THE YEAR IN REVIEW 2006:

SELECTED CASES FROM THE ALASKA SUPREME COURT, THE ALASKA COURT OF APPEALS, AND THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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I. INTRODUCTION

The Year in Review is a collection of brief summaries of selected state and federal appellate cases concerning Alaska law from the year 2006. They are neither comprehensive in breadth (several cases are omitted) nor in depth (many issues within individual cases are omitted). Attorneys should not rely on these summaries as an authoritative guide; rather, they are intended to alert the Alaska legal community about judicial decisions from the previous year. The summaries are grouped by subject matter.

II. ADMINISTRATIVE LAW

Alaska Supreme Court

Allen v. Alaska Oil & Gas Conservation Commission

In *Allen v. Alaska Oil & Gas Conservation Commission*,[1] the supreme court held that the Alaska Oil & Gas Conservation Commission ("Commission") applied the proper standard in denying a petition for a unitization order and that the superior court may deny a request for a *de novo* hearing on appeal from the Commission.[2] The day before his oil and gas exploration leases were set to expire, Allen petitioned the Commission for a unitization order to combine his valueless leases with other highly productive oil fields.[3] After the Commission denied the petition, the superior court refused Allen's request to hear his appeal *de novo* and affirmed the Commission's decision.[4] Allen appealed, arguing that the superior court incorrectly refused his request of a hearing and that the Commission applied the wrong standard in its denial of his petition.[5] The supreme court held that the statute relied upon by Allen as entitling him to a *de novo* hearing had been impliedly repealed by legislative developments, and therefore the decision to hear an appeal *de novo* was left to the superior court's discretion.[6] The supreme court further held that the proper statutory standard for evaluating Allen's unitization petition was the standard relating to involuntary unitization, since Allen's petition was not seeking voluntary unitization.[7] The supreme court affirmed the decision of the superior court, holding that it was correct to deny Allen's petition for a *de novo* hearing and that the Commission applied the proper statutory standard in rejecting Allen's petition.[8]

Brandal v. State, Commercial Fisheries Entry Commission

In *Brandal v. State, Commercial Fisheries Entry Commission*,[9] the supreme court held that the Commercial Fisheries Entry Commission's (the "CFEC") denial of a limited entry fishing permit was valid despite a twenty-two year delay.[10] Brandal worked as a crew member on his father's boat until 1972.[11] He was a gear license holder in 1974, and applied for a limited entry permit in 1977.[12] In order to receive a permit, an individual must accumulate twenty points for certain fishing related activities.[13] Brandal's application was denied for lack of sufficient points, and he was given an interim permit.[14]

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[1] 139 P.3d 564 (Alaska 2006).
[2] *Id.* at 565–66.
[3] *Id.* at 565.
[4] *Id.*
[5] *Id.*
[6] *Id.* at 567–72.
[7] *Id.* at 571.
[8] *Id.* at 572.
[9] 128 P.3d 732 (Alaska 2006).
[10] *Id.* at 734.
[11] *Id.*
[12] *Id.*
[13] *Id.* at 735.
[14] *Id.*

Twenty-two years later, the CFEC officially denied his application.[15] The superior court affirmed the CFEC's decision.[16] Brandal appealed, arguing that (1) he should have been awarded points for special circumstances, (2) CFEC was required to inform applicants that only partners of gear licensees in 1971-72 would be granted special circumstances points, and (3) the twenty-two year delay violated his due process.[17] The supreme court held that Brandal's first argument failed, because the special circumstances provision applied to former co-owners of boats, not crew members.[18] Brandal's second claim also failed because at least two individuals who were not partners of gear licensees in 1971-72 did in fact receive permits.[19] Finally, Brandal's third claim failed because there was no risk of error based on the delay, and there was no evidence of prejudice.[20] The supreme court affirmed the decision of the superior court, holding that the CFEC's denial of Brandal's limited entry fishing permit was valid despite a twenty-two year delay.[21]

Benavides v. State

In *Benavides v. State*,[22] the supreme court held that legislative employees are not necessarily entitled to the same per diem allowance as legislators.[23] Benavides, a legislative aide required to travel to Juneau for the legislative session, was not granted a per diem allowance for his time there.[24] He filed suit, claiming that he was guaranteed a per diem equal to that given to legislators under Alaska Statute section 24.10.130(b).[25] The supreme court held that the plain language of the statute[26] was consistent with the Alaska Legislative Council's decision not to give Benavides a per diem allowance.[27] Additionally, a look at the legislative history was insufficient to rebut the conclusion that the plain language allowed the Council's decision.[28] The supreme court affirmed the decision of the superior court, holding that Benavides and other legislative employees are not entitled to the same per diem allowance as legislators.[29]

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[15] *Id.*
[16] *Id.*
[17] *Id.* at 735.
[18] *Id.* at 737.
[19] *Id.* at 738.
[20] *Id.* at 739–740.
[21] *Id.* at 734.
[22] 151 P.3d 332 (Alaska 2006).
[23] *Id.* at 333.
[24] *Id.* at 333–34.
[25] *Id.* at 334.
[26] ALASKA STAT. § 24.10.130(b) states that "[l]egislators and officers and employees of the legislative branch of government are entitled to a per diem allowance."
[27] *Benavides*, 151 P.3d at 335–36.
[28] *Id.* at 336–37.
[29] *Id.* at 333, 338.

Flowline of Alaska v. Brennan

In *Flowline of Alaska v. Brennan*,[30] the supreme court held that an injured employee who had worked for more than thirteen weeks was an ongoing, hourly worker entitled to workers' compensation benefits.[31] From November 1998 to March 1999, Brennan worked for Flowline of Alaska ("Flowline") full-time, with intermittent breaks due to weather and equipment failure, among other things.[32] When Brennan was injured in early March 1999, he requested workers' compensation payments as an ongoing, hourly worker with thirteen consecutive weeks of experience.[33] Flowline contested the classification before the Alaska Workers' Compensation Board ("Board"), arguing first that Brennan was an "exclusively temporary" worker and, alternatively, that Brennan was a seasonal hourly worker.[34] The Board concluded that Brennan was an ongoing, hourly worker, and the superior court affirmed.[35] The supreme court adopted superior court's decision and held that Brennan was an ongoing, hourly worker, not a temporary or seasonal worker, because of his ongoing relationship with Flowline, the gross number of hours he worked, and the fact that he worked for more than thirteen weeks.[36] The supreme court affirmed the superior court's decision, holding that an injured employee who had worked for more than thirteen weeks was an ongoing, hourly worker entitled to workers' compensation benefits.[37]

State v. Grunert

In *State v. Grunert*,[38] the supreme court held that the Alaska Board of Fisheries ("Board") exceeded its authority in promulgating an emergency regulation to create a cooperative fishery scheme and in allocating fishery resources within a single fishery.[39] Grunert, a non-participating salmon fisher, challenged the Board's regulation authorizing a cooperative of salmon purse seine fishers.[40] The superior court rejected the challenge but was reversed by the supreme court.[41] The Board then promulgated an emergency regulation to again authorize a cooperative.[42] Grunert challenged and the superior court entered final judgment for Grunert; the Board appealed.[43] The supreme court held that the Board exceeded its authority in promulgating an emergency regulation to create a cooperative fishery scheme because the regulation was at odds with the Limited Entry Act and that the means employed by the regulation, in authorizing different equipment for the cooperative and open fishers, did not create two distinct fisheries.[44] The

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[30] 129 P.3d 881 (Alaska 2006).
[31] *Id.* at 881.
[32] *Id.* at 884.
[33] *Id.*
[34] *Id.* at 882.
[35] *Id.* at 881.
[36] *Id.* at 881–82, 886.
[37] *Id.* at 881.
[38] 139 P.3d 1226 (Alaska 2006).
[39] *Id.* at 1229.
[40] *Id.*
[41] *Id.* at 1230.
[42] *Id.*
[43] *Id.* at 1231.
[44] *Id.* at 1234, 1237.

regulation was at odds with the Limited Entry Act's purpose to protect active, economically dependent fishers, because the emergency regulation required only some participation by the permit holders in the cooperative,[45] allowing fishers who made the minimum number of deliveries to receive the same profit as those who made more deliveries.[46] Also, the differences in gear authorized under the regulation did not create two distinct fisheries, and the Board therefore violated its authorizing statute by allocating fishery resources within a single fishery.[47] The supreme court upheld the superior court's decision in part and reversed in part, holding that the Board exceeded its authority by promulgating an emergency regulation to create a cooperative fishery scheme and that the means employed by the regulation were outside the Board's authority to allocate fishery resources within a single fishery.[48]

J & S Services v. Tomter

In *J & S Services v. Tomter*,[49] the supreme court held that the Alaska State Procurement Code's exclusionary provision expressly exempted a government agency from liability for civil damages, but that damages could be recovered from a government officer in an individual capacity so long as the officer was acting outside of the scope of regular duties.[50] After losing a bid for leasing an airplane to the Department of Natural Resources, J & S Services ("J & S") brought suit in superior court, alleging that Tomter, who headed the leasing project, and the procurement agency were liable for a number of torts relating to improper dealing in awarding the contract.[51] The superior court dismissed claims against Tomter and the State, and J & S appealed.[52] The supreme court held that the procurement agency was exempted from liability in a civil damage suit under the procurement code, but that officials acting outside of the scope of their official duties were not exempt from individual capacity civil suits.[53] No exemption from civil suit is explicitly provided for individuals in the procurement code, and under traditional principles of official immunity, officials acting outside of the scope of regular work duties may be held individually liable in civil damages suits.[54] The supreme court affirmed the superior court's dismissal of claims against the State, but reversed the dismissal of claims against Tomter and remanded the case, holding that the procurement code expressly exempted a government agency from liability for civil damages, but that damages could be recovered from a government officer in an individual capacity who was acting outside of the scope of regular duties.[55]

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[45] *Id.* at 1234.
[46] *Id.*
[47] *Id.* at 1237–39.
[48] *Id.* at 1241.
[49] 139 P.3d 544 (Alaska 2006).
[50] *Id.* at 548.
[51] *Id.* at 546.
[52] *Id.*
[53] *Id.* at 548.
[54] *Id.*
[55] *Id.* at 552.

Lewis v. State

In *Lewis v. State*,[56] the supreme court held that the Department of Corrections ("Department") did not violate due process of a state prisoner in refusing her request to be examined by a physician of her choosing in order to prove a medical condition that would entitle her to be considered for executive clemency.[57] Lewis, convicted of second-degree murder, was not to be eligible for parole until 2011.[58] Fearing she would not live until 2011 because of her poor health, she applied for executive clemency.[59] The Department's medical staff determined there were no medical grounds to support her request for clemency.[60] Lewis filed a complaint against the State asking for a declaratory judgment on whether she should be allowed independent medical opinion evidence.[61] The superior court granted summary judgment to the State, finding that denial of Lewis' request to see an independent doctor did not violate her due process.[62] The supreme court applied a three-factor test to determine whether Lewis had a fair opportunity to make a factual showing to support her clemency application.[63] The test balanced (1) the private interest affected by official action; (2) the risk of erroneous deprivation of that interest because of the procedures used and the value of additional safeguards; and (3) the government's interest.[64] Under this test, the Department's denial of Lewis' access to an independent doctor did not violate her due process because Lewis did not demonstrate there would be any practical value in consulting an independent doctor.[65] The supreme court affirmed the decision of the superior court, holding that the Department did not violate a prisoner's due process when it denied her access to an independent doctor to prove a medical condition that would entitle her to be considered for clemency.[66]

Lakloey, Inc. v. University of Alaska

In *Lakloey, Inc. v. University of Alaska,*[67] the supreme court held that the costs expended in preparing a bid were not recoverable when irregularities in the bid solicitation process were not shown to have caused any actual damages.[68] In soliciting bids for improvements to its facilities, the University of Alaska ("University") issued an addendum to the bid instructions on the day the bids were scheduled to be opened.[69] Lakloey, which had submitted a bid prior to the issuance of the addendum, protested, arguing that the addendum violated the instructions issued to bidders as well as relevant statutes.[70] After the University rejected the two properly submitted bids, including

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[56] 139 P.3d 1266 (Alaska 2006).
[57] *Id.* at 1267.
[58] *Id.*
[59] *Id.*
[60] *Id.* at 1268.
[61] *Id*.
[62] *Id.*
[63] *Id.* at 1268, 1270.
[64] *Id.* at 1270.
[65] *Id.*
[66] *Id.* at 1267, 1272.
[67] 141 P.3d 317 (Alaska 2006).
[68] *Id.* at 318–19.
[69] *Id.* at 319.
[70] *Id.*

Lakloey's, it denied Lakloey's bid protest without a hearing.[71] On appeal, the superior court also rejected Lakloey's arguments.[72] The supreme court held that a successful bid protester must show actual damages in order to recover the costs of bid preparation and that, while the University violated Alaska law and its own instructions, Lakloey failed to show that these violations and irregularities caused it any additional expenses.[73] The supreme court affirmed the superior court's decision, holding that the costs expended in preparing a bid were not recoverable when irregularities in the bid solicitation process were not shown to have caused any actual damages.[74]

City of Saint Paul v. State

In *City of Saint Paul v. State*,[75] the supreme court held that a Department of Natural Resources ruling that used the statutory definition of a boundary for tidelands did not address a boundary dispute and, therefore, properly left the issue open for judicial resolution.[76] The City of Saint Paul ("City") applied to the Department of Natural Resources ("Department") for a conveyance of tidelands.[77] The Department conveyed the tidelands in accordance with the current boundary, which was statutorily defined according to the current mean high water line.[78] The City argued that by granting the tidelands according to the current boundary rather than an earlier line, it was adjudicating a boundary dispute.[79] The supreme court held that the Department was not adjudicating a boundary dispute by issuing the tidelands, because the Department used the statutory definition, there were no evidentiary hearings, and the commissioner made it clear that the conveyance did not establish a fixed boundary.[80] The commissioner conveyed the tidelands under a statute that does not require the commissioner to resolve the boundary dispute.[81] The supreme court affirmed the Department's conveyance, holding that it did not adjudicate the boundary dispute.[82]

Western States Fire Protection Co. of Alaska v. Anchorage

In *Western States Fire Protection Co. of Alaska v. Anchorage*,[83] the supreme court held that, even under the rational basis standard of review, the decision of the Anchorage Board of Building Regulation Examiners and Appeals ("Board") must be vacated where the Board has not addressed a critical issue in determining the appropriate outcome of the proceeding.[84] Western States Fire Protection Co. appealed a decision of

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[71] *Id*.
[72] *Id.* at 320.
[73] *Id.* at 321–23.
[74] *Id.* at 318–19.
[75] 137 P.3d 261(Alaska 2006).
[76] *Id*. at 262.
[77] *Id*. at 263.
[78] *Id*. at 264.
[79] *Id*.
[80] *Id*. at 265.
[81] *Id*. at 266.
[82] *Id*. at 267.
[83] 146 P.3d 986 (Alaska 2006).
[84] *Id.* at 991.

the Anchorage Fire Department that the sprinkler system in a school was inadequate.[85] The Board reversed the decision of the fire department, based on a narrow reading of the fire code, but without considering the adequacy of water coverage for fire prevention.[86] The supreme court held that rational basis review of the Board's decision was appropriate and found the decision lacking in proper reference to the overall goal of the fire code: to ensure the adequacy of water coverage of a potential fire hazard.[87] The supreme court vacated and remanded the decision of the Board, holding that the Board had not addressed a critical issue in determining the appropriate outcome of the proceeding.[88]

Wilson v. State, Department of Corrections

In *Wilson v. State, Department of Corrections*,[89] the supreme court held that the State's policy of transporting released prisoners to the community nearest the "place of arrest" satisfies the Alaska administrative code's requirement[90] of a return to the "place of arrest."[91] Shortly before his release from prison, Wilson requested to be transported by airplane directly to his home and place of arrest, which was accessible only by footpath and airplane.[92] The Department of Corrections ("DOC") denied his request,[93] and he filed an administrative grievance and appeal, arguing that the DOC was required by its regulation to transport him to his "place of arrest."[94] The DOC denied his grievance and appeal,[95] the superior court denied his subsequent suit for declaratory relief and damages, and Wilson appealed.[96] The supreme court held that the DOC could return released prisoners to the community nearest the "place of arrest" since the phrase "place of arrest" is ambiguous,[97] there is no legislative history which helps define it,[98] and the statute's purpose to get prisoners home is achieved by the DOC's interpretation, which was reasonable and not arbitrary. [99] The supreme court affirmed the decision of the superior court, holding that the State's policy of transporting released prisoners to the community nearest the "place of arrest" satisfies the Alaskan administrative code's requirement of a return to the "place of arrest."[100]

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[85] *Id.* at 988.
[86] *Id.* at 989.
[87] *Id.* at 989–91.
[88] *Id.* at 987, 991.
[89] 127 P.3d 826 (Alaska 2006).
[90] ALASKA STAT. § 33.30.081 (2006); ALASKA ADMIN. CODE tit. 22, § 05.585 (2006).
[91] *Wilson,* 127 P.3d at 828, 834.
[92] *Id*. at 828.
[93] *Id*.
[94] *Id*.
[95] *Id*.
[96] *Id*.
[97] *Id*. at 830.
[98] *Id*. at 831.
[99] *Id.* at 832–34.
[100] *Id*. at 828, 834.

III. BUSINESS LAW

Ninth Circuit Court of Appeals

Valdez Fisheries Development Ass'n v. Alaska

In *Valdez Fisheries Development Ass'n v. Alaska*,[101] the Ninth Circuit held that a bankruptcy court lacked jurisdiction to interpret a settlement agreement in an adversary proceeding brought between two creditors after the underlying bankruptcy had been closed.[102] Valdez Fisheries Development Association ("VFDA") and Sea Hawk Seafoods, Inc. ("Sea Hawk"), its creditor, entered into a settlement agreement in the course of VFDA's bankruptcy proceedings.[103] The bankruptcy court approved the agreement and entered a final decree closing the bankruptcy proceedings.[104] The bankruptcy court then claimed jurisdiction over an adversary proceeding between Sea Hawk and the State of Alaska prompted by the VFDA case.[105] The Ninth Circuit held that the bankruptcy court (1) lacked "related to" jurisdiction over the resultant case, since the bankruptcy proceeding had been entirely closed prior to the adversary proceeding and could not, therefore, be impacted or altered by it and (2) lacked ancillary jurisdiction to "vindicate its authority" or "effectuate its decree" in the previous case, since the bankruptcy court had not explicitly retained jurisdiction or incorporated the terms of the settlement agreement as required for ancillary jurisdiction.[106] The Ninth Circuit reversed the order of the district court, holding that a bankruptcy court lacked jurisdiction to interpret a settlement agreement in an adversary proceeding brought between two creditors after the underlying bankruptcy had been closed.[107]

Alaska Supreme Court

Alaska Construction & Engineering, Inc. v. Balzer Pacific Equipment Co.

In *Alaska Construction & Engineering, Inc. v. Balzer Pacific Equipment Co.*,[108] the supreme court held that a lessor who succeeded on the primary issue in the case was the prevailing party and could therefore recover from a lessee the attorneys' fees stipulated in the repossession provision of the lease, but could not recover its trial costs after repossession nor the higher interest rate printed on its repair invoices.[109] Alaska Construction & Engineering, Inc. ("ACE") leased rock-crushing equipment with the option to purchase from Balzer Pacific Equipment Co. ("Balzer").[110] ACE defaulted, and Balzer repossessed its equipment after posting a bond.[111] At trial, the jury found that

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[101] 439 F.3d 545 (9th Cir. 2006).
[102] *Id.* at 546.
[103] *Id.* at 547.
[104] *Id.*
[105] *Id.*
[106] *Id.* at 547–50.
[107] *Id.* at 546.
[108] 130 P.3d 932 (Alaska 2006).
[109] *Id.* at 941.
[110] *Id.* at 934.
[111] *Id.*

ACE breached the contract and awarded $50,500 in damages to Balzer; it also rejected all of ACE's affirmative defenses and three out of four counterclaims, awarding ACE $10,000.[112] The judge ruled that Balzer was the prevailing party and was entitled to attorneys' fees accrued before it recovered its equipment, but not after, and set the prejudgment interest at the statutory rate rather than the much higher rate specified on invoices Balzer sent to ACE.[113] ACE appealed the prevailing party decision and Balzer cross-appealed the attorneys' fees and interest rate decisions.[114] The supreme court held that the lessor prevailed on the primary issue in the case and, as the prevailing party, could therefore recover from the lessee the attorneys' fees provided by the repossession provision of the lease, but not its trial costs, nor the higher interest rate printed on its invoices.[115] First, Balzer was the prevailing party because it prevailed on the main issue in the case, had the larger monetary award, and succeeded on greater and more significant portions of its claims than ACE.[116] Further, the supreme court read the lease and option to purchase as separate agreements.[117] Thus, the attorneys' fees provision of the option to purchase was inapplicable since the option was never exercised, and the attorneys' fees provided by the repossession clause of the lease only applied up to the time that Balzer obtained possession of its equipment.[118] Finally, the court set the interest rate at the statutory rate rather than the eighteen percent printed on the repair invoices sent to ACE because Balzer did not show that ACE had knowledge of the eighteen percent provision or a reasonable opportunity to reject it.[119] The supreme court affirmed the superior court's decision, holding that Balzer was the prevailing party because it succeeded on the main issue and was therefore entitled by the repossession provision of the lease to attorneys' fees incurred until repossession of the equipment, but not trial costs nor the higher interest rate printed on its repair invoices.[120]

Anchorage Chrysler Center, Inc. v. DaimlerChrysler Corp.

