. § 3115(d) (West 1985)).

The court struck down the rural residency requirement on two independent grounds. The first was based on constitutional interpretation. The court found a common theme running through article VIII sections 3, 15 and 17 of the Alaska Constitution — "exclusive or special privileges to take fish and wildlife are prohibited."[224] While noting that section 15 addresses fisheries only, the court stated that "the prevention of grants of exclusive or special privileges with respect to fish and game is also one purpose of the common use and the uniform application clauses. It follows that the grant of special privileges with respect to game based on one's residence is also prohibited."[225]

The court's other ground for declaring the law unconstitutional was that it violated the equal access clauses of article VIII.[226] The court found that "ensur[ing] that those Alaskans who need to engage in subsistence hunting and fishing in order to provide for their basic necessities are able to do so" was an "important" state interest.[227] However, the court found the rural preference provision, as a means of implementation, to be "extremely crude" and not sufficiently tailored to its purpose.[228] Specifically, the court held that the rural/urban distinction was both overinclusive and underinclusive.[229] The court found it overinclusive because it includes "numerous rural residents who have not engaged in subsistence hunting and fishing"[230] and underinclusive because it "unfairly excludes some urban residents who have lived a subsistence lifestyle and desire to continue to do so."[231] Because the means used to implement an important state purpose were not the least restrictive, the court held that the rural residency requirement violated the equal access clauses of article VIII. The court commented that a preference system based on individual characteristics was much more likely to meet the equal access requirement of article

224. *Id.* at 6. The court commented, however, that while section 15 does prohibit the granting of fishing monopolies, it does not "prohibit some differential treatment of diverse user groups as commercial, sport, and subsistence fishermen." *Id.* at 8.

225. *Id.* at 9.

226. *Id.* at 10. "In reviewing legislation which burdens the equal access clauses of article VIII, the purpose of the burden must be at least important. The means used to accomplish the purpose must be designed for the least possible infringement on article VIII's open access values." *Id.* (citing State v. Ostrosky, 667 P.2d 1184, 1191 (Alaska 1983); Johns v. Commercial Fisheries Entry Comm'n, 758 P.2d 1256, 1266 (Alaska 1988)).

227. *Id.* The court also examined the state's purpose of complying with ANILCA in order to retain state control over fish and game on federal lands. The court found this purpose not to be sufficiently important so as to withstand scrutiny under article VIII, stating that "[s]tate control merely for the sake of control is a questionable goal when the terms infringe upon the open access values of article VIII." *Id.* at 10 n.20.

228. *Id.* at 10.

229. *Id.* at 10-11.

230. *Id.* at 4-5.

231. *Id.*

VIII while still accomplishing the statute's purpose.[232] The court then remanded the case to the superior court for further action.

Justice Compton concurred with the court's conclusion that the rural preference scheme violated the exclusivity prohibition in sections 3, 15 and 17 of article VIII.[233] He expressed no opinion, however, as to whether the equal access clauses of article VIII were also violated, stating that the court's analysis of that issue was "superfluous to the decision."[234] Justice Moore concurred with the court's decision as to the equal access issue, but disagreed with the court's analysis of the exclusivity issue.[235] Justice Moore characterized this case as an equal protection case. He believed that the challenged statute should receive close scrutiny, arguing that it "at least must be closely related to an important state interest."[236] He found that "ensuring that persons who are dependent upon subsistence hunting and fishing have access to wildlife" is a "compelling" state interest, but he stated that the rural preference provision at issue was "only loosely related to that purpose."[237] Therefore, Justice Moore found that the provision violated the Alaska Constitution's equal protection and uniform application clauses, although he agreed with the court that a law tailored to individual characteristics would pass constitutional muster.[238] He disagreed with the implications of the plurality's exclusivity analysis because, in his opinion, not all preferences, especially those dealing with subsistence, would necessarily violate sections 3 and 15 of article VIII. Moreover, Justice Moore believed that it was impossible to find a violation of section 17 "without a full equal protection analysis."[239]

Justice Rabinowitz dissented, stating that, in his view, the state subsistence laws did not violate sections 3, 15 or 17 of article VIII of the Alaska Constitution.[240] He also disagreed with the court's equal protection analysis, stating that the majority erroneously applied strict

232. *Id.* at 11.

233. *Id.* at 12 (Compton, J., concurring).

234. *Id.* (Compton, J., concurring).

235. *Id.* (Moore, J., concurring).

236. Justice Moore considered "access to wildlife for subsistence purposes . . . [to be] a species of the important right to engage in economic endeavor." *McDowell,* 785 P.2d at 13. State v. Enserch Alaska Constr. Co., 787 P.2d 624 (Alaska 1989) (holding a statutory local hiring preference for public works projects unconstitutional under Alaska's equal protection clause). *See infra* notes 251-57 and accompanying text for a discussion of *Enserch.*

237. *McDowell,* 785 P.2d at 12. "There is only a modest correlation between the set of people who reside in areas designated as rural under the Act and the set of people who are dependent upon subsistence hunting and fishing." *Id.* at 13.

238. *Id.*

239. *Id.*

240. *Id.* at 14 (Rabinowitz, J., dissenting).

scrutiny and the least restrictive alternative standards.[241] Justice Rabinowitz would have applied a lesser standard of scrutiny and found that the subsistence legislation was substantially related to the legitimate legislative goal of ensuring the welfare of subsistence users, and that the fit between this goal and the rural preference provision was sufficiently close to withstand equal protection scrutiny under Alaska law.[242]

In *Robison v. Francis,*[243] the court reaffirmed its holding in *State v. Green*[244] that the state is not a "person" under the Civil Rights Act[245] and therefore dismissed a claim brought against the state under 42 U.S.C. § 1983.[246] The court also denied the plaintiff's claim for *Bivens*-type damages[247] resulting from the state legislature's passage of legislation that was unconstitutional under the United States Constitution,[248] affirming its decision in *Vest v. Schafer*[249] that the state may not be held liable for damages arising from the passage of unconstitutional legislation.[250]

In *State v. Enserch Alaska Construction, Inc.,*[251] the court held unconstitutional an Alaska statute which provided a hiring preference to residents of economically distressed zones for certain employment on public works projects. Relying upon the "sliding scale" method of analyzing equal protection claims articulated in *Alaska Pacific Insurance Co. v. Brown,*[252] the court held the statute invalid because its purpose, "disparate treatment of unemployed workers in one region in order to confer an economic benefit on similarly-situated workers in another region," was not a legitimate legislative goal.[253] The court held that the plaintiff could not recover from the state damages it suffered on account of the statute, however, arguing that if a state were

241. *Id.* (Rabinowitz, J., dissenting).

242. *Id.* at 14-15 (Rabinowitz, J., dissenting).

243. 777 P.2d 202 (Alaska 1989).

244. 633 P.2d 1381 (Alaska 1981).

245. 42 U.S.C. §§ 1981-2000 (1981).

246. *Francis,* 777 P.2d at 203 (citing State v. Green, 633 P.2d at 1382). *See* 42 U.S.C. § 1983 (1981).

247. In Bivens v. Six Unknown Agents of Fed. Bureau of Narcotics, 403 U.S. 388 (1971), the Court held that a violation of the fourth amendment by federal officials may result in the availability of money damages for any injuries suffered. A plaintiff is not limited to equitable remedies. *Id.* at 397.

248. *Francis,* 777 P.2d at 204.

249. 757 P.2d 588 (Alaska 1988).

250. *Francis,* 777 P.2d at 204 & n.3.

251. State v. Enserch Alaska Constr. Co., 787 P.2d 624 (Alaska 1989).

252. 687 P.2d 264, 269-70 (Alaska 1984).

253. *Enserch,* 787 P.2d at 634.

liable for unconstitutional legislation " '[l]egislators would become reluctant to legislate.' "[254]

In dissent, Justices Compton and Rabinowitz argued that the majority mischaracterized the state's purpose in enacting the preference law as intending to confer an economic benefit on workers in certain regions.[255] Instead, they argued, the statute was enacted for the legitimate purpose of reducing alcoholism, child abuse, domestic violence and other related social ills in certain regions of Alaska.[256] Because the law required a " 'reasonable relationship between the danger represented by non-citizens, as a class, and the . . . discrimination practiced upon them,' " Justice Compton argued, the statute did not violate the plaintiffs' rights to equal protection.[257]

VI. CRIMINAL LAW

The Alaska Supreme Court decided only three cases this year in the area of criminal law. As has been its custom, the court tended to adopt positions in all three cases which served to expand the power of the state rather than to expand the rights of criminal defendants. This was particularly evident in *Vaden v. State,*[258] a case addressing the criminal liability of two hunting guides for violations of fish and game law. The defendants in *Vaden* had flown undercover agents into the bush where the defendants and the agents allegedly violated numerous fish and game laws. Despite the questionable actions of the undercover agents, which allegedly included killing caribou, a divided court affirmed the numerous superior court convictions for three reasons.

First, the court held that the justification defenses available to the agents did not preclude the defendants' accomplice liability because Alaska's statutory scheme does not require that a principal be found guilty or even prosecuted in order for an accomplice to be convicted.[259] Second, the court rejected the entrapment defenses asserted, holding that the defendants had failed to show, by a preponderance of the evidence, that the police employed tactics of "persuasion or inducement such as would be effective to persuade the average person . . . to commit the offense."[260]

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254. *Id.* at 635 (quoting Vest v. Schafer, 757 P.2d 588 (Alaska 1988)).

255. *Id.* at 638-39 (Compton, J., dissenting), *id.* at 641-42 (Rabinowitz, J., dissenting).

256. *Id.* at 639 (Compton, J., dissenting), *id.* at 641 (Rabinowitz, J., dissenting).

257. *Id.* at 638-39 (Compton, J., dissenting) (quoting Toomer v. Witsell, 334 U.S. 385, 399 (1947)).

258. 768 P.2d 1102 (Alaska 1989).

259. *Id.* at 1106 (citing ALASKA STAT. § 11.81.420 (1988)).

260. *Id.* at 1107-08 (quoting ALASKA STAT. § 11.81.450 (1988)).

Finally, the court held that the conduct of the agents was not so outrageous as to warrant dismissal of the defendants' convictions on due process grounds.[261] Adopting the reasoning of the Ninth Circuit in *United States v. Williams,*[262] the court held that an undercover agent's actions are so outrageous so as to bar prosecution only when the agent "engineer[s] and direct[s] the criminal enterprise from start to finish."[263]

In dissent, Justices Burke and Moore vigorously argued that the undercover agents had exceeded permissible limits of police involvement by committing criminal acts in order to charge others as accessories to those same acts.[264] The dissenters also argued that the accomplice liability charges were inappropriate because the acts of a feigned accomplice may never be imputed to the targeted defendant.[265]

Both of the remaining criminal law cases decided by the court in 1989 concerned the revocation of a driver's license for driving while intoxicated. In *Sather v. State,*[266] the court affirmed both the superior court's revocation of the defendant's license and the duration of the revocation. The court first held that the trooper's forced entry into defendant's vehicle while the defendant was slumped over the steering wheel did not violate the defendant's right to privacy under the Alaska Constitution because the defendant's "right to privacy was minimal when weighed against the important social interest of ensuring that the driver did not pose a public danger or need immediate medical attention."[267] The court also held that a hearing officer can use the certified record of a driver's previous convictions in another state for purposes of enhancing the period of license revocation.[268]

In *Williamson v. State,*[269] the court had to decide whether to overturn the hearing officer's imposition of two consecutive, rather than concurrent, ten-year license revocation periods for a drunk driver

261. *Vaden,* 768 P.2d at 1107 (citing United States v. Russell, 411 U.S. 423, 432 (1973), where the Supreme Court indicated in dictum that at some point government involvement in detecting criminal activity could rise to a level of outrageousness "shocking to the universal sense of justice").

262. 791 F.2d 1383 (9th Cir. 1986), *cert. denied sub nom.,* Sears v. United States, 479 U.S. 869 (1986).

263. *Vaden,* 768 P.2d at 1108.

264. *Id.* at 1109-10 (Burke, J., dissenting).

265. *Id.* at 1110-12 (Burke, J., dissenting).

266. 776 P.2d 1055 (Alaska 1989).

267. *Id.* at 1056. Article I, § 22 of the Alaska Constitution provides, "[t]he right of the people to privacy is recognized and shall not be infringed."

268. *Sather,* 776 P.2d at 1056-57.

269. 779 P.2d 1238 (Alaska 1989).

with two previous convictions.[270] Citing the defendant's apparent inability to conform his conduct to the law and the danger which that conduct posed to the public, the court concluded that the hearing officer's imposition of two consecutive license revocation periods was not an abuse of discretion.[271]

VII. EMPLOYMENT LAW

The court decided numerous cases in the field of employment law this past year. Those cases have been separated into three subcategories: wrongful discharge, workers' compensation and miscellaneous issues such as vicarious liability and the duty to bargain collectively.

A. Wrongful Discharge

All three wrongful discharge cases decided by the Alaska Supreme Court in 1989 preserved or expanded the rights of employees discharged from their employment.[272]

Perhaps the most significant development in the field of wrongful discharge involved the court's decision in *Jones v. Central Peninsula General Hospital,* which examined the impact of employee policy manuals upon at-will employment agreements.[273] The court held, inter alia, that a policy manual issued by an employer may be incorporated into an employment agreement, thus bringing Alaska law in line with authority in the vast majority of other states.[274] The court supported its decision by citing other courts which have held that the provisions of policy manuals constitute an offer of a unilateral contract, and that an employee's retention of employment constitutes an

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270. *Id.* at 1239-40 (citing ALASKA STAT. § 28.15.181(c)(3)(A) (1989), which provides that if a person is convicted of driving while intoxicated three times within ten years, the revocation period shall be at least ten years).

271. *Id.* at 1240.

272. For more in-depth analyses of the state of the law on wrongful dicharge and employment-at-will in Alaska, see Perspective, *Employment At Will in Alaska: The Question of Public Policy Torts,* 6 ALASKA L. REV. 269 (1989); Perspective, *Shelter from the Storm: The Need for Wrongful Discharge Legislation in Alaska,* 6 ALASKA L. REV. 321 (1989).

273. 779 P.2d 783 (Alaska 1989). The opinion also presents a helpful discussion of the circumstances in which supervisors are entitled to a conditional privilege to the defamation claims of employees, and of the actions which constitute abuse of that conditional privilege. *Id.* at 789-91.

274. *Id.* at 785-88. Among the jurisdictions recognizing that a policy manual may be incorporated into an employment agreement are Alabama, Arizona, California, Connecticut, Illinois, Maryland, Michigan, Minnesota, New Jersey, New Mexico, New York, Ohio, Oregon, Pennsylvania, South Dakota, Tennessee, Washington and Wisconsin. *Id.* at 785-86.

acceptance of that offer.[275] In cases such as *Jones,* which involve an at-will employment agreement and a policy manual providing that employees may be terminated only for good cause, the effect of this holding will be to protect employees from firings not made for good cause.

The court similarly broadened employees' protection in *Thorstenson v. ARCO Alaska, Inc.*[276] *Thorstenson* arose when a terminated employee, after signing an agreement with his former employer not to file a wrongful termination claim in return for a monetary allowance, brought a wrongful termination action against his former employer.[277] Relying upon the Restatement (Second) of Contracts, the court held that summary judgment for the employer was inappropriate because there existed a genuine issue of material fact concerning whether Thorstenson "was fully aware of the facts surrounding his termination at the time he allegedly ratified his termination."[278] The court noted that Thorstenson's failure to "tender back" the monetary allowance prior to his suit for rescission of the agreement did not prevent his suit.[279] The "tender back rule" was created to protect the defendant in an action for rescission.[280] The court argued that the employer would be adequately protected if Thorstenson was later required to "tender back" his termination allowance with interest.[281]

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275. *Id.* at 786 (citing, inter alia, Pine River State Bank v. Mettile, 333 N.W.2d 622, 626 (Minn. 1983)).

276. 780 P.2d 371 (Alaska 1989).

277. *Id.* at 372-74.

278. *Id.* at 375. The court relied upon sections 380(2) and 381(2) of the Restatement (Second) of Contracts (1981).

> (2) The power of a party to avoid a contract for mistake or misrepresentation is lost if after he knows or has reason to know of the mistake or of the misrepresentation if it is non-fraudulent or knows of the misrepresentation if it is fraudulent, he manifests to the other party his intention to affirm it or acts with respect to anything that he has received in a manner inconsistent with disaffirmance.

RESTATEMENT (SECOND) OF CONTRACTS § 380(2) (1981).

> (2) The power of a party to avoid a contract for misrepresentation or mistake is lost if after he knows of a fraudulent misrepresentation or knows or has reason to know of a non-fraudulent misrepresentation or mistake he does not within a reasonable time manifest to the other party his intention to avoid it. The power of a party to avoid a contract for non-fraudulent misrepresentation or mistake is also lost if the contract has been so far performed or the circumstances have otherwise so changed that avoidance would be inequitable and if damages will be adequate compensation.

RESTATEMENT (SECOND) OF CONTRACTS § 381(2) (1981).

279. *Thorstenson,* 780 P.2d at 375.

280. " 'Tender of the benefits received under an agreement is ordinarily a prerequisite to an action at law for rescission of the agreement.' " *Id.* (quoting Knaebel v. Heiner, 663 P.2d 551, 554 (Alaska 1983)).

281. *Id.*

In *Reed v. Municipality of Anchorage,*[282] the court held that Alaska's "whistle blowing" statute, which prohibits retaliatory discharge in some instances,[283] does not create a private cause of action for individuals discharged in retaliation for complaining about violations of health and safety standards.[284] The court held, however, that the employee still retains the common law right to sue for breach of the implied covenant of good faith and fair dealing, because the statute does not show legislative intent to preclude an employee from suing on his own behalf.[285]

B. Workers' Compensation

The court addressed many workers' compensation cases in 1989. These cases are discussed in the order that the various issues would be encountered by an attorney in the course of a typical case: scope of liability, statute of limitation, benefit calculation and exclusivity of an employer's liability under the Alaska Workers' Compensation Act (the "Act").[286]

In order for an employer/employee relationship to come within the purview of the Act, an express or implied contract of employment must exist.[287] In *Childs v. Kalgin Island Lodge,*[288] the court was required to determine whether the Alaska Workers' Compensation Board (the "Board") had applied the correct legal test in deciding that the claimant was not an employee. The ultimate decision as to whether an employment relationship exists should be made by considering all the factors in light of the surrounding circumstances.[289] In reversing the Board's decision, the court found that the Board had failed to determine whether the person who had allegedly offered the job had authority to hire the claimant, and whether an offer and acceptance had been made.[290] In addition, the court determined that the Board had mistakenly failed to consider whether the injury occurred

282. 782 P.2d 1155 (Alaska 1989).

283. ALASKA STAT. § 18.60.089 (1986) (providing that "[a] person may not discharge or discriminate against an employee because the employee has filed a complaint or instituted a proceeding related to the enforcement of occupational safety and health standards . . .)."

284. *Reed,* 782 P.2d at 1157. ("Courts uniformly hold that health and safety legislation such as [ALASKA STAT. § 18.60.089] does not create a private cause of action *in the absence of explicit language to that effect.*").

285. *Id.* at 1158-59 (citing Mitford v. de Lasala, 666 P.2d 1000, 1006 (Alaska 1983) ("every contract imposes upon each party a duty of good faith and fair dealing in its performance or enforcement")).

286. ALASKA STAT. §§ 23.30.005-23.30.270 (1984).

287. Whitney-Fidalgo Seafoods, Inc. v. Beukers, 554 P.2d 250, 252 (Alaska 1976).

288. 779 P.2d 310 (Alaska 1989).

289. *Id.* at 314.

290. *Id.*

during a "tryout period" of employment, which would therefore have rendered it compensable as a matter of law.[291]

The Act creates a presumption that a claim for compensation falls within its provisions in the absence of substantial evidence to the contrary.[292] Before this presumption attaches, however, a claimant must establish some preliminary link between his disability and his employment.[293] In *Resler v. Universal Services, Inc.*,[294] the court concluded that a plaintiff's mere showing that his injury occurred at work *will* suffice to establish this link.[295] The court held that the resulting presumption of compensability was overcome in this case, however, by Resler's lack of credibility coupled with the testimony of witnesses that her injury was not work related.[296]

In *Pioneer Construction v. Conlon*,[297] another case defining the scope of liability under the Act, the court held that an injured equipment operator who still had the capacity to supervise employees at his own business was entitled to compensation for a temporary partial disability.[298] The court also concluded that the Board had mistakenly failed to reduce the claimant's self-employment earnings to reflect the value of his wife's services to his company, since her services were an out-of-pocket business cost which the claimant would have had to pay had his wife not gratuitously provided the services.[299] The court upheld the Board's decision to include the company's depreciation deductions in calculations of the claimant's self-employment wage, however, citing the Board's broad discretion in determining a claimant's wage-earning capacity.[300]

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291. *Id.* at 315 (citing Laeng v. Workmen's Comp. Appeals Bd., 6 Cal. 3d 771, 494 P.2d 1, 100 Cal. Rptr. 377 (1972)).

292. Section 23.30.120(a) of the Alaska Statutes provides that "[i]n a proceeding for the enforcement of a claim for compensation under this chapter it is presumed, in the absence of substantial evidence to the contrary, that (1) the claim comes within the provisions of this chapter . . . ." ALASKA STAT. § 23.30.120(a) (Supp. 1989).

293. Burgess Constr. Co. v. Smallwood, 623 P.2d 312, 316 (Alaska 1981).

294. 778 P.2d 1146 (Alaska 1989).

295. *Id.* at 1148-49 (citing *Smallwood,* 623 P.2d at 316 n.4).

296. *Id.* at 1150.

297. 780 P.2d 995 (Alaska 1989).

298. *Id.* at 997 (citing ALASKA STAT. § 23.30.200 (Supp. 1989); London v. Fairbanks Mun. Utils., Employers Group, 473 P.2d 639, 641-42 (Alaska 1970)). The court noted that actual post-injury earnings raise a presumption of actual earning capacity, and that this presumption may be rebutted with "evidence showing that [the post-injury earnings] are an unreliable indicator of earnings capacity." *Id.* (citing Hewing v. Peter Kiewit & Sons, 586 P.2d 182, 186 (Alaska 1978)).

299. *Id.* at 1000.