In *Anchorage Chrysler Center, Inc. v. DaimlerChrysler Corp.*,[121] the supreme court held that a statement can be fraudulent misrepresentation even if technically true and that a letter of intent is not necessary for fact-finders to determine the existence of an agreement.[122] Anchorage Chrysler Center, Inc. ("ACC") entered into an agreement with DaimlerChrysler Motors Co. ("DCMC") that ACC would rearrange its showrooms so as to sell only Dodge brand cars in one building and Chryslers, Plymouths, and Jeeps in another building.[123] ACC contended that this agreement included a DCMC promise to allow ACC to build another automobile dealership in the town of Wasilla and to disallow

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[112] *Id.*
[113] *Id.* at 934–35.
[114] *Id.* at 935.
[115] *Id.* at 937, 941.
[116] *Id.* at 935–36.
[117] *Id.* at 937.
[118] *Id.* at 937.
[119] *Id.* at 940–41.
[120] *Id.* at 941.
[121] 129 P.3d 905 (Alaska 2006).
[122] *Id.* at 915, 917.
[123] *Id.* at 907.

other new Dodge dealerships in the area.[124] DCMC never provided ACC any Jeeps, arguing that ACC had failed to remodel its buildings per the agreement.[125] DCMC also argued that although it had suggested that there were no plans for another Dodge dealership when ACC inquired, it did not break any promises when it allowed a new Dodge dealership to be built in the Anchorage area,[126] and that despite talks concerning an ACC dealership in Wasilla, DCMC never delivered or signed a written letter of intent giving ACC rights to a new dealership.[127] The supreme court held that even though DCMC's statements that there were no plans for a new Dodge dealership were technically true, a true statement can be misleading and, therefore, can still be an actionable fraudulent misrepresentation if it induced actions that an informed party would not have undertaken.[128] The supreme court also held that ACC did not need a new letter of intent for the Wasilla dealership to create an agreement and that whether or not there was an agreement at all is a question for the fact-finder.[129] The supreme court vacated the dismissal of ACC's contract claims, holding that a statement can be fraudulent misrepresentation even if technically true and that a letter of intent is not necessary for fact-finders to determine the existence of an agreement.[130]

[124] *Id.* at 908.
[125] *Id.* at 909.
[126] *Id.* at 910.
[127] *Id.* at 909.
[128] *Id.* at 915.
[129] *Id.* at 917.
[130] *Id.* at 915, 917.

IV. CIVIL PROCEDURE

Ninth Circuit Court of Appeals

Johnson v. Columbia Properties Anchorage

In *Johnson v. Columbia Properties Anchorage,*[131] the Ninth Circuit held that limited liability companies ("LLCs") share the citizenship of all of their members for purposes of invoking the district court's diversity jurisdiction; thus, the district court properly exercised jurisdiction over an Alaska state court case removed to federal district court by the defendant, an LLC whose members were not Alaska citizens.[132] Johnson, an independent crane operator, provided crane services to Columbia Properties Anchorage ("Columbia") between September 1998 and February 2000 and sent an invoice in January, 2002.[133] Columbia did not pay[134] and, in February 2003, Johnson filed suit in Alaska state court.[135] Columbia removed the case to federal district court based on diversity of citizenship and moved for partial summary judgment, arguing that the claims were time-barred by Alaska's three-year statute of limitations.[136] The district court granted the defendant's motion.[137] Johnson appealed, arguing that the district court should have remanded to state court based on the citizenship of the LLCs.[138] The Ninth Circuit held that an LLC is a citizen of every state of which its partners are citizens.[139] Since none of the partners were Alaska citizens, the district court properly denied the plaintiff's motion to remove.[140] The Ninth Circuit also held that the district court properly applied Alaska law by tolling the statute of limitations at the conclusion of the project, not at the submission of the invoice.[141] The Ninth Circuit affirmed the decision of the district court, holding that LLCs have the citizenship of all of their members; thus, the district court properly exercised jurisdiction over an Alaska state court case removed to federal district court by the defendant, an LLC whose members were not Alaska citizens.[142]

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[131] 437 F.3d 894 (9th Cir. 2006).
[132] *Id.* at 899.
[133] *Id.* at 897–98.
[134] *Id.* at 898.
[135] *Id.*
[136] *Id.*
[137] *Id.*
[138] *Id.* at 899.
[139] *Id.*
[140] *Id.* at 899–900.
[141] *Id.* at 900–01.
[142] *Id.* at 902.

Alaska Supreme Court

In re Adoption of Erin G.

In *In re Adoption of Erin G.*,[143] the supreme court held that a father's petition under the federal Indian Child Welfare Act to invalidate his daughter's adoption was time-barred by Alaska's one-year statute of limitations for challenging adoption decrees.[144] Erin G. was born to an unmarried, terminally ill mother and an incarcerated father.[145] In September, 2002, the superior court entered an adoption decree making the Grants the legal parents of Erin.[146] David L., Erin's father, spent more than a year appealing other issues in the case and seeking new counsel, but did not file a petition to invalidate Erin's adoption until October, 2004, more than two years after the adoption order.[147] The supreme court held that Alaska's one-year statute of limitations on challenging adoptions applied to the federal Indian Child Welfare Act, thus barring David from entering his petition.[148] Because Congress did not put a statute of limitations in the Indian Child Welfare Act, it was appropriate to adopt the local statute of limitations as long as it did not conflict with federal laws or policies.[149] Here, there was no such conflict, and the one-year statute of limitations on petitioning adoptions provided a good balance between protecting the rights of Indian parents and protecting the rights of an adopted child.[150] The supreme court affirmed the ruling of the superior court, holding that a father's petition under the federal Indian Child Welfare Act to invalidate his daughter's adoption was time-barred by Alaska's one-year statute of limitations for challenging adoption decrees.[151]

Blood v. Kenneth A. Murray Insurance, Inc.

In *Blood v. Kenneth A. Murray Insurance, Inc.*,[152] the supreme court held that the termination-of-coverage notice obligations of the insurer were satisfied by mailing multiple written notices to the last known address even though the notices were returned undelivered.[153] Blood bought a six month renewable auto insurance policy from Kenneth A. Murray Insurance, Inc. ("KMI") but did not pay the renewal premium.[154] KMI mailed termination of coverage notices to Blood's address which were returned undelivered.[155] Blood was then injured and his claim was denied.[156] The superior court found that even though KMI had satisfied its statutory duty by mailing the notices to the last known address, KMI had a separate, non-statutory duty of care and due diligence to inform the

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[143] 140 P.3d 886 (Alaska 2006).
[144] *Id.* at 887.
[145] *Id.* at 887–88.
[146] *Id.* at 888.
[147] *Id.*
[148] *Id.* at 889.
[149] *Id.* at 891–92.
[150] *Id.* at 892–93.
[151] *Id.* at 887.
[152] 151 P.3d 428 (Alaska 2006).
[153] *Id*. at 432–34.
[154] *Id*. at 430.
[155] *Id*.
[156] *Id.*

insured of terminated coverage, though that failure was not the legal cause of harm to Blood.[157] The supreme court held that KMI fulfilled its statutory duty by mailing notice of termination of coverage to his last known address and that the returned letters supplied sufficient proof of mailing.[158] The supreme court also held that the superior court erred in holding KMI to a separate duty of care to inform the insured of termination; the separate duty of care which may be found in real estate forfeitures is not comparable to routine termination or non-renewal of automobile policies.[159] The supreme court reversed the superior court's finding of a non-statutory duty of care for KMI, holding that KMI satisfied its notice obligations by mailing multiple written notices to the last known address of the insured.[160]

Brannon v. Continental Casualty Co.

In *Brannon v. Continental Casualty Co.*,[161] the supreme court held that the statute of limitations began running on an insured's claim for breach of duty to defend against the insurer at the initial refusal to defend, but that the statute of limitations was equitably tolled until the underlying litigation was complete.[162] Terry Pfleiger acted as a real estate broker for the Brannons in their purchase of franchising assets from investors.[163] The Brannons and Pfleiger were sued by the investors.[164] The Brannons, in turn, cross-claimed against Pfleiger for breach of his fiduciary duty as their broker.[165] Continental Casualty Co. ("Continental"), Pfleiger's professional liability insurance carrier, refused to defend him in these suits in 1997.[166] Pfleiger's rights to sue Continental for breach of a duty to defend were later assigned to the Brannons.[167] The Brannons asserted these rights by filing a complaint against Continental in 2002.[168] The superior court granted Continental's motion for summary judgment, ruling that the three-year statute of limitations had begun running in 1997 and had expired.[169] The Brannons appealed.[170] The supreme court held that, although the statute of limitations began running when the contractual duty to defend was breached, it was equitably tolled until the underlying litigation was resolved, because the duty to defend is ongoing and can be assumed at any time before final judgment.[171] Tolling allows the insured to wait until he has finished litigating the underlying claim before filing a claim against the insurer.[172] The supreme court vacated the superior court's dismissal and remanded, holding that the statute of

[157] *Id.* at 431.
[158] *Id.* at 432.
[159] *Id*. at 432–34.
[160] *Id*.
[161] 137 P.3d 280 (Alaska 2006).
[162] *Id.* at 282.
[163] *Id.*
[164] *Id.*
[165] *Id.*
[166] *Id.*
[167] *Id.* at 283.
[168] *Id.*
[169] *Id.*
[170] *Id.* at 283–84.
[171] *Id.* at 284–85.
[172] *Id.* at 285.

limitations began running on an insured's claim for breach of duty to defend against the insurer at the initial refusal to defend, but that the statute of limitations was equitably tolled until the underlying litigation was complete.[173]

Catholic Bishop of Northern Alaska v. Does

In *Catholic Bishop of Northern Alaska v. Does*,[174] the supreme court held that Alaska Statute section 09.10.065, which eliminates any statute of limitations for claims of sexual abuse, does not apply retroactively, but declined to decide whether the discovery rule tolled the statutes of limitations for this case because it involved questions of fact.[175] Petitioner, Catholic Bishop of Northern Alaska, appealed the superior court's ruling against its motion for dismissal in a civil case arising from sexual abuse on the grounds that the claims were barred by the statute of limitations.[176] Petitioner argued that section 09.10.065 does not apply retroactively, meaning that the 2001 statute had no application to allegations of abuse from the 1970s and before.[177] The supreme court held that section 09.10.065 does not apply retroactively, because there is a presumption against statutes applying retroactively and because there was no legislative history indicating otherwise.[178] However, the supreme court declined to dismiss the case, finding that whether the statute of limitations had tolled was a question of fact, necessitating discovery and further trial proceedings.[179] The supreme court affirmed the decision of the superior court, holding that section 09.10.065 does not apply retroactively and that the question of the tolling of the statute of limitations was a factual one, deserving of further discovery proceedings.[180]

Domke v. Alyeska Pipeline Co., Inc.

In *Domke v. Alyeska Pipeline Co., Inc.*,[181] the supreme court held that the superior court erred in a series of procedural decisions in a wrongful termination action.[182] Domke sued his employer ("Champion") for wrongful termination as well as a customer of his employer ("Alyeska") and the customer's employee ("Disbrow") for tortious interference with his employment contract.[183] Champion counterclaimed for conversion and unjust enrichment.[184] Domke and Champion each prevailed in part, and Domke appealed.[185] The supreme court held that the superior court erred when it denied Domke's motion for judgment notwithstanding the verdict to hold Alyeska vicariously liable for Disbrow's interference, because the record compelled this finding, as the

[173] *Id.* at 282.
[174] 141 P.3d 719 (Alaska 2006).
[175] *Id.* at 725.
[176] *Id.* at 722.
[177] *Id.* at 720–21.
[178] *Id.* at 724.
[179] *Id.* at 725.
[180] *Id.*
[181] 137 P.3d 295 (Alaska 2006).
[182] *Id.* at 308.
[183] *Id.* at 298.
[184] *Id.*
[185] *Id.*

interference occurred within the scope of Disbrow's employment.[186] The supreme court also held that the superior court erred when it ruled that Champion's counterclaims were compulsory and thus timely, finding that the claims were permissive because they were not logically related to Domke's.[187] The supreme court further held that the superior court erred when it entered judgment against Domke based on a jury finding that Domke had contributed to the interference with his contract, finding that this contravened the statutory definition of the cause of action.[188] The supreme court affirmed the decisions of the superior court, but remanded for proceedings consistent with the three aforementioned holdings.[189]

Fairbanks North Star Borough v. Interior Cabaret, Hotel, Restaurant & Retailers Ass'n

In *Fairbanks North Star Borough v. Interior Cabaret, Hotel, Restaurant & Retailers Ass'n*,[190] the supreme court held that it was an abuse of discretion to find that Interior Cabaret, Hotel, Restaurant & Retailers Ass'n ("ICHRRA") was a public interest litigant, because it did not meet its burden of showing that it was not motivated primarily by economic concerns.[191] ICHRRA initially filed suit in an attempt to block a referendum approving a five-percent retail-sales tax on alcoholic beverages from being placed on the election ballot, but amended its complaint after the tax proposal was approved by the voters, claiming that the tax violated another Alaska statute.[192] The supreme court held that a litigant must satisfy four criteria in order to be considered a public interest litigant: (1) whether the case is designed to effectuate strong public policies; (2) whether numerous people will receive benefits from the lawsuit if the plaintiff succeeds; (3) whether only a private party could have been expected to bring the suit; and (4) whether the litigant would have sufficient economic incentive to bring the suit forward even if the action only involved narrow issues that lacked general importance.[193] The supreme court held that ICHRRA failed the fourth criteria because its members had a direct economic incentive to prevent a sales tax on alcohol and that the potential benefits to winning the lawsuit were not "insubstantial" or "diffuse."[194] The supreme court reversed and remanded the ruling of the superior court, holding that it was an abuse of discretion to find that ICHRRA was a public interest litigant, because it did not meet its burden of showing that it was not motivated primarily by economic concerns.[195]

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[186] *Id.* at 300–01.
[187] *Id.* at 301–03.
[188] *Id.* at 306–07.
[189] *Id.* at 308.
[190] 137 P.3d 289 (Alaska 2006).
[191] *Id.* at 294.
[192] *Id.* at 291.
[193] *Id.*
[194] *Id.* at 294.
[195] *Id.*

Hogg v. Raven Contractors, Inc.

In *Hogg v. Raven Contractors, Inc.*,[196] the supreme court held that a deferential standard of review applies to reviewing the superior court's denial of a motion for a new trial following a jury verdict.[197] Hogg sued Raven Contractors ("Raven") for negligence after he suffered injuries from falling into a borough trash disposal unit.[198] The jury decided that though Raven had been negligent, Raven's negligence was not the legal cause of Hogg's injury.[199] Hogg moved for a new trial, arguing that the jury's verdict did not follow court instructions on negligence and causation, and the superior court denied the motion.[200] The supreme court held that review of a trial court's decision to deny a motion for a new trial following a jury verdict is highly deferential and that the denial will be reversed only if the verdict was "plainly unreasonable and unjust" because the verdict was "completely lacking or slight and unconvincing."[201] The supreme court affirmed the superior court's denial of a new trial, holding that under this deferential standard of review, there was an evidentiary basis for the jury's decision and the verdict was not "plainly unreasonable and unjust."[202]

International Seafoods of Alaska, Inc. v. Bissonette

In *International Seafoods of Alaska, Inc. v. Bissonette*,[203] the supreme court held that the trial court did not abuse its discretion in certifying the plaintiffs as a class, using a single verdict form, instructing the jury, sanctioning absent class members, and awarding attorneys' fees.[204] A group of salmon fishers from the Egegik district sued International Seafoods of Alaska, Inc. ("International Seafoods") after it failed to match the major fishing buyers with the higher "bay price,"[205] as the fishermen interpreted their contract to promise.[206] At trial, a jury agreed with the fishermen that International Seafoods had breached its contract as to the class of fishermen, and the court awarded damages and attorneys' fees to the class.[207] The supreme court held that the trial court did not abuse its discretion in certifying all fishermen who, in the year 2000, took salmon from the Egegik district and sold them to International Seafoods as a certifiable class, because the class was sufficiently numerous, shared common issues, and was adequately represented by counsel.[208] Also, the trial court was within its discretion in declining to exclude members of the class who did not respond to discovery and instead limiting admissible evidence to that which was gathered from members who responded.[209] Further, the trial court was authorized to use a single verdict form in this class action rather than a verdict form for

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[196] 134 P.3d 349 (Alaska 2006).
[197] *Id.* at 352.
[198] *Id.* at 350.
[199] *Id.* at 351.
[200] *Id.* at 351–52.
[201] *Id.* at 352.
[202] *Id*. at 353.
[203] 146 P.3d 561 (Alaska 2006).
[204] *Id.* at 562.
[205] "Bay price" is the price paid by the major fishing buyers that season. *Id.* at 563.
[206] *Id.*
[207] *Id.* at 565–66.
[208] *Id.* at 567–68.
[209] *Id.* at 569.

each member of the class.[210] The jury instructions that assumed a single contract, rather than separate contracts for each fisherman, were acceptable because both sides argued and admitted the single-contract theory at trial.[211] Finally, International Seafoods presented no authority for overturning the augmented attorneys' fees.[212] The supreme court affirmed the jury award, holding that the trial court did not abuse its discretion in certifying the plaintiffs as a class, using a single verdict form, instructing the jury, sanctioning absent class members, and awarding attorneys' fees.[213]

Jarvis v. Ensminger

In *Jarvis v. Ensminger*,[214] the supreme court held that the superior court properly granted summary judgment on contract claims, but had incorrectly granted summary judgment *sua sponte* on the misrepresentation and promissory estoppel claims.[215] Jarvis, a former employee at a car dealership, sued his former employers regarding stock options provided in his contract of employment but never disbursed to him, claiming breach of contract, misrepresentation, and promissory estoppel.[216] Jarvis's former employers moved for summary judgment based only on the breach of contract issue;[217] however, the superior court *sua sponte* granted summary judgment on the misrepresentation and promissory estoppel claims as well.[218] The supreme court held that since a contractual condition had not been met, summary judgment was appropriately granted to Ensminger.[219] Summary judgment was rendered in error on the misrepresentation and promissory estoppel claims, however, because Ensminger never moved for summary judgment on these issues, and, since the burden of showing any genuine issue of material fact never shifted to Jarvis, Jarvis' claims should not have been dismissed for failing to do so.[220] Furthermore, granting summary judgment was not harmless.[221] The supreme court partly affirmed and partly reversed the superior court, holding that the summary judgment was properly granted on the contract claims, but incorrectly granted *sua sponte* on the misrepresentation and promissory estoppel claims.[222]

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[210] *Id.* at 571.
[211] *Id.* at 572.
[212] *Id.* at 573.
[213] *Id.*
[214] 134 P.3d 353 (Alaska 2006).
[215] *Id.* at 355.
[216] *Id.* at 355.
[217] *Id.* at 357.
[218] *Id.* at 361.
[219] *Id.* at 358–59.
[220] *Id.* at 362.
[221] *Id.* at 364.
[222] *Id.*

Jerry Kinn, Valley Motors, Inc. v. Alaska Sales & Service, Inc.

In *Jerry Kinn, Valley Motors, Inc. v. Alaska Sales & Service, Inc.*,[223] the supreme court held that an arbitrator who did not have financial ties to a party involved in arbitration was not evidently biased,[224] and that because of the construction of a contract, the arbitrator had the authority to require the rescission of part of a property contract.[225] Kinn sold to Alaska Sales & Service, Inc. an automobile dealership and the property upon which it was located, in two separate agreements.[226] After discovering that the land was contaminated, Alaska Sales & Service brought an arbitration action against Kinn.[227] The arbitrator ruled in favor of Alaska Sales & Service, requiring Kinn to rescind the property contract, but not the asset (dealership) contract.[228] Upon Kinn's appeal, the superior court held that the arbitrator did have the authority to require rescission of the property contract, and that the arbitrator was not biased.[229] Kinn appealed.[230] The supreme court held that the ties between the arbitrator and the attorney for Alaska Sales & Services were not the kind of financial ties that would lead a reasonable person to believe that the arbitrator would be biased.[231] Also, a reasonable person could understand the exchange to involve two contracts, thus the arbitrator was allowed to require the rescission of one but not the other.[232] The supreme court affirmed the decision of the superior court, holding that an arbitrator who did not have financial ties to a party in an arbitration was not evidently biased and that he had the authority to require the partial rescission of the property contract.[233]

John's Heating Service v. Lamb

In *John's Heating Service v. Lamb,*[234] the supreme court held that the applicable two-year statute of limitations did not act as a bar to a suit arising from carbon monoxide poisoning, since the injured party filed suit less than one year after they were put on inquiry notice of the possible injury.[235] On October 15, 1991, the Lambs called John's Heating Service to inspect their furnace, which was not functioning properly.[236] Although John's Heating Service did some minor work, the problem was not solved, and on January 31, 1993 the Lambs learned from another furnace repair service that the furnace was likely circulating carbon monoxide throughout the home.[237] Later that year, the Lambs hired a lawyer, submitted to neurological tests which showed evidence of carbon monoxide poisoning, and filed suit against John's Heating Service on December

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[223] 144 P.3d 474 (Alaska 2006).
[224] *Id*. at 485.
[225] *Id*. at 487–88.
[226] *Id*. at 478.
[227] *Id*. at 479.
[228] *Id*. at 480.
[229] *Id*. at 482.
[230] *Id*.
[231] *Id*. at 485.
[232] *Id*. at 488.
[233] *Id*.
[234] 129 P.3d 919 (Alaska 2006).
[235] *Id.* at 925–26.
[236] *Id.* at 921.
[237] *Id.*

23, 1993, more than two years after the initial service call.[238] At trial, the jury returned a verdict for the Lambs, which John's Heating Service appealed on statute of limitations grounds.[239] The supreme court held that the suit was timely, because although the Lambs were on inquiry notice of the poor functioning of the furnace on October 15, 1991, the Lambs were not on notice of the possible health consequences until January 31, 1993.[240] The supreme court affirmed the decision of the superior court, holding that the complaint arising from carbon monoxide poisoning was timely because plaintiffs were not on notice until they learned of the possible health consequences.[241]

Kay v. Danbar, Inc.

In *Kay v. Danbar, Inc.*[242] the supreme court held that a plaintiff who elects to limit his damage claims under Civil Rule 26(g)[243] may subsequently withdraw his request and that where there is at least minimally sufficient evidence that a Realtor assumed a responsibility to protect a tenant, a jury must decide whether or not that assumed duty was breached.[244] Kay contacted a RE/MAX agent in an apartment search, moved into a duplex, and a month later fractured his ankle after slipping on loose carpet in the garage.[245] In the suit that followed, Kay initially invoked Civil Rule 26(g), which caps damages at $100,000 but also provides for expedited discovery.[246] However, after determining that damages would exceed that amount, he attempted to withdraw his use of Rule 26(g).[247] The court denied his request and, despite a jury verdict of over $400,000, reduced the amount in accordance with the cap.[248] The supreme court held that Kay could withdraw his use of Rule 26(g), because the rule is comparable to a motion for leave to amend, and a complaint may be amended if it is in the interest of justice to do so.[249] Here, Kay specifically told the opposing party that he may need to withdraw his election to use Rule 26(g), and he immediately informed them of his intent to do so once he found out that the damages would likely exceed $100,000.[250] Additionally, RE/MAX was explicitly designated as the property manager and was specifically mentioned in the rental agreement as the party which would undertake certain managerial duties.[251] As a result, there was enough evidence that a jury could reasonably find that RE/MAX had a duty to warn Kay about the hazard which eventually caused his injury.[252] The supreme court affirmed in part, reversed in part, and remanded the trial holding that a plaintiff who elects to limit his damage claims under Rule 26(g) may subsequently withdraw his

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[238] *Id.*
[239] *Id.*
[240] *Id.* at 923, 925.
[241] *Id.* at 926.
[242] 132 P.3d 262 (Alaska 2006).
[243] ALASKA R. CIV. P. 26(g) (2006).
[244] *Kay,* 132 P.3d at 268, 272.
[245] *Id.*
[246] *Id.* at 265.
[247] *Id.* at 264.
[248] *Id.* at 265.
[249] *Id.* at 266.
[250] *Id.* at 267.
[251] *Id.* at 270–71.
[252] *Id.* at 272.

request for the expedited procedure provided by the rule and that where there is at least minimally sufficient evidence that a Realtor assumed a responsibility to protect a tenant, it is a question for the jury whether or not that assumed duty was breached.[253]

City of Kenai v. Friends of the Recreation Center, Inc.

In *City of Kenai v. Friends of the Recreation Center, Inc.*,[254] the supreme court held that full attorneys' fees should be awarded to public interest litigants even though the case was ultimately dismissed as moot.[255] Friends of the Recreation Center, Inc. ("Friends") sued the city for entering into a contract for private management of the city's recreation center without competitive bidding, as required by city ordinance.[256] The superior court issued a preliminary injunction to stop the city from honoring its contract.[257] The city council then amended the ordinance to exclude recreation center managers from the competitive bidding requirement, and the case was dismissed as moot.[258] Friends was awarded full attorneys' fees, and the city appealed.[259] The supreme court held that the attorneys' fees award was not an abuse of discretion because if a prevailing party is a public interest litigant, it is normally entitled to the full amount of reasonable attorneys' fees.[260] The court found that Friends had demonstrated probable success on the merits, making it the prevailing party despite the case being dismissed for mootness.[261] The supreme court affirmed the decision of the superior court, holding that full attorneys' fees should be awarded to public interest litigants even though their case was dismissed as moot.[262]

Lee v. State

In *Lee v. State*,[263] the supreme court held that facts alleged in a complaint were properly deemed admitted when an individual willfully failed to follow court orders in responding to discovery.[264] The State filed a complaint against Lee under Alaska's Unfair Trade Practices and Consumer Protection Act, alleging that he engaged in consumer fraud in his advertisements and demonstrations for "free electricity."[265] Lee did not adequately respond to discovery requests, despite repeated orders to do so from the court.[266] In response, the trial court ordered the facts alleged in the complaint to be deemed admitted.[267] The supreme court held that the complaint was properly deemed

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[253] *Id.* at 272–73.
[254] 129 P.3d 452 (Alaska 2006).
[255] *Id*. at 454.
[256] *Id*.
[257] *Id*.
[258] *Id*. at 455.
[259] *Id*.
[260] *Id*.
[261] *Id*. at 460.
[262] *Id*. at 454.
[263] 141 P.3d 342 (Alaska 2006).
[264] *Id.* at 348–51.
[265] *Id.* at 345–46.
[266] *Id.* at 346.
[267] *Id.*

admitted, because Lee's decision not to answer discovery was willful and prejudicial to the State's case.[268] Also, there did not appear to be any effective alternatives that would correct the prejudice to the State's case, other than deeming the facts to be admitted.[269] The supreme court affirmed the decision of the trial judge, holding that the facts in the complaint were properly deemed admitted when an individual willfully and prejudicially failed to follow court orders in responding to discovery.[270]

McLaughlin v. Lougee

In *McLaughlin v. Lougee*,[271] the supreme court held that the repeal of statutory contribution in Alaska did not preclude a common-law contribution action against defendants who were not parties to the original action.[272] The McLaughlins lost title to a property due to malpractice by their attorney Robson.[273] The McLaughlins allege that Robson's law firm conspired with Robson in order to deprive the McLaughlins of their legal rights to sue Robson for malpractice.[274] Because Robson's liability insurance was exhausted, the McLaughlins sought contribution for the remainder of their damages from Robson's alleged co-conspirator, the law firm.[275] The superior court ruled that because the Uniform Contribution Act was repealed in 1989 by voter initiative, the McLaughlins could not seek contribution from Hughes Thorsness, a non-party to the original action.[276] The supreme court first stated that the ruling on this case applied only to cases between the 1989 voter initiative and the new contribution law enacted in 1997.[277] The supreme court held that common-law contribution is available against non-parties to the original action because fairly allocating damages according to the relative fault of all parties, or non-parties, furthers the objective of Alaska's comparative-fault-several-liability rule.[278] Because Alaska does not reduce damages in an original action for the fault of non-parties, disallowing contribution in a subsequent action would be unfair to the parties deemed at fault in the original action.[279] The supreme court reversed the superior court's decision and remanded the case, holding that the repeal of statutory contribution in Alaska did not preclude a common-law contribution action against defendants who were not parties to the original action.[280]

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[268] *Id.* at 348–50.
[269] *Id.* at 351.
[270] *Id.* at 348–51.
[271] 137 P.3d 267 (Alaska 2006).
[272] *Id.* at 280.
[273] *Id.* at 268.
[274] *Id.* at 269.
[275] *Id.*
[276] *Id.*
[277] *Id.* at 270 n.4.
[278] *Id.* at 272.
[279] *Id.* at 273.
[280] *Id.* at 280.

State, Department of Transportation and Public Facilities v. Miller

In *State, Department of Transportation and Public Facilities v. Miller*,[281] the supreme court held that the superior court did not err: (1) in denying the State a continuance where new information came to light two and a half months before trial; (2) in instructing the jury on negligence; (3) in permitting the jury to consider the lost earning capacity of the plaintiff; or (4) in failing to grant the State's motion for judgment notwithstanding the verdict.[282] Miller was injured in a plane crash at an unmanned airport in Kipnuk owned and maintained by the State of Alaska.[283] He sued the State for negligence on the grounds that the State failed to maintain functioning windsocks on the runway and was awarded damages.[284] The State appealed.[285] The supreme court held that the superior court's denial of a continuance for further discovery did not prevent the State from presenting evidence on four issues which affected the overall trial, because the State had enough time to present its core case and alert the jury as to the existence of the four new issues[286] and thus was not deprived of a "substantial right."[287] Further, considering the condition of the airport as a whole, the jury was correctly instructed on the south windsock's relevance.[288] Also, the superior court did not err in instructing the jury to consider lost earning capacity when Miller stipulated he was not seeking damages in relation to his decision to leave his job, because the issue of lost earning capacity was distinct from the issue of actual lost earnings, and on the facts a reasonable jury could have found that Miller was entitled to damages for lost earning capacity.[289] Finally, the State was not entitled to a judgment notwithstanding the verdict, because a reasonable person could find that the State, having installed but not maintained the windsock, was aware it had created a dangerous condition and failed to adequately warn about or remedy the condition.[290] The supreme court affirmed the decision of the superior court, holding that the superior court did not err: (1) in denying the State a continuance where new information came to light before trial; (2) in instructing the jury on negligence; (3) in permitting the jury to consider the lost earning capacity of the plaintiff; or (4) in failing to grant the State's motion for judgment notwithstanding the verdict.[291]

Milos v. Quality Asphalt Paving, Inc.

In *Milos v. Quality Asphalt Paving, Inc.*,[292] the supreme court held that the evidence in a wrongful death suit permitted the inference that an employee killed at his worksite was off-shift at the time of the accident and that this fact was material to a

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[281] 145 P.3d 521 (Alaska 2006).
[282] *Id.* at 523.
[283] *Id.*
[284] *Id.*
[285] *Id.*
[286] *Id.* at 529.
[287] *Id.* at 530.
[288] *Id.* at 531.
[289] *Id.* at 532.
[290] *Id.* at 533.
[291] *Id.* at 523.
[292] 145 P.3d 533 (Alaska 2006).

determination of whether Alaska's workers' compensation statute would apply as an exclusive remedy.[293] Milos was killed after riding, without authorization, an ATV belonging to his employer, Quality Asphalt Paving, Inc. ("Quality"), up a large pile of gravel and accidentally contacting an overhead power line.[294] Milos's estate sued Quality for negligence, and Quality moved for summary judgment, arguing that, under Alaska law, workers' compensation was the estate's sole remedy.[295] The superior court granted summary judgment to Quality, holding that Milos's injuries arose out of and in the course of his employment.[296] The supreme court held that the estate had submitted enough evidence to create a genuine issue of fact about whether Milos was on the clock at the time of the accident.[297] Further, this issue was material because if Milos's off-clock status were proven, it might exclude him from workers' compensation coverage.[298] There was not a sufficient relationship between Milos's actions and his employment to allow summary judgment based on the applicability of the workers' compensation statute.[299] The supreme court reversed the summary judgment and remanded the case, holding that the evidence permitted the inference that Milos was off-shift at the time of the accident and that this fact was material to a determination of whether Alaska's workers' compensation statute would apply.[300]

Morgan v. Morgan

In *Morgan v. Morgan*,[301] the supreme court held that a former wife failed to move for modification of her marriage dissolution decree within a reasonable time after discovering her former husband's pension.[302] The parties' 1974 divorce decree dividing their marital property did not include the husband's then-unvested pension.[303] The former wife, having learned of the pension's existence in 2000, moved to modify the dissolution decree in June, 2003, and the superior court granted the motion.[304] The former husband appealed, claiming the former wife's motion was not filed within a reasonable time.[305] The supreme court agreed, holding that the former wife's generalized fear of the former husband's anger problem should not have precluded her from seeking relief sooner.[306] The supreme court reversed and remanded the decision of the superior court, holding that the former wife failed to move within a reasonable time to modify her marriage dissolution decree after learning of her former husband's pension.[307]

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[293] *Id.* at 534.
[294] *Id.* at 535.
[295] *Id.*
[296] *Id.* at 536.
[297] *Id.* at 537.
[298] *Id.* at 538.
[299] *Id.* at 541.
[300] *Id.* at 534.
[301] 143 P.3d 975 (Alaska 2006).
[302] *Id.* at 977.
[303] *Id.* at 975.
[304] *Id.* at 976.
[305] *Id.*
[306] *Id.* at 976–77.
[307] *Id.* at 977.

Murray v. Ledbetter

In *Murray v. Ledbetter*,[308] the supreme court held that an attorney's alleged misrepresentation in court was not sufficiently egregious to qualify as fraud directed at a court of law but at most was a wrong committed between the individual parties.[309] Rodney and Katherine Ledbetter, while married, came to a debt settlement agreement with Murray.[310] The following year, they filed for divorce, and the decree of divorce ordered Rodney to assume most of the marriage debt liabilities.[311] After moving to Anchorage, Katherine received notice that Murray was filing suit against Katherine and Rodney for defaulting on their settlement agreement.[312] Katherine responded with a letter stating that Rodney had assumed all marital debts and eventually dropped off several legal documents, including the original summons and complaint, at the office of Rodney's attorney, Crist.[313] Without any consultation with Katherine, Crist represented her in an Idaho court and agreed on a new settlement with Murray's attorney.[314] The superior court judge held that the Idaho judgment could not be enforced in Alaska because it had been obtained fraudulently in the Idaho court.[315] The supreme court held that the degree of misconduct by Crist was not sufficient to find that he had acted recklessly in representing Katherine in an Idaho court,[316] that Katherine failed to prove that the Idaho court's determination on her being required to pay back the debt would have been different had she been represented by her own attorney,[317] that as a result of the misrepresentation one party was not able to take advantage of the other,[318] that it would be inequitable to place the consequences of the superior court's decision on Murray, the lender,[319] and that Katherine was partly at fault for completely ignoring the case after depositing documents at Crist's office.[320] If there was a wrong, it was between Katherine and Crist, not between Crist and the Idaho court.[321] The supreme court reversed the superior court's ruling, holding that an attorney's alleged misrepresentation in court was not sufficiently egregious to qualify as fraud directed at a court of law, but at most was a wrong committed between the individual parties.[322]

Perkins v. Doyon Universal Services, LLC

In *Perkins v. Doyon Universal Services, LLC*,[323] the supreme court held that an employer does not discriminate on the basis of race so long as it is able to provide

[308] 144 P.3d 492 (Alaska 2006).
[309] *Id.* at 493.
[310] *Id.*
[311] *Id.*
[312] *Id.* at 493–94.
[313] *Id.* at 494.
[314] *Id.* at 494–95.
[315] *Id.* at 495.
[316] *Id.* at 500–01.
[317] *Id.* at 501–02.
[318] *Id.* at 502–03.
[319] *Id.* at 503.
[320] *Id.* at 504.
[321] *Id.*
[322] *Id.* at 493.
[323] 151 P.3d 413 (Alaska 2006).

legitimate, non-discriminatory reasons for hiring a non-minority rather than a minority individual.[324] Perkins, who identified himself as black, applied for a job at Doyon Universal Services, LLC ("Doyon"), but the job was given to another individual who was not a minority.[325] As a result, Perkins filed a discrimination suit as a pro se plaintiff.[326] The superior court granted summary judgment dismissal to Doyon.[327] The supreme court held that when a plaintiff establishes that he is a member of a recognized class protected by statute and that he was denied a position for which he was qualified, he establishes a prima facie case of discrimination, shifting the burden to the defendant.[328] Although the burden shifted, however, Doyon had legitimate reasons for hiring the non-minority candidate over Perkins.[329] The hired individual had worked for eight years in a kennel, whereas Perkins had only worked in a research lab, which has a more tenuous relationship to the desired job.[330] The supreme court affirmed the dismissal, finding that an employer does not discriminate on the basis of race so long as it is able to provide legitimate, non-discriminatory reasons for hiring a non-minority rather than a minority individual.[331]

Price v. Eastham

In *Price v. Eastham*,[332] the supreme court held that the superior court must include sufficient findings in its decision for meaningful appellate review[333] and that even a *pro se* litigant must preserve claims for appeal by raising them at the trial level.[334] Price posted "no trespassing" signs on his property to prohibit snowmachiners from crossing the land.[335] A group of snowmachiners sued Price to have the trail declared right-of-way or, alternatively, a prescriptive easement.[336] The superior court found that a right-of-way, or alternatively a prescriptive easement, existed.[337] After the supreme court affirmed and remanded,[338] the superior court issued a single sentence order describing the length and width of the easement, and Price appealed.[339] The supreme court held that the superior court failed to make findings sufficient to clearly and explicitly specify the scope of the easement, and therefore to allow for meaningful appellate review. [340] Additionally, the supreme court refused to consider a new argument Price raised on appeal, because he did not raise that issue at the trial level, even though *pro se* litigants should be held to less

[324] *Id.* at 418.
[325] *Id.* at 415.
[326] *Id*.
[327] *Id.*
[328] *Id.* at 416.
[329] *Id.* at 418.
[330] *Id.* at 417.
[331] *Id.* at 418.
[332] 128 P.3d 725 (Alaska 2006).
[333] *Id*. at 727.
[334] *Id.* at 731–32.
[335] *Id.* at 726.
[336] *Id*.
[337] *Id.* at 726–27.
[338] *Id.* at 727.
[339] *Id*.
[340] *Id.* at 727–28.

rigorous standards than attorneys.[341] The supreme court remanded the case, holding that the superior court's one sentence order describing the prescriptive easement did not provide enough specificity for meaningful appellate review and that, though a *pro se* litigant's brief should be read generously, the court would not consider on appeal an issue he or she did not preserve at the trial level.[342]

Smith v. CSK Auto, Inc.

In *Smith v. CSK Auto, Inc.*,[343] the supreme court held that, while the doctrine of res judicata bars an action when the claims in that action were previously dismissed with prejudice,[344] a new claim in the subsequent action is not barred when it does not stem from the same transaction.[345] Mr. Smith sued his former employer, CSK Auto, for injuries Smith allegedly received while working at CSK.[346] After CSK had the case removed to federal court based on diversity of citizenship, and shortly after the court dismissed Smith's claims with prejudice, he filed the current action in superior court, stating claims similar to those of the federal case, in addition to a new wrongful termination claim.[347] The superior court dismissed this second complaint on grounds that it was barred by either res judicata or collateral estoppel, and Smith appealed.[348] After quickly dispensing with the claims that were identical to those of the previously dismissed complaint,[349] the supreme court held that the wrongful termination claim, which was new to this action, was not a new legal theory arising from the same facts, but was rather a claim arising from a different transaction.[350] Since the wrongful termination claim arose from a different harm, and caused a different injury, the claim was not precluded.[351] The supreme court affirmed the decision of the superior court in part and reversed in part, holding that the claims that were based on the same injury as the previously dismissed complaint were barred by res judicata, while the new claim of wrongful termination was not barred since it did not stem from the same transaction.[352]

Solomon v. Interior Regional Housing Authority

In *Solomon v. Interior Regional Housing Authority,*[353] the supreme court held that equitable tolling is available in overcoming the statute of limitations in a state law claim when a litigant is pursuing the claim in federal court in a timely manner.[354] Solomon sued Interior Regional Housing Authority ("IRHA") in federal court for violating the

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[341] *Id.* at 731–32.
[342] *Id*. at 727-28, 731–32.
[343] 132 P.3d 818 (Alaska 2006).
[344] *Id.* at 820–21.
[345] *Id.* at 821.
[346] *Id.* at 819.
[347] *Id.* at 819–20.
[348] *Id.* at 820.
[349] *Id.* at 820–21.
[350] *Id.* at 822.
[351] *Id.*
[352] *Id.* at 821, 824.
[353] 140 P.3d 882 (Alaska 2006).
[354] *Id.* at 882–83.

Indian employment preference laws, and claimed that he was not hired in retaliation for his worker's compensation claims.[355] Solomon's federal claims were dismissed, and afterward he filed in state court under Alaska state law.[356] The IRHA argued that his claim was barred by the statute of limitations.[357] Solomon argued that, because he was pursuing those claims in federal court, his state claim should be eligible for equitable tolling to allow him to file his claim in state court.[358] The supreme court, applying a three-part test, held that his claim was eligible for equitable tolling under state law, because: (1) the IRHA had notice about the alternative remedy; (2) there was no prejudice to the IRHA; and (3) Solomon acted reasonably and in good faith.[359] The supreme court reversed the decision of the superior court, holding that, because Solomon was pursuing his claim in federal court, his state court claim was eligible for equitable tolling of the statute of limitations.[360]

Stuart v. Whaler's Cove, Inc.