300. *Id.* at 998.

In *Moretz v. O'Neill Investigations,*[301] the court stated that a worker is entitled to compensation for prejudgment interest on medical expenses that the claimant's private insurer paid on his behalf prior to the Board's decision that the injury was compensable.[302] The court specifically held that "workers' compensation claimants are entitled to the time value of the compensation for their injuries" and the fact that the claimant's expenses were paid by a private medical insurer instead of by the claimant does not change this right to recover prejudgment interest.[303] The court noted that it is for the claimant and the insurer, not the Board, to decide how the interest is divided between them.[304]

Two additional decisions considering the scope of liability in workers' compensation cases are largely confined to their facts. In *Kodiak Oilfield Haulers v. Adams,*[305] the court affirmed the Board's decision that medical travel for treatment of a work-related injury is covered under the Act.[306] However, under the multi-part balancing test set out in *Anchorage Roofing Co. v. Gonzales,*[307] the court affirmed the Board's denial of benefits to an employee for injuries he sustained while returning from a trip for medical treatment because his five-day delay in returning home from the trip ended the compensability of injuries incurred during the return trip.[308]

In *Clark v. Municipality of Anchorage,*[309] the court interpreted an agreement setting forth the employer's coverage obligations. It determined that, for the employer to deny coverage of medical expenses, there must be a finding by the Board that the treatment in question is not reasonable, necessary or related to the employee's injury.[310] Because the Board had made no finding as to whether Clark was or was not disabled, the court reversed the Board's denial of her claim.[311] The court also held that a compromise and release signed by the

301. 783 P.2d 764 (Alaska 1989).

302. *Id.* at 766.

303. *Id.* at 765.

304. *Id.*

305. 777 P.2d 1145 (Alaska 1989).

306. *Id.* at 1148 (citing 1 A. LARSON, LAW OF WORKMEN'S COMPENSATION § 13.13 (1986)). *See also* ALASKA STAT. § 23.30.265 (1984).

307. 507 P.2d 501, 507 (Alaska 1973). In determining whether an employee's trip arises out of the course of employment, the court stated that "there is the need . . . to balance a variety of factors such as the geographic and durational magnitude of the deviation in relation to the overall trip, past authorization or toleration of similar deviations, the general latitude afforded the employee in carrying out his job, and any risks created by the deviation which are causally related to the accident." *Id.*

308. *Kodiak,* 777 P.2d at 1149.

309. 777 P.2d 1159 (Alaska 1989).

310. *Id.* at 1161.

311. *Id.* at 1160-61.

claimant[312] covered "scheduled" injuries to her upper and lower extremities under the standard articulated in *Witt v. Watkins,*[313] and that Clark was therefore not entitled to permanent partial disability for these injuries.[314]

In *Fox v. Alascom, Inc.,*[315] a case involving the statute of limitations for workers' compensation claims, the court considered when the statute of limitations begins to run for claimants suffering from work-related nervous breakdowns. Rejecting the decision of the Board and the superior court that the period begins to run when the claimant begins to suffer from work-related stress, the court concluded that the period commences when the claimant becomes aware of the work-related injury.[316] Relying upon *Alaska State Housing Authority v. Sullivan,*[317] the court held that a claimant becomes aware of her injury for purposes of the statute of limitations when she actually knows of the injury or when a reasonably prudent claimant in her place would have known of the injury.[318]

In *Pan Alaska Trucking v. Crouch,*[319] another case involving the statute of limitations for workers' compensation claims, the court considered whether an amended statute,[320] requiring workers' compensation claimants to request a hearing within two years of the employer's controversion of their claim, applied retroactively to a cause of action arising prior to its enactment. Relying upon *Matanuska Maid, Inc. v.*

312. *Id.* at 1160 ("Under the terms of the settlement, the municipality would no longer be liable to Clark for any disability compensation, past or future.").

313. 579 P.2d 1065, 1068-69 (Alaska 1978) (holding that the standard for setting aside a release should be "whether, at the time of signing the release, the releasor intended to discharge the disability which was subsequently discovered. Relevant to the determination of this question are all of the facts and circumstances surrounding execution of the release. Also relevant to the determination is whether a reasonable person in the position of the releasor under the circumstances then existing would have had such an intent.").

314. *Clark,* 777 P.2d at 1161.

315. 783 P.2d 1154 (Alaska 1989).

316. *Id.* at 1159.

317. 518 P.2d 759, 761 (Alaska 1974) (interpreting ALASKA STAT. § 23.30.100-(d)(2) (1984), the provision defining the limitations period for workers' compensation claims, to include an implied condition tolling the time to file "until by reasonable care and diligence it is discoverable and apparent that a compensable injury has been sustained"(citation omitted)).

318. *Fox,* 783 P.2d at 1158.

319. 773 P.2d 947 (Alaska 1989).

320. ALASKA STAT. § 23.30.110(c) (Supp. 1989) (effective July 1, 1982).

State,[321] the court held that the statute should apply retroactively because the amendment was merely procedural and did not affect or diminish the plaintiff's substantive rights.[322] In dissent, Justice Rabinowitz argued that the court has "unfettered discretion" to apply a statute purely prospectively, and that such a construction was preferred because the court's retroactive application of the statute imposed undue hardship on the injured employee.[323]

In *Bailey v. Litwin Corp.,*[324] the first of several cases examining benefit calculations under the Act, the court confirmed that workers' compensation awards should equal the total payments the employee would have received for his normal life expectancy.[325] The court's holding admonished the Board not to consider the possibility of a claimant's retirement when calculating a lump sum award for a permanent partial disability. In support of its position, the court stated that the "right to have compensation benefits continue into retirement years is built into the very idea of workmen's compensation as a self-sufficient social insurance mechanism."[326]

In *Estate of Ensley v. Anglo Alaska Construction, Inc.,*[327] the court was faced with the question of whether a claimant could recover temporary total disability benefits for a work-related injury even though he could no longer work as a result of non-work-related cancer. Relying upon its decision in *Burgess Construction Co. v. Smallwood,*[328] the court held that the claimant could recover employment benefits until the date his work-related injury would no longer have prevented him from working. The loss of earning capacity due to the non-work-related disease did not destroy the causal link between the work injury and the claim.[329] A contrary interpretation, the court

321. 620 P.2d 182, 187 (Alaska 1980).

322. *Pan Alaska Trucking,* 773 P.2d at 949 ("[A] change in a procedural rule is substantive in character where the change makes it appear to one just starting down the road to vindication of his cause that the road has become more difficult to travel or the goal less to be desired . . . . The same clearly cannot be said of the amendment in this case. It is only in retrospect that the obstacle posed by the two-year limit appears imposing.").

323. *Id.* at 949-52 (Rabinowitz, J., dissenting) (citing Warwick v. State *ex rel.* Chance, 548 P.2d 384, 393-94 (Alaska 1976); Plumley v. Hale, 594 P.2d 497, 503 (Alaska 1979)).

324. 780 P.2d 1007 (Alaska 1989).

325. *Id.* at 1009-11.

326. *Id.* at 1011 (quoting 2 A. LARSON, THE LAW OF WORKMEN'S COMPENSATION § 60.21(f) (1987)).

327. 773 P.2d 955 (Alaska 1989).

328. 623 P.2d 312, 317 (Alaska 1981) (holding that liability for workers' compensation benefits will be imposed when employment is established as a causal factor in the disability).

329. *Estate of Ensley,* 773 P.2d at 958.

noted, would wrongfully create a windfall to employers simply because of the employee's misfortune in developing an independent medical problem.[330]

In a holding more closely confined to the facts of the case, *Morrison v. Afognak Logging, Inc.*,[331] the court upheld a Board finding that a claimant was entitled to disability benefits based upon a twenty-five percent partial permanent disability rating, despite the fact that a doctor who had examined the claimant had assigned a higher disability rating.[332] The court found the Board's decision reasonable because the doctor had mistakenly accorded double weight to the fact that the injury was to the dominant hand of the claimant.[333]

The *Morrison* court also examined whether the court's holding in *Providence Washington Insurance Co. v. Grant*,[334] which eliminated the need to multiply the maximum amount recoverable for an injury by the percentage of impairment, should be applied retroactively to increase the maximum amount of benefits available to Morrison.[335] Relying upon the interpretation of *Grant* in *Suh v. Pingo Corp.*,[336] the court held that the claimant was entitled to apply the *Grant* rule to the one-half percent difference between the rate set by the Board and the rate which the defendant had been paying prior to the *Grant* decision, because the employer bore the risk that subsequent changes in the relevant law might increase its compensation liability.[337]

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330. *Id.* at 959. The court noted, however, that coverage should be denied if the employee's disease or condition was known at the time of the industrial accident. *Id.* at 959 n.6 (citing W. KEETON, D. DOBBS, R. KEETON & D. OWEN, PROSSER AND KEETON ON THE LAW OF TORTS § 52, at 353 (5th ed. 1984)).

331. 768 P.2d 1139 (Alaska 1989).

332. *Id.* at 1142.

333. *Id.* at 1141-42 (The doctor had assigned a rating suggested in the American Medical Association Guide to Permanent Impairment, failing to note that the AMA Guide rating added extra points for injury to the dominant hand.).

334. 693 P.2d 872 (Alaska 1985). In overruling Cesar v. Alaska Workmen's Comp. Bd., 383 P.2d 805 (Alaska 1963), the court in *Grant* held that "[t]he plain language of [section 23.30.190(a)(2) of the Alaska Statutes] does not require that the maximum amount recoverable be multiplied by the percentage of impairment to the body member or function. Instead, it states the maximum amount recoverable under the subsection without referring to the percentage of impairment." *Id.* at 877; *see* ALASKA STAT. § 23.30.190 (1984).

335. *Morrison,* 768 P.2d at 1142-43.

336. 736 P.2d 342, 347 (Alaska 1987) ("Workers who have been forced to wait for their PPD benefits until after the date of *Grant* are compensated at the higher post-*Grant* level; workers who have been compensated promptly for pre-*Grant* permanent disabilities are not. Employers who have begun payment before *Grant* are assured of the lower liability under pre-*Grant* law; employers who have delayed payment are not.").

337. *Morrison,* 768 P.2d at 1142-43.

In *McKean v. Municipality of Anchorage,*[338] the final case examining benefit calculations under the Act, the court held that the Board must redetermine a claimant's benefits when the employer changes the claimant's disability status from temporary total disability to permanent total disability. The court rejected the Board's argument that collateral estoppel bars such a redetermination, stating that the determination of compensation rates for a temporary disability is a different issue from the determination of compensation rates for a permanent disability.[339] Justices Burke and Moore dissented, arguing that collateral estoppel properly applied to the facts of the case, and that Alaska's statutes do not mandate a recalculation based solely on inflationary increases in comparable salaries.[340]

The liability of an employer under the Act is exclusive and supersedes all other liability of the employer to either the employee or anyone otherwise entitled to recover damages from the employer.[341] In *Van Biene v. ERA Helicopters, Inc.,*[342] the court held that such exclusivity does not, however, prevent an employee from bringing a negligence action against a workers' compensation insurer.[343] Relying upon the Restatement (Second) of Torts, the *Van Biene* court found that an employer's workers' compensation carrier could also be held liable for negligence to the estates of deceased workers if the insurer actually inspected and approved the working conditions of the employer prior to the accident.[344]

C. Miscellaneous

The court decided a variety of additional employment law cases which address diverse substantive areas such as vicarious liability and the duty to bargain collectively. In *Patton v. Spa Lady, Inc.,*[345] the

338. 783 P.2d 1169 (Alaska 1989).

339. *Id.* at 1171-73. The court noted that "[t]he Alaska workers' compensation statute provides the same formula to be used in determining the compensation rate for those with temporary or permanent total disability status — average weekly wage as calculated under former [section] 23.30.220 [of the Alaska Statutes] — however, the actual figures to be used in making the calculation may differ according to the employee's circumstances at the time of the determination." *Id.* at 1173.

340. *Id.* at 1173 (Burke, J., dissenting) (citing ALASKA STAT. §§ 23.30.220(3), 23.30.130 (1984)).

341. *See* ALASKA STAT. § 23.30.055 (Supp. 1989); Wright v. Action Vending Co., 544 P.2d 82, 85 (Alaska 1975).

342. 779 P.2d 315 (Alaska 1989).

343. *Id.* at 321.

344. *Id.* at 322. *See* RESTATEMENT (SECOND) OF TORTS § 324A (1965) (imposing liability on a defendant when the defendant negligently performs an undertaking to render services to a third party).

345. 772 P.2d 1082 (Alaska 1989).

court held for the first time that an employer who hires an independent contractor may be vicariously liable to a person who is injured on the business premises by an unsafe condition resulting from the independent contractor's negligence.[346] In reaching this decision, the court relied on section 422 of the Restatement (Second) of Torts,[347] which provides an exception to the general common law rule that an employer is not vicariously liable for the torts of its independent contractor.[348] Justice Rabinowitz offered three policy reasons for this extension of tort law in cases where the independent contractor performs his work on the employer's property: (1) assigning liability to the owner of the business ensures that a financially responsible person is available to compensate the injured victim; (2) the owner is usually in a better position to guard against risks of injury; and (3) business owners are often in a better position than the injured party to contract for insurance or indemnification to cover any damages caused by an independent contractor's negligence.[349]

In *Vail v. Coffman Engineers, Inc.*,[350] the court interpreted an Alaska statute which required that an employer provide "return transportation" to a terminated employee if that employee was originally recruited from out of state.[351] In affirming the superior court's decision, a bare majority of the court held that this statute requires that employers provide return transportation only to employees whom the employer paid to relocate at the time of hire, and does not require that the employer pay return transportation expenses for the employee's family or belongings.[352] This holding invalidated a regulation issued by the Alaska Department of Labor which defined "return transportation" to include "all transportation and costs as originally furnished to, financed for, or provided to an employee by an employer."[353] In dissent, Justice Compton argued that the Department of Labor's longstanding definition of "return transportation" should not be overruled because it is consistent with the legislative purpose of protecting employees' expectations that an employer will pay for the same costs upon termination as upon hiring.[354]

346. *Id.* at 1084.

347. RESTATEMENT (SECOND) OF TORTS § 422 (1965).

348. *Patton*, 772 P.2d at 1083 (citing Sievers v. McClure, 746 P.2d 885, 889 n.6 (Alaska 1987)).

349. *Id.* (citing W. KEETON, D. DOBBS, R. KEETON & D. OWEN, PROSSER AND KEETON ON THE LAW OF TORTS §§ 70-71, at 500, 509-12 (5th ed. 1984)).

350. 778 P.2d 211 (Alaska 1989).

351. ALASKA STAT. § 23.10.380(a) (1984).

352. *Vail*, 778 P.2d at 213-14.

353. *Id.* at 214 (quoting ALASKA ADMIN. CODE tit. 8, § 20.030(1) (Oct. 1988)).

354. *Id.* 778 P.2d at 214-15 (Compton, J., dissenting).

One of the most fundamental principles of labor law is that an employer of unionized labor who implements unilateral changes in the terms and conditions of employment without first consulting the union violates the duty to bargain collectively.[355] Once an impasse has been reached following a breakdown in good faith bargaining over proposed changes in the conditions of employment, however, the employer may unilaterally implement new terms of employment, provided they were previously offered to the union in the course of the bargaining.[356] The court, in *Alaska Public Employees Association v. State,*[357] applied this principle in holding that the state's unilateral change of wage and employment conditions, after an impasse had been reached in good faith negotiations, did not violate the Public Employee Relations Act.[358] Because the affected employees had no right to be paid according to the terms of the original contract, the court also held that the reduction in employees' compensation did not constitute deprivation of property without just compensation under the Alaska Constitution.[359]

In *Public Employees' Local 71 v. State,*[360] another case involving the Public Employment Relations Act, the court construed section 23.40.215(a) of the Alaska Statutes as providing that the monetary terms of a state collective bargaining agreement are not effective until funds have been appropriated by the state legislature.[361] The court also determined that the state had not violated its duty to bargain in good faith when the governor sought across-the-board budget cuts that effectively eliminated the union's bargained for increase in pay, since the proposed budget reductions did not specifically include funds earmarked for the employees' pay raise.[362]

The court addressed the scope of an arbitrator's authority in *Sea Star Stevedore Co. v. International Union of Operating Engineers, Local 302,*[363] holding that an arbitrator does not have the power to reach the merits of a grievance not submitted to him.[364] The court found that while it was proper for an arbitrator to adjudicate on remand a question concerning the meaning of a reinstatement order he had previously issued, the arbitrator had exceeded his jurisdiction when he

355. Alaska Pub. Employees Ass'n v. State, 776 P.2d 1030, 1033 (Alaska 1989) (citing First Nat'l Maintenance Corp. v. NLRB, 452 U.S. 666, 674 (1981); NLRB v. Katz, 369 U.S. 736, 742-43 (1962)).

356. *Id.*

357. 776 P.2d 1030 (Alaska 1989).

358. *Id.* at 1033; *see* ALASKA STAT. §§ 23.40.070-.260 (1984); ALASKA CONST. art. I, § 18.

359. *Alaska Pub. Employees Ass'n,* 776 P.2d at 1033-34.

360. 775 P.2d 1062 (Alaska 1989).

361. *Id.* at 1063-64. *See* ALASKA STAT. § 23.40.215(a) (1984).

362. *Public Employees' Local 71,* 775 P.2d at 1064.

363. 769 P.2d 428 (Alaska 1989).

364. *Id.* at 430-31.

issued an additional order which reached the merits of a subsequent economic layoff. The court concluded that the propriety of the subsequent economic layoff should have been submitted to a subsequent arbitration.[365]

Finally, in *Hatten v. Union Oil Co.*,[366] an action for intentional interference with contractual rights, the court determined that a material issue of fact existed as to the predominant motive of the defendant in interfering with the claimant's employment with an independent contractor.[367] The court therefore held that summary judgement was precluded, because under Alaska law it is the burden of the defendant in such cases to show that the predominant motive was justified.[368]

VIII. FAMILY LAW

The court was extremely active in the family law area in 1989, deciding twenty-four cases. A number of these cases involve questions arising under Alaska Rule of Civil Procedure 90.3, the Child Support Award Guidelines,[369] which became effective in 1987. The cases presented in this section are grouped into five categories: jurisdiction, property division, child support and custody, attorney's fees and parental rights.

A. Jurisdiction

In 1989 the court decided two cases dealing primarily with the issue of which state has jurisdiction over a family law case. In both cases the court demonstrated a willingness to defer jurisdiction to the other state.

The court addressed several jurisdictional issues in *Crews v. Crews*,[370] a divorce and child custody dispute. With respect to custody of the child, under section 3 of the Uniform Child Custody Jurisdiction Act,[371] a state should not assume jurisdiction unless no other state is willing or able to do so.[372] Because in the present case, Florida had proper jurisdiction over the custody issue, "[a]ny exercise of jurisdiction by Alaska would encourage the unilateral removal of children for

365. *Id.* (citing Detroit & Midwestern States Joint Bd., Amalgamated Clothing Workers of America v. White Tower Laundry and Cleaners, 353 F. Supp. 168 (E.D. Mich. 1973)).

366. 778 P.2d 1150 (Alaska 1989).

367. *Id.* at 1153.

368. *Id.* at 1152-53 (citing Alyeska Pipeline Service Co. v. Aurora Air Service, Inc., 604 P.2d 1090, 1093-94 (Alaska 1979)).

369. ALASKA R. CIV. P. 90.3.

370. 769 P.2d 433 (Alaska 1989).

371. ALASKA STAT. § 25.30.020 (Supp. 1989).

372. *Crews*, 769 P.2d at 435 (quoting UNIF. CHILD CUSTODY JURISDICTION ACT, 9 U.L.A. 145 (1988)).

the purpose of obtaining custody."[373] The court also held that because the Alaska court was declining jurisdiction, the requirement that it "communicate with other courts apparently exercising simultaneous jurisdiction, that is, Florida, was not applicable."[374]

The court did find that it would have in rem jurisdiction over the marital status of the parties, however, so long as one of the parties was "physically present in the state with an intent to remain indefinitely."[375] The court remanded the case for a determination of the issue of the party's intention to remain in Alaska.

The second jurisdictional case, *Kerr v. Kerr,*[376] involved a wife's attempt to recover child support payments from her spouse, against whom a default judgment for nonpayment had been entered in Indiana. The husband denied that the Indiana court issuing the default judgment had jurisdiction over him, claiming that his limited appearance in Indiana to contest jurisdiction was insufficient for jurisdiction to attach; and he was therefore not obligated to make the payments. Reversing the lower court's dismissal of the wife's claim, the court found that the Indiana court did have jurisdiction; the husband and wife had a marital relationship in Indiana and she still resided there.[377]

B. Property Division

In *Mann v. Mann,*[378] the court held that State Supplemental Employee Benefits ("SBS benefits") are marital property subject to division at the time of divorce. The court found that the trial court erred in drawing an analogy between social security benefits and SBS benefits and in reasoning that since social security benefits were indivisible in divorce cases, SBS benefits should not be either. The court distinguished the two types of benefits on the grounds that social security, a federal benefits program, was not divisible because of the federal preemption doctrine while no such doctrine applied to SBS benefits, a state administered program. Since the division of SBS benefits does not conflict with federal law, and since the benefits were earned during the course of the marriage, they "are . . . subject to equitable division upon divorce."[379]

373. *Id.* Section 25.30.010(5) of the Alaska Statutes sets forth the policy to "deter abductions and other unilateral removals of children undertaken to obtain custody awards." ALASKA STAT. § 25.30.010(5) (1983).

374. *Crews,* 769 P.2d at 435 (referring to ALASKA STAT. § 25.30.050(b) (1983)).

375. *Id.* at 436 (citing Perito v. Perito, 756 P.2d 895, 897-98 (Alaska 1988)).

376. 779 P.2d 341 (Alaska 1989).

377. *Id.* at 343-44.

378. 778 P.2d 590 (Alaska 1989).

379. *Id.* at 591-92.