In *Stuart v. Whaler's Cove, Inc.*,[361] the supreme court held that the superior court did not abuse its discretion when refusing to hold a party in contempt after it had made significant efforts to comply with the court's prior order.[362] The superior court previously ordered Whaler's Cove, Inc. ("Whaler's Cove") to remove buildings that obstructed the right-of-way shared by Stuart.[363] A majority of the encroaching buildings were removed, but not all of them.[364] Stuart filed a motion requesting that Whaler's Cove be held in contempt.[365] The superior court found that significant effort had been exerted and denied the motion.[366] The supreme court held that, under a clear error standard of review and according considerable deference,[367] the record documented significant efforts by Whaler's Cove, including using heavy equipment, draining the reservoir, and reinforcing the embankment.[368] Furthermore, these efforts improved the flow through the right-of-way.[369] The supreme court affirmed the superior court's decision, holding that the superior court did not abuse its discretion when refusing to hold Whaler's Cove in contempt after it had made significant efforts to comply with the court's prior order.[370]

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[355] *Id*. at 883.
[356] *Id*.
[357] *Id*.
[358] *Id.* at 884.
[359] *Id*.
[360] *Id.* at 886.
[361] 144 P.3d 467 (Alaska 2006).
[362] *Id.* at 467–78.
[363] *Id.* at 468.
[364] *Id.*
[365] *Id.*
[366] *Id.* at 468–69.
[367] *Id.* at 469.
[368] *Id.*
[369] *Id.*
[370] *Id.* at 467–78.

Valley Hospital Ass'n v. Brauneis

In *Valley Hospital Ass'n v. Brauneis*,[371] the supreme court held that a motion for entry of a default judgment could not be denied on grounds that an averment lacks proof without first providing a plaintiff with notice and opportunity to submit evidence of the truth of the averment.[372] Valley Hospital Association, Inc. ("Valley Hospital") obtained a default judgment against Brauneis, but appealed the superior court's refusal to award attorneys' fees and grant the hospital the right to enforce a health care provider lien.[373] The supreme court held that a motion for entry of a default judgment could not be denied on grounds that an averment lacks proof without first providing a plaintiff with notice and opportunity to submit evidence of the truth of the averment, thus Valley Hospital should have been given notice and an opportunity to provide evidence that it recorded the lien, since it was questioned.[374] In addition, the supreme court held that the denial of attorneys' fees was not an abuse of discretion since Valley Hospital failed to document its fees and had waived its right to fees when it failed to move for reconsideration.[375] The supreme court remanded the case, holding that a motion for entry of a default judgment could not be denied on grounds that an averment lacks proof without first providing a plaintiff with notice and opportunity to submit evidence of the truth of the averment.[376]

Vazquez v. Campbell

In *Vazquez v. Campbell*,[377] the supreme court held that a losing party who engages in bad-faith conduct or brings frivolous claims and defenses can be forced to pay all reasonable attorneys' fees and costs to the prevailing party instead of just a partial payment.[378] Campbell sought to enforce a child custody order entered by a court in Oregon, and the Vazquezes unsuccessfully opposed this order at the superior court level.[379] The superior court ruled that the Vazquezes litigated in bad-faith and thus awarded full attorneys' fees and costs to Campbell.[380] The supreme court held that Alaska Civil Rule 82,[381] which gives partial attorneys' fees to the prevailing party as a standard, allows a court to award full attorneys' fees if the losing party acted in bad-faith or pursued frivolous claims or asserted frivolous defenses.[382] Furthermore, the supreme court held that Campbell was entitled to attorneys' fees despite that fact that she used a free legal aid service.[383] The supreme court affirmed the ruling of the superior court, holding that a losing party who engages in bad-faith conduct or brings frivolous claims

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[371] 141 P.3d 726 (Alaska 2006).
[372] *Id*. at 729.
[373] *Id*. at 726.
[374] *Id*. at 729.
[375] *Id*. at 730.
[376] *Id*. at 731.
[377] 146 P.3d 1 (Alaska 2006).
[378] *Id.* at 2.
[379] *Id*.
[380] *Id.*
[381] ALASKA R. CIV. P. 82.
[382] *Vazquez*, 146 P.3d at 2.
[383] *Id.* at 3.

and defenses can be forced to pay all reasonable attorneys' fees and costs to the prevailing party instead of just a partial payment.[384]

Williams v. Williams

In *Williams v. Williams*,[385] the supreme court held that neither the doctrine of equitable estoppel nor Alaska's statutory fraud tolling provision applied in a suit by an heir against two of her siblings for fraudulently removing stock from their father's estate.[386] Pete Williams began a transfer of stock in a family business to two of his four children, Mike and Connie, who completed the transfer after Pete's death, removing the stock from his estate, which was probated nine years later.[387] Another child, Christine, sued Mike and Connie for fraud in connection with the stock transfer eight years after the probate.[388] The superior court dismissed her complaint as untimely.[389] Christine appealed, arguing that the statute of limitations was tolled under the doctrine of equitable estoppel because Mike and Connie concealed the existence of an earlier will and the stock transfer and misrepresented that she would receive a share in the business.[390] She also argued that her suit was timely under an Alaska statute that tolls the statute of limitations on claims of fraud in probate proceedings until discovery of the fraud.[391] The supreme court held that, to show equitable estoppel, a plaintiff must show fraudulent conduct, justifiable reliance, and damage and must exercise due diligence in uncovering concealed facts, and that neither equitable estoppel nor the statutory fraud tolling provision applied to Christine's suit because Mike and Connie did not commit the fraudulent acts she alleged.[392] Even if they did, Christine's suit would still be untimely because, with due diligence, she should have discovered the concealed facts at the time of the probate, ending the toll.[393] The supreme court affirmed the decision of the superior court, holding that neither the doctrine of equitable estoppel nor Alaska's statutory fraud tolling provision applied to Christine's claims against Mike and Connie for fraudulently removing stock from their father's estate.[394]

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[384] *Id.* at 2–3.
[385] 129 P.3d 428 (Alaska 2006).
[386] *Id.* at 433, 435.
[387] *Id.* at 429-30.
[388] *Id.*
[389] *Id.* at 430.
[390] *Id.* at 431–32.
[391] *Id.* at 433–34.
[392] *Id.* at 432–33.
[393] *Id.* at 433.
[394] *Id.* at 433, 435.

V. CONSTITUTIONAL LAW

Ninth Circuit Court of Appeals

Alaska Right to Life Committee v. Miles

In *Alaska Right to Life Committee v. Miles*,[395] the Ninth Circuit held that certain challenged provisions of Alaskan campaign finance law did not violate the First Amendment.[396] The Alaska Right to Life Committee ("AKRTL"), a pro-life nonprofit corporation, sued the director and members of the Alaska Public Offices Commission (collectively "APOC") in their official capacities after APOC notified AKRTL that a proposed AKRTL telemarketing campaign shortly before the 2002 gubernatorial race would subject AKRTL to selected financial disclosure requirements under state campaign finance law.[397] AKRTL alleged multiple violations of the First Amendment.[398] The district court granted summary judgment to APOC, and AKRTL appealed.[399] The Ninth Circuit held that the challenged provisions did not violate the First Amendment, because: (1) the definition of "electioneering communication" was neither unconstitutionally vague nor overbroad on its face or as applied;[400] and (2) the three forms of challenged reporting requirements survived strict scrutiny.[401] The Ninth Circuit affirmed the decision of the district court, holding that the selected provisions of Alaskan campaign finance law challenged by AKRTL did not violate the First Amendment.[402]

Frederick v. Morse

In *Frederick v. Morse*,[403] the Ninth Circuit held that a school principal cannot restrict political speech contrary to the school's mission if the speech did not disrupt school activities[404] and was neither plainly offensive nor school-sponsored.[405] Joseph Frederick displayed a banner that read "Bong Hits 4 Jesus" as the Olympic Torch passed by his school.[406] The students had been released from class for the event, and Frederick was standing off school property as he held the banner.[407] The school principal took the banner, stating that it was offensive material contrary to the school's drug policy, and suspended Frederick from school for ten days.[408] Frederick sought a declaratory judgment that his First Amendment rights had been violated, which the district court refused on summary judgment.[409] The Ninth Circuit held that a school may restrict

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[395] 441 F.3d 773 (9th Cir. 2006).
[396] *Id.* at 794.
[397] *Id.* at 776–77.
[398] *Id.* at 777.
[399] *Id.*
[400] *Id.* at 782–86.
[401] *Id.* at 791.
[402] *Id.* at 794.
[403] 439 F.3d 1114 (9th Cir. 2006).
[404] *Id.* at 1123.
[405] *Id.* at 1119.
[406] *Id.* at 1115.
[407] *Id.*
[408] *Id.* at 1116.
[409] *Id.* at 1117.

speech that is neither plainly offensive nor school-sanctioned only if it reasonably will disrupt school activities[410] and, because it was undisputed that Frederick's speech was not likely to disrupt school activities, the school violated Frederick's constitutional rights.[411] Additionally, Morse, the school principal, was not entitled to qualified immunity because she violated Frederick's established constitutional rights in a way that would clearly be a violation to a reasonable principal.[412] Thus, the Ninth Circuit vacated the district court's dismissal and remanded for further proceedings, holding that a school principal cannot restrict disfavored political speech that did not disrupt school activities and was neither plainly offensive nor school-sponsored.[413]

Alaska Supreme Court

Alyeska Pipeline Service Co. v. State, Department of Environmental Conservation

In *Alyeska Pipeline Service Co. v. State, Department of Environmental Conservation*,[414] the supreme court held that a state entity could bill an appealing permit holder for the administrative costs of an appeal without violating due process.[415] The Alaska Department of Environmental Conservation ("Department") issued several air quality permits to Alyeska Pipeline Service Co. ("Alyeska"), and Alyeska appealed based on several aspects of the permits.[416] The Department billed Alyeska approximately $8,000 for the administration costs of their appeal.[417] Alyeska claims that this was improper under Alaska Statute section 46.14.240, or alternatively that the statute is a violation of their due process.[418] The supreme court held that the plain language of section 46.14.240 allows the Department to recover such costs from Alyeska and that Alyeska failed to meet its burden of showing that the plain language should not control.[419] The supreme court also held that the Department's interpretation of the statute did not impede Alyeska's access to justice because Alyeska failed to identify any specific harm done to it as a result of the imposition of the fees.[420] Also, Alyeska's argument that it did not receive proper notice was rejected because it continued to pursue its claim for almost a year after it received the initial invoice.[421] Because Alyeska was unable to provide evidence that the plain language of the statute was not controlling, and because there was no evidence of a due process violation, they could be required to pay for the administrative costs of their own appeal.[422] The supreme court affirmed the superior

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[410] *Id.* at 1118.
[411] *Id.* at 1123.
[412] *Id.* at 1124–25.
[413] *Id.* at 1125.
[414] 145 P.3d 561 (Alaska 2006).
[415] *Id.* at 563.
[416] *Id.*
[417] *Id.*
[418] *Id.* at 564, 568.
[419] *Id.* at 564–68.
[420] *Id.* at 568–69.
[421] *Id.* at 570–71.
[422] *Id.* at 563–73.

court, holding that a state entity could bill an appealing permit holder for the administrative costs of such an appeal.[423]

Anchorage Citizens for Taxi Reform v. Municipality of Anchorage

In *Anchorage Citizens for Taxi Reform v. Municipality of Anchorage*,[424] the supreme court held that a voter initiative requiring the granting of taxi licenses to all eligible persons did not violate the Alaska constitutional prohibition of voter initiated appropriation.[425] In 2002, Anchorage Citizens for Taxi Reform ("Citizens") submitted a petition for a voter initiative requiring that all eligible persons wishing to obtain a taxi license must be granted one by Anchorage, but the municipal clerk rejected the submission.[426] The supreme court held that the initiative, if approved, would not appropriate assets of Anchorage.[427] The taxi permits are not public assets, since fares paid by customers go to the cab drivers, not the state.[428] The supreme court demanded that the initiative be placed on the ballot at the next municipal election.[429] The supreme court reversed the judgment of the superior court, holding that a voter initiative requiring the granting of taxi licenses to all eligible persons did not violate the constitutional prohibition of voter initiated appropriation.[430]

Crawford v. Kemp

In *Crawford v. Kemp*,[431] the supreme court held that an arrestee raised a genuine issue of material fact as to whether the facts and circumstances known to an arresting officer supported a reasonable belief that the arrestee's words created a hazardous condition constituting disorderly conduct.[432] Kemp, a state trooper, asked Crawford his name while in search of a suspect in a courthouse clerk's office.[433] Crawford repeatedly refused and, after a further exchange of words, was arrested and searched.[434] Crawford filed a complaint alleging violation of his right to free speech and unreasonable search and seizure, but the superior court found that Kemp had sufficient probable cause to arrest Crawford for disorderly conduct and was immune under state and federal law; Crawford appealed.[435] The supreme court held that the arrestee raised a genuine issue of material fact as to whether the facts and circumstances known to the officer supported a reasonable belief that the arrestee's words were unreasonably loud or created a hazardous condition constituting disorderly conduct.[436] The supreme court also held that, because it

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[423] *Id.* at 561, 573.
[424] 151 P.3d 418 (Alaska 2006).
[425] *Id.* at 426.
[426] *Id.* at 420–21.
[427] *Id.* at 422.
[428] *Id.* at 424.
[429] *Id.* at 426.
[430] *Id.*
[431] 139 P.3d 1249 (Alaska 2006).
[432] *Id.* at 1254–55.
[433] *Id.* at 1251.
[434] *Id*. at 1251–52.
[435] *Id.* at 1252–53.
[436] *Id.* at 1254–55.

was not clear that Kemp arrested Crawford out of a good faith belief that Crawford was violating the law, Kemp was not immune from the state law tort suit.[437] The supreme court reversed the superior court's decision, holding that the arrestee raised a genuine issue of material fact as to whether the facts and circumstances known to the officer supported a reasonable belief that the arrestee's words created a hazardous condition constituting disorderly conduct.[438]

Green Party of Alaska v. State, Division of Elections

In *Green Party of Alaska v. State, Division of Elections*,[439] the supreme court held that a statute restricting recognition of political parties by the Alaska Division of Elections ("Division") was constitutional because it served the State's compelling interest in regulating ballot access in a way that did not overburden the Green Party's voters or candidates.[440] An Alaska statute[441] defined a political party as an organized group whose number of registered voters was equal to, or whose candidate for governor had received, at least three percent of the popular vote in the previous gubernatorial election.[442] The Division withdrew official recognition from the Green Party of Alaska, whose registered voters were equal to only about two percent of the votes cast in the previous gubernatorial election, and whose candidate received only about one percent of the popular vote.[443] The Green Party challenged the constitutionality of the statute, alleging that it violated the party's rights to equal protection, free speech, free political association, and ballot access.[444] The supreme court held that the Green Party had asserted a constitutionally protected right,[445] but that it had overstated the injury to its rights, because it could still register voters before the next election or add its candidate to the ballot by petition.[446] The State had a compelling interest in preventing confusion, deception and frustration of the democratic process at the polls, and therefore could require parties to demonstrate some specific degree of voter support.[447] Also, its means of accomplishing this goal, tying party recognition to the gubernatorial election, was narrowly tailored, because the gubernatorial election is the only statewide election which is sufficiently likely to result in a competitive race.[448] Finally, the State had satisfied its burden of determining the existence of less restrictive alternatives by establishing that its three-percent requirement was well within the mainstream of ballot access laws of other states.[449] The supreme court affirmed the decision of the superior court, holding that a statute restricting recognition of political parties by the Division was constitutional

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[437] *Id.* at 1258–59.
[438] *Id.* at 1254–55.
[439] 147 P.3d 728 (Alaska 2006).
[440] *Id.* at 729.
[441] ALASKA STAT. § 15.60.010(21) (2002) (current version at ALASKA STAT. § 15.60.010(25) (2007)).
[442] *Green Party*, 147 P.3d at 730.
[443] *Id.*
[444] *Id.* at 731.
[445] *Id.* at 733.
[446] *Id.* at 734.
[447] *Id.* at 734–35.
[448] *Id.* at 735.
[449] *Id.* at 735–36.

because it served the State's compelling interest in regulating ballot access in a way that did not overburden the Green Party's voters or candidates.[450]

Kohlhaas v. State

In *Kohlhaas v. State*,[451] the supreme court held that secession is unconstitutional and an improper subject for a ballot initiative.[452] Kohlhaas submitted a ballot initiative with one hundred qualifying signatures calling for Alaska's secession from the United States.[453] The Lieutenant Governor refused to certify the initiative petition for circulation.[454] The superior court affirmed this refusal, and Kohlhaas appealed.[455] The supreme court held that the petition was correctly rejected because the power of the people to enact laws through initiative cannot extend beyond the legislature's power under the Constitution.[456] Although review of an initiative's constitutionality typically cannot occur until after its enactment, an initiative petition can be rejected if it is clearly unconstitutional.[457] Secession is clearly unconstitutional under several post-civil war Supreme Court decisions and is not a power reserved by the states under the Tenth Amendment.[458] The supreme court affirmed the rejection of the initiative, holding that secession is unconstitutional and an improper subject for a ballot initiative.[459]

Myers v. Alaska Psychiatric Institute

In *Myers v. Alaska Psychiatric Institute*,[460] the supreme court held that in non-emergencies, a non-consenting mental patient cannot be forced by the State to take psychotropic drugs, unless the court finds that it is in the patient's best interest and that the use of such drugs is the least intrusive method of treatment.[461] Myers was an involuntary patient at the Alaska Psychiatric Institute ("API"), and API petitioned the superior court to authorize the use of psychotropic drugs without her consent.[462] The court found that under Alaska statute, it was not authorized to make an independent determination of Myers' best interests, and thus deferred to API's judgment.[463] Myers appealed, arguing that a court must determine what is in her best interest, that the right to refuse consent to medication is fundamental, and that API must show both that the State has a compelling interest and that the medication was the least intrusive method.[464] The supreme court held that because Alaska's constitution provides a broader right to privacy

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[450] *Id.* at 729.
[451] 147 P.3d 714 (Alaska 2006).
[452] *Id.* at 720.
[453] *Id.* at 715.
[454] *Id.* at 716.
[455] *Id.*
[456] *Id.* at 717.
[457] *Id.*
[458] *Id.* at 718–19.
[459] *Id*. at 720.
[460] 138 P.3d 238 (Alaska 2006).
[461] *Id.* at 239.
[462] *Id.*
[463] *Id.* at 240.
[464] *Id.* at 240–41.

than the U.S. Constitution, Myers' right to refuse medical care is fundamental.[465] Further, when a substantial burden is placed on such privacy, the State must show that there is a compelling interest and that there are no means less restrictive.[466] Although API has a compelling interest in keeping Myers safe,[467] a court, rather than API, must determine whether or not Myers' constitutional right to privacy has been violated.[468] The supreme court vacated the involuntary treatment order, holding that in non-emergencies, a non-consenting mental patient cannot be forced by the State to take psychotropic drugs, unless the court finds that it is in the patient's best interest and that the use of such drugs is the least intrusive method of treatment.[469]

Sengupta v. University of Alaska

In *Sengupta v. University of Alaska*,[470] the supreme court held that a former tenured state university professor failed to establish a prima facie case of First Amendment retaliation.[471] The University of Alaska Fairbanks ("UAF") terminated Sengupta for cause.[472] The professor sought reemployment with UAF, but when UAF refused to rehire him as a matter of policy, Sengupta filed suit, alleging violation of the First Amendment.[473] The superior court granted summary judgment in favor of UAF, and Sengupta appealed.[474] The supreme court held that Sengupta failed to make a prima facie First Amendment retaliation case because he adduced no evidence that permitted a reasonable inference that UAF's refusal to rehire him was motivated by anything other than its no-rehire policy.[475] The supreme court affirmed the decision of the superior court, holding that Sengupta did not establish a prima facie case of First Amendment retaliation.[476]

Simpson v. Murkowski

In *Simpson v. Murkowski*,[477] the supreme court held that senior Alaskans were not entitled to longevity bonuses under the doctrine of promissory estoppel or the Contracts Clause.[478] In 1972 the Alaska legislature approved a program giving Alaskans over the age of sixty-five a monetary bonus as an incentive for them to remain in Alaska.[479] In 2003, the Governor used his veto power to eliminate appropriations for the longevity bonus program, despite the existence of a phase-out program which indicated that seniors

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[465] *Id.* at 248.
[466] *Id.* at 245–46.
[467] *Id.* at 249–50.
[468] *Id.* at 250.
[469] *Id.* at 239, 254.
[470] 139 P.3d 571 (Alaska 2006).
[471] *Id.* at 578.
[472] *Id.* at 574.
[473] *Id.*
[474] *Id.* at 575.
[475] *Id.* at 578.
[476] *Id.*
[477] 129 P.3d 435 (Alaska 2006).
[478] *Id.* at 437.
[479] *Id.*

already receiving benefits would continue to receive them.[480] In response to the Governor's veto, a group of senior citizens sued the State, and the superior court granted summary judgment in favor of the State.[481] The supreme court held that the senior citizens were not entitled to longevity bonuses under the doctrine of promissory estoppel.[482] In order to show promissory estoppel, a party must show: (1) the action induced a change of position, (2) the promisor should have foreseen the reliance, (3) there was an actual promise, and (4) justice calls for enforcement.[483] The senior citizens failed to establish (3), because the prior Governor's letter suggesting the gradual phase-out of the program was a proposal, not an enforceable promise.[484] Also, the discontinuation of the longevity bonus program did not violate the Contract Clause of the Alaska Constitution, since the language of the statute did not clearly show that the legislature intended to create a contract with the citizens when the statute was enacted.[485] Further, the Governor was well within his authority to veto the appropriations under his power granted by the Alaska Constitution.[486] The supreme court affirmed the ruling of the superior court, holding plaintiff senior citizens could not claim promissory estoppel or a Contracts Clause violation when the Governor vetoed appropriations for a longevity bonus that had been given to senior citizens in order to encourage them to remain in Alaska.[487]

City of Skagway v. Robertson

In *City of Skagway v. Robertson*,[488] the supreme court held that a city ordinance restricting speech was not overbroad, and therefore was constitutional, because it was properly construed to apply only to commercial speech which did nothing more than propose a transaction.[489] The City of Skagway ("City"), in order to discourage aggressive sales tactics aimed at pedestrians, passed an ordinance confining person-to-person sales within its historic district to enclosed structures or areas containing at least 200 square feet of retail space.[490] Appellant Robertson sold tours by approaching pedestrians on the street; appellant Lee sold tours from various retail locations.[491] The City appealed the superior court's finding that the ordinance's restriction on speech was not narrowly tailored because it amounted to a non-specific ban on sales in public, no matter what was being sold.[492] Applying the *Central Hudson*[493] test for commercial speech, the supreme court held that the ordinance did not restrict "business" as a whole

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[480] *Id.*
[481] *Id.* at 437–38.
[482] *Id.* at 440.
[483] *Id.*
[484] *Id.* at 442–43.
[485] *Id.* at 445.
[486] *Id.* at 446–47.
[487] *Id.* at 449.
[488] 143 P.3d 965 (Alaska 2006).
[489] *Id.* at 966.
[490] *Id.*
[491] *Id.*
[492] *Id.* at 967.
[493] Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm'n of N.Y., 447 U.S. 557, 566 (1980).

but merely a subcategory of business, "Off Premises Canvassing."[494] Further, the language of the ordinance stating that it addressed speech "solely intended" to attract pedestrians did not impermissibly focus on the intent of the speaker; rather, the word "solely" was a proper use of limiting language, focusing the application of the ordinance to commercial speech only.[495] The supreme court reversed the superior court, holding that the Skagway city ordinance restricting speech was not overbroad, and therefore was constitutional, because it was properly construed to apply only to commercial speech which did nothing more than propose a transaction.[496]

Staudenmaier v. Municipality of Anchorage

In *Staudenmaier v. Municipality of Anchorage*,[497] the supreme court held that allowing initiative petitions to force the sale of public utilities would deprive the assembly of its discretionary authority in violation of the Alaska Constitution.[498] Staudenmaier submitted two initiative petitions that the Anchorage municipal clerk refused to certify.[499] The first called for the municipality to sell the Anchorage Municipal Light and Power Utility at fair market value, and the second called for the sale of the Anchorage Municipal Refuse Collection Utility to the highest bidder.[500] The superior court affirmed rejection of the petitions, and Staudenmaier appealed.[501] The supreme court held that the petitions were properly rejected because article XI, section 7 of the Alaska Constitution[502] prohibits the making of appropriations by voter initiative.[503] The supreme court reasoned that this prohibition applies to initiatives that designate the use of state assets, such as Staudenmaier's.[504] The Anchorage Municipal Charter section that allowed the sale of municipal utilities by voter initiative violated the Alaska Constitution when it was written, and was therefore void.[505] The supreme court affirmed the decision of the superior court, holding that allowing initiative petitions to force the sale of public utilities would deprive the assembly of its discretionary authority in violation of the Alaska Constitution.[506]

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[494] *Robertson,* 143 P.3d at 969.
[495] *Id.* at 969–70.
[496] *Id.* at 970.
[497] 139 P.3d 1259 (Alaska 2006).
[498] *Id.* at 1265.
[499] *Id.* at 1260–61.
[500] *Id.*
[501] *Id.* at 1261.
[502] ALASKA CONST. art. XI, § 7.
[503] *Staudenmaier*, 139 P.3d at 1265.
[504] *Id.* at 1262.
[505] *Id.* at 1265.
[506] *Id.*

Alaska Court of Appeals

Bessette v. State

In *Bessette v. State*,[507] the court of appeals held that a police officer had probable cause to stop a person operating a snowmachine on a sidewalk.[508] Trooper Loop approached Bessette after noticing him trying to start a snowmachine on the sidewalk.[509] Bessette showed signs of drunkenness and admitted he had driven the snowmachine.[510] Bessette's breath alcohol content registered above the legal limit, and Trooper Loop arrested him for driving under the influence.[511] Bessette filed a motion to suppress all evidence from the stop, claiming Trooper Loop did not have probable cause to stop him for operating the snowmachine on the sidewalk because the sidewalk was covered with snow.[512] The superior court found that Officer Loop did have probable cause to make the stop and convicted Bessette.[513] Bessette appealed the denial of his suppression motion.[514] The court of appeals held that probable cause existed because having a snowmachine on the sidewalk is a traffic infraction regardless of whether the sidewalk is under a snow berm.[515] The court of appeals affirmed Bessette's conviction, holding that a police officer had probable cause to stop a person operating a snowmachine on a sidewalk.[516]

Case v. Municipality of Anchorage

In *Case v. Municipality of Anchorage*,[517] the court of appeals held that the presumption of constitutionality of the meritorious defense requirement for setting aside a default judgment was not rebutted.[518] Case demanded a trial to contest a speeding ticket but failed to appear on the specified trial date and received a negative default judgment.[519] The magistrate denied his motion to set aside the default judgment on grounds that he failed to assert a meritorious defense, which would show that the trial result could be different if retried.[520] Case appealed, arguing that the meritorious defense requirement violated his Fifth Amendment right to remain silent.[521] The court of appeals held that the evidence was insufficient to overcome the presumption of constitutionality of the meritorious defense requirement, because no case law prohibited the requirement and Case had failed to cite any authority supporting his argument.[522] However, the court of appeals declined to resolve the constitutional issue completely, holding only that to the

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[507] 145 P.3d 592 (Alaska Ct. App. 2006).
[508] *Id.* at 595.
[509] *Id.* at 593.
[510] *Id.*
[511] *Id.* at 594.
[512] *Id.*
[513] *Id.*
[514] *Id.*
[515] *Id.* at 595.
[516] *Id.* at 593.
[517] 128 P.3d 193 (Alaska Ct. App. 2006).
[518] *Id.* at 195–96.
[519] *Id.* at 194.
[520] *Id.*
[521] *Id.*
[522] *Id.* at 195–96.

extent the meritorious defense rule required merely a general defense theory, it did not violate the Fifth Amendment.[523] The court of appeals affirmed the judgment of the magistrate, holding that the presumption of constitutionality of the meritorious defense requirement for setting aside a default judgment was not rebutted.[524]

State v. Herrmann

In *State v. Herrmann*,[525] the court of appeals held that a superior court ruling that Alaska's pre-2005 presumptive sentencing law was unconstitutional amounted to an impermissible advisory opinion when an individual failed to show that he had been prejudiced by such a sentencing.[526] Herrmann was convicted of vehicle theft, driving under the influence, and refusing to submit to a breath test.[527] The State sought to use Herrmann's prior convictions as proof of aggravating factors, but the superior court ruled that Alaska's pre-2005 presumptive sentencing law was unconstitutional under *Blakely*[528] and had to be thrown out in its entirety.[529] The State petitioned for a review of the ruling.[530] The court of appeals held that the superior court's ruling was an advisory opinion on an issue not raised by Herrmann's case, because Hermann did not dispute the existence of the prior convictions or show that his Sixth Amendment rights had been violated.[531] In a series of other cases, the court of appeals determined that there is no *Blakely* problem when the State limits its proof of aggravators to the defendant's prior convictions, and the defendant does not dispute the existence of those convictions.[532] The court of appeals vacated the decision of the superior court, holding that in the absence of a showing that Herrmann had been prejudiced by being sentenced under the pre-2005 scheme, the ruling that the State's sentencing law was unconstitutional amounted to an impermissible advisory opinion.[533]

Hotrum v. State

In *Hotrum v. State*,[534] the court of appeals held that a warrantless entry was justified under the emergency aid doctrine and that criminalizing possession of more than twenty-five marijuana plants did not violate the Alaska Constitution.[535] Police went to Hotrum's house following a 911 call concerning gun shots and loud noises and entered the house when no one responded to their presence.[536] Hotrum entered a no contest plea

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[523] *Id.* at 196.
[524] *Id.*
[525] 140 P.3d 895 (Alaska Ct. App. 2006).
[526] *Id.* at 895–97.
[527] *Id.* at 895.
[528] 542 U.S. 296 (2004).
[529] *Herrmann*, 140 P.3d at 896–97.
[530] *Id*.
[531] *Id.* at 897.
[532] *Id*.
[533] *Id.* at 897–98.
[534] 130 P.3d 965 (Alaska Ct. App. 2006).
[535] *Id.* at 966–67.
[536] *Id.* at 967.

and was convicted of misconduct involving a controlled substance.[537] He appealed, arguing that police made an unlawful warrantless entry and that criminalizing the possession of more than twenty-five marijuana plants, regardless of their size, violates the privacy provision of the Alaska Constitution.[538] The court of appeals held that the warrantless entry met all three requirements under the emergency aid doctrine, which are that: (1) the police had reasonable grounds to believe there was an emergency and an immediate need for their assistance; (2) the search was not primarily motivated by intent to arrest or seize evidence; and (3) there was some reasonable basis to associate the emergency with the place searched.[539] The court of appeals also held that criminalization of possession of more than twenty-five marijuana plants did not violate the privacy provision of the Alaska Constitution because the legislature has the power to set reasonable limits on personal marijuana possession.[540] The court of appeals affirmed the decision of the superior court, holding that the warrantless entry was justified under the emergency aid doctrine and that criminalizing possession of more than twenty-five marijuana plants did not violate the Alaska Constitution.[541]

Morgan v. State

In *Morgan v. State*,[542] the court of appeals held that due process entitles an individual to a new trial, rather than a mere reassessment of the facts by a new judge, when the testimony of witnesses is essential to the verdict.[543] Morgan was convicted of second-degree sexual assault.[544] He appealed, and the case was remanded to the superior court, but a new judge was assigned to the case.[545] The original trial judge did not allow evidence that T.F., the alleged victim, had previously made false accusations of rape against another man.[546] On remand, the new judge allowed this evidence, but Morgan was convicted again.[547] Morgan appealed, arguing that he should have been given a new trial, rather than allowing the new judge to rely on the transcript from the old trial.[548] The court of appeals held that, because the verdict depends in large part on the credibility of T.F. and because her credibility cannot be determined from a cold read of the record, it would violate Morgan's due process rights to allow the new judge to decide the case without a new trial.[549] The court of appeals reversed the decision of the superior court, holding that due process entitles an individual to a new trial, rather than a reassessment of the facts by a new judge, when the testimony of witnesses is essential to the verdict.[550]

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[537] *Id*. at 966.
[538] *Id*. at 966–67.
[539] *Id*. at 968.
[540] *Id*. at 970.
[541] *Id*. at 966–967.
[542] 139 P.3d 1272 (Alaska Ct. App. 2006).
[543] *Id.* at 1274.
[544] *Id.* at 1273.
[545] *Id.*
[546] *Id.* at 1275.
[547] *Id.* at 1276.
[548] *Id.* at 1277.
[549] *Id.* at 1280.
[550] *Id.* at 1274, 1280.

Stevens v. Matanuska-Susitna Borough

In *Stevens v. Matanuska-Susitna Borough*,[551] the court of appeals held that a local noise ordinance did not violate the First Amendment, nor was it unconstitutionally vague.[552] Stevens was cited seven times for violating the local noise ordinance by playing loud music at his restaurant.[553] The district court found that Stevens violated the noise ordinance, and he appealed, arguing that the ordinance was vague, overbroad, and would have the effect of chilling free speech.[554] The court of appeals held that three factors governed whether the First Amendment is violated: (1) whether the regulation is justified without reference to the content of the speech; (2) whether the regulation is "narrowly tailored to serve a significant governmental interest"; and (3) whether the regulation leaves open ample alternative channels of communication.[555] Here, because Stevens offered no evidence that the ordinance reached substantially more conduct than was necessary to achieve the Borough's goals, the ordinance did not violate the First Amendment.[556] Furthermore, the ordinance was not unconstitutionally vague because it outlined geographic and time restrictions on noise, thus providing adequate notice of what conduct was prohibited.[557] The court of appeals affirmed the decision of the district court, holding that the local noise ordinance did not violate the First Amendment, nor was it unconstitutionally vague.[558]

Williams v. State

In *Williams v. State*,[559] the court of appeals held that Alaska Statute section 12.30.027(b), which prohibits anyone charged with domestic violence from returning to the alleged victim's residence while on pre-trial release, violates the equal protection clause of the Alaska Constitution.[560] Williams was charged with assaulting his wife in 2004 after he was seen with his hand around her neck.[561] As a condition of his pre-trial release, and in accordance with section 12.30.027(b), Williams was prohibited from returning to his wife's residence, despite no objection from the alleged victim or the State.[562] Williams argued this statute violated equal protection and infringed on his fundamental right to maintain his marital relationship.[563] The district court held the statute did not violate equal protection, and Williams appealed.[564] The court of appeals held that the statute was unconstitutional because it infringed on an important right without proof that it advanced a state interest.[565] Infringement on Williams' right to live

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[551] 146 P.3d 3 (Alaska Ct. App. 2006).
[552] *Id*. at 6.
[553] *Id*.
[554] *Id*. at 6–7.
[555] *Id*. at 9.
[556] *Id*.
[557] *Id.* at 10–11.
[558] *Id*. at 6.
[559] 151 P.3d 460 (Alaska Ct. App. 2006).
[560] *Id*. at 471.
[561] *Id*. at 462.
[562] *Id*.
[563] *Id*.
[564] *Id*. at 463.
[565] *Id*. at 465–66.

with his wife required careful scrutiny.[566] The statute was overinclusive because many crimes that do not evidence a threat of future violence in the home are included under domestic violence offenses.[567] This allows the statute to create significant hardship without advancing the State's interest in reducing domestic violence.[568] Thus, the statute is unconstitutional.[569] The court of appeals reversed the decision of the district court, holding that the Alaska statute prohibiting anyone charged with domestic violence from returning to the alleged victim's residence while on pre-trial release violates the equal protection clause of the Alaska Constitution.[570]

[566] *Id*. at 465.
[567] *Id.* at 467–68.
[568] *Id*.
[569] *Id.* at 471.
[570] *Id*.

VI. CONTRACT LAW

Alaska Supreme Court

Adams v. Adams

In *Adams v. Adams*,[571] the supreme court held that specific performance of an option-to-purchase provision in a lease was justified by the lessor's actual knowledge of the option and that reformation of the lease was supported by clear and convincing evidence.[572] Michael Adams leased property to the lessee, Don Adams, with a signed extension that gave the lessee an option to purchase.[573] The lessee sought to exercise the option to purchase and Michael refused, claiming he was unaware of the option.[574] The lessee sued for specific performance.[575] The supreme court held that actual knowledge may be inferred from circumstances and that here, there was enough circumstantial evidence to support the superior court's finding that Michael had actual knowledge of the option-to-purchase provision.[576] The supreme court also held that there was no clear error in the superior court's finding of clear and convincing evidence that reformation of the lease was justified by a mutual mistake of fact.[577] The supreme court also held that the lessor should have been awarded interest, and that the lessee should have been awarded attorneys' fees, under the contract.[578] The supreme court thus affirmed the specific performance order and the reformation of the lease and remanded for adjustment of interest to the lessor. [579]

Cleary v. Smith

In *Cleary v. Smith*,[580] the supreme court held that a settlement agreement between the Alaska federal prison systems and Alaska prisoners resolving a suit regarding prison conditions did not create a contract right for a certain class of prisoners to remain in Alaska prisons.[581] A group of prisoners filed a class action lawsuit in 1981 challenging the conditions of prisons operated by the State of Alaska or the Federal Bureau of Prisons ("FBOP").[582] After being divided into classes, the prisoners confined in the FBOP prisons came to a settlement agreement that allowed all Alaska prisoners housed in the FBOP system to be transferred to Alaska state prisons.[583] One member of that class, Donald Stumpf, filed a motion for an injunction when he was informed that he would be transferred to an Arizona detention center, arguing that the settlement agreement gave

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[571] 131 P.3d 464 (Alaska 2006).
[572] *Id*. at 465.
[573] *Id*.
[574] *Id*.
[575] *Id*.
[576] *Id*. at 466.
[577] *Id*. at 468–69.
[578] *Id.* at 469–70.
[579] *Id*. at 470.
[580] 146 P.3d 997 (Alaska 2006).
[581] *Id.* at 998–99.
[582] *Id.* at 998.
[583] *Id.*

him a property interest in his Alaska confinement.[584] The supreme court affirmed the superior court's denial of the injunction, holding that the settlement agreement did not create a contract right in allowing all members of the FBOP class from the 1981 suit to remain in Alaska and avoid transfer to a non-FBOP facility.[585]

[584] *Id*.
[585] *Id.* at 998–99.

VII. CRIMINAL LAW

Alaska Supreme Court

C.J. v. State

In *C.J. v. State*,[586] the supreme court held that (1) the State owed a duty of care to a parolee's victim; (2) capping non-economic damages did not violate equal protection under the Alaska Constitution; and (3) each sexual penetration, in one continuous assault, was a separate incident.[587] Luke Carter was released on mandatory parole after serving ten years of his fifteen-year sentence for violent rape.[588] Shortly thereafter, Carter violated terms of his parole, and the parole officer issued an arrest warrant but did not take any further action to locate or arrest Carter.[589] Two weeks later, Carter raped C.J. and was later charged and convicted by a jury for three counts of first-degree sexual assault.[590] C.J. filed an action against the State for negligence, and the State filed a motion for summary judgment.[591] The superior court denied the State's motion for summary judgment, treated C.J.'s injuries as a single injury, and limited non-economic damages to a cap of $400,000.[592] The supreme court held that the State had a duty to exercise due care in supervising parolees.[593] The supreme court also held that the cap on non-economic damages did not violate equal protection under the Alaska Constitution.[594] Under the "sliding scale approach" for equal protection claims, the damages cap, which imposed only economic burdens and was substantially related to the legitimate interest of reducing insurance premiums, satisfied the minimum scrutiny "means-end fit requirement" and is therefore constitutional.[595] However, the damages were not limited to a single cap since each sexual penetration, though committed in rapid succession, was a distinct act and a separate assault under criminal law.[596] The supreme court vacated the denial of summary judgment and remanded for discretionary function immunity, holding that the cap on non-economic damages for each incident was constitutional.[597]

State, Department of Corrections v. Cowles

In *State, Department of Corrections v. Cowles*,[598] the supreme court held that a parole board cannot be held liable for its selection of parole conditions[599] and that, under certain circumstances, the State must exercise due care in supervising parolees.[600] A

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[586] 151 P.3d 373 (Alaska 2006).
[587] *Id*. at 375, 378, 382.
[588] *Id*. at 375.
[589] *Id*. at 376.
[590] *Id*.
[591] *Id*.
[592] *Id*. at 377.
[593] *Id*. at 377–78.
[594] *Id*. at 378, 382.
[595] *Id*. at 378, 380–82.
[596] *Id*. at 382–85.
[597] *Id*. at 375, 378, 382.
[598] 151 P.3d 353 (Alaska 2006).
[599] *Id.* at 359–60.
[600] *Id.* at 363.

parolee murdered his girlfriend and then committed suicide.[601] He had been incorrectly assigned a "medium" supervision level, although his actions warranted a "maximum" supervision level.[602] The personal representative of the girlfriend's estate sued the Department of Corrections, alleging that it negligently administered the parole plan.[603] The superior court denied the State's motion for summary judgment, and the State appealed.[604] Emphasizing the policy considerations inherent in the parole process as well as the separation-of-powers doctrine, the supreme court expressly overruled *State, Division of Corrections v. Neakok*,[605] holding discretionary-function immunity immunized the State from negligence liability arising from a parole board's decision of parole conditions or parole revocation.[606] The supreme court also narrowed *Neakok*, holding that the State must exercise due care in supervising parolees only when it knows, or reasonably should know, that they pose a threat to a particular individual or group.[607] The supreme court vacated the superior court's order denying the State's motion for summary judgment, holding that a parole board's selection of parole conditions is entitled to discretionary function immunity and that the State has a duty to exercise due care to supervise parolees only in certain circumstances.[608]