In *Streb v. Streb,*[380] the court reversed a trial court decision requiring a former husband to reimburse his ex-wife for half of the money he withdrew from their joint bank account to cover living expenses while the couple was temporarily separated. Emphasizing the rule that marital property is not divisible until permanent separation at the earliest, the court reasoned that both spouses have "the right to manage and control marital funds" until the couple no longer operates as a financial unit.[381]

In *Richmond v. Richmond,*[382] a divided court addressed the question of how properly to value the goodwill component of an attorney's law practice for the purpose of including the property in the marital estate to be divided. The majority held that because the attorney was the sole shareholder of his firm, the firm had no marketable professional goodwill that could be sold and, therefore, the trial court erred by including it in the marital estate.[383]

Justice Rabinowitz dissented on the issue of goodwill valuation.[384] He emphasized that the attorney was the sole shareholder of a multi-lawyer firm, not a sole practitioner.[385] While he agreed that the firm would have no marketable goodwill if the attorney were dissolving a single-lawyer practice, in this case the firm was "multi-lawyer" and he argued that the majority had failed to consider whether a multi-lawyer firm has professional goodwill, the value of which should be included in the marital estate.[386]

Richmond also held that the proper value of the tangible assets of a firm is the fair market value of the equipment, not its replacement cost.[387] With respect to "rehabilitative alimony," the court held that the party requesting such an award must show an intention to use the money for the purposes of rehabilitation or training.[388] The court also

380. 774 P.2d 798 (Alaska 1989). *See infra* notes 439-40 and accompanying text for a discussion of child support issues in this case.

381. *Id.* at 802 (citing Burcell v. Burcell, 713 P.2d 802, 805 (Alaska 1983)).

382. 779 P.2d 1211 (Alaska 1989).

383. *Id.* at 1213-14. The majority recognized that the attorney's firm was "multi-lawyer" in the sense that it employed several associates. However, the firm was not deemed a "multi-lawyer" firm for the purposes of determining whether the firm's goodwill was marketable because the attorney was the sole shareholder. *Id.* at 1214 & n.3. The majority gave no opinion as to whether multi-shareholder firms have marketable goodwill.

The dissent uses the phrase "multi-lawyer" less restrictively than the majority. Justice Rabinowitz suggests that the phrase means "more than one lawyer" rather than "more than one partner." *See id.* at 1221 (Rabinowitz, J., dissenting).

384. *Id.* at 1218 (Rabinowitz, J., dissenting).

385. *Id.* at 1221 (Rabinowitz, J., dissenting).

386. *Id.* (Rabinowitz, J., dissenting).

387. *Id.* at 1214.

388. *Id.* at 1215 (citing Miller v. Miller, 739 P.2d 163, 165 (Alaska 1987)).

held that child support awards made prior to the effective date of the new Child Support Award Guidelines (the "Guidelines") can be redetermined under Alaska Rule of Civil Procedure 90.3.[389]

Schofield v. Schofield[390] marked only the second time that the supreme court modified a property division in a divorce or dissolution decree pursuant to Alaska Rule of Civil Procedure 60(b). The court found that the four factors required to modify a property division set forth in *Foster v. Foster*[391] were present in this case as well, and held that the trial court did not abuse its discretion in modifying the property division in the dissolution decree.[392]

Hartland v. Hartland[393] presented the court with several property division and procedural issues. First, the court ruled that the husband could not appeal the valuation of his retirement benefits on the grounds that there was not sufficient evidence to support the valuation when it was the husband himself who failed to provide the necessary evidence.[394] Second, the court ruled that the trial court had erred in not discounting the future benefits of the husband's retirement pension to present value.[395] Third, the court stated that the trial court failed to apply either of the two standard methods for dividing a pension, the discounted lump sum method or the retained jurisdiction method.[396]

Next, the court interpreted section 25.24.160(6) of the Alaska Statutes by declaring, "[u]nder the concept of no-fault divorce, a court cannot rely on one party's fault in ending the marriage to justifying [sic] awarding a greater portion of the marital property to the other spouse."[397] It is permissible, however, for a court to reduce one partner's share to reflect the considerable amount of marital assets that the husband used while separated from the wife.[398] While a court does

389. *Id.* at 1217 (citing ALASKA STAT. § 25.24.170(b) (Supp. 1989)). *See* ALASKA R. CIV. P. 90.3.

390. 777 P.2d 197 (Alaska 1989).

391. 684 P.2d 869 (Alaska 1984). The four factors are:

(1) [T]he fundamental, underlying assumption of the dissolution agreement had been destroyed,
(2) the parties' property division was poorly thought out,
(3) the property division was reached without the benefit of counsel,
(4) the marital residence was the parties' principal asset.

Id. at 872.

392. *Schofield,* 777 P.2d at 202.

393. 777 P.2d 636 (Alaska 1989).

394. *Id.* at 640.

395. *Id.* at 641. The court did not express an opinion as to which discount rate to use and directed the trial court to determine the appropriate rate. *Id.* at n.4.

396. *Id.* at 641. (The court can award the pension benefits, to one party or both, as a lump sum, discounted to present value. The court can also retain jurisdiction over the payments and have them "made to the parties as retirement benefits come due.").

397. *Id.* at 642.

398. *Id.*

have the authority, therefore, to recapture dissipated marital assets, it must take care not to double count by both recapturing the value of property and awarding the wife a larger share because assets have been dissipated.[399] The court also concluded that vested or earned compensation that has yet to be received shall be classified as divisible marital property and that, therefore, the husband's deferred commissions should be included in the marital estate.[400]

With respect to attorney's fees, the court remarked that under the usual rule in divorce cases, where both parties have similar educational levels and similar financial situations, neither party will be awarded attorney's fees. However, the divorce exception to Alaska Rule of Civil Procedure 82 is inapplicable in post-judgment modifications and enforcement motions. Because the husband had unnecessarily delayed the action, causing needless costs to be incurred, the trial court did not abuse its discretion in awarding attorney's fees to the wife.[401]

On the husband's claim that he was entitled to relief from judgment under Alaska Rule of Civil Procedure 60(b)(6), the court came to the conclusion that relief under the Rule was reserved for extraordinary cases, not merely cases where relief would not be granted under the other subsections of Rule 60(b) or "when a party takes a deliberate action they later regret as a mistake."[402]

Finally, with respect to the contempt action for delay in transferring title to certain stock, the court held that a party shall not be excused from otherwise contemptible behavior if the party willfully failed to follow the court's order on the advice of counsel.[403] In ascertaining the amount of the decline in the stock's value caused by the husband's delay, the court decreed that "[t]he appropriate measure of damages is the difference in the stock's value when . . . [the wife] would have sold it had . . . [the husband] complied with the court's order and its value when she actually sold it within a reasonable time of receiving the certificates."[404]

In *Crafts v. Morgan,*[405] the court established that a spouse would not be bound to a property division settlement that waived her rights to the marital property if she did not understand the nature of the

399. *Id.* at 643.

400. *Id.* (citing Schober v. Schober, 692 P.2d 267 (Alaska 1984)).

401. *Id.* at 644. *See* ALASKA R. CIV. P. 82.

402. *Hartland,* 777 P.2d at 645. *See* ALASKA R. CIV. P. 60(b).

403. *Hartland,* 777 P.2d at 647 (citing McKnight v. Rice, Hoppner, Brown & Brunner, 678 P.2d 1330, 1334 & n.2 (Alaska 1984) (Advice of counsel is not a shield when a party ignores a court order.)).

404. *Id.* at 648.

405. 776 P.2d 1049 (Alaska 1989).

dissolution agreement she had signed.[406] The court based its ruling on the following findings as required by section 25.24.230(a)(1) of the Alaska Statutes: (1) her command of the English language did not, in itself, guarantee that she understood her marital property rights, (2) there was no evidence that she was advised of her marital rights during her first divorce and (3) there was no evidence that she received advice concerning her marital rights until after she had signed the dissolution.[407] The court also noted that the trial court had the discretion to exclude from marital assets any property accumulated during the marriage that had been acquired with pre-marital assets.[408] On the issue of attorney's fees, the court reversed the trial court's award to the husband, on the grounds that the husband was no longer the prevailing party. The court reiterated that "the divorce exception to Alaska Rule of Civil Procedure 82 does not apply to post-judgment motions involving only money and property division."[409]

C. Child Support and Custody

In *Garding v. Garding,*[410] the court addressed the circumstances under which the Alaska courts may modify out-of-state custody decrees. The court first addressed the jurisdictional issue, reiterating the principle that an Alaska court may modify an out-of-state decree so long as (1) Alaska has jurisdiction,[411] and (2) the state from which the decree emanated does not.[412]

In order to modify any custody award, the court must find that a change of circumstances has occurred requiring modification and that such modification must be in the best interests of the children.[413] However, unlike the initial custody award, modification of a pre-existing award will not be granted unless a change of circumstances can be demonstrated.[414] Reversing the lower court's modification of the award which granted custody to the father, the court held that it is not sufficient to show merely that the moving parent's position has improved, particularly when a similar improvement has occurred with

406. *Id.* at 1054.

407. *Id.* at 1053-54. *See* ALASKA STAT. § 25.24.230(a)(1) (Supp. 1989).

408. *Id.* (citing Rose v. Rose, 755 P.2d 1121, 1123 (Alaska 1988)). *See* Matson v. Lewis, 755 P.2d 1126, 1128 (Alaska 1988).

409. *Crafts,* 776 P.2d at 1055.

410. 767 P.2d 183 (Alaska 1989).

411. *Id.* at 184 n.1 (citing ALASKA STAT. § 25.30.020(a)(1)(A) (Supp. 1989)). The Alaska court had jurisdiction because Alaska was the children's home state at the time the modification proceeding was commenced. *Id.*

412. *Id.* (citing MONT. CODE ANN. § 40-4-211(a) (1987)). Montana lost its modification jurisdiction when both the parents and the children moved to Alaska. *Id.*

413. *Id.* at 184 (citing ALASKA STAT. § 25.20.110 (1983)).

414. *Id.* at 184-85.

respect to the non-moving parent.[415] The dissent by Justice Burke criticized the majority for "callous indifference" to the children, stating that the majority had erroneously emphasized the changes in circumstances requirement and suggesting instead that the court's primary focus should be promoting the best interests of the children.[416]

The court relied upon *Garding* in *House v. House,*[417] finding that a "custodial parent's decision to leave the state with the children [while the non-custodial parent remains in Alaska] constitutes a substantial change in circumstances."[418] Having found the requisite change in circumstances, the court upheld the trial court's denial of the mother's modification request, on the grounds that the children's interests would be best served by remaining with their father.[419] With respect to the mother's payment of child support, the court commented that it would be proper to consider the non-custodial parent's cost of transportation required for visitation in determining child support payments.[420] Finally, the court reversed the trial court's award of attorney's fees to the father because they were erroneously awarded under the prevailing party standard.[421]

The court also upheld the trial court's refusal to grant a continuance for a change of custody hearing despite the fact that the custody investigator's report was incomplete. Although the pre-trial order

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415. *Id.* at 186.

416. *Id.* (Burke, J., dissenting) (citing Poesy v. Bunney, 98 Idaho 258, 261-62, 561 P.2d 400, 403-04 (1977)).

417. 779 P.2d 1204 (Alaska 1989). *See supra* text accompanying notes 410-416.

418. *Id.* at 1207-08. The court's finding that the change in circumstances was substantial bears comment. The standard for modifying a custody order requires only a "change in circumstances," not a "substantial" one. ALASKA STAT. § 25.20.110 (1983). However, in *House,* the court cites this statute erroneously by including the word "substantial." 779 P.2d at 1207. The precedent for requiring a "substantial" change is found in King v. King, 477 P.2d 356, 360 (Alaska 1970) ("The concept of 'substantial change' of circumstances . . . may be considered simply a rule of judicial economy designed to discourage discontented parents from continually renewing custody proceedings."). *See supra* notes 410-16 and accompanying text discussing Garding v. Garding, 767 P.2d 183 (Alaska 1989), where both the majority and dissent use the phrases "substantial change in circumstances" and "change in circumstances" interchangeably.

419. *House,* 779 P.2d at 1208.

420. *Id.* at 1209.

421. *Id. See* L.L.M. v. P.M., 754 P.2d 262, 265 (Alaska 1988) ("attorney's fees should only be awarded where one party acts 'willfully and without just excuse.' "). In divorce cases, attorney's fees are awarded on the basis of the financial situations and earning capacities of the parties involved, not the prevailing party standard. Bergstrom v. Lindback, 779 P.2d 1235, 1238 (Alaska 1989) (citing L.L.M. v. P.M., 754 P.2d 262, 263-64 (Alaska 1988)).

provided that the hearing would not be scheduled until the investigator's report was complete, the court held that the parent requesting the continuance had "reasonable opportunity in court to introduce evidence and contest the other side's evidence" and would not be "deprived of a substantial right or seriously prejudiced by the lower court's ruling."[422]

The dissent, written by Justice Rabinowitz and joined by Chief Justice Matthews, criticized the majority's finding that the mother was not prejudiced by the denial of a continuance. Justice Rabinowitz reasoned that the mother was not able to adequately prepare her case, particularly as a pro se litigant, because she did not have an opportunity to study the investigator's report, prepare a cross-examination or hire an expert. The dissent also noted that there had been no showing that an emergency had occurred that warranted the trial court's scheduling the hearing before the investigator's report was complete.[423]

In *Charlesworth v. Child Support Enforcement Division,*[424] the court held that, on a motion to modify child support payments, the statutory "material change in circumstances" requirement was met by the state's adoption of the new Child Support Award Guidelines of Alaska Rule of Civil Procedure 90.3.[425] The court also held that the new child support guidelines shall be applied retroactively in calculating awards for child support.[426]

The court also interpreted the Rule 90.3(f) requirement that a child reside with a parent "for a specified period of at least 25 percent of the year" in order for that parent to have shared custody or joint

422. *House,* 779 P.2d at 1206-07 (quoting Barrett v. Gagnon, 516 P.2d 1202, 1203 (Alaska 1973)) (holding that a parent must show that she has been "deprived of a substantial right or seriously prejudiced by the lower court's ruling" before the court will find an abuse of discretion by the trial court).

423. *Id.* at 1210 (Rabinowitz, J., dissenting).

424. 779 P.2d 792 (Alaska 1989).

425. *Id.* at 793. In 1987 the state adopted Alaska Rule of Civil Procedure 90.3, which superseded the previous child support guidelines. Section 25.24.170 of the Alaska Statutes now includes a section that states: "For the purposes of a motion to modify or terminate child support, the adoption or enactment of guidelines or a significant amendment to guidelines for determining support is a material change in circumstances, if the guidelines are relevant to the motion." ALASKA STAT. § 25.24.170(b) (Supp. 1989) (amended Aug. 25, 1988). *See* Patch v. Patch, 760 P.2d 526, 529 (Alaska 1988) (a party must demonstrate that "there has been a material and substantial change in circumstances affecting the movant's ability to pay"). *See also infra* notes 428-30 and accompanying text.

426. *Charlesworth,* 779 P.2d at 794.

custody, holding that unless the decree actually stipulates such a period, a parent cannot claim shared or joint custody, irrespective of how long the child actually resides with the parent.[427]

In *Arndt v. Arndt,*[428] the court held that the combination of the father's fifty percent decrease in income, the mother's increased income and decreased cost of living and a change in the custody arrangement were sufficient to constitute a "material change in circumstances," thus supporting consideration of the father's motion to modify the child support decree.[429] The court also restated its position that a trial court's award of an unequal distribution of marital property simply to ease one party's responsibility to provide child support constitutes reversible error. As in this case, however, where there is no evidence that an unequal distribution occurred, the court reaffirmed that the "[d]ivision of marital property by the court is separate and distinct from questions of child support."[430]

Under the Guidelines, child support awards are based primarily on a parent's adjusted annual income, which is defined as total income from all sources less mandatory deductions such as federal income tax.[431] In *Bergstrom v. Lindback,*[432] the court held that the parent's actual tax liability should be deducted from total income rather than the amount withheld by the employer. The court further held that where deferred compensation is included in the total income figure, the amount must be reduced by the income taxes which would have been owed had the deferred compensation been part of that year's income for tax purposes. In addition, the court held that the determination of the parties' past child support, as governed by Alaska Rule of Civil Procedure 90.3, "should be based on the parties' actual past income."[433]

The court decided an issue of first impression in *Child Support Enforcement Division v. Gammons.*[434] Section 47.23.120(a) of the Alaska Statutes requires that a parent owing a duty of child support reimburse the state for any assistance granted by the state on his child's behalf. The parent may not, however, be required to pay any more than is provided for under a previously entered child support

427. *Id.* at 794-95 (quoting ALASKA R. CIV. P. 90.3(f)).

428. 777 P.2d 668 (Alaska 1989).

429. *Id.* at 670.

430. *Id.*

431. ALASKA R. CIV. P. 90.3(a)(1)(A).

432. 779 P.2d 1235 (Alaska 1989). *See infra* note 482 and accompanying text for a discussion of an attorney's fees issue in this case.

433. *Id.* at 1236-37 (The parties had agreed to the application of Rule 90.3 in determining the amount of the child support award.).

434. 774 P.2d 181 (Alaska 1989).

order.[435] An order requiring no support from the non-custodial parent is not a "support order" under Alaska law.[436] The court, after examining the law in other states, found that the Alaska system would be circumvented if the court were to hold to the contrary.[437] Because a non-custodial parent has both common law and statutory duties to support a child regardless of a no-support order, that parent will therefore be liable for reimbursement to the state for any assistance provided by the Child Support Enforcement Division ("CSED") to the child.[438]

Although a parent's obligation to support his children generally terminates at the age of majority, in *Streb v. Streb*[439] the court held that, by reason of a child's physical or mental disability, a parent may continue to be obligated to support the child beyond the age of majority. The court found that such a determination could be made in a divorce proceeding, and need not be sought in a separate action. Any award should be based on the amount necessary to provide for "reasonable child care expenditures" and not on the parent's total income available.[440]

Another matter involving support for post-majority children was presented in *Propst v. Propst,*[441] a case that sharply divided the court three to two. The majority held that under Alaska Rule of Civil Procedure 60(b)(5) a father may seek relief from a modified support order to pay post-majority education, provided that the motion is brought in timely fashion and the granting of relief would not "inequitably disturb an interest of reliance on the judgment."[442] This case was factually similar to *Lawrence v. Lawrence,*[443] in that the child support order providing post-majority education payments had been issued before the supreme court's 1984 decision in *Dowling v. Dowling,*[444] which held that the court would no longer enforce post-majority child support for education.[445]

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435. ALASKA STAT. § 47.23.120(a) (1984).

436. *Gammons,* 774 P.2d at 184-85.

437. *Id.* at 184 ("Parents could agree to no-support orders in an attempt to evade supporting their children, knowing that the state would provide for their children and knowing that the state would have no recourse against them.") (citing, with approval, Department of Revenue v. Hubbard, 720 P.2d 1177 (Mont. 1986); Roberts v. Roberts, 592 P.2d 597 (Utah 1979)).

438. *Id.*

439. 774 P.2d 798 (Alaska 1989). *See supra* notes 380-81 and accompanying text for a discussion of property division issues in this case.

440. *Id.* at 800-01.

441. 776 P.2d 780 (Alaska 1989).

442. *Id.* at 783 (citing RESTATEMENT (SECOND) OF JUDGMENTS § 74 (1982)).

443. 718 P.2d 142 (Alaska 1986).

444. 679 P.2d 480 (Alaska 1984).

445. *Propst,* 776 P.2d at 782 (citing *Dowling,* 679 P.2d at 483).

In *Propst,* the court held that the father had sought relief within a reasonable time, even though he waited five years after the modification to file his motion. The court excused this delay for two reasons. First, the mother agreed at the time of modification not to raise the passage of time as a waiver to the father's right to appeal. Second, the father had relied on the CSED's representations that, presumably in accordance with *Dowling,* the CSED would not enforce the post-majority educational support award.[446] When the CSED reversed its position in 1986 and sought support payments, the father filed an appeal two months later.[447] The court also held that although the children relied on their father's support for college funding, there was insufficient evidence to show that they had relied on the 1981 support order. The court therefore found that the superior court had abused its discretion in not granting relief from the support order.[448]

The dissent, authored by Justice Rabinowitz and joined by Chief Justice Matthews, strongly disagreed with the court's holding, finding it inexcusable that the father waited nearly two and one-half years after the court's decision in *Dowling* to file an appeal of the support order modification. The dissent rejected both of the majority's reasons for excusing the filing delay because they neither diminished the father's post-majority educational support obligations nor furnished any basis for extending the time within which he should have sought relief under Rule 60(b)(5).[449]

Although a non-custodial parent's support obligation is generally to be calculated according to the formulae described in the Guidelines, where "good cause" exists, courts will allow variations so as to meet the child's reasonable needs without unduly burdening the parent.[450] In 1989, the court decided two cases addressing the "good cause" exception to the child support guidelines.[451] In neither case did it find good cause.[452] In *Coats v. Finn,*[453] the court declared that "good cause" was to be determined under the circumstances of each case where adherence to the prescribed formula would produce an unfair result. The court cautioned, however, that trial courts must apply

446. *Id.* at 783. The father stipulated to dismiss the appeal at that time to conserve family resources. *Id.*

447. *Id.* at 782.

448. *Id.* at 784.

449. *Id.* at 786 (Rabinowitz, J., dissenting).

450. Coats v. Finn, 779 P.2d 775, 777 (Alaska 1989).

451. A court may alter the child support award as determined under the formulae in paragraphs (a) and (b) of Rule 90.3 for cause. A non-exclusive list of examples of good cause is provided in Rule 90.3(c)(1)(A) and (c)(1)(B) and includes especially large family size, significant income of a child and adjusted parental income below the federal poverty line. ALASKA R. CIV. P. 90.3(c).

452. *Coats,* 779 P.2d 775 (Alaska 1989); Cox v. Cox, 776 P.2d 1045 (Alaska 1989).

453. 779 P.2d 775 (Alaska 1989).

careful scrutiny and not depart from the prescribed formula unless clear and convincing evidence demonstrates that "manifest injustice" would result from the rule's strict application. The court reiterated the policy behind the support guidelines, that "the noncustodial parent must contribute a fair share to satisfy the child's reasonable needs."[454]

In the second case addressing, inter alia, the "good cause" requirement, *Cox v. Cox*,[455] the court held that its earlier decision in *Malekos v. Yin*,[456] allowing a custodial parent to waive child support payments as long as there was no finding of detriment to the child, had been superseded by the provision of the Guidelines which requires the non-custodial parent to provide support for the child.[457] The parties' independent agreement on a child support arrangement was not sufficient to automatically constitute "good cause" for the purpose of allowing an exception to the application of Rule 90.3.[458] The court further ruled that it was not an abuse of discretion for the trial court to determine that a proper child support award should be a fixed amount rather than a percentage of the non-custodial parent's income.[459]

In *Nelson v. Jones*,[460] the court held that it was not an abuse of discretion for the trial court to deny a father's motion to reestablish visitation with his minor daughter. Visitation had been contingent on the father receiving psychological treatment from a specific doctor and visitation rights were terminated when that psychologist refused to keep the father as a patient because he would not admit in treatment to having sexually abused his daughter. In light of the trial court's finding that the father did sexually abuse the minor, the court held that the severity of the trial court's order was justified by the overriding need to protect the child.[461]

The court also affirmed the trial court's decision not to grant the father's motion to set aside the final judgment relating to a divorce decree under Alaska Rule of Civil Procedure 60. The father had argued that he was under duress at the time he signed the custody stipulation, had ineffective assistance of counsel and that the interests of justice required further expert testimony to be heard. The trial court was found not to have abused its discretion in finding that the father failed to prove duress where that court had the opportunity to observe the father at the drafting of the stipulation that was incorporated in

454. *Id.* at 777-79.
455. 776 P.2d 1045 (Alaska 1989).
456. 655 P.2d 728 (Alaska 1982).
457. 776 P.2d at 1047-48.
458. *Id.* at 1049.
459. *Id.*
460. 781 P.2d 964 (Alaska 1989).
461. *Id.* at 969.

the decree.[462] Although the trial court did not specifically address the father's contention of ineffective counsel, the supreme court noted that the appellant presented no support for the proposition that ineffective assistance of counsel is a ground for setting aside a civil judgment.[463] The court also found that the trial court did not abuse its discretion in denying the Rule 60 motion where further expert testimony probably would not change the result in a new trial.[464]

The court also held that the trial court did not commit clear error by including the fair market value rather than the book value of the father's business interest in the marital property.[465] The court also discussed the standard for awarding attorney's fees in an action to modify or enforce a visitation order, holding that the appropriate standard is neither the divorce judgment standard (that considers the relative economic situations of the parties) nor the prevailing party standard. Rather, fees are appropriate where the motion was unreasonable or brought in bad faith.[466]

Finally, the court held that it was not an abuse of discretion for the trial court judge to deny the father's motion for disqualification after the judge was seen socializing with the guardian ad litem in the case. The court found the trial judge's explanation that "social meetings with guardians ad litem and counsel were difficult to avoid in a community the size of Haines" to be adequate and that the trial court did not abuse its discretion in determining that prior adverse rulings against the father were not the result of personal bias developed from a nonjudicial source.[467]

Justices Rabinowitz and Matthews dissented in part, arguing that the trial court did abuse its discretion in making parental visitation contingent on an admission of sexual abuse.[468] As a consequence, the two justices also dissented with respect to the award of attorney's fees in this case since they found the father's motion to reestablish visitation not to have been brought in bad faith.[469]

In *Carter v. Novotny,*[470] the court discussed the propriety of awarding custody of a child to a non-parent, affirming the superior court's award of physical custody to the child's maternal aunt and shared custody to both the aunt and the child's father.[471] Relying on

462. *Id.* at 967-68.
463. *Id.* at 968 n.3.
464. *Id.* at 968 & n.4.
465. *Id.* at 970.
466. *Id.* at 971.
467. *Id.* at 972.
468. *Id.* (Rabinowitz, J., dissenting in part).
469. *Id.* at n.1 (Rabinowitz, J., dissenting in part).
470. 779 P.2d 1195 (Alaska 1989).
471. *Id.* at 1198-99.

Britt v. Britt,[472] the court stated that in a custody dispute between a parent and a non-parent, "the parent is to be preferred unless parental custody would be 'clearly detrimental to the child.' "[473] After receiving additional information, including a psychological evaluation of the father, the trial court found that it would be "clearly detrimental" not to transfer physical custody from the father to the aunt.[474] With respect to the shared custody aspect of the arrangement, the court extended the "child's best interests" policy, which applies to shared custody between parents, to apply as well in custody disputes between a non-parent and a parent.[475]

In *Buness v. Gillen,*[476] the court examined whether a stepparent has standing to contest custody of a child by the child's natural parent. The court held "that a non-parent who has a significant connection with the child has standing to assert a claim for custody."[477] The court based this holding on the ground that the stepparent in this case was a parent within the meaning of section 25.20.060 of the Alaska Statutes[478] because he was the child's "psychological parent,"[479] and therefore had standing to contest custody. The court reversed the superior court's partial summary judgment in favor of the natural parent and remanded for a determination of whether the welfare of the child required that the stepparent be awarded custody.[480]

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472. 567 P.2d 308 (Alaska 1977).

473. *Carter,* 779 P.2d at 1197 (quoting *Britt,* 567 P.2d at 310).

474. *Id.* at 1197 (The trial court noted that the father had "engaged in dangerous behavior with his children, including holding a firearm during an argument with another daughter.").

475. *Id.* at 1199 ("The court may award shared custody to both parents if shared custody is determined by the court to be in the best interests of the child. An award of shared custody shall assure that the child has frequent and continuing contact with each parent to the maximum extent possible." ALASKA STAT. § 25.20.060(c) (1983)).

476. 781 P.2d 985 (Alaska 1989).

477. *Id.* at 988.

478. The statute provides:

> Custody of the child. (a) If there is a dispute over child custody, either parent may petition the superior court for resolution of the matter under [sections] 25.20.060-25.20.130 [of the Alaska Statutes]. The court shall award custody on the basis of the best interest of the child. In determining the best interests of the child, the court shall consider all relevant factors including those factors enumerated in [section] 25.24.150(c).

ALASKA STAT. § 25.20.060(a) (1983).

479. *Buness,* 781 P.2d at 988. "The statutes recognize that those relationships that affect the child which are based upon psychological rather than biological parentage may be important enough to protect through custody and visitation, to ensure that the child's best interests are being served." *Id.* at 987 (quoting Carter v. Brodrick, 644 P.2d 850, 855 (Alaska 1982)).

480. The court reiterated the principle that preference should be given to parental custody, unless it would be clearly detrimental to the child. The court also stated that the superior court, when resolving a custody dispute between a non-biological parent

D. Attorney's Fees

In divorce cases, attorney's fees are awarded on the basis of the financial situations and earning capacities of the parties involved, not the prevailing party standard of Alaska Rule of Civil Procedure 82.[481] Since almost all family cases involve issues of attorney's fees, those issues are discussed in the same section as the main issue of the case. One case deserves special notice, however. Where, as in *Bergstrom v. Lindback,* the parents in a child support case are unmarried parents, the standard for awarding attorney's fees should be that of divorce cases as well, and not the prevailing party standard mandated in Rule 82.[482]

E. Parental Rights

The court decided four cases involving parental rights. Two of the cases dealt with the "child in need of aid" statute and two cases interpreted provisions of the Indian Child Welfare Act.

The first case involved section 25.23.050(a) of the Alaska Statutes which waives a parent's right of consent to the adoption of a child by another party if the parent has failed to meaningfully communicate with the child, without justifiable cause, for a period of at least one year.[483] In *In re B.S.L.,*[484] the majority held that even though the natural mother may have felt that any attempt to communicate with her daughter would have been blocked by the father and his family and therefore futile, she still was obliged to make a reasonable effort to do so. Since the mother had failed to communicate with her child over a three-year period, the court ruled that there was no "justifiable cause" to prevent the waiving of her right to consent to the adoption and thus terminated her parental rights.[485] The court also held that the existence of two different statutory mechanisms for the termination of parental rights — the standard adoption proceeding and the

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and a biological parent, must award custody to the biological parent unless, inter alia, "the welfare of the child requires that a non-parent receive custody." *Id.* at 989 (citing Turner v. Pannick, 540 P.2d 1051, 1055 (Alaska 1975)).

481. Bergstrom v. Lindback, 779 P.2d 1235, 1238 (Alaska 1989) (citing L.L.M. v. P.M., 754 P.2d 262, 263-64 (Alaska 1988)); ALASKA R. CIV. P. 82.

482. *Bergstrom,* 779 P.2d at 1238. *See supra* notes 432-33 and accompanying text for a discussion of child support issues in this case.

483. ALASKA STAT. § 25.23.050(a) (Supp. 1989).

484. 779 P.2d 1222 (Alaska 1989). *See* Note, *Abandonment v. Adoption: Terminating Parental Rights and the Need for Distinct Legal Inquiries,* 7 ALASKA L. REV. 247 (1990).

485. *Id.* at 1225-26.

"child in need of aid" proceeding[486] — violated neither equal protection nor substantive due process principles as there was a rational reason for separate proceedings in that they served different purposes.[487]

Justice Rabinowitz, joined in dissent by Chief Justice Matthews, felt that the adoptive parents had not shown by clear and convincing evidence that no "justifiable cause" existed for the mother's failure to communicate with her child.[488] The dissent cited the following factors in support of its position: (1) the mother's youth and indigency and their effect upon her efforts to communicate with her daughter, particularly because she did not reside in Alaska, (2) her lack of legal sophistication and (3) the "obstructive conduct of the natural father and several members of his family."[489]

In *A.M. v. State,*[490] the court applied the "child in need of aid" statute,[491] upholding a superior court decision to place the children of an Eskimo mother in a foster home. The record showed that: (1) the children's sole legal custodian, their father, was in jail for sexually abusing them, (2) the children would likely suffer emotional damage if they were to be returned to their mother's home and (3) the placement of the children in a foster home in Anchorage while their mother lived in Juneau did not constitute a de facto termination of the mother's visitation rights.[492]

The court clarified that under the "child in need of aid" statutes, "the other parent's acquiescence or fault in allowing the abuse to occur is not required in order to find the child to be in need of aid."[493] In addition, while the court recognized that the mother could not financially afford to visit her children regularly if they were placed in a home in Anchorage, the situation was not as burdensome as that in *D.H. v. State,* where the court ruled that placing a child in a foster home in Alabama constituted a de facto termination of visitation rights. The inconvenience to the mother was outweighed by the substantial evidence that the placement was in the children's best interest.[494]

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486. *Id.* (The mother challenged the constitutionality of sections 25.23.050, 25.23.120(c) and 25.23.130(a) of the Alaska Statutes, dealing with an adoption proceeding, and section 47.10.080(c)(3), addressing a "child in need of aid" proceeding.).

487. *Id.* at 1226-27.

488. *Id.* at 1227 (Rabinowitz, J., dissenting).

489. *Id.* at 1227, 1228-29 & n.3 (Rabinowitz, J., dissenting).

490. ALASKA STAT. §§ 47.10.010-.290 (1987).

491. 779 P.2d 1229 (Alaska 1989).

492. *Id.* at 1232-33.

493. *Id.* at 1232; ALASKA STAT. § 47.10.010(a)(2)(D).

494. A.M. v. State, 779 P.2d at 1233-34. *See* D.H. v. State, 723 P.2d 1274, 1276-77 (Alaska 1986).

Catholic Social Services, Inc. v. C.A.A.[495] presented a question of first impression as to whether Indian tribes are entitled to notice of proceedings in which a parent voluntarily relinquishes parental rights to an Indian child. Citing the absence of any provision for such notice in the Indian Child Welfare Act ("ICWA" or "the Act")[496] the court answered the question in the negative.

The case involved a mother who voluntarily relinquished her child for adoption through Catholic Social Services, a private adoption agency. The mother had experienced chronic difficulties with alcohol, which caused her to abuse the child and to have difficulty caring for her. In June of 1986, the mother signed a formal Relinquishment of Parental Rights before a probate master, and her parental rights were formally terminated by the superior court shortly thereafter.[497] The child then went to live with a non-Indian family designated by the mother.

By the time the adoptive family petitioned formally to adopt the child, the mother had received counseling and had contacted her tribe, the Cook Inlet Tribal Council ("Tribe") about the possibility of regaining her parental rights, and filed a Revocation of Relinquishment.[498] The Tribe moved to intervene and to set aside the termination decree pursuant to 25 U.S.C. § 1914.[499] The superior court granted these motions and vacated the termination, but the supreme court reversed on appeal and remanded the case to the superior court.[500]

The majority of the supreme court held, per curiam, that tribes have no right under ICWA to intervene in voluntary termination proceedings, and therefore they are not entitled to notification of such proceedings.[501] In contrast to involuntary terminations, for which tribal notice is specifically provided for,[502] the Act is silent about notice of voluntary terminations. Furthermore, the court found no legislative history supporting such a notice requirement, nor any due process implications for failing to provide notice in this case.[503]

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495. 783 P.2d 1159 (Alaska 1989) (per curiam). For a more thorough treatment of the central issues in this case, *see* Note, Catholic Social Services, Inc. v. C.A.A.: *Best Interests and Statutory Construction of the Indian Child Welfare Act,* 7 ALASKA L. REV. 203 (1990).

496. 25 U.S.C. §§ 1901-63 (1988).

497. 783 P.2d at 1161.

498. *Id.*

499. *Id.* (25 U.S.C. § 1914 (1988) allows parents or tribes to move to set aside adoption or termination decrees that violate provisions of the Act.)

500. *Id.* at 1160.

501. *Id.*

502. 25 U.S.C. § 1912(a) (1988).

503. *Catholic Social Services,* 783 P.2d at 1160.

In dissent, Justice Rabinowitz argued that the Tribe in fact has an explicit statutory right to intervene under ICWA and that a right to notice is implicit in this unqualified intervention right.[504] Given the general purpose of the Act and the interests that it seeks to protect, Justice Rabinowitz contended that the Tribe's powers are illusory without notification of voluntary termination proceedings and that the majority decision too readily allowed circumvention of tribal participation in Indian child custody proceedings.[505]

In *In re T.N.F.*,[506] a divided court held that ICWA applied to a non-Indian biological surrogate mother who wanted to withdraw her consent to her child's adoption by the child's biological Indian father. The court held that the mother could have withdrawn her consent in accordance with the Act if she had challenged the adoption within the time period specified in Alaska's statute of limitations.[507]

In holding that the child qualified as an Indian under ICWA, the court declined to adopt an "Indian family" exception to the Act.[508] Consistent with its holding in *A.B.M. v. M.H.*,[509] the court refused to adopt this exception because it focuses only on the interests of Indian parents, and Congress intended that the Act protect the interests of the Indian children, tribes and communities as well.[510] While the court acknowledged that Congress probably did not consider surrogate parent arrangements when it adopted the Act, the court declined to utilize a judicially created exception that could potentially exclude the types of cases that Congress intended the Act to cover.[511]

The court reasoned that "ICWA incorporates state statutes of limitations except in challenges based on fraud or duress which are governed by the two-year statute of limitations in [section] 1913(d)."[512] The court reached this conclusion after analyzing federal

504. *Id.* at 1162-63 (Rabinowitz, J., dissenting). The Act provides that tribes have the right to intervene in any child custody proceeding involving an Indian child at any point in the proceeding. 25 U.S.C. § 1911(c) (1988).

505. *Id.* (Rabinowitz, J., dissenting).

506. 781 P.2d 973 (Alaska 1989).

507. *Id.* at 978-81.

508. *Id.* at 976-77. The "Indian family" exception, as adopted by other state courts, states that "ICWA does not apply to the adoption of an Indian child that was never part of an Indian family." *Id. See In re* T.R.M., 525 N.E.2d 298, 302-03 (Ind. 1988) (court held that the Act did not apply because the adopted Indian child had spent its entire life, save the first five days, in a non-Indian culture with non-Indian adoptive parents).

509. 651 P.2d 1170, 1173 (Alaska 1982), *cert. denied,* 461 U.S. 914 (1982).

510. *In re T.N.F.*, 781 P.2d at 977.

511. *Id.* at 978.

512. *Id.* at 981. Section 1913(d) states that "[u]pon a finding that such consent was obtained through fraud or duress, the court shall vacate such decree and return the child to the parent. [However, n]o adoption which has been effective for at least two

case law, the preemption doctrine and statutory construction, as well as other federal statutes.[513] Furthermore, the court held that Alaska's one-year limitation applied, rather than California's three-year limitation, because Alaska had "sufficient contacts with and interests in . . . [the] adoption to ensure that application of Alaska law was not arbitrary or unfair. . . ."[514] Since the one-year period had expired, the court affirmed the superior court's decision that the mother's action was barred by Alaska's statute of limitations.

Justice Compton agreed with the court's refusal to recognize the "Indian family" exception to the Act.[515] He disagreed, however, with the majority holding that the Act applied to the non-Indian biological mother of T.N.F., noting that the mother was availing herself of the protections of the Act "to further purposes which have nothing to do with furtherance of Indian welfare. . . ."[516] Therefore, Justice Compton would have affirmed solely on the basis of Alaska's statute of limitations.

Although Justice Rabinowitz agreed with the majority's rejection of the "Indian family" exception and with the majority holding that the Act applied to this case, he dissented because he disagreed with the holding that the Alaska statute of limitations barred the action to vacate the adoption decree.[517] He concluded that any consent given in violation of the procedures in section 1913(a) was invalid and without force or effect and, therefore, the adoption was void *ab initio.* Justice Rabinowitz would have reversed on the grounds that a section 1914 action based on non-compliance with section 1913(a) could be brought at any time, and therefore an action like *In re T.N.F.* should not be barred by the one-year statute of limitations.[518]

IX. FISH AND GAME LAW

In 1989, the court handed down three fishing cases, two of which upheld the Commercial Fisheries Entry Commission's ("CFEC") refusal to reconsider awarding additional points to applicants which

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years may be invalidated under the provisions of this subsection unless otherwise permitted by state law." 25 U.S.C. § 1913(d) (Supp. 1987).

513. *In re T.N.F.,* 787 P.2d at 978-81.

514. *Id.* at 982. *See id.* at 981-82 (quoting Phillips Petroleum Co. v. Shutts, 472 U.S. 797, 821 (1985) ("[A state] must have a 'significant contact or aggregation of contacts' to the claims . . ., contacts 'creating state interests', in order to ensure that the choice of [state] law is not arbitrary or unfair.")).

515. *Id.* (Compton, J., concurring).

516. *Id.* (Compton, J., concurring).

517. *Id.* at 984 (Rabinowitz, J., dissenting).

518. *Id.* at 985 (Rabinowitz, J., dissenting).

would entitle them to receive entry permits for Cook Inlet Drift gill net fishing.[519]

The first, *Wilson v. Commercial Fisheries Entry Commission,*[520] held that a fisherman who did not claim Availability of Alternative Occupations ("AAO") points, either on his original application in 1975 or at any other opportunity over the next four years when his file was closed, was not entitled to later claim AAO points despite the court's decision in *Deubelbeiss v. Commercial Fisheries Entry Commission.*[521] *Deubelbeiss* invalidated as unconstitutional that portion of the Alaska Administrative Code awarding AAO points based on census districts.[522] Because the points sought by plaintiff had not been denied persuant to the invalid provisions, he was not affected by *Deubelbeiss* and therefore not entitled to a new hearing.[523]

The plaintiff claimed Sun Valley, Nevada, as his domicile in his original application but he neither claimed any AAO points as a Sun Valley resident nor challenged the CFEC's AAO point allocation for Sun Valley.[524] Seven years later, however, he claimed that he had in fact been domiciled in Seldovia, Alaska, and he argued that *Deubelbeiss* entitled him to have the CFEC re-evaluate his application and grant him the AAO points he needed to receive his permit.[525]

The court disagreed, stating that the plaintiff could have successfully argued that, under *Deubelbeiss,* Sun Valley's census district had been unconstitutionally deprived of its fair share of AAO points, or, alternatively, that his domicile was in fact Seldovia while his original application was under consideration from 1975 to 1979. Because his claim relied on neither of these arguments, *Deubelbeiss* did not apply and his request for an amendment to the original application remained untimely.[526]

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519. Wilson v. Commercial Fisheries Entry Comm'n, 770 P.2d 1126 (Alaska 1989); Sublett v. Commercial Fisheries Entry Comm'n, 773 P.2d 952 (Alaska 1989).

520. 770 P.2d 1126 (Alaska 1989).

521. 689 P.2d 487 (Alaska 1984). "In *Deubelbeiss,* this court held CFEC's system of awarding AAO points based on census districts violative of equal protection of law under article I, section 1 of the Alaska Constitution. This court reasoned that census districts were not designed to take into account community economic opportunities." *Wilson,* 770 P.2d at 1129 (citing *Deubelbeiss,* 689 P.2d at 489-90).

522. *Wilson,* 770 P.2d at 1130 (citing *Deublebeiss,* 689 P.2d at 489).

523. *Id.*

524. *Id.* at 1129-30.

525. *Id.* at 1127-28. The applicant's domicile is determinative of the CFEC allocation of AAO points. At no time, before or after *Deubelbeiss,* has an applicant domiciled in Sun Valley, Nevada been eligible for any AAO points. *Id.* at 1126 n.1. However, applicants "domiciled in Seldovia have always been eligible for at least two of the maximum four AAO points." *Id.* at 1127. The potential two point differential was critical to the applicant in *Wilson,* who only needed one more point to obtain an entry permit. *Id.* at 1130.

526. *Id.* at 1129-30.

In the second case, *Sublett v. Commercial Fisheries Entry Commission,*[527] the court held that an applicant who failed to appeal a 1978 CFEC decision denying him additional past participation points at the time of the decision was precluded from later making a timely appeal.[528] Subsequent decisions by the court[529] could not revive the old claim since the applicant could have made his appeal at the proper time but chose not to do so.[530] The court also held that even if the applicant's current appeal were considered to be part of a 1986 CFEC decision not to reopen his previous application, rather than part of the original decision, the appeal still would be untimely because collateral estoppel and res judicata prevent collateral attack of a CFEC decision made in an adjudicatory hearing.[531]

In the third fish and game case handed down in 1989, *McDowell v. State,* the court held that the state's rural preference provision for subsistence fishermen and hunters was unconstitutional.[532]

X. PROCEDURE

A variety of procedural challenges were presented to the court in 1989. Although some of the cases involve substantive questions in other areas, they have been classified into five broad categories with respect to the dominant procedural issues: discovery, preclusion, summary judgment, attorney's fees and costs and attorney disqualification and sanctions. In addition, the several cases which fall outside the scope of these five categories are discussed under the "miscellaneous" heading at the end of the section.