State v. Parker

In *State v. Parker*,[609] the supreme court held that a victim's age and the intention to use child pornography pictures only for private use did not mandate inclusion among the least serious conduct of the offenses charged.[610] Parker pled no contest to possession of child pornography, attempted misconduct involving a controlled substance, and exploitation of a minor after taking approximately 100 photographs and three videos of a sixteen-year-old girl whom he had given drugs to on numerous occasions.[611] At sentencing, Parker presented mitigating factors.[612] He argued that his conduct was among the least serious for the offense because the girl was over the age of consent (sixteen) and the images were intended for private rather than commercial use.[613] The trial court denied Parker's claim, but the court of appeals reversed, concluding that the conduct was the least serious for the offenses charged.[614] The supreme court held that Parker's intention for only private use, rather than commercial use, made the conduct less serious, but not necessarily the least serious, especially since production of child pornography is a separate crime.[615] The presumptive sentence is intended to encompass

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[601] *Id.* at 353.
[602] *Id.* at 356.
[603] *Id.* at 357.
[604] *Id*.
[605] 721 P.2d 1121, 1125 (Alaska 1986).
[606] *Cowles*, 151 P.3d at 359–60.
[607] *Id.* at 363.
[608] *Id.* at 365.
[609] 147 P.3d 690 (Alaska 2006).
[610] *Id.* at 691.
[611] *Id.* at 691–93.
[612] *Id*. at 694.
[613] *Id.*
[614] *Id*.
[615] *Id.* at 695, 697.

most of the convictions, with the least serious mitigator only applying to a few;[616] that the child was over the age of consent does not automatically put his conviction in the least serious category, especially considering that he likely could have been convicted of more charges than those to which he pled no contest.[617] The supreme court reversed the court of appeals and remanded the case, holding that the victim's age and the intention to use child pornography pictures only for private use did not mandate inclusion among the least serious conduct for the offenses charged.[618]

Surrells v. State

In *Surrells v. State*,[619] the court of appeals held that revocation of a first felony offender's probation and imposition of his remaining suspended sentence does not constitute an increase in his maximum sentence and therefore does not implicate the *Blakely*[620] right to trial by jury.[621] Surrells was convicted of a class B felony and was sentenced by a judge to six years imprisonment with four years suspended.[622] As a first felony offender, his unsuspended term of imprisonment could not exceed the four-year presumptive term for a second felony offender convicted of the same offense in the absence of aggravating factors or extraordinary circumstances.[623] After Surrells served two years in prison and was released, his probation was revoked and he served two additional years.[624] Subsequently, the State petitioned to revoke his probation and Surrells moved to correct his sentence, arguing that any additional revocation of his probation would require a showing of aggravating factors in a trial by jury.[625] The court of appeals held that a sentencing court has authority to revoke a defendant's probation and impose previously suspended jail time as a result of the defendant's post-sentencing conduct; because the original maximum sentence never changed, the sentence was never "increased," and the *Blakely* right to trial by jury did not apply.[626] Furthermore, a first felony offender's probation can be revoked, resulting in an unsuspended sentence that exceeds the presumptive term for a typical second felony offender of the same offense, when it is justified by the totality of the circumstances, such as poor performance on probation.[627] As a benchmark rule, this sentencing guideline does not implicate the *Blakely* right to trial by jury.[628] The court of appeals affirmed the superior court's decision, holding that revocation of a first felony offender's probation and imposition of a remaining suspended sentence does not constitute an increase in his maximum sentence and therefore the *Blakely* right to trial by jury does not apply.[629]

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[616] *Id.* at 695.
[617] *Id.* at 696.
[618] *Id.* at 698–99.
[619] 151 P.3d 483 (Alaska 2006).
[620] Blakely v. Washington, 542 U.S. 296 (2004).
[621] *Surrells,* 151 P.3d at 485.
[622] *Id.*
[623] *Id*.
[624] *Id.* at 486.
[625] *Id.* at 486–87.
[626] *Id.* at 488.
[627] *Id.* at 492–93.
[628] *Id.* at 492.
[629] *Id.* at 485.

Alaska Court of Appeals

Alex v. State

In *Alex v. State*,[630] the court of appeals held that jury instructions defining "constructive possession" as having "the power to exercise dominion or control" were problematic, but in the case at hand, the instructions were harmless error.[631] The defendant was convicted of a weapons charge when a gun was found under his seat, the passenger seat of a car.[632] At trial, he argued that he had no knowledge of the gun, despite his earlier confession to the police.[633] The court of appeals held that the jury instructions, defining constructive possession as "the power to exercise dominion or control over a thing," were problematic, as there was no mention of any intent to possess.[634] However, the instructions were harmless since the defense in this case had not contested any knowledge of the gun, thus intent to possess it was not an issue.[635] The jury instruction would have only made a difference had the defendant conceded knowledge of the gun under his seat.[636] The court of appeals affirmed the judgment of the superior court, holding that although jury instructions defining "constructive possession" as having the power to exercise dominion or control" were problematic, they were harmless in the case at hand.[637]

Anderson v. State

In *Anderson v. State*,[638] the court of appeals held that hindering prosecution in the first degree can be committed by rendering assistance to felony probationers who have committed misdemeanor or non-criminal violations of their probation and that it is not necessary to have a separate search warrant when executing an arrest warrant for parts of the house which do not belong to the person being arrested.[639] Lars and Lana Anderson were convicted of first-degree hindering prosecution when they allowed their twenty year-old son, Daniel, to hide in their bedroom while police officers looked for him in response to a parole violation he committed.[640] The Andersons argued that because drinking alcohol during probation did not qualify as a crime "punishable as a felony," they could not be held for first degree hindering prosecution[641] and that by finding Daniel hidden in their bedroom, the police violated the Fourth Amendment, because the arrest warrant was for Daniel, and their bedroom was private.[642] The court of appeals held that the Andersons can be guilty of first degree hindering prosecution despite the fact that drinking alcohol while on probation is not in and of itself a felony, because it is the

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[630] 127 P.3d 847 (Alaska Ct. App. 2006).
[631] *Id.* at 848.
[632] *Id.* at 849.
[633] *Id.* at 849–50.
[634] *Id.* at 851.
[635] *Id.* at 851–52.
[636] *Id.* at 852.
[637] *Id.* at 848.
[638] 145 P.3d 617 (Alaska Ct. App. 2006).
[639] *Id*. at 623, 627.
[640] *Id*. at 618–620.
[641] *Id*. at 620–21.
[642] *Id*. at 623–24.

punishment for the original offense which is altered by violating parole.[643] Also, there was no additional warrant needed to enter the residence, even though it was shared with Lars and Lana, as long as the officers had probable cause to believe that Daniel was inside the home.[644] The court of appeals affirmed the superior court's judgment, holding that it is not necessary for a probation violator to have committed a felony for someone to be guilty of first degree hindering prosecution and that a separate search warrant for different parts of a shared home is not necessary if the arrestee could be hiding there.[645]

Cooper v. District Court

In *Cooper v. District Court*,[646] the court of appeals held that neither the victim of a crime nor the State Office of Victims' Rights ("Office") has standing to challenge the sentence imposed upon the perpetrator of a crime.[647] Cynthia Cooper and the Office independently challenged her husband's sentence which was imposed for his assault against her.[648] Cynthia also moved to have a portion of the proceedings sealed from public access because it violated psychotherapist-patient privilege.[649] Daniel Cooper arranged a plea bargain with the Municipality of Anchorage to complete a year of counseling.[650] The District Court agreed to allow Daniel to satisfy this condition of his probation by continuing in a program he had already begun.[651] Cynthia objected, claiming that Daniel must complete a domestic violence intervention program approved by the Department of Corrections,[652] but the District Court judge declared that Daniel's current program was sufficient, and Cynthia applied for relief.[653] The court of appeals held that though the victim may provide input before decisions such as sentencing are made,[654] victims do not have the right to appeal those decisions because ultimately criminal prosecutions are conducted on behalf of the entire community, and victims are not parties to criminal proceedings.[655] Also, the Office only has the authority to advocate on behalf of clients and to assist crime victims in protecting their legal rights and, thus, has no authority to file a suit except on behalf of a client who has standing.[656] Finally, the records that Cynthia moved to seal did not contain information protected by the psychotherapist-patient privilege and, furthermore, that Cynthia waived any privilege she otherwise would have had by failing to make a timely objection.[657] The court of appeals

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[643] *Id*. at 623.
[644] *Id*. at 625.
[645] *Id*. at 623, 627.
[646] 133 P.3d 692 (Alaska Ct. App. 2006).
[647] *Id.* at 695.
[648] *Id.*
[649] *Id.* at 695–96.
[650] *Id.* at 696.
[651] *Id.*
[652] *Id.*
[653] *Id.* at 697.
[654] *Id.* at 700.
[655] *Id.* at 700, 702.
[656] *Id.* at 712.
[657] *Id.* at 719.

denied the application of relief, holding that neither the victim of a crime nor the Office has standing to challenge the sentence imposed upon the perpetrator of a crime.[658]

Douglas v. State

In *Douglas v. State*,[659] the court of appeals held that there was no reversible error in the superior court judge's evidentiary rulings, that the prosecutor's final argument mentioning presumption of innocence and the right to remain silent was not so prejudicial as to warrant a reversal, but that sentencing was conducted in violation of *Blakely v. Washington*[660].[661] Douglas was convicted of two counts of first-degree sexual assault and two counts of fourth-degree sexual assault.[662] Douglas appealed, arguing that (1) evidence of sexual phone calls between the victim and another man and of noise complaints should have been admitted, (2) the prosecutor's final argument incorrectly described the presumption of innocence and the right to remain silent, and (3) the superior court failed to weigh the probative value in admitting evidence of his prior assault conviction.[663] The court of appeals held that the superior court appropriately weighed the probative value of evidence regarding sexual phone calls and noise complaints against the prejudicial value when limiting the admissibility of the evidence.[664] Second, although the prosecutor's comments regarding the presumption of innocence were incorrect, the limiting instructions given by the judge meant that the comments were not prejudicial enough to warrant reversal.[665] Furthermore, the prosecutor's comments that Douglas argues attacked his decision to remain silent were fair comments on the evidence.[666] Ultimately, however, the court remanded the case to determine whether the aggravating factors during sentencing were *Blakely*-compliant.[667] The court of appeals affirmed the conviction and remanded the case for further proceedings regarding the aggravating factors, holding that there was no reversible error in the superior court judge's evidentiary rulings, that the prosecutor's final argument mentioning presumption of innocence and the right to remain silent was not so prejudicial as to warrant a reversal, but that sentencing was conducted in violation of *Blakely*.[668]

Garhart v. State

In *Garhart v. State*,[669] the court of appeals held that *Crocker*[670] restrictions on search warrants did not apply retroactively to a pre-*Crocker* conviction for marijuana possession, and that appellant's commercial cultivation of marijuana was not

[658] *Id.* at 695.
[659] 151 P.3d 495 (Alaska Ct. App. 2006).
[660] 542 U.S. 296 (2004).
[661] *Douglas,* 151 P.3d 495 at 497.
[662] *Id.* at 497–98.
[663] *Id.* at 498, 500, 502.
[664] *Id.* at 500.
[665] *Id.* at 501.
[666] *Id.* at 502.
[667] *Id.* at 506–07.
[668] *Id.* at 497, 507.
[669] 147 P.3d 746 (Alaska Ct. App. 2006).
[670] State v. Crocker, 97 P.3d 93 (Alaska Ct. App. 2004).

constitutionally protected.[671] Garhart was convicted of controlled substance misconduct after warranted searches of his house and vehicle revealed evidence of commercial cultivation of marijuana.[672] After Garhart's conviction but prior to sentencing, *Crocker* was decided, holding that a warrant to search a home for marijuana must be based upon probable cause to believe that the marijuana possession falls outside the scope of protected personal use.[673] Garhart's motion for a new trial was denied by the superior court and he appealed, citing *Crocker*.[674] The court of appeals held that, even though *Crocker* established a new rule of state constitutional law, here it did not satisfy the three-prong Alaska test for retroactivity because: (1) the policy behind *Crocker* of protecting the privacy of the home was not at issue, (2) the law enforcement officers reasonably relied on the pre-*Crocker* law in applying for and issuing the search warrants, and (3) full retroactive application would have a substantial negative impact on the administration of justice because many cases would be reopened.[675] Also, Garhart's commercial cultivation of marijuana was not protected by the Alaska Constitution because the legislature may properly limit the amount of marijuana a person may possess even if for personal use in his or her home, and Garhart exceeded that amount.[676] The court of appeals affirmed the superior court judgment, holding that *Crocker* restrictions on search warrants did not apply retroactively to a pre-*Crocker* conviction, and that the appellant's commercial cultivation of marijuana was not constitutionally protected.[677]

Hall v. State

In *Hall v. State*,[678] the court of appeals held that a five year composite sentence with two and a half years suspended was appropriate for a man who pled no contest to writing bad checks while he was awaiting trial for writing other bad checks.[679] While awaiting trial for writing $8,000 in bad checks, Hall was accused of writing more bad checks in the amount of nearly $65,000.[680] Hall pled no contest to these charges, and the trial judge sentenced him to four years, two suspended, for a scheme to defraud and one year, six months suspended, for the misdemeanor of violating conditions of his release.[681] Hall appealed the sentences, arguing that because this was his first felony and the crime was a nonviolent property crime, precedent required the judge to give him probation, not imprisonment.[682] The court of appeals held that imprisonment can be a useful deterrent and, because Hall had a history of writing bad checks, the trial judge was correct in ruling that probation would not deter Hall from continuing to write bad checks.[683] Additionally, when a defendant has committed a Class B felony, as Hall did here, a first offender

[671] *Garhart,* 147 P.3d at 750–51.
[672] *Id.* at 747.
[673] *Id.*
[674] *Id.*
[675] *Id.* at 749–50.
[676] *Id.* at 750.
[677] *Id.* at 750–51, 754.
[678] No. A-9437, 2006 Alas. App. LEXIS 168 (Alaska Ct. App. Oct. 13, 2006).
[679] *Id.* at *12–13.
[680] *Id.* at *1.
[681] *Id.* at *5.
[682] *Id.* at *5–6.
[683] *Id.* at *7–8.

should receive more than probation unless there are mitigating circumstances.[684] The court of appeals affirmed the ruling of the superior court, holding that a five-year composite sentence, with two and a half years suspended, was appropriate for a man who pled no contest for writing bad checks while he was awaiting trial for writing other bad checks.[685]

Jackson v. State

In *Jackson v. State*,[686] the court of appeals held that a district court did not violate the doctrine of separation of powers by requiring a minor to return to court on a bi-weekly basis to report the progress of her probation.[687] Jackson pled no contest to two counts of underage alcoholic beverage consumption.[688] Jackson received a sentence of probation, a condition of which required her to meet with her sentencing judge on alternate weeks to discuss her progress.[689] Jackson appealed, arguing that the Department of Corrections had the exclusive authority to monitor probationers.[690] The court of appeals held that the sentencing judge did not violate the doctrine of separation of powers,[691] because the state supreme court had recognized that the probation process was shared between the judicial and executive branches and that the legislature intended the judiciary to supervise minors convicted of consuming alcoholic beverages.[692] The court of appeals affirmed the decision of the district court, holding that the district court did not violate the doctrine of separation of powers when it required Jackson to report the progress of her probation to her sentencing judge.[693]

Lampkin v. State

In *Lampkin v. State*,[694] the court of appeals held that convictions for one act that violated separate statutes did not constitute double jeopardy when each statue served a separate societal interest and that one offense was not a lesser included offense of the other.[695] Lampkin was serving a jail sentence when he was convicted of fourth and fifth degree controlled substance misconduct and promoting contraband in the first degree for possessing the two controlled substances.[696] Lampkin appealed the convictions, arguing that conviction for both drug possession and promoting contraband violated double jeopardy. [697] Lampkin argued, alternatively, that drug possession is a lesser included

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[684] *Id.* at *11.
[685] *Id.* at *13.
[686] 127 P.3d 835 (Alaska Ct. App. 2006).
[687] *Id.* at 837.
[688] *Id.* at 835.
[689] *Id.* at 836.
[690] *Id.*
[691] *Id.* at 837.
[692] *Id.* at 836.
[693] *Id.* at 837.
[694] 141 P.3d 362 (Alaska Ct. App. 2006).
[695] *Id*. at 364, 366.
[696] *Id*. at 362.
[697] *Id*. at 363.

offense of the promoting contraband charge.[698] The court of appeals held that the defendant was not in double jeopardy, because the two statutes serve the distinct societal interests of preventing possession of controlled substances and preventing introduction of contraband materials into the prison.[699] Additionally, possession of drugs is not a lesser included offense of the promoting contraband charge, because when the jury found the defendant guilty of promoting contraband, it did not logically follow that they must also find him guilty of possession.[700] The court of appeals affirmed Lampkin's conviction, holding that his conviction under two separate statutes for one act did not constitute double jeopardy and that one charge was not a lesser included offense of the other.[701]

Miller v. State

In *Miller v. State*,[702] the court of appeals held that an investigative traffic stop of a driver who had been involved in a verbal domestic dispute was not supported by a reasonable suspicion that the argument would lead to a crime.[703] A 911 caller reported an argument in a parking lot and gave a general description of the vehicle and individuals involved.[704] The responding officer stopped a vehicle matching the description and ultimately arrested the driver, Miller, for driving while under the influence and refusing to submit to a chemical test.[705] Miller moved to suppress the evidence from the stop, but his motion was denied.[706] The court of appeals held that a report of a verbal domestic disturbance alone did not provide the officer with an objective basis for believing that a crime had been or was about to be committed.[707] No violence or threat of violence had been reported, and there was no reason to believe that the verbal argument, though heated, would end in domestic violence.[708] The court of appeals reversed the district court's conviction, holding that an investigative traffic stop of a driver involved in a verbal domestic dispute was not supported by a reasonable suspicion that the argument would lead to a crime.[709]

State v. Moreno

In *State v. Moreno*,[710] the court of appeals held that Alaska's pre-2005 presumptive sentencing law was valid, provided that there is a jury trial when *Blakely*-compliant aggravating factors are involved.[711] Moreno was convicted of first degree

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[698] *Id*.
[699] *Id*. at 364.
[700] *Id*. at 366.
[701] *Id*. at 364, 366.
[702] 145 P.3d 627 (Alaska Ct. App. 2006).
[703] *Id.* at 628–29.
[704] *Id.*
[705] *Id.*
[706] *Id.* at 629.
[707] *Id.* at 630.
[708] *Id.*
[709] *Id.* at 628–29.
[710] 151 P.3d 480 (Alaska Ct. App. 2006).
[711] *Id*. at 481.

sexual abuse of a minor in 2004.[712] The State proposed no aggravating factors, and Moreno faced an eight year presumptive sentence under Alaska's pre-2005 presumptive sentencing law.[713] The superior court found the presumptive sentencing law unconstitutional under the Sixth Amendment and announced its intention to apply indeterminate sentencing to Moreno.[714] The court of appeals held that Alaska's pre-2005 presumptive sentencing law was not unconstitutional because its constitutional flaws could be remedied by providing a jury trial when certain aggravating factors were involved.[715] The court recognized that the law did violate the Sixth Amendment right to a jury trial under *Blakely v. Washington*,[716] but determined that the court could sever the unconstitutional portions of the law from the presumptive sentencing scheme as a whole.[717] The court of appeals reversed the decision of the superior court, holding that Alaska's pre-2005 presumptive sentencing law was valid, provided that there is a jury trial when *Blakely*-compliant aggravating factors are involved.[718]

Porterfield v. State

In *Porterfield v. State*,[719] the court of appeals held that a co-conspirator's statement against penal interest to an unknown police informant was not testimonial in nature and, therefore, did not implicate the confrontation clause of the Sixth Amendment[720] as described in *Crawford v. Washington*.[721] Porterfield was convicted of first-degree murder and first-degree arson.[722] The government presented the testimony of Porterfield's wife admitting each spouse's involvement to a friend who was covertly acting as a police informant.[723] Previously, the court of appeals held that these statements were properly admitted under the "statement against penal interest" hearsay exception and that Porterfield's Sixth Amendment rights were not violated.[724] Granting this appeal to reconsider in light of the *Crawford* decision, the court of appeals followed circuit and state precedent to hold that Porterfield's wife's statements did not implicate the confrontation clause of the Sixth Amendment because they were not testimonial in nature.[725] These statements were not testimonial because Porterfield's wife had no knowledge that her statements could be used against Porterfield,[726] and she made the statements to a friend, not to a government official.[727] The court of appeals affirmed the superior court, holding that Porterfield's wife's statement against penal interest to an

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[712] *Id*. at 480.
[713] *Id*.
[714] *Id*. at 481.
[715] *Id*.
[716] 542 U.S. 296 (2004).
[717] *Moreno,* 151 P.3d at 481.
[718] *Id*.
[719] No. A-9033, 2006 Alas. App. LEXIS 170 (Alaska Ct. App. Oct. 13, 2006).
[720] *Id.* at *14.
[721] 541 U.S. 36 (2004).
[722] *Porterfield*, 2006 Alas. App. LEXIS at *1–2.
[723] *Id.*
[724] *Id.* at *3.
[725] *Id.* at *14.
[726] *Id.* at *13.
[727] *Id.* at *4–5, *13.

unknown police informant was not testimonial in nature and, therefore, did not implicate the confrontation clause of the Sixth Amendment as described in *Crawford*.[728]

Smart v. State

In *Smart v. State*,[729] the court of appeals held that the *Blakely v. Washington*[730] right to jury trial and requirement of reasonable doubt for aggravating factors should be applied retroactively to all defendants.[731] Two men received enhanced sentences based on the State's proof of aggravating factors.[732] After their convictions were final, *Blakely* was decided, giving criminal defendants the right to a jury trial on any issue of fact that would potentially increase the defendants' maximum penalty.[733] The court of appeals held that the correct test for retroactive application of *Blakely* was the test stated by the United States Supreme Court in *Linkletter v. Walker*[734] and later adopted by the Alaska supreme court in *State v. Semancik*[735].[736] The court distinguished the retroactivity test stated in *Teague v. Lane*,[737] which limits the authority of federal courts to overturn state criminal convictions in federal habeas corpus proceedings, because *Teague* did not address the authority of state courts.[738] Under *Semancik*, the court looks at the purpose of the new rule, the extent of reliance on the old rule, and the effect of retroactive application on the administration of justice.[739] The new rule, *Blakely*, consisted of the defendant's right to require proof beyond a reasonable doubt and the right to have a jury decide issues of fact that might raise a defendant's maximum penalty.[740] The purpose of the *Blakely* requirement of proof beyond a reasonable doubt, to prevent unconstitutional punishment, was sufficient to merit full retroactivity under *Semancik*.[741] Also, although reliance on the earlier standard was substantial, the administration of justice would not be severely impacted by retroactive application of *Blakely*.[742] The purpose of the *Blakely* right to jury trial on issues of fact, to guarantee the citizenry's liberties, also favored retroactivity.[743] The court of appeals reversed and vacated the superior court's ruling for one of the convicts and affirmed the ruling for the other convict on grounds of harmless error, holding that the *Blakely* right to jury trial and requirement of reasonable doubt for aggravating factors should be applied retroactively to all defendants.[744]

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[728] *Id.* at *14.
[729] 146 P.3d 15 (Alaska Ct. App. 2006).
[730] 542 U.S. 296 (2004).
[731] *Smart,* 146 P.3d at 17.
[732] *Id.* at 38–39.
[733] *Id.* at 17.
[734] 381 U.S. 618 (1965).
[735] 99 P.3d 538 (Alaska 2004).
[736] *Smart*, 146 P.3d at 18.
[737] 489 U.S. 288 (1989).
[738] *Smart*, 146 P.3d at 18, 24.
[739] *Id.* at 18.
[740] *Id.* at 30.
[741] *Id.* at 33.
[742] *Id.* at 35.
[743] *Id.* at 38.
[744] *Id.* at 17, 40.