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527. 773 P.2d 952 (Alaska 1989).

528. *Id.* at 954-55.

529. The applicant sought to revive his application for two additional past participation points because of the court's decisions in Commercial Fisheries Entry Comm'n v. Byayuk, 684 P.2d 114 (Alaska 1984), and Commercial Fisheries Entry Comm'n v. Templeton, 598 P.2d 77 (Alaska 1979). *Sublett,* 773 P.2d at 954-55. *Templeton* allowed a person who fished as an equal partner to receive special circumstance points for economic dependence even though the gear license was not in that person's name. *Templeton,* 598 P.2d at 81. *Byayuk* held that the principle in *Templeton* should be applied retroactively, both to applicants who have received final decisions and to those applicants who failed to raise the issue of partnership points prior to final decision. *Byayuk,* 684 P.2d at 121-22. The two additional points would have given him the 16 total points necessary to receive an entry permit. *Sublett,* 773 P.2d at 954 n.4. *Byayuk* and *Templeton* were not directly on point, however, in that they dealt with economic dependence points by partners for gear license holders, not past participation points. *Id.* at 955 & n.7.

530. *Sublett,* 773 P.2d at 955.

531. *Id.* at 954.

532. 785 P.2d 1 (Alaska 1989). *See supra* notes 215-42 and accompanying text for a full discussion of *McDowell.*

A. Discovery

One of the most significant decisions for the personal injury bar was *Langfeldt-Halland v. Saupe Enterprises, Inc.*[533] The issue of first impression before the court was whether an attorney for a party to a civil action may be present during a physical or psychiatric examination by a physician hired by opposing counsel.[534] Reasoning by analogy, a divided court found that the plaintiff's counsel was entitled to attend such an examination because the constitutional right to counsel is afforded to both civil and criminal litigants and, although not coextensive, the compulsory nature of the examination mandated that the same right be afforded to both civil and criminal litigants.[535] The majority specifically refrained from considering whether counsel for the party ordering the examination should also be permitted to attend the examination.[536]

In an extensive dissent, Justice Moore, joined by Justice Compton, stated that "this ruling threatens to turn medical exams into mini-depositions dominated by legal theatrics rather than medical fact finding," and the two justices chastised the majority for failing to consider fully the policy and practical implications of its ruling.[537]

In *Rohweder v. Fleetwood Homes, Inc.*,[538] the court reaffirmed its view that trial courts must be given great flexibility in tailoring sanctions under Alaska Rule of Civil Procedure 37(b). The court upheld the trial court's order precluding Rohweder from using any information relating to documentation and interrogatories which he had failed to produce for Fleetwood in the nine months following an initial request, reasoning that this delay, along with Rohweder's failure to heed an order to comply, reasonably implied that he willfully intended to impede discovery.[539] The court found that the trial court had abused its discretion, however, in precluding Rohweder from pursuing a rescission remedy. Because the defendant was cognizant of the basis for the remedy, it could not be said that he had had no notice of Rohweder's claim.[540]

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533. 768 P.2d 1144 (Alaska 1989).

534. *Id.* at 1144-45.

535. *Id.* at 1146. The court noted the example that indigent persons do not have the right to appointed counsel in civil cases as do criminal defendants. *Id.* n.23. *See* Houston v. State, 602 P.2d 784, 792-96 (Alaska 1979) (according the same right to criminal litigants).

536. *Id.* at 1147.

537. *Id.* at 1148 (Moore, J., dissenting).

538. 767 P.2d 187 (Alaska 1989).

539. *Id.* at 191.

540. *Id.* at 192. The trial court had precluded Rohweder from pursuing rescission because he failed to mention rescission as a remedy in response to an interrogatory requesting all damages which Rohweder would seek. *Id.* The court said, however,

At issue in *Superior Fire Protection Co. v. Du Alaska Co.*[541] was whether raising a new theory of recovery in interrogatories qualified as an amended pleading by the express or implied consent of the parties under Alaska Rule of Civil Procedure 15(b). Superior Fire Protection Company ("Superior") argued that Du Alaska's failure to object to Superior's answers to interrogatories, which raised an issue of misrepresentation not previously pleaded, constituted implied consent to trying the issue and, accordingly, Superior should be allowed to amend its pleadings. The court rejected this argument, noting that such a position would be unduly burdensome as it would require counsel to examine all discovery materials obtained from an adverse party and make motions to strike any answers that suggested unpled theories.[542]

B. Preclusion

In *DeNardo v. Municipality of Anchorage,*[543] the supreme court affirmed the superior court's decision to dismiss petitioner's federal civil rights action under the doctrine of collateral estoppel.[544] The court summarized and discussed the doctrines of res judicata and collateral estoppel. "Res judicata bars the relitigation of the same claim between the same parties and their privies when (1) a court of competent jurisdiction, (2) has rendered final judgment on the merits, and (3) the same cause of action and same parties or their privies were involved in both suits."[545] Collateral estoppel bars relitigation of issues that " 'have been actually litigated and determined in the first action by a valid and final judgment,' " in which the determination of those issues was essential to the judgment.[546] Collateral estoppel also bars relitigation of issues, including those relying on the constitution, that were decided incorrectly in the first case.[547]

Although inapplicable to the particular facts of the case before it, the court stated that prior judgments could be collaterally attacked if (1) they were ordered by a court lacking subject matter or personal jurisdiction, (2) the judgment was not rendered by a duly constituted court with competency to render it, (3) there was a failure to comply

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that this failure to mention rescission as a damage should not prejudice Rohweder since rescission is a remedy, not a damage. *Id.*

541. 772 P.2d 1088 (Alaska 1989).

542. *Id.* at 1089. *See* ALASKA R. CIV. P. 15(b).

543. 775 P.2d 515 (Alaska 1989).

544. *Id.* at 518.

545. *Id.* at 517 (citing Blake v. Gilbert, 702 P.2d 631, 634-35 (Alaska 1985)).

546. *Id.* at 517 (quoting Bignell v. Wise Mechanical Contractors, 720 P.2d 490, 494 (Alaska 1986)).

547. *Id.* at 517 (citing DeNardo v. State, 740 P.2d 453, 457 (Alaska), *cert. denied,* 484 U.S. 918 (1987); Buckeye Indus. v. Secretary of Labor, 587 F.2d 231, 234 (5th Cir. 1979)).

with the requirements necessary for a court's valid exercise of power or (4) the defendant was not given proper notice of the action and the opportunity to be heard.[548]

The court further ruled that the superior court erred in awarding the defending party attorney's fees under Alaska Rule of Civil Procedure 82(a)(2), which generally allows fees to the prevailing party. Application for fees in a civil rights action under 42 U.S.C. § 1983[549] must be determined in accordance with 42 U.S.C. § 1988[550] and not the Alaska Rules. Under the dictates of *Hughes v. Rowe,*[551] a prevailing civil rights defendant is entitled to attorney's fees only when the plaintiff's action was found by the court to be "frivolous, unreasonable, or without foundation, even though not brought in subjective bad faith."[552] The court held that the trial court's remark that the petitioner's claim appeared to have merit provided the factual determination necessary to conclude that attorney's fees, as a matter of federal law, were improperly granted to the defendant.[553]

The court reviewed the application of the equitable tolling doctrine in *Dayhoff v. Temsco Helicopters, Inc.*[554] The plaintiffs, former employees of Temsco, claimed that they had been undercompensated for helicopter services that they had provided to several public construction projects.[555] In October of 1983 they asked the Department of Labor to accept an assignment of their claim, which the department has the power to prosecute under Alaska law.[556] The department withdrew from both cases nearly two years later and the plaintiffs subsequently filed complaints in superior court in January 1986, which were then consolidated.[557] The superior court sustained a motion for summary judgment, reasoning that the two-year statute of limitations had expired in 1985.[558] On appeal, the plaintiffs claimed that the statute of limitations was equitably tolled while the Department of Labor reviewed their claims.[559]

Under the equitable tolling doctrine, if a plaintiff has more than one legal remedy available and pursues his initial remedy in a judicial or quasi-judicial forum, then the statute of limitations is equitably

548. *Id.* at 517.
549. 42 U.S.C. § 1983 (1981).
550. *Id.* § 1988 (1981).
551. 449 U.S. 5 (1980).
552. *DeNardo,* 775 P.2d 518 (citing *Hughes,* 449 U.S. at 15).
553. *Id.*
554. 772 P.2d 1085 (Alaska 1989).
555. *Id.* at 1086.
556. *See* ALASKA STAT. § 23.10.110(b) (1983).
557. *Dayhoff,* 772 P.2d at 1086.
558. *Id. See* ALASKA STAT. § 23.10.130 (1983).
559. *Dayhoff,* 772 P.2d at 1087.

tolled if: (1) the defendant is given notice of the plaintiff's claim, (2) the delay does not prejudice the defendant's ability to gather evidence and (3) plaintiff acted reasonably and in good faith.[560] Since the first two elements of this doctrine were disputed questions of fact, the summary judgment motion was improper if Department of Labor proceedings were classified as quasi-judicial. The court held that since the department has the power to conduct investigations, issue subpoenas and hold hearings, Department of Labor proceedings were quasi-judicial; therefore summary judgment was inappropriate.[561]

In *Alaska Foods, Inc. v. Nichiro Gyogyo Kaisha, Ltd.*,[562] the court confronted the issue of whether a corporate shareholder who was not a party to actions by the corporation is bound by prior litigation of the corporation. Alaska Foods held thirty percent of the shares in Adak Aleutian Processors ("AAP"), a closely held corporation.[563] AAP had filed claims against Nichiro Gyogyo Kaisha ("Nichiro") in three separate suits. In the first suit, a default judgment was entered against AAP for failing to provide adequate answers to interrogatories. In the second suit, summary judgment against AAP was entered based on grounds of res judicata; the third suit was dismissed. Subsequently, Alaska Foods brought an action against Nichiro based on issues which had been raised previously by AAP.[564]

Although the court did not determine whether res judicata would bar Alaska Foods from pursuing its claims,[565] the case is important for two reasons. First, the court noted for the first time that a default judgment *could* have a preclusive effect on a non-party.[566] More importantly, the court dropped its reliance on notions of privity and instead embraced the analytical framework provided by the Restatement (Second) of Judgments concerning the application of res judicata when the person to be precluded by a corporation's prior judgments is a shareholder of that corporation.[567]

C. Summary Judgment

The court considered several issues relating to summary judgment motions this term. In *Bauman v. Alaska Division of Family &*

560. *Id.*

561. *Id.* at 1087-88.

562. 768 P.2d 117 (Alaska 1989).

563. *Id.* at 118, 123.

564. *Id.* at 119-20.

565. The court remanded the case so that the trial court could evaluate the facts in light of the new standard proposed. *Id.* at 123.

566. *Id.* at 120-21. The court explicitly recognized, for the first time, that a default judgment, as opposed to a judgment on the issues, can have a preclusive effect. *Id.*

567. *Id.* at 121-23. *See* RESTATEMENT (SECOND) OF JUDGMENTS § 59 (1980).

Youth Services,[568] the court reiterated that a movant is not entitled to summary judgment solely because the opponent has failed to respond. Instead, he must first meet the initial burden of showing the absence of genuine issues of material fact and the right to judgment as a matter of law.[569] More importantly, however, the court ruled that a district court is not required to instruct a pro se litigant of the necessity of opposing a motion for summary judgment.[570] In so holding, the court refused to extend the ruling in *Breck v. Ulmer*[571] that once a pro se litigant has opposed a motion for summary judgment, a trial court must inform the pro se litigant of the necessity of submitting affidavits to that effect. While recognizing the difficulty and complexity for a pro se litigant in pursuing a lawsuit, the court reasoned that ensuring the court's impartiality outweighed these concerns.[572]

Justice Rabinowitz found the majority's reasoning unpersuasive. He believed that *Breck* was not distinguishable and that the minimal effort of informing pro se litigants of the need to oppose a summary judgment motion would not compromise a trial court's impartiality.[573]

The proper use of Alaska Rule of Civil Procedure 54(b) in situations where partial summary judgment has been granted was considered in *Zeilinger v. Standard Alaska Petroleum Co.*[574] Rule 54(b) allows a trial court to enter final judgment as to one or more claims in a multi-claim action under certain circumstances; however, in *Zeilinger,* the partial summary judgment motion granted by the court disposed of only some of the issues pertinent to a single claim, but not the claim itself. The court therefore held that the trial court had erroneously entered the Rule 54(b) certificate because such a judgment is interlocutory and not within the scope of Rule 54(b).[575]

In *Munn v. Bristol Bay Housing Authority,*[576] the court considered the granting of motions to continue or stay a summary judgment motion under Alaska Rule of Civil Procedure 56(f). The unanimous decision held that affidavits supporting a Rule 56(f) motion need not specify which facts are sought through further discovery, provided the affidavits set forth adequate reasons why facts necessary to oppose the summary judgment motion cannot be presented. The court noted that requiring such specificity would create an "unfair hardship" in many

568. 768 P.2d 1097 (Alaska 1989).
569. *Id.* at 1099 (citing ALASKA R. CIV. P. 56).
570. *Id.*
571. 745 P.2d 66 (Alaska 1987), *cert. denied,* — U.S. —, 108 S. Ct. 1579 (1988).
572. *Bauman,* 768 P.2d at 1099.
573. *Id.* at 1101-02 (Rabinowitz, J., dissenting).
574. 769 P.2d 436 (Alaska 1989).
575. *Id.* (citing 10 C. WRIGHT, A. MILLER & M. KANE, FEDERAL PRACTICE AND PROCEDURE, § 2656, at 52-53 (1983)).
576. 777 P.2d 188 (Alaska 1989).

cases and that Rule 56(f) motions " 'should be freely granted' " as long as the party requesting the stay of summary judgment has not demonstrated dilatory behavior.[577]

Another issue before the court in *Munn* was the scope of the attorney-client privilege. Munn sought to depose the defendants' attorney, claiming that the attorney had advised the defendants in bad faith to file an assault claim against Munn.[578] The court declined to adopt the Eighth Circuit rule proposed by the defendants that opposing counsel cannot be deposed unless the information sought: (1) is crucial to the preparation of the case, (2) is nonprivileged and (3) may not be obtained by any other means.[579] Instead, the court held that "the filing of an assault claim against a person for the purpose of interfering with that person's employment rights comes within the civil fraud exception to the attorney-client privilege" and that attorneys as witnesses were not entitled to special treatment.[580]

D. Attorney's Fees and Costs

Alaska Rule of Civil Procedure 82 grants a trial court broad discretion in awarding attorney's fees to the prevailing party in a lawsuit. In 1989 the court decided three cases involving the application of this rule. The first two addressed the procedure for awarding fees between competing parties in a lawsuit while the third addressed the means of settling the disputes between an attorney and his client. The last case in this section deals with the scope of "court costs" under Alaska Rule of Civil Procedure 79.

In *Myers v. Snow White Cleaners and Linen Supply, Inc.*,[581] the court addressed the impact of pre-trial settlement offers which fail to comply with Alaska Rule of Civil Procedure 68 on the calculation of Rule 82 attorney's fees awards. Under Rule 68, a trial court may penalize a party for not accepting a settlement offer made prior to trial if the jury verdict does not exceed the pre-trial offer.[582] The court limited Rule 68's applicability, holding that a district court cannot take into account non-complying settlement offers because such settlement offers lack the protections afforded by Rule 68.[583] A party's settlement posture, therefore, should not be considered when determining

577. *Id.* at 193 (quoting Jennings v. State, 566 P.2d 1304, 1313-14 (Alaska 1977)).
578. *Id.* at 194.
579. *Id.* at 195-96 (citing Shelton v. American Motors Corp., 805 F.2d 1323, 1327 (8th Cir. 1986)).
580. *Id.*
581. 770 P.2d 750 (Alaska 1989).
582. ALASKA R. CIV. P. 68.
583. The court cited the following as conditions necessary to bring a settlement offer within the ambit of Rule 68: that the offer be definite, that it be irrevocable for ten days and that it be made at least ten days before trial. *Meyer*, 770 P.2d at 752-53.

appropriate attorney's fees and thus does not justify reducing an award.[584]

In *Day v. Moore,*[585] the court, relying on *Myers,* stressed that the use of Rule 82 to accomplish purposes other than providing just compensation was improper and found the trial court's consideration of the defendant's settlement posture to be an abuse of discretion. The trial court had attempted to penalize the defendant for not accepting a pre-trial offer that was virtually identical to the plaintiff's eventual recovery.[586]

Day also considered the proper determination of the prevailing party in multi-claim suits. For purposes of Rule 82, the party who has successfully prosecuted or defended against an action and who has had the decision or verdict rendered in his favor is considered the prevailing party, even though the party may not have prevailed on every issue. Whether the party has defeated a claim of great potential liability is also relevant. Since the plaintiff prevailed in one of his three claims and also prevailed in the defendant's counterclaim for $25,000, the court affirmed the lower court's holding that the plaintiff was the prevailing party.[587]

In *Breeze v. Sims,*[588] the court addressed several issues regarding Alaska Bar Rule 34, which generally allows a client to seek arbitration proceedings regarding fee disputes between the client and his attorney.[589] The court held that the standard of review for arbitration decisions made pursuant to Bar Rule 34 is the standard set forth in the Uniform Arbitration Act, which provides that determinations of fact are not reviewable.[590] Furthermore, the court stated that under Bar Rule 34(b), the client is the person legally responsible for paying the attorney's fees, even if he is paying for the representation of another.[591]

CTA Architects of Alaska, Inc. v. Active Erectors & Installers, Inc.,[592] interpreted the scope of Alaska Rule of Civil Procedure 79(b), which provides that reimbursement for court costs be restricted to those costs attendant to preserving, protecting or transporting exhibits

584. *Id.* at 753.
585. 771 P.2d 436 (Alaska 1989).
586. *Id.* at 438-39.
587. *Id.* at 437.
588. 778 P.2d 215 (Alaska 1989).
589. Alaska Bar Rule 34.
590. *Breeze.* 778 P.2d at 217. *See* ALASKA STAT. § 09.43.120 (1983).
591. *Breeze.* 778 P.2d at 217-18.
592. 781 P.2d 1364 (Alaska 1989).

to court.[593] Holding that expert's fees for the cost of preparing exhibits are not properly compensable as a "necessary expense of . . . producing exhibits," the court defined "producing" in the legal sense, to mean providing a document or exhibit for discovery.[594] The court specifically rejected appellee's suggested definition that "producing" means creating or composing exhibits.[595] The court also held that computer research costs and paralegal expenses are not analogous to attorney's fees and cannot be awarded under Rule 82, but are more appropriately characterized as costs that can be fully recovered under Rule 79(b).[596]

The concurring opinion of Justice Rabinowitz, joined by Justice Burke,[597] added that the "catch-all" phrase in Rule 79(b) referring to the allowance of costs for "any other expenses necessarily incurred" is limited in its scope by the application of Alaska Rule of Civil Procedure 83 and Alaska Administrative Rule 7(c).[598] Expert witness fees under Rule 7(c) are granted to the prevailing party only for the time the expert spent testifying,[599] and are generally limited to fifty dollars per hour.[600] The concurrence noted that prior case law has left open the possibility of recovery for expert preparation costs only in cases involving bad faith or reprehensible conduct.[601]

E. Attorney Disqualification and Sanctioning

The disqualification of an attorney from a case under the Alaska Code of Professional Responsibility ("the Code") Canon 9[602] was discussed in *Gabianelli v. Azar*.[603] Prior to the suit, Gabianelli's attorney, Eggers, and Azar's accountant, Bowers, had lived together for nearly twelve years. Because Bowers had advised Azar on the tax consequences of the underlying transaction in the suit, the trial court

593. *Id.* at 1365 n.3; ALASKA R. CIV. P. 79(b).

594. *CTA Architects,* 781 P.2d at 1366 (quoting ALASKA R. CIV. P. 79(b)).

595. *Id.*

596. *Id.* at 1367 (citing Atlantic Richfield Co. v. State, 723 P.2d 1249, 1253 (Alaska 1986); Smith v. Shortall, 732 P.2d 548, 550 n.1 (Alaska 1987)).

597. *Id.* at 1367 (Rabinowitz, J., concurring).

598. *Id.* (Rabinowitz, J., concurring) (citing ALASKA R. CIV. P. 83 and ALASKA ADMIN. R. 7(c)).

599. *Id.* at 1368 (Rabinowitz, J., concurring) (citing Atlantic Richfield Co. v. State, 723 P.2d 1249, 1253 (Alaska 1986)).

600. *Id.* at 1367 (Rabinowitz, J., concurring) (citing ALASKA ADMIN. R. 7(c)).

601. *Id.* at 1368 n.2 (Rabinowitz, J., concurring) (citing Miller v. Sears, 636 P.2d 1183, 1195 (Alaska 1981)).

602. ALASKA CODE OF PROFESSIONAL RESPONSIBILITY CANON 9 (1988) ("A lawyer should avoid even the appearance of professional impropriety.").

603. 777 P.2d 1167 (Alaska 1989).

granted Azar's motion to disqualify Eggers from further participation.[604] In reversing the trial court's decision, the supreme court held that under these circumstances, a party seeking to disqualify an attorney under Canon 9 should demonstrate at least a reasonable possibility that the attorney acquired privileged or confidential information from the previous relationship. Because Alaska does not recognize an accountant-client privilege, however, any information which Eggers might have gained was discoverable and unprivileged.[605]

In *Burrell v. Disciplinary Board of the Alaska Bar Association,*[606] the court faced the more difficult issue of sanctioning an attorney for possible violations of the Code. The Disciplinary Board of the Bar Association had suspended Burrell from practice, finding him guilty of: (1) violating DR 7-105(A)[607] by writing a letter to another attorney threatening to present criminal charges so as to gain an advantage in a civil matter and (2) violating Alaska Bar Rules 15(7) and 28(d) by writing a letter that constituted practicing law while being suspended.[608] Stressing that a suspended attorney "must be particularly prudent to avoid even the appearance of practicing law,"[609] the court rejected Burrell's claim that the letters were protected free speech, holding that persons who consented to be bound by a code of professional responsibility had, to some extent, limited their right to free speech.[610]

In *Keen v. Ruddy,*[611] which arose when judgment debtors filed an abuse of process claim against an attorney who had commenced a collection action against them on behalf of an estate, the court addressed two important procedural issues. First, the court held that a suit initiated by the administrator of an estate to collect debts owed to the estate, and continued by the estate's attorney after the administrator's resignation, does not constitute an abuse of process.[612] Citing *Kollodge v. State,*[613] the court concluded that even if the suit were improper in the sense that the attorney continued the suit without a client, there was no abuse of process because the suit did not constitute

604. *Id.* at 1166-68.

605. *Id.* at 1169.

606. 777 P.2d 1140 (Alaska 1989) (per curiam).

607. DR 7-105(A) prohibits attorneys from threatening to present criminal charges solely to obtain an advantage in a civil proceeding.

608. *Burrell,* 777 P.2d at 1141. Burrell wrote the second letter while he was under a 90-day suspension. *Id.* at 1141 n.1.

609. *Id.* at 1143 (citing *In re* Robson, 575 P.2d 777 (Alaska 1978)).

610. *Id.* at 1142. The court noted that it had previously rejected such an argument in *In re* Vollintine, 673 P.2d 755, 757 (Alaska 1983).

611. 784 P.2d 653 (Alaska 1989).

612. *Id.* at 655-56.

613. 757 P.2d 1024 (Alaska 1989).

" 'a willful act in the use of the process not proper in the regular conduct of the proceeding.' "[614]

Second, the court affirmed the trial court's imposition of Alaska Rule of Civil Procedure 11 sanctions against the attorney who had filed the abuse of process claim. The court reasoned that the plaintiffs had acted in bad faith in bringing their suit and that the attorney therefore could not have signed the pleadings with a reasonable belief that the pleadings were supported by existing law or a good faith argument for its extension.[615] In reaching this decision the court applied the Seventh Circuit's standard of review of Rule 11 sanctions, under which the appellate court "reviews all factors relevant to the issue of whether the attorney's inquiry into facts and law was reasonable under an abuse of discretion standard."[616] The court rejected the argument that the trial court's sanction of $100.00 for the Rule 11 violation was too low, arguing that Rule 11 sanctions carry with them a stigma and a message of disapproval, and that the trial court could reasonably have considered this penalty sufficient to punish the attorney for his conduct.[617]

F. Miscellaneous

In *Korean Air Lines v. State,*[618] the court held that the trial court did not err in granting a judgment notwithstanding the verdict ("j.n.o.v.") on the issue of legal causation in an airplane crash where the jury had already established willful misconduct on the part of the appellant, Korean Air Lines ("KAL").[619] The case arose from the 1983 crash between a KAL DC-10 and a Southcentral Airways Piper Navajo at Anchorage International Airport.[620] The crash occurred in foggy weather, with reported visibility below the quarter-mile legal limit.[621] Crew errors, such as failing to verify the runway heading with either the cockpit compasses or the Jeppesen charts and taking off without legal visibility, were determined to be the cause of the accident.[622] Two issues were presented to the jury pursuant to the Warsaw Treaty: (1) Did the KAL crew's mistakes constitute willful misconduct as defined within article 25 of the Warsaw Convention

614. 784 P.2d at 655 (citing *Kollodge,* 757 P.2d at 1026 (quoting Jenkins v. Daniels, 751 P.2d 19, 22 (Alaska 1988))).
615. *Id.* at 656-57.
616. *Id.* at 659 (citing R.K. Harp Inc. Corp. v. McQuade, 825 F.2d 1101, 1103 (7th Cir. 1987)).
617. *Id.*
618. 779 P.2d 333 (Alaska 1989).
619. *Id.* at 335.
620. *Id.* at 334-35.
621. *Id.* at 336.
622. *Id.* at 339.

and, if so, (2) was that willful misconduct the legal cause of the accident?[623]

The jury found that the crew's errors did constitute willful misconduct, "but that the wilful misconduct was not the legal cause of the crash."[624] The trial court granted a j.n.o.v. motion, holding that once the jury established that KAL had engaged in willful misconduct, "fair-minded people exercising reasonable judgment could not differ in concluding that KAL's wilful misconduct was a legal cause of the crash."[625] The court found that j.n.o.v. was properly granted because the crash would not have occurred but for the crew's mistakes, and therefore, as a matter of law, the willful misconduct was the legal cause of the accident.[626] The court also held that the trial court, under Alaska Rule of Evidence 403, correctly excluded evidence pertaining to the state's efforts to install ground radar because it would "have confused the jury."[627] The court upheld the trial court's award of attorney's fees, saying that such an award will only be disturbed if "manifestly unreasonable."[628]

The issue before the court in *Smith v. Lee*[629] was how explicit an indispensible party's assent to be bound by the outcome of litigation must be, so as to defeat a motion for dismissal under Alaska Rule of Civil Procedure 17(a).[630] The defendant, Lee, had moved for a dismissal pursuant to Rule 17(a) because Smith had not joined Union Bank, a party that Lee claimed was indispensable to the action. The trial court granted the motion but stayed the order to allow Union Bank to ratify the commencement of the action. Final judgment was later entered in favor of the defendant because the Union Bank assent was not a proper ratification of the action.[631]

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623. *Id.* at 336. *See* Warsaw Convention of 1929, art. 25, 49 Stat. 3000, T.S. No. 876, 137 L.N.T.S. 11.

624. Korean Air Lines v. State, 779 P.2d at 337.

625. *Id.*

626. *Id.* at 339. The court stated that "[w]hile these actions may not have been the sole cause of the accident, we conclude that reasonable persons would regard this conduct as a cause and attach responsibility to it." *Id.*

627. *Id.* at 339-40. The court also ruled that this exclusion did not prejudice KAL since KAL was allowed to introduce other evidence showing the confusing taxiway conditions at the airport on the day of the crash. *Id.* at 340.

628. *Id.* at 341 (citing Haskins v. Shelden, 558 P.2d 487, 495 (Alaska 1976); Alaska Placer Co. v. Lee, 553 P.2d 54, 63 (Alaska 1976); Oake v. Greater Anchorage Area Borough, 439 P.2d 790, 793 (Alaska 1968)).

629. 770 P.2d 754 (Alaska 1989).

630. *Id.* at 755-56. Alaska Rule of Civil Procedure 17(a) requires that every action be prosecuted in the name of the real party in interest.

631. Smith v. Lee, 770 P.2d at 755-56.

The court, reversing the trial court, explained that under *Truckweld Equipment Co. v. Swenson Trucking & Excavating, Inc.*[632] and *Municipality of Anchorage v. Baugh Construction & Engineering Co.*,[633] a party need agree only to be bound by the court proceedings generally. The party need not specifically agree to be bound by judgments regarding costs and attorney's fees.[634]

In *Buoy v. ERA Helicopters, Inc.*,[635] the court addressed several discrete procedural issues pertaining to the superior court's denial of the plaintiff's motion for a third trial. Plaintiffs brought the original suit to recover damages for injuries sustained in a crash of defendant's helicopter.[636]

Reaffirming the principle that it will not reverse a trial court's decision on a motion for a new trial except when "exceptional circumstances exist to prevent a miscarriage of justice,"[637] the court held first that the defendant's attorney was permitted to cross-examine plaintiff's witness, a psychologist, as to whether the jury award in the previous trial had affected plaintiff's depression. This inquiry did not constitute abuse because: (1) the plaintiff's attorney had opened the line of questioning, (2) the jury was instructed to consider the evidence of the first trial for the limited purpose of determining its effect on plaintiff and (3) the legal cause of plaintiff's depression was in dispute.[638]

Second, the court ruled that, while it is preferable for a trial court to specifically instruct the jury that "there could be more than one legal (or proximate) cause of an injury," a "but for" causation instruction is permissible because it does not suggest that "there could only be one legal (or proximate) cause of an injury or mental condition."[639] The court also held that motions for a new trial based on alleged internal inconsistency in the jury verdict must be preserved through post-trial motions made prior to the jury's discharge.[640]

Finally, with respect to determining the "prevailing party" for an award of attorney's fees under Rule 82 in this case, the significant issue

632. 649 P.2d 234 (Alaska 1982).

633. 722 P.2d 919 (Alaska 1986).

634. Smith v. Lee, 770 P.2d at 756.

635. 711 P.2d 439 (Alaska 1989).

636. *Id.* at 441.

637. *Id.* at 442 (citing Montgomery Ward v. Thomas, 394 P.2d 774, 774-75 (Alaska 1964)).

638. *Id.* at 444-45.

639. *Id.* at 445.

640. *Id.* at 446 n.7, 447 (citing City of Homer v. Land's End Marine, 459 P.2d 475, 480 (Alaska 1969)). Buoy's statement before the jury's discharge appeared to raise only the grounds of a verdict unsupported by the evidence, but did not raise the issue of the verdict's alleged internal inconsistency. *Id.* at 446 n.7.

was the amount of damages assessed against defendant after deducting the amount plaintiffs received from third parties in a settlement, and not merely the liability of defendant.[641]

Dalkovski v. Glad[642] determined the proper standard under Alaska Rule of Civil Procedure 47(c) for excusing a juror who has personal knowledge of the facts of the case. The court ruled that a juror's personal knowledge of the facts of a case is grounds for excusing the juror for cause, even though it is not one of the grounds delineated in Rule 47(c).[643] The court further stated that a "juror with personal knowledge . . . presents a greater threat to the litigants' right to a fair trial" than does a juror with a bias or prejudice, and thus a higher standard prevails for retaining the former.[644] Unless it is beyond question that the challenged juror can reach a verdict without use of his personal knowledge, he must not be retained. Affirming the jury verdict, the court provided that the retaining of such a juror is reversible error only if "the error would have had a substantial influence on the verdict of a jury of reasonable men."[645]

In *Gudenau v. Bang,*[646] the court held that where a confession of judgment provides that breach of the judgment may be established only by plaintiff's filing of an affidavit from a specified independent contractor, the party allegedly in breach may contest the veracity of the affidavit by submitting affidavits that tend to impeach the contractor's original affidavit. By submitting impeaching affidavits the defendant here raised genuine issues of material fact, causing the court to remand for determination of whether the defendant had actually breached the judgment of confession.[647]

The issue before the court in *Gregg v. Gregg*[648] was whether, under former Alaska Rule of Civil Procedure 99, a judge may administer the witness oath over the telephone to a witness who is not physically present in Alaska.[649] In upholding the admissibility of telephonic testimony irrespective of the witness' location, the court ruled that it was not necessary for the witness to take the oath in the

641. *Id.* at 448. *See* Owen Jones & Sons, Inc. v. C.R. Lewis Co., 497 P.2d 312, 313-14 (Alaska 1972) ("it is not an immutable rule that the party who obtains an affirmative recovery must be considered the prevailing party").

642. 774 P.2d 202 (Alaska 1989).

643. *Id.* at 205. The court stated that the grounds for juror dismissal listed in Rule 47(c) are not exclusive. *Id.* at 204-05.

644. *Id.* at 206.

645. *Id.* at 206-07.

646. 781 P.2d 1357 (Alaska 1989).

647. *Id.* at 1362-63.

648. 776 P.2d 1041 (Alaska 1989).

649. *Id.* at 1041-42.

presence of the officer authorized to administer oaths, nor was it necessary for the witness to be within Alaska's boundaries. Because Rule 99 was intended to facilitate judicial proceedings, a witness who testifies telephonically is physically absent "to the same extent whether across the street or on the far side of the globe."[650]

Two issues concerning Alaska Rule of Evidence 801, the hearsay rule, were addressed in *Klawock Heenya Corp. v. Dawson Construction/Hank's Excavation.*[651] Klawock Heenya Corporation ("Klawock") argued that the trial court had improperly excluded the testimony of one witness and had allowed the introduction of improper hearsay evidence.[652] The court agreed that the testimony of the defendant's employee concerning matters within the scope of his employment was not hearsay under Rule 801(d)(2)(D) and its exclusion was reversible error since it would have "considerable persuasive value."[653] The court also held that an exhibit offered to prove the extent of damages and prepared by a party not testifying at trial was hearsay as defined in Rule 801(c) and thus inadmissible under Rule 802.[654]

In *McCall v. Coats,*[655] the court reviewed whether the failure to disclose a prior assignment of claims to a non-party was proper grounds for an order to set aside a judgment under Alaska Rule of Civil Procedure 60(b)(2) or 60(b)(3).[656] The petitioners were Lundgren Pacific Construction Company, Inc. ("Lundgren"), J. McCall, Incorporated ("McCall, Inc.") and John R. McCall ("McCall"). McCall was president of and owned stock in both Lundgren and McCall, Inc. and was also president of J. McCall, Ltd. ("McCall, Ltd."). McCall, Ltd. was not a party to the suit.[657] The defendant, Coats, served on the board of directors of Lundgren and McCall, Inc. and was employed by both as general manager and vice-president. Coats was released from his positions when he allegedly assisted competitors.[658]

Petitioners succeeded in obtaining a judgment against Coats for breach of his employment contract.[659] It was later discovered that the

650. *Id.* at 1043-44.
651. 778 P.2d 219 (Alaska 1989).
652. *Id.* at 220.
653. *Id.* at 220-21. *See* ALASKA R. EVID. 801(d)(2)(D).
654. *Klawock,* 778 P.2d at 221. Hearsay is defined as "a statement, other than one made by the declarant while testifying at the trial or hearing, offered into evidence to prove the truth of the matter asserted." ALASKA R. EVID. 801(c).
655. 777 P.2d 655 (Alaska 1989).
656. Rules 60(b)(2) and 60(b)(3) provide for relief from final judgment because of newly discovered evidence and fraud, respectively. *Id.* at 657; *see* ALASKA R. CIV. P. 60(b)(2), (b)(3).
657. *McCall,* 777 P.2d at 655-56.
658. *Id.* at 656.
659. *Id.*

petitioners had assigned all of their claims against Coats to McCall, Ltd. prior to the commencement of the suit.[660] Coats moved to set aside the judgment under Rule 60(b)(2) and Rule 60(b)(3), among others, arguing that the petitioners intentionally had attempted to circumvent Alaska Rule of Civil Procedure 17(a), which requires that all actions be prosecuted in the name of the real party in interest.[661] The trial court set aside the judgment and ordered a new trial pursuant to Alaska Rule of Civil Procedure 59(e).[662]

Rule 60(b)(2) requires, inter alia, that the newly discovered evidence "be such as would *probably change* the result on a new trial [and that it] not be merely cumulative or impeaching."[663] The court found the disclosure of the assignment to McCall, Ltd. to be merely impeaching and further recognized that the superior court had failed to find a "probable change" in result.[664]

Under Rule 60(b)(3), a losing party must demonstrate by clear and convincing evidence that an adverse party has obtained a verdict through fraud, misrepresentation or other misconduct such that the losing party was prevented " 'from fully and fairly presenting his case or defense.' "[665] Unlike the "probable change" requirement of Rule 60(b)(2), the party need not demonstrate that the information withheld would alter the result of the case. Although the court held that Coats had not met this test, it provided little justification for the holding. The court proffered as one of its reasons, however, that the disclosure of the assignment "would not have probably changed the result on a new trial."[666] The court thus failed to address the fraud component of Rule 60(b)(3) and instead substituted the Rule 60(b)(2) analysis.

Several issues were addressed in *Kenai Peninsula Borough, Inc. v. English Bay Village Corp.*[667] English Bay Village Corporation ("English Bay") filed suit against Kenai Peninsula Borough (the "Borough") seeking, inter alia, to enjoin the Borough from enforcing a foreclosure

660. *Id. See* ALASKA R. CIV. P. 17(a), 60(b)(2), 60(b)(3).

661. *McCall,* 777 P.2d at 656. Rule 59(e) permits the court to order a new trial within ten days after judgment sua sponte, on any grounds for which it might have done so upon request of either party. *Id.* at 657 n.2. *See* ALASKA R. CIV. P. 59(e).

662. *McCall,* 777 P.2d at 657 (emphasis added) (quoting Montgomery Ward v. Thomas, 394 P.2d 774, 776 (Alaska 1964)). *See* ALASKA R. CIV. P. 60(b)(2).

663. *McCall,* 777 P.2d at 657-58 & n.5 (citing *Montgomery Ward,* 489 P.2d at 776).

664. *Id.* at 658 (quoting Rozier v. Ford Motor Co., 573 F.2d 1332 (5th Cir. 1978)). *See* ALASKA R. CIV. P. 60(b)(3).

665. *McCall,* 777 P.2d at 658 (quoting *Rozier,* 573 F.2d at 1339).

666. *Id.*

667. 781 P.2d 6 (Alaska 1989).

judgment previously granted to them and seeking to set aside the judgment. The Borough never filed an answer.[668] The trial court granted a preliminary injunction and English Bay subsequently applied for an entry of default.[669] After seventeen months, the court clerk sent the parties notice that the case would be dismissed for want of prosecution in thirty-three days absent a showing of good cause.[670] Thirty-six days later, English Bay filed an application for default judgment.[671] The Borough, believing that the case had been dismissed, moved to dissolve the preliminary injunction but did not preserve its defense of lack of proper service.[672] The trial court entered a default judgment against the Borough, which the Borough failed to appeal within the thirty-day appeal period.[673] Finally, three weeks after the appeal period expired, the Borough moved to set aside the default judgment pursuant to Alaska Rule of Civil Procedure 60(b).[674]

The main issue before the court was whether the trial court abused its discretion in denying the motion to set aside the default judgment.[675] The Borough argued that the judgment was void because the trial court never obtained personal jurisdiction over the Borough.[676] The court rejected this argument because personal jurisdiction attached when the Borough voluntarily appeared seeking to dissolve the preliminary injunction and failed to challenge the court's jurisdiction.[677]

Justice Moore, in a lengthy dissent, argued that the default judgment was invalid under the "plain usurpation of power standard,"

668. *Id.* at 7. The Borough claimed that it had never received a copy of the complaint that had been filed with the court, although it had received an unfiled copy without a court caption or a signature, which it assumed was a negotiating ploy. *Id.* at 7-8.

669. *Id.* The Borough also denied being served with the entry of default. *Id.* at 8.

670. *Id. See* ALASKA R. CIV. P. 41(e).

671. *English Bay,* 781 P.2d at 8. English Bay may have waited because it knew the time limitation would not be strictly enforced. *Id.* at 13 (Moore, J., dissenting).

672. *Id.* at 8.

673. *Id.* (The thirty-day appeal period is provided by Alaska Rule of Appellate Procedure 204(a)).

674. *Id.*

675. *Id.* at 7. The court held that the Borough's contentions as to the entry of the default judgment and the actions taken before it was entered should have been taken up earlier on appeal and, therefore, the court refused to consider the merits of the superior court's underlying decision. *Id.*

676. *Id.* at 8. This contention was based on the Borough's claim that service was defective. *Id.*

677. *Id.* at 8-9; *see* ALASKA STAT. § 09.05.010 (1983) ("The voluntary appearance of the defendant is equivalent to personal service of a copy of the summons and complaint upon the defendant."). The court noted that any issues regarding lack of service or improper service were thus rendered irrelevant. *English Bay,* 781 P.2d at 9.

claiming that the court had clearly acted beyond the scope of its powers.[678] This issue had never been raised in the court below nor was it briefed on appeal; and therefore the majority would not consider it unless a miscarriage of justice would result.[679] Justice did not so require because the Borough provided no credible reason for failing to act for two years.[680]

There were two issues before the court in *Evron v. Gilo.*[681] The first was whether a trial court's premature transfer of a case to the inactive calendar, and the subsequent dismissal pursuant to Alaska Rule of Civil Procedure 16.1(g),[682] was plain error, thus allowing an appellate court to consider issues not raised before the trial court.[683] The second issue, which is substantively an insurance question, was whether a passenger injured in an automobile accident may maintain a direct action against the tortfeasor's insurance company.[684]

The court first held that the 270-day period under Rule 16.1(g) does not commence until the service of the summons and the complaint. Because the court clerk transferred the case to the inactive calendar prior to service, the trial court erred in dismissing the case. The court found this error prejudicial to Evron because the dismissal occurred more than two years after the automobile accident, thus raising potential statute of limitation problems.[685]

With respect to the question of whether an injured party may bring a claim against the tortfeasor's insurer, the court reaffirmed its holding in *Severson v. Estate of Severson* that injured parties cannot sue insurance companies directly.[686] Evron had argued that under New Mexico and Oklahoma law, a direct action may be maintained when legislation forces the purchase of insurance.[687] Because a

678. *English Bay,* 781 P.2d at 22 (Moore, J., dissenting). *See* ALASKA R. CIV. P. 60(b)(4).

679. *English Bay,* 781 P.2d at 9.

680. *Id.* The majority opinion discussed at length its reasons for rejecting the plain usurpation of power standard. *Id.* at 9-11.

681. 777 P.2d 182 (Alaska 1989).

682. Alaska Rule Civil Procedure section 16.1(g) provides that if a motion to set trial is not filed within 270 days after the service of the summons and complaint, the case will be transferred to the inactive calendar and if the case remains on the inactive calendar for more than 60 days, it will be dismissed.

683. *Evron,* 777 P.2d at 184-87.

684. *Id.* at 187-88.

685. *Id.* at 186-87. The statute of limitations for personal injury suits is two years. ALASKA STAT. § 09.10.070 (1983).

686. *Evron,* 777 P.2d at 187; Severson v. Estate of Severson, 627 P.2d 649, 651 (Alaska 1981).

687. *Id.* at 187 (citing Anchor Equities, Ltd. v. Pacific Coast Am., 105 N.M. 751, 737 P.2d 532 (1987); England v. New Mexico Highway Comm'n, 91 N.M. 406, 575 P.2d 96 (1978); Breeden v. Wilson, 58 N.M. 517, 273 P.2d 376 (1954); Tidmore v. Fullman, 646 P.2d 1278 (Okla. 1982)).

mandatory liability insurance law now exists in Alaska,[688] he urged that the issue be reconsidered.[689] The court found his argument unpersuasive, stating, "[w]e see no reason to change our adherence to [our] well-settled rule . . . merely because the legislature has changed Alaska's automobile insurance law from a system which encourages the acquisition of liability insurance to one which requires such insurance."[690]

XI. PROPERTY

In 1989, the court handed down fourteen property decisions. These cases are grouped in the following six sections: eminent domain, title, liens, probate and estates, and miscellaneous.