State v. Stafford

In *State v. Stafford*,[745] the court of appeals held that when determining the mandatory minimum sentences for individuals convicted of driving under the influence ("DUI"), the date of sentencing was the pertinent date for applying a new, more lenient law.[746] In 2004, the Alaska legislature repealed a lifetime look-back period for prior DUI convictions and enacted an amendment which required sentencing courts to count only an offender's DUI convictions within the previous fifteen years for the purpose of determining mandatory minimum sentences.[747] Stafford and Castrey were arrested for DUI; both had DUI convictions that were more than fifteen years old.[748] The district court applied the new law because Stafford and Castrey were awaiting sentencing when the amendment went into effect.[749] The State appealed, arguing that the date the offense was committed should be the pertinent date for applying the new law.[750] The court of appeals held that the date of sentencing was the pertinent date for applying the new law, because the legislative history of the statute suggested that the legislature wanted the new law to be applied as soon and broadly as possible, and there was no language suggesting its application should be limited to those offenses committed on or after the effective date.[751] The court of appeals affirmed the decision of the district court, holding that the date of sentencing was the pertinent date for applying the new law when determining the mandatory minimum sentences for individuals convicted of DUI.[752]

Stevens v. State

In *Stevens v. State*,[753] the court of appeals held that Alaska Statute section 28.15.021(5),[754] which allows off-highway vehicles to be operated without a license, did not exempt a driver whose license had been revoked from Alaska Statute section 28.15.291(a),[755] which prohibits the operation of a motor vehicle on the highway without a license,[756] and that Alaska Statute section 28.15.291(a) did not violate due process or equal protection.[757] Police found Stevens operating a four-wheel vehicle on a highway with a revoked license and charged him under section 28.15.291(a).[758] Stevens pled no contest and then appealed, arguing that, under section 28.15.021(5), he was not required to have a license to operate an off-highway vehicle on the highway and, in the alternative, that section 28.15.291(a) violated due process and equal protection.[759] The court of appeals held that the legislative purpose of section 28.15.021(5) was not to exempt

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[745] 129 P.3d 927 (Alaska Ct. App. 2006).
[746] *Id.* at 928, 934.
[747] *Id.* at 927–28.
[748] *Id.* at 928.
[749] *Id.*
[750] *Id.*
[751] *Id.* at 933.
[752] *Id.* at 928, 934.
[753] 135 P.3d 688 (Alaska Ct. App. 2006).
[754] ALASKA STAT. § 28.15.021(5) (2006).
[755] ALASKA STAT. § 28.15.291(a) (2006).
[756] *Id.* at 693.
[757] *Id.* at 693–94.
[758] *Id.* at 690.
[759] *Id.* at 690–91, 693–94.

unlicensed on-road operation of off-highway vehicles from the prohibition in section 28.15.291(a) but merely to permit unlicensed operation of off-highway vehicles only when they are operated off the highway.[760] Further, Stevens' due process was not violated because, when viewed together, section 28.15.291(a) and section 28.15.021(5) are not incompatible.[761] Also, section 28.15.291(a) did not fail for vagueness, because it was not ambiguous or confused after legal analysis.[762] Section 28.15.291(a) also did not violate equal protection, because the legislature was not irrational in distinguishing on-road and off-road operation of motor vehicles.[763] The court of appeals affirmed the guilty plea,[764] holding that section 28.15.021(5) did not exempt a driver whose license had been revoked from section 28.15.291(a),[765] and that section 28.15.291(a) did not violate due process or equal protection.[766]

Walsh v. State

In *Walsh v. State*,[767] the court of appeals held that a trial judge did not abuse his discretion when he did not inquire into or attempt to resolve an apparent breakdown in an attorney-client relationship in an indigent's criminal trial.[768] Walsh told the judge at his plea hearing that he and his attorney were having difficulty reaching an agreement on the pleadings.[769] Walsh later stated that there was a conflict of interest with his attorney and asked for new counsel, but did not specify any particular conflict.[770] The judge asked for particulars of ethical violations, but did not hear anything further about it.[771] After the trial had commenced, Walsh again objected to his attorney and was told by the judge that such complaints would be addressed elsewhere.[772] Walsh appealed his conviction.[773] The court of appeals held that judges should be hesitant to inject themselves in the attorney-client relationship and that here, the breakdown in attorney-client relationship never appeared so severe as to prevent communication between the attorney and Walsh, thus the judge acted properly.[774] The court of appeals affirmed the conviction, holding that the trial judge did not abuse his discretion when he did not inquire into or attempt to resolve an apparent breakdown in an attorney-client relationship in an indigent's criminal trial.[775]

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[760] *Id.* at 692.
[761] *Id.* at 693.
[762] *Id.*
[763] *Id.* at 694.
[764] *Id.* at 695.
[765] *Id.* at 693.
[766] *Id.* at 693–94.
[767] 134 P.3d 366 (Alaska Ct. App. 2006).
[768] *Id.* at 368.
[769] *Id.* at 369.
[770] *Id.*
[771] *Id.*
[772] *Id.*
[773] *Id.*
[774] *Id.* at 370–71.
[775] *Id.* at 368.

Y.J. v. State

In *Y.J. v. State*,[776] the court of appeals held that a minor's act of concealing a holster under a bed was evidence tampering.[777] Y.J. ran from a police officer who approached him and suspected him of concealing a weapon.[778] Y.J. ran into an apartment after tossing the gun, but a few minutes later he came out and was taken into custody.[779] Upon searching the apartment, police found a holster underneath the bed.[780] Y.J. was convicted of possessing a concealed weapon and evidence tampering.[781] After his trial, Y.J. filed a motion for a partial judgment of acquittal for the evidence tampering charge.[782] The superior court denied this motion, and Y.J. appealed.[783] The court of appeals held that concealing a holster under the bed was evidence tampering, because substantial evidence existed to show that Y.J.'s intent was to hide the holster from police, impairing the availability of evidence in a criminal investigation.[784] It was irrelevant that under the law, the holster was not actually "concealed" because it was found quickly by the police.[785] The court of appeals affirmed the decision of the superior court, holding that a minor's act of concealing a holster under a bed was evidence tampering.[786]

Zemljich v. Municipality of Anchorage

In *Zemljich v. Municipality of Anchorage*,[787] the court of appeals held that the government satisfies its duty to offer an independent test of blood alcohol when a driver understands this right, is given a reasonable opportunity to exercise this right, but is unwilling to make an affirmative decision to exercise or waive the right.[788] Police officer Daily stopped Zemljich's car after observing Zemljich stopped beside a young girl crying in the fetal position in an alley.[789] Daily observed that Zemljich appeared drunk and arrested him for driving under the influence after Zemljich showed a .227 alcohol level on a breath test.[790] Daily offered Zemljich an independent chemical test, but Zemljich could not decide whether an independent test would help him and left it undecided whether he would assert his right for that test.[791] The court of appeals held, in addition to finding a reasonable suspicion to authorize the stop,[792] that Zemljich impliedly waived his right to an independent chemical test.[793] The trial court correctly found waiver of the

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[776] 130 P.3d 954 (Alaska Ct. App. 2006).
[777] *Id.* at 958.
[778] *Id.* at 955.
[779] *Id.* at 956.
[780] *Id.*
[781] *Id.*
[782] *Id.*
[783] *Id.*
[784] *Id.* at 957.
[785] *Id.* at 958.
[786] *Id.*
[787] 151 P.3d 471 (Alaska Ct. App. 2006).
[788] *Id.* at 478.
[789] *Id.* at 474.
[790] *Id.*
[791] *Id.*
[792] *Id.* at 475.
[793] *Id.* at 478.

right to the independent test because Zemljich understood his right to an independent test[794] and was given reasonable opportunity to assert that right.[795] The court of appeals affirmed the conviction, holding that the government satisfies its duty to offer an independent test of blood alcohol when a driver understands this right, is given a reasonable opportunity to exercise it, but is unwilling to make an affirmative decision to exercise or waive the right.[796]

[794] *Id.* at 477.
[795] *Id.* at 478.
[796] *Id.*

VIII. CRIMINAL PROCEDURE

Alaska Supreme Court

Crawford v. State

In *Crawford v. State*,[797] the supreme court held that the warrantless search of the unlocked center console of an automobile was a reasonable search incident to arrest.[798] Crawford was arrested for reckless driving, and the arresting officer found crack cocaine in the vehicle's center console while conducting a search for weapons.[799] After his suppression motion was denied, Crawford pleaded no contest to fourth degree misconduct involving a controlled substance.[800] The court of appeals upheld the search because the officer had an articulable reason to believe that the console contained a weapon, and the supreme court granted a petition for hearing.[801] The supreme court held that the warrantless search was a reasonable search incident to arrest because the vehicle's console was within Crawford's immediate control and was unlocked, making it immediately associated with Crawford's person.[802] Additionally, the search was reasonably contemporaneous with Crawford's arrest because there was only a short delay between the arrest and the search.[803] The supreme court affirmed the decision of the court of appeals, holding that the warrantless search of a car's center console was a reasonable search incident to an arrest for reckless driving.[804]

Hora v. Cooper

In *Hora v. Cooper*,[805] the supreme court held that a person subject to a domestic violence protective order does not violate that order simply by being in the same public place as the person protected by the order,[806] and that the fact that two parties both expressed concerns for their safety was insufficient basis for subjecting both parties to a mutual restraining order.[807] Cooper was placed under a protective order after he pled no contest to a charge of family violence after allegedly assaulting his then-wife, Hora.[808] Hora later petitioned for a long-term restraining order, arguing that Cooper had violated the terms of the initial order, most notably by making eye contact with her at a local shopping mall and attending a conference that she also attended.[809] In separate proceedings, the superior court denied the petition for a long-term restraining order and granted Cooper's separate motion for a mutual restraining order stemming from the

[797] 138 P.3d 254 (Alaska 2006).
[798] *Id.* at 256, 262.
[799] *Id.* at 256–57.
[800] *Id.* at 257.
[801] *Id.* at 258.
[802] *Id.* at 260–61.
[803] *Id.* at 261–62.
[804] *Id.* at 262.
[805] 144 P.3d 451 (Alaska 2006).
[806] *Id.* at 453.
[807] *Id.* at 459.
[808] *Id.* at 453.
[809] *Id.* at 453–54.

couple's divorce proceedings.[810] The supreme court held that Cooper's conduct did not amount to "stalking" or "contacting," the relevant elements of the crime of violating a protective order.[811] The crime of stalking requires the victim to reasonably perceive the threat of injury, and Hora's evidence did not support such a finding.[812] Furthermore, a person subject to a domestic violence protective order does not commit the crime of violating that order simply by being in the same public place as the person protected by the order.[813] However, the superior court abused its discretion in issuing the mutual restraining order, as there was insufficient factual support for Cooper's concern that he would be subject to harassment or contact by Hora.[814] The supreme court affirmed the superior court's denial of a long-term restraining order and overturned its imposition of a mutual restraining order, holding that a person subject to a domestic violence protective order does not violate that order simply by being in the same public place as the person protected by the order, and that the fact that both parties expressed concerns for their safety is insufficient basis for subjecting both parties to a mutual restraining order.[815]

Vaska v. State

In *Vaska v. State*,[816] the supreme court held that it was error to apply the prior inconsistent statement provision for the first time on appeal, where defendant's decision not to cross examine a young witness was influenced by the State's reliance on the catchall exception to the hearsay rule and its failure to lay an adequate foundation to admit the witness' statements as prior inconsistent statements.[817] Vaska was convicted of first-degree sexual abuse of a minor, T.E.[818] At trial, the court permitted T.E.'s mother to testify about T.E.'s out of court statements since T.E. could not remember them while on the stand.[819] Vaska appealed, arguing that admission of the mother's hearsay statements under the catchall exception to the hearsay rule was unconstitutional.[820] On appeal, the State, for the first time, argued that the statements were admissible as prior inconsistent statements.[821] The court of appeals adopted this new theory, and Vaska appealed.[822] The supreme court held that a party offering a statement under the prior inconsistent statement rule must satisfy two foundational conditions.[823] First, the offering party must show that the prior statement is, in fact, inconsistent with the witnesses' testimony.[824] Second, the witness who made the prior statement is to be given an opportunity to explain or deny

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[810] *Id.*
[811] *Id.* at 454–59.
[812] *Id.* at 456–57.
[813] *Id.* at 457–59.
[814] *Id.* at 459.
[815] *Id.* at 451–59.
[816] 135 P.3d 1011 (Alaska 2006).
[817] *Id.* at 1013.
[818] *Id.*
[819] *Id.* at 1014.
[820] *Id.* at 1015.
[821] *Id.*
[822] *Id.*
[823] *Id.*
[824] *Id.*

it.[825] Both should be met while the witness is still on the stand and before the prior statement is admitted.[826] Here, the State abandoned its examination of T.E. and asked for her to be excused without complying with either of the foundational conditions.[827] The State's decision to apply the catchall theory at trial led Vaska to decide not to cross-examine T.E., potentially seriously prejudicing his case.[828] The supreme court reversed the evidentiary ruling of the court of appeals and remanded the case, holding that it was error to apply the prior inconsistent statement provision for the first time on appeal.[829]

Alaska Court of Appeals

State v. Avery

In *State v. Avery*,[830] the court of appeals held that, under *Blakely v. Washington*,[831] prior convictions need not be proven beyond a reasonable doubt when used as aggravating factors to increase a sentence.[832] After three prior felony convictions, Avery was convicted a fourth time for possessing cocaine.[833] The superior court added three years to Avery's sentence based on his criminal history.[834] Subsequent to the Supreme Court's holding in *Blakely* that all non-prior conviction aggravating factors that increase a defendant's prison sentence beyond the established maximum must be proven to a jury beyond a reasonable doubt,[835] Avery filed a motion to modify his sentence, arguing that the aggravating factors should have been proven to a jury.[836] The superior court ordered a new sentencing hearing to decide if the *Blakely* decision should affect Avery's sentence.[837] The State appealed, arguing that *Blakely* did not make Avery's sentence illegal and that the superior court did not have the authority to change Avery's sentence.[838] The court of appeals held that because all of the aggravating factors were based on Avery's prior convictions, his sentence was not illegal under *Blakely*.[839] Furthermore, because Avery's motion for relief was untimely, the superior court did not have the authority to alter his sentence.[840] The court of appeals thus reversed the superior court's order of a new sentencing hearing, holding that prior convictions need not be proven beyond a reasonable doubt when used as aggravating factors to increase a sentence.[841]

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[825] *Id.* at 1016.
[826] *Id.*
[827] *Id.* at 1018.
[828] *Id.* at 1021–22.
[829] *Id.* at 1024.
[830] 130 P.3d 959 (Alaska Ct. of App. 2006).
[831] 542 U.S. 296 (2004).
[832] *Avery,* 130 P.3d at 962.
[833] *Id.*
[834] *Id.* at 961.
[835] *Id.*
[836] *Id.* at 961.
[837] *Id.*
[838] *Id.*
[839] *Id.* at 961.
[840] *Id.* at 963.
[841] *Id.* at 962–63.

Billum v. State

In *Billum v. State*,[842] the court of appeals held that although the sentencing court's use of aggravating factors to compound defendant's sentence was technically unconstitutional, it was harmless error since the same sentence could have been imposed without use of any aggravating factors.[843] Billum was convicted of three counts of first-degree assault for causing a car accident and injuring four people.[844] Because he was intoxicated while driving, the judge used this aggravating factor to impose an additional five years of suspended sentence.[845] The court of appeals held that such use of an aggravating factor without benefit of a jury trial was unconstitutional under *Blakely v. Washington*[846].[847] However, because the judge had the authority to impose the same sentence by imposing consecutive sentences for each of the charges against the defendant, it was beyond a reasonable doubt that the use of the aggravating factor was harmless error.[848] The court of appeals affirmed the sentencing court's decision, holding that even though the use of aggravating factors in extending the sentence without a jury determination was unconstitutional, it was harmless error and the sentence should stand.[849]

Blank v. State

In *Blank v. State*,[850] the court of appeals held that a breath test conducted by an officer prior to arrest was not a preliminary breath test and therefore could be used as evidence at trial.[851] Blank hit and killed a pedestrian, then drove away from the scene.[852] A police officer later questioned her at her home, and administered a breath test, which showed that she was intoxicated.[853] Blank challenged the use of this test at trial, arguing that it was a preliminary breath test because it was given with a portable device and therefore could only be used in establishing probable cause.[854] The court of appeals held that whether or not a breath test is preliminary is determined by the point in time that the test is given, not the kind of device used, and therefore the breath test in question was not proven to be preliminary.[855] The court of appeals affirmed the superior court's decision, holding that the evidence of a breath test was admissible because the test had not been shown to be preliminary.[856]

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[842] 151 P.3d 507 (Alaska Ct. App. 2006).
[843] *Id.* at 508–09.
[844] *Id.* at 508.
[845] *Id.*
[846] 542 U.S. 296 (2004).
[847] *Billum,* 151 P.3d at 508–09.
[848] *Id.* at 509.
[849] *Id* at 509–10.
[850] 142 P.3d 1210 (Alaska Ct. App. 2006).
[851] *Id.* at 1212–13.
[852] *Id.* at 1211.
[853] *Id.*
[854] *Id.* at 1211–13.
[855] *Id.* at 1213.
[856] *Id.*

Brown v. State

In *Brown v. State*,[857] the court of appeals held that a probation officer authorized to conduct suspicionless searches of the probationer can also temporarily detain the probationer and enlist the assistance of the police to conduct the stop.[858] Probation Officer Davies mistakenly believed that one of his probationers who may have been violating parole got into a cab, so he requested that the police stop the cab.[859] When the police stopped the cab, Davies recognized him as Brown, another of his probationers.[860] Brown ran and left behind drugs.[861] On appeal, Brown argued that Davies did not have the authority to seize and detain Brown for the purpose of conducting a search and that, even if the stop was lawful if conducted by Davies alone, the stop became unlawful when Davies enlisted the help of the police.[862] The court of appeals held that a probation officer's authority to search a probationer carries the power to temporarily detain the probationer for the purpose of conducting the search, as long as the search is conducted in a reasonable time and manner and is not conducted for the purpose of harassment.[863] The court of appeals also held the police assistance did not make the search unlawful, since probation officers should not choose between endangering themselves by searching alone or foregoing a search altogether.[864] The court of appeals affirmed the decision of the superior court, holding that a probation officer has the authority to temporarily seize and detain a probationer in order to conduct a search subject to the conditions of parole and to enlist the assistance of the police to conduct the stop.[865]