A. Eminent Domain

The court reheard a 1988 case, *0.958 Acres, More or Less v. State,*[691] and amended its opinion to preclude expert testimony on overly speculative matters. The amendment provided that experts may not testify as to the likely effects of speculative plans for subdivisions when the planning authority has not yet considered the plans or when the valuation experts cannot determine with any degree of certainty how the land would be subdivided.[692]

B. Title

In *Smith v. Krebs,*[693] the court addressed the standard for granting a motion for summary judgment in a claim to quiet title based on adverse possession. The court determined that a question of material fact existed, specifically whether the hostility requirement was satisfied,[694] and ruled that the trial court had incorrectly granted summary judgment, remanding the case for trial.

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688. ALASKA STAT. § 28.22.011 (1989). This legislation was passed in 1984 and did not exist at the time of the *Severson* decision. *Evron,* 777 P.2d at 187.

689. *Evron,* 777 P.2d at 187.

690. *Id.*

691. 762 P.2d 96 (Alaska 1988), *amended,* 769 P.2d 990 (Alaska 1989).

692. 0.958 Acres, More or Less v. State, 769 P.2d 990, 990 (Alaska 1989).

693. 768 P.2d 124 (Alaska 1989).

694. *Id.* at 126. " 'In order to acquire title to land by adverse possession, the possessor must show that his use of the land was continuous, open and notorious, exclusive and hostile to the true owner.' " *Id.* at 125 n.3 (quoting Hubbard v. Curtiss, 684 P.2d 842, 848 (Alaska 1984)). The court declared that the test for determining whether the hostility requirement has been satisfied is "whether or not claimant acted toward the land as if he owned it." *Id.* at 126 (citing Peters v. Juneau-Douglas Girl Scout Council, 519 P.2d 826, 832 (Alaska 1974)). The court added that this condition would not be met if the claimant had "the record owner's permission to use the property." *Id.* (citing Penn v. Ivey, 615 P.2d 1, 3 (Alaska 1980)).

In *Dressel v. Weeks,*[695] the court illustrated the differences between the doctrines of quasi estoppel and equitable estoppel, holding that "the doctrine of quasi estoppel may be applied to divest legal title to real property from the title holder of record where the title holder knowingly benefitted from a transaction involving the property which runs counter to the interest sought to be asserted."[696]

Dressel, the title holder of real property, had orally agreed to transfer title to Kuhns, the decedent who had originally owned the property, in exchange for Kuhns' promise to bequeath him a different piece of property. Title was never officially transferred to Kuhns, however, although Dressel believed that he no longer had an interest in the property. In Dressel's presence, Kuhns sold the property to a third party, Weeks, whose title search failed to detect Kuhns' original transfer to Dressel and therefore erroneously showed that Kuhns still owned the property. When Kuhns died, she left the bargained-for parcel to Dressel. Weeks sued Dressel to quiet title to the property and Dressel counterclaimed by asserting his legal title.[697]

Weeks atttempted to invoke the doctrine of quasi estoppel to divest Dressel of his record title to the first property.[698] After finding that none of the requirements for equitable estoppel were present,[699] the court analyzed the case under the doctrine of quasi estoppel. The doctrine of quasi estoppel provides that a party may not take "a position inconsistent with one he has previously taken where circumstances render assertion of the second position unconscionable."[700]

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695. 779 P.2d 324 (Alaska 1989).

696. *Id.* at 333.

697. *Id.* at 326-27.

698. *Id.* at 329. Weeks believed that equitable estoppel was inapplicable because of Dressel's record title. *Id.*

699. *Id.* at 331. To preclude the title holder of real property from asserting that title, equitable estoppel requires:

> first, that the party making the admission by his declaration or conduct, was apprised of the true state of his own title; second, that he made the admission with the express intention to deceive, or with such careless and culpable negligence as to amount to constructive fraud; third, that the other party was not only destitute of all knowledge of the true state of the title, but of the means of acquiring such knowledge; and fourth, that he relied directly upon such admission, and will be injured by allowing its truth to be disproved.

Id. at 329 (citing Biddle Boggs v. Merced Mining Co., 14 Cal. 279, 367-68 (1859), as quoted in City of Long Beach v. Mansell, 3 Cal. 3d 462, 490, 476 P.2d 423, 443, 91 Cal. Rptr. 23, 43 (1970)).

The court found that: (1) the title holder did not know of his rights in the first property, (2) he did not intentionally deceive the third party, (3) the third party had constructive notice of title holder's legal title since his title was properly recorded, even if third party's search failed to discover it and (4) the third party did not rely on title holder's silence. *Id.*

700. *Id.* (quoting Jamison v. Consolidated Util., Inc., 576 P.2d 97, 102 (Alaska 1978)).

Ordinarily, the statute of frauds would void the oral agreement between Dressel and Kuhns to switch properties, because Dressel never transferred title to Kuhns.[701] However, because Kuhns had actually kept her part of the bargain by bequeathing the second property to Dressel, who accepted the bequest, the court found that Dressel received the benefits of a bargain while rejecting the burden, to the detriment of the party from whom he had derived the benefit, Kuhns.[702] Holding that "[o]ne who knowingly accepts the sale proceeds or other benefits from a transaction involving property to which he or she holds legal title is no longer deserving of the protection the recording act was intended to provide,"[703] the court applied the doctrine of quasi estoppel to divest Dressel of legal title to the first property.[704]

In *Dressel,* the court also addressed the burden of proof necessary to establish an award for damages in a conversion action when the actual extent of the conversion is impossible to determine.[705] The court adopted the holding of *Newman v. Basin Motor Co.,*[706] which provided that when there is "some uncertainty regarding the amount of damages sustained, it is enough if the evidence presented is sufficient to enable the court to make a fair and reasonable approximation."[707]

In *Welcome v. Jennings,*[708] the court held that an individual need not meet the annual labor requirements of section 38.05.210 of the Alaska Statutes in order to bring an action to quiet title of a mining claim located on state-selected federal land.[709] Although the plaintiff did not perform annual assessment work on the land, his compliance with the statutory requirements under section 38.05.195 of the Alaska Statutes constituted constructive possession of the claims sufficient to permit him to maintain his claim to quiet title.[710] The court based its holding on title 11 of the Alaska Administrative Code section

701. *Id.* at 331.

702. *Id.* at 332. The court commented that the oral agreement would have been unenforceable during the period between making the agreement and receiving the benefits of the bargain, that is, accepting Kuhns' bequest of the second property. *Id.*

703. *Id.* at 332-33, 333 n.12.

704. *Id.* at 333.

705. *Id.* at 326.

706. 98 N.M. 39, 644 P.2d 553 (N.M. Ct. App. 1982).

707. *Id.* at 45, 644 P.2d at 559 (quoted in *Dressel,* 779 P.2d at 328).

708. 780 P.2d 1039 (Alaska 1989).

709. *Welcome,* 780 P.2d at 1042-43. *See* ALASKA STAT. § 38.05.210 (1989).

710. *Welcome,* 780 P.2d at 1043. The applicable statute provides in relevant part: "Rights to deposits of minerals . . . on state land that is open to claim staking may be acquired by discovery, location and recording . . . ." ALASKA STAT. § 38.05.195 (1989).

86.115(c), which suspends the annual labor requirements pending federal approval of the state land selection.[711] The court also noted that the award of attorney's fees to plaintiff was reasonable in light of the pre-trial warning to defendant that his case was weak and that he might have to pay a large award of attorney's fees if his position was found to be frivolous.[712]

C. Liens

In *Nystrom v. Buckhorn Homes, Inc.*,[713] the court held that a corporate contractor is not an "individual" for the purposes of section 34.35.060 of the Alaska Statutes relating to the priority of mechanics' liens.[714] The court was required to determine whether a lender's lien, which would have had priority based on Alaska's first-in-time priority rule,[715] should be subrogated to a contractor's lien, which would have preferential status under the exception as a mechanics' lien.[716] Under section 34.35.060(c) of the Alaska Statutes, " 'a lien . . . in favor of an *individual* actually performing labor upon a building or other improvement in its original construction . . . is preferred to a prior encumbrance upon the land.' "[717] The court interpreted the term "individual" to mean "a natural person who is not acting as a contractor and who is employed by the owner of real property or employed by the contractor."[718]

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711. *Welcome*, 780 P.2d at 1042 (citing ALASKA ADMIN. CODE tit. 11, § 86.115(c) (1988) (provides in part that the provisions of section 38.05.210-.240 of the Alaska Statutes "do not apply to locations made on state-selected land until the state receives tentative approval of the selection from the federal government")).

712. *Id.* at 1043.

713. 778 P.2d 1115 (Alaska 1989).

714. *Id.* at 1120.

715. The applicable statute provides in relevant part: "[A]n encumbrance which is properly recorded shall be preferred to a lien . . . unless the claim of lien . . . or notice of right of lien . . . has been recorded before the encumbrance." ALASKA STAT. § 34.35.060(a) (1985).

716. The supreme court's holding on questions of law in this case were issued as guidance for the trial court when that court addressed this case on remand. *Nystrom*, 778 P.2d at 1119. The supreme court remanded the issue of whether the contractor's lien had been filed in time. A question of fact existed as to when the construction was actually completed. Since the ninety-day filing period begins upon completion of construction pursuant to section 34.35.068(a) of the Alaska Statutes, it was impossible for the court to determine when the period expired and thus whether the mechanics' lien was filed in time. If it was not, the mechanics' lien would be invalid, requiring the court to uphold the priority of the lender's lien as a matter of law. *Nystrom*, 778 P.2d at 1119.

717. *Id.* at 1120 (emphasis in original) (quoting ALASKA STAT. § 34.35.060(c) (1985)).

718. *Id.* at 1124.

In the same case, the court addressed another issue of first impression, holding that "a foreclosure sale, without notice to unrecorded lien claimants," does not extinguish a then unrecorded mechanic's lien that was subsequently perfected.[719] The court found that the trustee had a duty to check the record and physically inspect the property before a foreclosure sale, in order to protect "all interested parties, including those without recorded interests," by insuring that they have notice of the foreclosure sale.[720] The court therefore ruled that the contractor's lien survived the foreclosure sale because the contractor did not have notice of the sale. The court also noted that the lender could extinguish the contractor's lien by conducting a second foreclosure sale if proper notice was given to the contractor.[721]

Finally, the court also held that the trial court erred in holding that the lender was personally liable to the contractor for the sum owed by the owner under the doctrine of unjust enrichment.[722] The court applied the reasoning of *Frontier Rock & Sand v. Heritage Ventures,*[723] in holding that without proof that the lender ordered or authorized the work, he may not be held responsible to the contractor for the work done for the owner, even though he knew of the work and ultimately benefitted from it.[724]

Unpaid construction contractors may seek either of two remedies under Alaska's mechanics' lien statute: (1) the stop-payment remedy[725] and (2) the mechanics' lien.[726] In 1987, the court stated in *Donnybrook Building Supply Co. v. Alaska National Bank*[727] that this "statutory mechanics' lien scheme . . . constitutes a complete remedy that preempts common law and equitable remedies."[728] The court adopted a much narrower interpretation of this statutory scheme in 1989, however, holding in *Great Western Savings Bank v. George W. Easley Co.*[729] that the statute does not preempt actions by construction

719. *Id.* at 1124-25.

720. *Id.* at 1125. The court reasoned that a trustee, by physically inspecting the property, can determine whether another party is in possession of the property. *Id.*

721. *Id.*

722. *Id.* at 1126.

723. 607 P.2d 364, 368 (Alaska 1980) (discussing landlord's lack of obligation to a contractor for work done for tenant).

724. *Nystrom,* 778 P.2d at 1126.

725. ALASKA STAT. § 34.35.062 (1985).

726. ALASKA STAT. § 34.35.050 (1985); Great Western Sav. Bank v. George W. Easley Co., 778 P.2d 569, 575 (Alaska 1989). For the complete text of the mechanics' lien statute, *see* ALASKA STAT. §§ 34.35.050-.120 (1985).

727. 736 P.2d 1147 (Alaska 1987).

728. *Id.* at 1148-49.

729. 778 P.2d 569 (Alaska 1989).

contractors against construction lenders for breach of contract or tortious conduct.[730] The court reasoned that this holding was compelled by the fact that the mechanics' lien statute did not specifically address those particular situations.[731]

D. Probate and Estates

Section 13.16.505 of the Alaska Statutes generally provides that no levy shall be made against a decedent's estate in respect of any judgment prior to probate.[732] Section 09.35.060 of the Alaska Statutes, however, provides that a judgment may be levied as if the decedent were still living.[733] In *Lundgren v. Gaudiane,*[734] the court held that the superior court erred in enforcing a judgment against a decedent's funds, which were held in a federal court registry, before decedent's estate could be probated. The court ruled that to the extent that there is a conflict between the two statutory provisions, the more recent shall be treated as repealing the older.[735] The court also found that while the decedent's deposit of the funds in federal court deprived Gaudiane of the use of the money for a period of time, the decedent did not act unreasonably in doing so; and the superior court therefore acted unjustly in ordering the decedent's estate to pay interest on the funds while they were deposited with the federal court.[736]

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730. *Id.* at 577.

731. *Id.* (citing Gutierrez, *California Civil Code Section 3264 and the Ghost of the Equitable Lien,* 30 HASTINGS L.J. 493, 516-17 (1979) ("[S]tatutes precluding actions against a construction lender must be limited to those situations specifically addressed by the particular statute.")).

732. The statute provides in part:

> No execution may issue upon nor may any levy be made against any property of the estate under any judgment against a decedent or a personal representative, but this section shall not be construed to prevent the enforcement of mortgages, pledges or liens upon real or personal property in an appropriate proceeding.

ALASKA STAT. § 13.16.505 (1985).

733. Section 09.35.060 provides in part:

> If the judgment debtor dies after judgment, execution may be issued on the judgment in the manner and with the effect as if the debtor were still living, except that no action may be taken within six months from the granting of letters testamentary or of administration upon the estate of the deceased without leave of the court having jurisdiction over the probate of the estate.

ALASKA STAT. § 09.35.060 (1983).

734. 782 P.2d 285 (Alaska 1989).

735. *Id.* at 288 (Since section 13.16.505 of the Alaska Statutes was originally enacted in 1972 and section 09.35.060 was originally enacted in 1962, section 13.16.505 is determinative when the two conflict "[b]ecause the latest declaration of the legislature prevails." (citing 1A C. SANDS, SUTHERLAND STATUTORY CONSTRUCTION § 22.22 (3d ed. rev. 1973))).

736. *Id.* at 289.

Estate of Rhyner v. Farm Credit Bank of Spokane[737] interpreted the jurisdictional aspects of the Ship Mortgage Act,[738] finding that while federal courts had exclusive jurisdiction over in rem proceedings to foreclose on a ship mortgage, state courts can retain concurrent jurisdiction over in personam claims for any deficiency.[739] The court also held that a creditor is not entitled to summary judgment on a deficiency claim where a genuine issue of material fact still exists.[740]

The claims arose out of the creditor bank's foreclosure on the debtor's preferred ship mortgage. The bank, whose claim was unsatisfied after a forced public sale of one of two mortgaged vessels, obtained a final default judgment in rem against the other ship in federal court on an admiralty claim. The state court, hearing the separate claim against the estate for the unpaid loan balance plus interest, entered summary judgment against the debtor's estate, granting the bank the difference between the outstanding balance and the proceeds from the sale of the second vessel.[741]

The estate claimed that the decedent was a member of a partnership and it could therefore neither sell the ship nor protect itself from claims of the decedent's former partners. In response, the court stated that the estate had sufficient statutory protection to guard against the claims of the surviving partners by either demanding an accounting or paying the claim and becoming subrogated to the rights of the bank and foreclosing and selling that part of the security that the bank did not exhaust.[742]

The estate's claim that the bank had waived its right to recover a deficiency by failing to tender its security to the estate was also without merit. The estate had never tendered title nor properly tendered payment to the bank.[743] The court further held that a creditor is not obliged to foreclose on all of its collateral before seeking a deficiency judgment, since his interest in the remaining security would revert to the debtor upon satisfaction of the judgment.[744]

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737. 780 P.2d 1001 (Alaska 1989).

738. 46 U.S.C. §§ 911-84 (1982 & Supp. V) (repealed 1988).

739. *Estate of Rhyner,* 780 P.2d at 1004.

740. *Id.* at 1004-05. The court determined that a question existed as to whether the bank received fair value in the forced sale of the petitioner's mortgaged property since the estate offered "a preliminary showing of a probable significant disparity between the sales price [of the security] and its fair value." *Id.* at 1005. Citing Zeman v. Lufthansa German Airlines, 699 P.2d 1274, 1280 (Alaska 1985), the court noted that "[a]ll reasonable inferences of fact are drawn against the moving party and in favor of the non-moving party." *Estate of Rhyner,* 780 P.2d at 1004-05 n.5.

741. *Id.* at 1003.

742. *Id.* at 1005-06; *see* ALASKA STAT. §§ 32.05.200(a), 32.05.200(b)(4), 32.05.260(4), 32.05.380 (1986).

743. *Estate of Rhyner,* 780 P.2d at 1006.

744. *Id.* at 1007.

Finally, the court determined that the estate was not entitled to an adjustment for the value of the equipment and licenses aboard the ship because a preferred ship mortgage attaches to the vessel and to all of the equipment and appurtenances on board. Absent any credible evidence as to the value of the equipment, the lower court was not required to adjust the deficiency amount.[745]

E. Miscellaneous

In *Doyle v. Peabody,*[746] the court considered whether a landowner who supplies water to his neighbor may terminate the arrangement without paying damages. Doyle and Peabody had entered into an agreement whereby Doyle had permission to tap Peabody's well in exchange for monetary compensation.[747] Peabody subsequently informed Doyle that the access to the well would be terminated so that Peabody could obtain a permit for an improvement to his septic system.[748] When Peabody refused to partially compensate Doyle for the cost of a new well, Doyle filed a complaint for damages and injunctive relief under provisions of Alaska's environmental conservation statutes,[749] the Alaska Water Use Act[750] and common law in an action based on an irrevocable license.[751]

The court held that Doyle could not recover for the cost of the well under any of these theories. First, neither Alaska's environmental conservation statutes nor the Alaska Water Use Act creates a private cause of action.[752] Second, licenses for the use of land are revocable, both at law and in equity, and compensation can be recovered only for expenditures made in reliance on the license.[753] The well was constructed not in reliance on the license, but because the license had been revoked.[754]

In *J.P. Enterprises v. Ursin Seafoods, Inc.,*[755] the court, in an issue of first impression, addressed the distinction between a bailment and a lease of space, ruling that a bailment exists where " 'the person leaving the property made such a delivery of the property as to amount to a

745. *Id.* at 1005.
746. 781 P.2d 957 (Alaska 1989).
747. *Id.* at 958. The agreement had no specific duration and appeared to be on a yearly basis. *Id.*
748. *Id.*
749. ALASKA STAT. § 46.03.790 (1987).
750. ALASKA STAT. § 46.15.010-.270 (1987 & Supp. 1989).
751. *Doyle,* 781 P.2d at 958-59.
752. *Id.* at 959-60.
753. *Id.* at 961.
754. *Id.* The court remanded to the superior court to determine if Doyle's expenditures for a new pump and pressure tank for the well were compensable. *Id.* at 961-62.
755. 777 P.2d 1165 (Alaska 1989).

relinquishment of exclusive possession, control, and dominion over the property.' "[756] Because the owner of fishing gear stored in plaintiff's yard was required to notify plaintiff in writing before he removed any gear after it was sold, the court held that a bailment relationship existed rather than one of lessor and lessee.[757]

Dunlap v. Bavarian Village Condominium Association[758] presented a challenge to rules restricting condominium owners from parking "junk" cars in their carports. For the purpose of improving aesthetics and marketability, the Bavarian Village Condominium Association ("Association") adopted a rule that prohibited the parking of stored vehicles by owners in their carports.[759] By contract, these carports were reserved for the owner's exclusive use, but were subject to regulation by the Association.[760] Dunlap argued that his 1968 Mustang was a classic and not a junk car, and claimed that the regulation was not reasonably related to a legitimate purpose.[761] The court upheld the rule, noting that although the rule eliminates only those cars which are unlicensed and uninsured, it was sufficiently tailored to the legitimate objectives of appearance and marketability to withstand equal protection scrutiny.[762]

In foreclosure proceedings, it is generally within the court's equitable powers to govern the process as it sees fit. *Hayes v. Alaska USA Federal Credit Union*[763] addressed for the first time the issue of whether a court has the authority to set an "upset price," or minimum bid, at a judicial foreclosure sale. Holding that section 09.35.180(a) of the Alaska Statutes does not limit the court's traditional equitable powers to govern the foreclosure process,[764] the court ruled that a lower court has the discretion to declare an upset price. The court, however, cautioned that "[i]t may be preferable for the court to allow bidding to proceed and then, in ruling on a motion to confirm the sale,

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756. *Id.* at 1166 (quoting 8 C.J.S. *Bailments,* § 8, at 232 (1988) (footnotes omitted)).

757. *Id.*

758. 780 P.2d 1012 (Alaska 1989).

759. *Id.* at 1013-14. The Association's rule defined "stored vehicle" as one which is not licensed, not insured and not driven at least once every sixty days. *Id.*

760. *Id.* at 1031 & n.1.

761. *Id.* at 1016.

762. *Id.* at 1017 (The holding did not rely on a classification of Dunlap's Mustang as either a classic or junk car.).

763. 767 P.2d 1158 (Alaska 1989).

764. *Id.* at 1160. The statute provides in part:

> [w]here real property executed upon has been sold, the judgment creditor may, upon motion, apply for an order confirming the sale. The judgment debtor may object to the confirmation of the sale on the grounds that there were substantial irregularities in the proceedings of sale which caused probable loss or injury to the judgment creditor.

ALASKA STAT. § 09.35.180(a) (1983).

determine whether confirmation should be granted or a resale ordered."[765] Because the parties in *Hayes* agreed to the setting of a presale upset price, it was not error for the trial court to establish one.[766] Affirming the upset price, the court also established the "gross inadequacy" standard for confirming the adequacy of the upset price. Under this standard a court would refuse to withhold confirmation of a judicial sale only if the inadequacy "shocked the conscience" of the court.[767] Finally, the court ruled that the failure of the trial court to appoint a master to hold an evidentiary hearing to determine the upset price did not deprive the complainant of due process rights.[768]

When a lessee remains in possession of property after the lessor has lost his title through a foreclosure sale, the lessee's status becomes that of tenant by sufferance.[769] Absent any agreement between the foreclosure purchaser and the lessee, the rent liability of a tenant by sufferance, therefore, is no longer the stated contract rent, but rather the fair rental value of the premises.[770] In *Interior Energy Corp. v. Alaska Statebank,*[771] however, the court found an implied agreement between the foreclosure purchaser and the lessee to the effect that the correct rental amount owed to purchaser was based on the contract rent.[772]

On a separate issue raised in another appeal that was consolidated for this case, the court reiterated the analysis of ownership under trade fixture law that a tenant is entitled to the trade fixture if the tenant can show that he or she "installed it, did not intend to donate it to the landlord, and could now remove it and restore the premises to their former condition."[773] The lessee was barred by equitable estoppel, however, from contesting the ownership of most fixtures on the premises because he knew of the lessor's material representations of ownership of the fixtures to the bank.[774]

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765. *Id.* at 1161.

766. *Id.*

767. *Id.*

768. *Id.* at 1163.

769. Interior Energy Corp. v. Alaska Statebank, 771 P.2d 1352, 1357 (Alaska 1989).

770. *Id.* (citing Legler v. Legler, 149 Ind. App. 447, 273 N.E.2d 303 (Ct. App. 1971)).

771. 771 P.2d 1352 (Alaska 1989).

772. *Id.* at 1358. The court found an agreement based on a letter sent from the purchaser to the lessee stating the amount of rent owed to purchaser, a figure clearly based on the contract rent. The court found that lessee had implied its acceptance by not protesting the rental amount. Also, the court stated that the record showed that lessee had argued, albeit on another issue, that the terms of the lease were still valid. *Id.*

773. *Id.* at 1356.

774. *Id.* at 1354-55.

The court addressed the issue of discrimination in renting based on marital status in *Foreman v. Anchorage Equal Rights Commission,*[775] ruling that a landlord may not discriminate by refusing to rent to unmarried couples when the landlord does rent to single persons, married persons and married persons with children.[776] Interpreting both the state statute's and the municipal code's ban of discrimination on the basis of marital status to "protect the rights of unmarried couples," the court ruled that the exception in section 18.80.240(2) of the Alaska Statutes allowing "singles" or "married couples" only does not apply when a landlord rents to more than one class of persons.[777] With respect to the Anchorage Equal Rights Commission's ("AERC") delay in releasing its findings, the court found that the landlord had not been prejudiced by the AERC's failure to meet its deadline, and thus, the AERC did not lose its jurisdiction over the matter.[778]

XII. TAX LAW

The court decided five tax cases in 1989. They ranged in subject matter from the applicability of a state tax on an interest in federally leased land to whether a taxpayer had exhausted all administrative remedies available before bringing suit. In addition, one of the court's most significant constitutional holdings came in the area of tax law. In *Principal Mutual Life Insurance Co. v. Division of Insurance,*[779] the court invalidated a state statute that imposed higher premium taxes on foreign insurance companies than on domestic ones, finding that it violated the equal protection clauses of both the Alaska and federal Constitutions.[780] In addition, the court overruled a portion of *State v. Wakefield Fisheries, Inc.,*[781] holding that a formal protest is required at the time of payment in order to preserve the right to bring a common law action in assumpsit for refund of an illegal tax.[782]

In *Principal Mutual,* the plaintiff, an Iowa insurance company, sought a refund for taxes paid from 1980 to 1985 for which it was assessed the tax rate for foreign insurers, a rate double that charged to

775. 779 P.2d 1199 (Alaska 1989).

776. *Id.* at 1203.

777. *Id. See* ALASKA STAT. § 18.80.240 (1986); ANCHORAGE MUN. CODE § 05.20.020.

778. *Foreman,* 779 P.2d at 1204.

779. 780 P.2d 1023 (Alaska 1989).

780. *Id.* at 1025-28. The court invalidated former ALASKA STAT. § 21.09.210(b) (1984) (amended 1986). *Id.*

781. 495 P.2d 166 (Alaska 1972) (finding no requirement that a taxpayer formally protest an illegal tax at the time of payment in order to receive a refund).

782. *Principal Mutual Life Ins.,* 780 P.2d at 1030-31.

domestic insurers.[783] The plaintiff relied on *Metropolitan Life Insurance Co. v. Ward,*[784] a 1985 United States Supreme Court case that invalidated Alabama's differential premium tax law on the grounds that it violated the equal protection provision of the federal Constitution.[785]

The court held that section 21.09.210(b) of the Alaska Statutes was unconstitutional under both the Alaska and federal Constitutions because it discriminated between domestic and foreign insurers without a legitimate state purpose.[786] Even if the three purposes advocated by the state were considered legitimate, the court found no rational relation connecting these purposes to the differential tax rates found in the statute.[787] The court used the federal "rational relation" test in reaching its conclusion, noting that a statute that could not pass muster under this test would *a fortiori* fail under Alaska's more demanding equal protection analysis.[788]

The court remanded the case for the superior court to determine whether the state waived its right to require a protest at the time of payment in order to sustain a tax refund claim,[789] noting that the applicable statute liberalized the common law rule that no recovery

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783. *Id.* at 1024.

784. 470 U.S. 869 (1985).

785. *Id.* at 883.

786. *Principal Mutual Life Ins.*, 780 P.2d at 1025. The court held that subsections (b)(1) and (b)(3) were both unconstitutional because they provide different tax rates for foreign and domestic insurers but that subsection (b)(2) was not unconstitutional provided it may be "interpreted to include domestic, as well as foreign, hospital and medical service companies." *Id.* at 1025 n.7. The Alaska Legislature amended section 21.09.210(b) of the Alaska Statutes in 1986 to equalize the tax rate applied to both domestic and foreign insurers. *Id.* at 1024.

787. *Id.* at 1026. The state advanced arguments to the effect that the tax differential

> (1) enables domestic insurers, burdened by Alaska's higher cost of doing business, to maintain competitive equality with foreign insurers[;] (2) ensures a more stable insurance market in Alaska because domestic insurers cannot leave the state if they perceive the risks to be too high[; and] (3) increases the availability of insurance in Alaska because domestic insurers are more familiar with the state and will write coverage for risks which foreign companies will not insure.

Id.

788. *Id.* at 1028 n.15. The court did not determine what level of scrutiny is required under the Alaska equal protection analysis, but did comment that the Alaska test is even more demanding than the federal rational basis test. *Id.* at 1025-26 & n.9 (citing Isakson v. Rickey, 550 P.2d 359, 362 (Alaska 1976), *criticized on other grounds,* Commercial Fisheries Entry Comm'n v. Apokedak, 606 P.2d 1255, 1261 (Alaska 1980)).

789. *Id.* at 1030. *See* ALASKA STAT. § 43.15.010 (1983).

could be made at law for illegal taxes paid voluntarily "without compulsion."[790]

In response to the majority's overruling of *Wakefield,* Justice Compton filed a dissent criticizing the court's remanding of the case to resolve an issue that was raised neither in the parties' briefs nor in their arguments. The dissent suggested that the majority reached this result by interpreting both a statute, section 43.15.010(a) of the Alaska Statutes, and a case that neither party had cited.[791]

In *National Bank of Alaska v. Department of Revenue,*[792] the court held that income earned by a bank from certain federal obligations, such as Treasury Bills, Treasury Notes and Federal Farm Credit Bank Bonds, falls within the exception to the federal law exempting such income from state taxation.[793]

The Alaska Business License ("ABL") Act imposes a license fee, which effectively amounts to a tax, on each person doing business in the state.[794] Under the pertinent Alaska statute, which has since been repealed, the license fee for each national bank was seven percent of its net income, including interest from federal obligations.[795] The federal statute, however, exempted all income derived from federal obligations from inclusion in net income for purposes of state taxation "except nondiscriminatory franchise or other nonproperty taxes in lieu thereof imposed on corporations."[796] The court decided that the ABL's license fee is correctly classified as a " 'nonproperty' tax in lieu of a franchise tax allowable under 31 U.S.C. § 742,"[797] following the reasoning of New Jersey,[798] Florida[799] and Montana.[800] The court further found the tax in question to be nondiscriminatory because its

790. *Principal Mutual Life Ins.,* 720 P.2d at 1030.

791. *Id.* at 1031 (Compton, J., dissenting).

792. 769 P.2d 990 (Alaska 1989).

793. *Id.* at 991.

794. ALASKA STAT. § 43.70.020-.120 (1983).

795. *National Bank of Alaska,* 769 P.2d at 993 (citing ALASKA STAT. § 43.70.030(b) (repealed 1984)).

796. 31 U.S.C. § 742 (1976) (recodified at 31 U.S.C. § 3124(a) (1982)). A common example of a nonproperty tax is a tax on the privilege of operating a business within the state. *See infra* note 799.

797. *National Bank of Alaska,* 769 P.2d at 995-96. The court recognized that, in categorizing a tax, it must base its determination on the operation of the tax, and not the terms used to name it. *Id.* at 994 n.18 (citing Educational Films Corp. v. Ward, 282 U.S. 379 (1931)).

798. *Id.* at 994 (citing Garfield Trust Co. v. Director, Division of Taxation, 102 N.J. 420, 428, 508 A.2d 1104, 1109 *appeal dismissed,* 479 U.S. 925 (1986) ("*[I]nclusion* of the face value and interest income of federal obligations in the bases for calculating the . . . [tax] does not by its own force violate [31 U.S.C. § 742]." (emphasis in original))).

799. *Id.* at 995 (citing Department of Revenue v. First Union Nat'l Bank of Florida, 513 So. 2d 114 (Fla. 1987), *appeal dismissed,* 485 U.S. 949 (1988)). The Supreme

application did not discriminate between income generated from federal obligations and income derived from state obligations.[801]

Finally, the court held that the income from certain federal obligations was not independently exempt from taxation by virtue of other federal statutes limiting its taxability.[802] The court adopted Maryland's reasoning that the state had taxed neither the instruments nor the interest thereon, but rather "the privilege of doing business as a financial institution in corporate form in [the] state," using the income generated from federal obligations merely as a measuring stick to determine the appropriate amount of the franchise tax.[803]

In *North Star Alaska Housing Corp. v. Fairbanks North Star Borough Board of Equalization,*[804] the court discussed whether the Borough could tax the developer's interest in land leased from the federal government, and if so, which valuation methods were appropriate.[805] Relying on its decision in *Ben Lomond, Inc. v. Fairbanks North Star Borough Board of Equalization,*[806] the court stated that the taxing authority may examine the underlying "substance of a transaction to determine whether there exists a taxable interest."[807] Since the developer's lease granted him an interest in the federal land permitting him to build and rent housing units for valuable consideration, the developer's interest may be taxed as real property.[808]

The court also determined that the choice of the valuation method was within the Borough's discretion provided that the method

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Court of Florida found that the tax in question was a "nonproperty excise tax on the privilege of operating a bank . . . within the state" and was therefore a franchise tax for the purposes of the exception in 31 U.S.C. § 3124(a)(1). *First Nat'l Bank,* 513 So. 2d at 118.

800. *National Bank of Alaska,* 769 P.2d at 995 (citing Schwinder v. Burlington Northern, Inc., 213 Mont. 382, 393-94, 691 P.2d 1351, 1356 (1984), *clarified,* 224 Mont. 500, 730 P.2d 422 (Mont. 1986) ("Congress, in 31 U.S.C. § 3124 provided a distinction between *nondiscriminatory franchise taxes* measured by tax exempt obligations on the one hand, and *property taxes* otherwise levied directly or indirectly by states on such federal items on the other." (emphasis in original))).

801. *National Bank of Alaska,* 769 P.2d at 996 (citing National Bank of Alaska v. Department of Revenue, 642 P.2d 811, 818 (Alaska 1982)).

802. *Id.* at 996-97. The bank argued that "its Federal Home Loan Bank (FHLB) obligations are exempt under 12 U.S.C. § 1433, and that its Federal Farm Credit Bank (FFCB) obligations are exempt under 12 U.S.C. § 2079." *Id.*

803. *Id.* at 997 (citing Department of Assessments and Taxation v. Maryland Nat'l Bank, 310 Md. 664, 531 A.2d 294 (1987), *appeal dismissed,* 486 U.S. 1048 (1988)).

804. 778 P.2d 1140 (Alaska 1989).

805. *Id.* at 1140.

806. 760 P.2d 508 (Alaska 1988).

807. *North Star Alaska Housing,* 778 P.2d at 1143 (citing *Ben Lomond,* 760 P.2d at 511-12 n.11).

808. *Id.*

chosen generates a value that represents a "full and true value"[809] of the property and that it has been selected in the absence of fraudulent behavior on the part of the tax authority.[810] The court upheld the Board's choice of the reversionary method[811] over the rent savings method[812] as its choice was neither fundamentally wrong nor fraudulent.[813]

Finally, the court noted that although the government did not own a reversionary interest in the developer's buildings, there was a possibility that at the end of the lease term, the developer might be unable to sell the structures and leave them for the government's benefit. In this situation, the developer's buildings would be worthless at the end of the outlease, a fact which should be reflected in the Board's valuation and tax assessment.[814]

Two additional tax cases decided by the court this past year address the exhaustion of administrative remedies doctrine, which requires a potential litigant to exhaust all available administrative remedies before pursuing his claim against an administrative body in a judicial forum. *Standard Alaska Production Co. v. Department of Revenue*[815] provided that a taxpayer who disputed an assessment increase could not bring an action to invalidate the increase in the superior court, even if disguised in the form of a declaratory judgment, until he had exhausted all of the administrative remedies available to him.[816] Specifically, the court ruled that cases of mixed questions of facts and law, such as this one, are especially appropriate for administrative resolution prior to judicial review.[817] The court declined to apply either the "futility" exception to the administrative exhaustion doctrine,[818]

809. This is defined as "the estimated price that the property would bring in the open market and under the then prevailing market conditions in a sale between" the parties. *Id.* (citing ALASKA STAT. § 29.45.110(a) (1986)).

810. *Id.* at 1144 (citing Twentieth Century Inv. Co. v. City of Juneau, 359 P.2d 783, 788 (Alaska 1961)).

811. "The reversionary method values property based upon its fee simple value, discounted by a factor representing the fact that the property will revert to the owner in the future." *Id.* at 1143.

812. "The rent savings method arrives at a value based upon the market rental value of the leasehold minus the amount of rent actually paid by the lessee." *Id.*

813. *Id.* at 1145.

814. *Id.* at 1146. The court remanded this case to reconsider its valuation in light of this finding. *Id.*

815. 773 P.2d 201 (Alaska 1989).

816. *Id.* at 203-04.

817. *Id.* at 207-08.

818. *Id.* at 209. Under the "futility" exception, a claimant need not pursue *all* administrative remedies if a formal hearing on the matter would be "futile" or would certainly result in an adverse decision. *Id.*

or the "irreparable harm" exception,[819] holding that the plaintiff was required to exhaust all of his administrative remedies and was not entitled to declaratory relief.[820]

In the second case addressing the exhaustion of remedies doctrine, *Bethel Utilities Corp. v. City of Bethel,*[821] the court similarly held that the appellant, a privately owned utility, could not sue the city for a tax refund in the superior court as an original action because the ordinances involved prescribed an administrative procedure for relief.[822] Following the reasoning of *FedPac International Inc. v. Department of Revenue,*[823] the court held that when a specific procedural remedy exists and a common law remedy does not, the court should interpret the intent of the ordinance or statute to preclude original civil actions. Because no original right of action existed in the superior court, that court was correct in summarily finding for the city on this issue.[824]

The court acknowledged that the taxpayer was not foreclosed from obtaining judicial review of the administrative decision, however, noting that such review can be obtained only after an administrative decision has been issued and the plaintiff has followed the appropriate appeals procedure.[825] The court further held that where the plaintiff has properly appealed an administrative decision, that is, where he has pursued the specific procedural remedy and received an adverse administrative decision, he may appeal directly to the superior court. Here, the city conceded that, with respect to the plaintiff's claims after April 1986, the time at which he had exhausted his administrative remedies, the trial court should consider this case a permissible appeal of that decision.[826]

819. Plaintiff proposed that its business would suffer "irreparable harm" because the further delay caused by the administrative process would make the company's financial status uncertain (due to the unknown status of the tax assessment), which would adversely affect plaintiff's relations with its current and potential creditors. *Id.* at 209-10. The court rejected this line of reasoning, as it could arguably apply in all tax cases, destroying the efficacy of the exhaustion of administrative remedies doctrine. *Id.* at 210.

820. *Id.*

821. 780 P.2d 1018 (Alaska 1989).

822. *Id.* at 1021.

823. 646 P.2d 240, 241 (Alaska 1982).

824. *Bethel Utilities,* 780 P.2d at 1021.

825. *Id.* at 1022.

826. *Id.*

XIII. TORTS

The court handed down three tort cases in 1989. The first case concerned the ripeness of a professional malpractice claim. The second discussed statutory liability for alcohol vendors. The third case established the six elements of the tort of intentional interference with prospective economic advantage.

The question of when a professional malpractice claim is ripe for adjudication divided the court, three to two, in *Thomas v. Cleary.*[827] In this case, plaintiffs sued their accountants for damages resulting from faulty tax advice regarding the sale of their business and the subsequent tax liability assessed against them. The majority held that plaintiffs may not establish a cause of action in tort until "actual loss or damage resulting from the professional's negligence" has occurred.[828] Until a tax deficiency has been assessed against the plaintiffs,[829] the plaintiffs' claim against their accountant cannot be said to be ripe for adjudication. The court remanded this case with instructions to vacate the judgment without prejudice.[830]

The dissent, authored by Chief Justice Matthews and joined by Justice Rabinowitz, disagreed with the majority's conclusion that plaintiffs had not yet suffered any damage because they had not yet received a notice of tax deficiency from the IRS. According to the dissent, the incurrence of a tax liability, rather than the actual assessment by the IRS, is sufficient to constitute damage. The dissent also cited evidence in the record that the defendant had advised plaintiffs to make a sale of assets, and that plaintiffs had been harmed by accepting this advice.[831]

The court addressed the standards of liability for selling alcohol to an intoxicated individual in *Williford v. L.J. Carr Investments, Inc.,*[832] holding that in a wrongful death action, a vendor may be held

827. 768 P.2d 1090 (Alaska 1989).

828. *Id.* at 1092 (citing Linck v. Barokas & Martin, 667 P.2d 171, 173 n.4 (Alaska 1983)). The other three elements of a professional negligence cause of action are: "(1) a duty, (2) a breach of that duty, [and] (3) a proximate causal connection between the negligent conduct and the resulting injury." *Id.*

829. The IRS had not assessed any tax deficiency against plaintiffs because no corporate tax return was filed in 1977, the year of plaintiffs' business liquidation. *Id.* at 1093. As a result, the court noted that the IRS could now try to collect taxes from plaintiffs for that year, as well as additional penalties and interest. *Id.* at 1093 n.7. The court was not asked to decide the issue of whose responsibility it was to file this return. *Id.* at 1091 n.4.

830. *Id.* at 1094.

831. *Id.* at 1094-96 (Matthews, C.J., dissenting). The record showed that plaintiffs incurred an additional $207,459 in tax liability because they structured the sale of their business as a sale of assets, upon defendant's recommendation, rather than as a stock sale. *Id.*

832. 783 P.2d 235 (Alaska 1989).

liable for providing alcohol unwittingly to third parties where the vendor's direct actions violated statutory requirements.[833] In this case, the vendor sold alcohol to the deceased's intoxicated nephew, possibly in violation of both sections 04.16.030 and 04.21.020 of the Alaska Statutes. Section 04.16.030 forbids a state licensee from selling alcoholic beverages to a drunken person, and section 04.21.020 imposes civil liability on a person who violates section 04.16.030 for the injuries resulting from the intoxication of the drunken person served.[834] The court noted, however, that "a vendor who furnishes alcohol to sober persons will not be held liable under . . . section 04.21.020, regardless [of] whether the vendor thereby indirectly provides the alcohol to an intoxicated third person."[835] In addition, the court stated that common law negligence actions for the sale of liquor to intoxicated persons are limited to cases that arose prior to the enactment of section 04.21.020 in 1982.[836]

The court also held that the liability of a negligent actor can be relieved through the doctrine of intervening superseding cause only in exceptional cases where the harm done was so unforeseeable to the negligent actor that, in retrospect, it appears to have been highly extraordinary.[837] In this case, the court thought that it was not highly extraordinary that the intoxicated decedent, allegedly provided with alcohol by the defendant, might be struck "by a speeding car on a dark road, driven by [the intervening] drunken driver."[838] The court further held that the question of whether an intervening act was highly extraordinary was an issue for the jury and should not be decided in a motion for summary judgment.[839]

The most significant holding in *Oaksmith v. Brusich*[840] was the court's adoption of a test requiring that a party must show six elements in order to sustain an action in tort for intentional interference with prospective economic advantage. The elements are that: (1) a prospective business relationship existed between the parties, (2) the alleged tortfeasor knew of the prospective business relationship and intended to prevent the relationship from developing, (3) the prospective business relationship did not result in financial benefit to the plaintiff, (4) the alleged tortfeasor's conduct "interfered with the prospective relationship," (5) the interference caused the plaintiff's

833. *Id.* at 239.
834. *Id.* at 238-39. *See* ALASKA STAT. §§ 04.16.030 (Supp. 1989), 04.21.020 (1986).
835. *Williford,* 783 P.2d at 239 n.11 (citation omitted).
836. *Id.* at 238 n.10 (citing Nazareno v. Urie, 638 P.2d 67 (Alaska 1981)).
837. *Id.* at 237.
838. *Id.* at 238 & n.9.
839. *Id.* at 238.
840. 774 P.2d 191 (Alaska 1989).

damages and (6) the alleged tortfeasor's conduct was not privileged or justified.[841] The court reversed the trial court's finding of intentional interference with prospective economic advantage, stating that there was insufficient evidence to prove whether the alleged tortfeasor's conduct was wrongful or whether the conduct actually induced the failure of the relationship.[842]

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841. *Id.* at 198. This test is very similar to that used to sustain a tort claim for intentional interference with contractual relations, as the two torts are closely related. *Id.*

842. *Id.*