Bryant v. State

In *Bryant v. State*,[866] the court of appeals held that a defense counsel was not ineffective for failing to call a witness who may have given favorable testimony and failing to offer evidence that could have been used to rehabilitate credibility.[867] Bryant was convicted after standing trial for sexual abuse of a minor.[868] He moved for a new trial based on ineffective counsel, arguing that his trial attorney neglected to call a witness to the stand who would have given testimony in his favor, and that his counsel failed to offer into evidence a certificate that Bryant hoped to use during his closing argument to rehabilitate his credibility.[869] The court of appeals held that Bryant did not meet his burden of proof to show that the trial attorney knew, or should have known, what the witness was going to say and what help that witness could have provided.[870] The court of appeals also held that the rehabilitation evidence was unnecessary because

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[857] 127 P.3d 837 (Alaska Ct. App. 2006).
[858] *Id.* at 844–45.
[859] *Id.* at 839.
[860] *Id.*
[861] *Id.* at 840.
[862] *Id.* at 843–45.
[863] *Id.* at 844.
[864] *Id.* at 845.
[865] *Id.* at 844–45, 847.
[866] 133 P.3d 690 (Alaska Ct. App. 2006).
[867] *Id.* at 691–92.
[868] *Id.*
[869] *Id.*
[870] *Id.* at 691.

the prosecution did not address the issue in its closing argument and because the evidence would not have rehabilitated his credibility.[871] The court of appeals affirmed the ruling of the superior court, holding that a defense counsel was not ineffective for failing to call a witness who may have given favorable testimony and failing to offer evidence that could have been used to rehabilitate credibility.[872]

Carlson v. State

In *Carlson v. State*,[873] the court of appeals held that a judge may deviate from the judicially declared benchmark range for individuals convicted of second-degree murder without violating the Sixth Amendment.[874] Carlson was convicted of second-degree murder and was sentenced to fifty years imprisonment with ten years suspended.[875] The judge determined that Carlson's sentence should exceed the benchmark range because of his prior history of delinquency and repeated perjury.[876] Carlson appealed, claiming that his Sixth Amendment rights were violated when the judge imposed a sentence above the benchmark range without the aid of a jury.[877] The court of appeals held that a judge could deviate from the judicially declared benchmark range without violating the Sixth Amendment, because the legislature retained an indeterminate sentencing structure, allowing a sentencing judge to impose a sentence above the benchmark for any sound reason.[878] Defendants convicted of second-degree murder do not have a Sixth Amendment right to have a jury decide whether their sentences should exceed the benchmark range, because a finding of guilt subjects the defendant to the statutory penalty of ten to ninety-nine years in prison.[879] Within the statutory range, sentencing is indeterminate, and judges are permitted to impose a sentence above the thirty-year benchmark ceiling as long as they have a sound reason for doing so.[880] The court of appeals affirmed the judgment of the superior court, holding that it is not a violation of the Sixth Amendment for judges to deviate from the judicially declared benchmark range for second-degree murder.[881]

Cleveland v. State

In *Cleveland v. State*,[882] the court of appeals held that a presumptive term of imprisonment may be properly increased when at least one *Blakely*[883]-compliant aggravating factor has been proven, even if other aggravating factors relied on by the

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[871] *Id.* at 692.
[872] *Id.* at 691–92.
[873] 128 P.3d 197 (Alaska Ct. App. 2006).
[874] *Id.* at 211.
[875] *Id.* at 198.
[876] *Id.* at 212.
[877] *Id.*
[878] *Id.* at 203–04.
[879] *Id.* at 209.
[880] *Id.*
[881] *Id.* at 211.
[882] 143 P.3d 977 (Alaska Ct. App. 2006).
[883] Blakely v. Washington, 542 U.S. 296 (2004).

sentencing judge have not been proven to a jury.[884] Cleveland was convicted of three felonies relating to the forcible sexual penetration of his female cousin and was sentenced to nineteen years imprisonment.[885] On appeal, he argued that the sentencing judge improperly increased the presumptive maximum term of imprisonment, since the aggravating factors were not presented to a jury, in violation of the Sixth and Fourteenth Amendments.[886] The court of appeals held that Cleveland's sentence did not violate the Constitution, since five of the seven aggravating factors were in fact proven to the jury, and any one of the five was sufficient to allow the sentencing judge to increase the maximum presumptive term of imprisonment.[887] The court of appeals affirmed the superior court's denial of Cleveland's motion for a correction of sentence, holding that the presumptive maximum term was properly exceeded.[888]

Collier v. Municipality of Anchorage

In *Collier v. Municipality of Anchorage*,[889] the court of appeals held that a police officer did not violate a driver's Fifth Amendment right to counsel when the officer required the driver to produce his driver's license during a routine traffic stop.[890] Collier was convicted of speeding and appealed, arguing that the officer improperly obtained his identification after he had invoked his Fifth Amendment right.[891] The court of appeals held that a routine traffic stop was not a custodial interrogation, and as such, the right to counsel did not arise when the officer requested Collier's driver's license.[892] The court of appeals affirmed the conviction for speeding, holding that the driver's Fifth Amendment right to counsel was not triggered when a police officer required him to produce his driver's license when he was stopped for speeding.[893]

State v. Dague

In *State v. Dague*,[894] the court of appeals held that where a criminal defendant is entitled to a trial by jury on an aggravating factor, the defendant is not further guaranteed a grand jury indictment on that factor.[895] Dague was prosecuted for second-degree murder for the death of a ten-month-old infant in her care; she was ultimately convicted of manslaughter.[896] The State asked the judge to hold a jury trial to consider the presence of an aggravating factor.[897] The trial court discharged the jury and barred the State from

[884] *Cleveland,* 143 P.3d at 984–85.
[885] *Id.* at 979.
[886] *Id.*
[887] *Id.* at 979–80.
[888] *Id.* at 988.
[889] 138 P.3d 719 (Alaska Ct. App. 2006).
[890] *Id.* at 720–21.
[891] *Id.* at 720.
[892] *Id.*
[893] *Id.* at 721–22.
[894] 143 P.3d 988 (Alaska Ct. App. 2006).
[895] *Id.* at 991.
[896] *Id.*
[897] *Id.* at 992.

raising the issue with a subsequent jury.[898] The court of appeals held that because aggravating factors are not "elements" of the crime but rather are factors related to sentencing, they need not be alleged in the indictment, and the sentencing judge has a duty to take account of aggravating factors even if not raised by the State.[899] Furthermore, the *Blakely*[900] line of cases did not prohibit state courts from using the element/sentencing factor dichotomy for purposes outside of the Sixth Amendment right to jury trial, such as the grand jury indictment concerned here.[901] The court of appeals reversed the superior court's decision, holding that, even where a defendant is guaranteed a jury trial on an aggravating factor, that factor is not an element of the crime for purposes of the grand jury clause of the Alaska Constitution.[902]

Davis v. State

In *Davis v. State*,[903] the court of appeals held that the speedy trial calculation under Alaska Criminal Rule 45[904] restarted when the defendant failed to change his plea at a change-of-plea hearing he requested, that the Rule 45 clock did not begin running until the trial judge ruled on the defendant's suppression motion, and that hearsay testimony was improperly admitted under the present-sense-impression-exception.[905] On July 26, 2000, Davis was charged with criminal offenses related to an automobile collision; the passenger in the other vehicle involved allegedly told the police officer statements regarding Davis.[906] Davis' trial began on February 4, 2002 which could have violated his statutory right to a speedy trial.[907] However, since Davis scheduled a change-of-plea hearing at which he did not change his plea, the superior court ruled that the speedy trial calculation restarted.[908] The jury subsequently found Davis guilty on all counts.[909] The court of appeals held that the speedy trial calculation restarted when the defendant announced that he would not change his plea at a change-of-plea hearing he requested and that the Rule 45 clock did not begin running until the trial judge ruled on defendant's suppression motion.[910] The court of appeals also held that the present-sense-impression hearsay exception is defined by its spontaneity or substantial contemporaneity and that hearsay testimony was improperly admitted under this exception here,[911] since there was time for the passenger to reflect before the police officer asked him questions about the event. [912] The court of appeals reversed the conviction and granted a new trial, holding that the speedy trial calculation under Alaska Criminal Rule 45 restarted when

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[898] *Id.* at 992–93.
[899] *Id.* at 994–97.
[900] Blakely v. Washington, 542 U.S. 296 (2004).
[901] *Dague*, 143 P.3d at 1002.
[902] *Id.* at 1014.
[903] 133 P.3d 719 (Alaska Ct. App. 2006).
[904] ALASKA R. CRIM. P. 45 (2006).
[905] *Davis*, 133 P.3d at 722–23, 730.
[906] *Id*. at 722.
[907] *Id*.
[908] *Id*.
[909] *Id*.
[910] *Id*.
[911] *Id*. at 727.
[912] *Id*. at 729.

the defendant failed to change his plea at a change-of-plea hearing he requested, that the Rule 45 clock did not begin running until the trial judge ruled on defendant's suppression motion, and that hearsay testimony was improperly admitted under the present sense impression exception.[913]

Erickson v. State

In *Erickson v. State*,[914] the court of appeals held that a pat-down search of a passenger in a minor traffic violation stop, who the officer suspected of giving a false name, was an illegal search.[915] Erickson was a passenger in a car pulled over for not having a front license plate.[916] The police officer could not find the name that Erickson gave him in the Alaska Public Safety Information Network ("APSIN") and concluded that the name given was false.[917] The officer ordered Erickson out of the car and conducted a pat-down search, where he found an identification card.[918] The officer arrested Erickson for giving false information and then continued the pat-down search, finding illegal drugs.[919] Erickson was convicted of possession of illegal drugs and appealed the denial of his motion to suppress evidence of the search.[920] The court of appeals held that the search was illegal because the officer did not have probable cause to arrest Erickson and had no reason to believe Erickson was armed and dangerous.[921] The fact that the officer could not find the name in APSIN is not enough to justify an arrest, so the pat-down search could not be performed incident to that arrest.[922] The court of appeals reversed and remanded the decision of the superior court, holding that a pat-down search of the passenger in a minor traffic violation stop, who the officer suspected of giving a false name, was an illegal search.[923]

State v. Garrison

In *State v. Garrison*,[924] the court of appeals held that an individual's statements to the police are admissible when made outside the presence of counsel before the start of adversary proceedings and when any alleged police threats occur after the individual's incriminating statements are made.[925] Garrison was interviewed at his home without counsel present as part of an ongoing murder investigation.[926] He had refused earlier attempts at questioning outside his attorney's presence.[927] However, at this time,

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[913] *Id*. at 722–23, 730.
[914] 141 P.3d 356 (Alaska Ct. App. 2006).
[915] *Id.* at 357.
[916] *Id.*
[917] *Id*.
[918] *Id*.
[919] *Id.* at 358.
[920] *Id.* at 358–59.
[921] *Id.* at 359–60.
[922] *Id*.
[923] *Id.* at 357, 362.
[924] 128 P.3d 741 (Alaska Ct. App. 2006).
[925] *Id.* at 742–43.
[926] *Id.* at 743.
[927] *Id.*

Garrison answered the police officer's questions and admitted he had a connection to the murder weapon.[928] The trial court held that this evidence was inadmissible, and the State appealed.[929] The court of appeals held that the evidence was admissible, because there was no violation of attorney-client privilege when Garrison was not in custody and when formal proceedings had not yet been brought against him.[930] Additionally, the court of appeals held that the testimony was given voluntarily, as the statements made by the police were minimally coercive, if at all, and were made after Garrison had already admitted his connection to the weapon.[931] The court of appeals reversed the decision of the superior court, holding that an individual's statements to the police are admissible when made outside the presence of counsel before the start of adversary proceedings and when alleged police threats occur after the individual's incriminating statements are made.[932]

State v. Gottschalk

In *State v. Gottschalk*,[933] the court of appeals held that giving an individual a copy of the indictment when he was in court for another proceeding did not constitute service for purposes of starting the speedy trial period under Alaska Criminal Rule 45.[934] While in a court proceeding on a petition to revoke his probation, Gottschalk was given a copy of an indictment for felony DUI in a pending case.[935] The superior court found that providing Gottschalk with the copy during the probation proceeding constituted service for Criminal Rule 45 purposes, even though he was not formally served until three months later.[936] The court of appeals held that the speedy trial period under Rule 45 must have a clear, exact start date, and that Gottschalk's proposed start date, when he received a copy of the indictment, would open the door for confusion as to when the Rule 45 clock started on each individual case.[937] Therefore, the court determined that to start the speedy trial period, a defendant must be formally served under Rules 4 and 9 or formally arraigned on the charge under Rule 10.[938] The court of appeals reversed the superior court's order dismissing the case, holding that the defendant was not "served" for purposes of Rule 45 when the State gave him a copy of the indictment while he was in court for another proceeding, but instead was served when he was formally served with the charge several months later.[939]

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[928] *Id.* at 743–44.
[929] *Id.* at 744.
[930] *Id.*
[931] *Id.* at 748–49.
[932] *Id.* at 742–43.
[933] 138 P.3d 1170 (Alaska Ct. App. 2006).
[934] *Id.* at 1172.
[935] *Id.* at 1170.
[936] *Id.* at 1171.
[937] *Id.* at 1172.
[938] *Id.*
[939] *Id.*

Joseph v. State

In *Joseph v. State*,[940] the court of appeals held that a police officer's reasonable suspicion of public use of marijuana does not justify conducting an investigative stop and that any evidence obtained as a result of an attempt to conduct an unjustified investigative stop must be suppressed.[941] Joseph was convicted of third-degree controlled substance misconduct.[942] The primary evidence against Joseph was a bag of cocaine that he threw away while being pursued by an officer who was investigating a report of public use of marijuana.[943] Joseph appealed, arguing that the cocaine evidence should have been suppressed as the fruit of an unlawful seizure.[944] The court of appeals held that the seizure was unlawful because Alaska case law limits investigative stops to situations in which the suspected criminal activity poses imminent public danger or recently caused serious harm, and the public use of marijuana did not satisfy this requirement.[945] The court of appeals also held that the cocaine evidence should have been suppressed because the exclusionary rule applies to situations in which evidence is obtained while police are attempting to conduct an unlawful investigative stop.[946] The court of appeals rejected the rule in the United States Supreme Court's decision of *California v. Hodari D.*[947] on state law grounds, finding that the *Hodari D.* rule fails to safeguard citizens' rights to privacy under the Alaska Constitution.[948] The court of appeals reversed the ruling of the superior court, holding that the exclusionary rule applies to evidence obtained during an attempt to conduct an unjustified investigative stop and that reasonable suspicion of public use of marijuana does not justify conducting an investigative stop.[949]

Knox v. State

In *Knox v. State*,[950] the court of appeals held that a defense attorney's failure to inform a defendant before his guilty plea that he would be subject to mandatory parole should he be released early because of good-time credit constituted a prima facie case for ineffective assistance of counsel.[951] Knox was charged with selling crack cocaine, a class B felony, and faced a presumptive six-year sentence as a third-felony offender.[952] Knox argued that his attorneys provided ineffective assistance of counsel in handling his suppression motion and in advising him about his plea.[953] The court of appeals held that Knox did not overcome the strong presumption that his attorney represented him effectively with respect to the suppression hearing, because he did not show that the

[940] No. A-8939, 2006 Alas. App. LEXIS 167 (Alaska Ct. App. Oct. 13, 2006).
[941] *Id.* at *3.
[942] *Id.* at *1.
[943] *Id.*
[944] *Id.* at *1–2.
[945] *Id.* at *10.
[946] *Id.* at *21.
[947] 499 U.S. 621 (1991).
[948] *Joseph*, 2006 Alas. App. LEXIS 167 at *34.
[949] *Id.* at *36.
[950] 130 P.3d 971 (Alaska Ct. App. 2006).
[951] *Id.* at 973.
[952] *Id.* at 971–72.
[953] *Id.* at 972.

decisions were not tactical.[954] However, there was a prima facie case of ineffective assistance of counsel with respect to his plea decision, because the attorney admitted that she did not know that he would receive mandatory parole after his early release because of good-time credit, and she claimed that she believed this fact may have swayed Knox's decision to plead.[955] The court of appeals reversed the dismissal of Knox's application for post-conviction relief and remanded, holding that the defense attorney's erroneous and influential advice to the defendant that he would not be subject to mandatory parole after his early release constituted a prima facie case for ineffective assistance of counsel.[956]

Marunich v. State

In *Marunich v. State*,[957] the court of appeals held that a trial court's addition of general conditions of probation after sentencing did not violate a probationer's double jeopardy rights but did violate his due process rights.[958] Marunich was sentenced to six years in prison and four years on probation for two separate robberies.[959] The superior court issued its written judgment a week later, which contained twelve conditions of probation that had not been mentioned by the sentencing judge.[960] Marunich appealed, arguing that the added conditions of probation illegally increased the severity of his sentence.[961] The court of appeals held that the addition of conditions which are inherent aspects of being on probation did not violate Marunich's double jeopardy rights, because probation officers have a certain authority to supervise and control the conduct of probationers.[962] The post-sentencing addition of the general conditions violated Marunich's due process rights, however, because he was not given notice or the opportunity to seek judicial review of the conditions.[963] The court of appeals directed the superior court to give Marunich an opportunity to object to the conditions, holding that the post-sentencing addition of general conditions of probation violated Marunich's due process rights, though not his double jeopardy rights.[964]

McQuade v. State

In *McQuade v. State*,[965] the court of appeals held that a traffic stop which led to the arrest of two people in connection with a robbery was based on reasonable suspicion, and therefore, it was proper that the evidence gained during the traffic stop was not suppressed. A robbery occurred at an Anchorage gas station.[966] After choosing to follow

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[954] *Id.*
[955] *Id.* at 973.
[956] *Id.*
[957] 151 P.3d 510 (Alaska Ct. App. 2006).
[958] *Id.* at 514.
[959] *Id.* at 513.
[960] *Id.*
[961] *Id.* at 514.
[962] *Id.* at 521.
[963] *Id.* at 522.
[964] *Id.* at 523.
[965] 130 P.3d 973 (Alaska Ct. App. 2006).
[966] *Id.* at 974.

a suspicious vehicle, occupied by McQuade and Johnston, and observing continued suspicious behavior including the commission of a traffic violation, a police sergeant pulled over McQuade and Johnston.[967] In searching the car, officers found clothing that fit the robber's description and cash that fit the description of the stolen money.[968] McQuade and Johnston moved to suppress this evidence, arguing that the sergeant lacked reasonable suspicion to stop them as robbery suspects.[969] The superior court denied the motion.[970] The court of appeals held that in order to satisfy the reasonable suspicion standard, an officer must not rely on just a hunch, but have an objective justification for making a stop and be able to point to "specific and articulable facts."[971] Because of the time at which the officer saw the car, the reactions of the men to the police car, the abrupt driving maneuvers, and the unusual behavior of the men while the sergeant followed, the sergeant could point to "specific and articulable facts" and had an objective justification for stopping the car.[972] The court of appeals affirmed the decision of the superior court, holding that a traffic stop which led to the arrest of two people in connection with a robbery was based on reasonable suspicion, and therefore, it was proper that the evidence gained during the stop was not suppressed.[973]

Myers v. Municipality of Anchorage

In *Myers v. Municipality of Anchorage*,[974] the court of appeals held that two Anchorage ordinances punishing the sale or possession of drug paraphernalia were invalid, one because it was unconstitutionally vague, the other because it made possible a conviction without proof of *mens rea*.[975] Myers, a "head shop" owner,[976] challenged the constitutionality of Sections 08.35.020 and 08.35.025 of the Anchorage Municipal Code,[977] the first prohibiting the sale of drug paraphernalia or possession of drug paraphernalia with intent to sell, the second prohibiting the possession of drug paraphernalia in public.[978] Interpretation of the ordinances required examination of the definition of "drug paraphernalia" found in Section 08.35.010.[979] The court of appeals held that Section 08.35.010, which outlawed all items intended either to help introduce controlled substances into the human body, *or* to facilitate violations of Alaska's drug laws,[980] impermissibly encompassed both legal and illegal uses of controlled substances.[981] The court of appeals also held that this Section's definition of "drug paraphernalia" as items that circumstances may reasonably indicate a subjective intent to

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[967] *Id.* at 974–75.
[968] *Id.* at 975.
[969] *Id.*
[970] *Id.* at 976.
[971] *Id.* at 977.
[972] *Id.*
[973] *Id.*
[974] 132 P.3d 1176 (Alaska Ct. App. 2006).
[975] *Id.* at 1185.
[976] *Id.* at 1186.
[977] ANCHORAGE, ALASKA, MUN. CODE §§ 08.35.020, 08.35.025 (1996).
[978] *Myers*, 132 P.3d at 1177.
[979] *Myers*, 132 P.3d at 1177; ANCHORAGE, ALASKA, MUN. CODE § 08.35.010 (1996).
[980] *Myers*, 132 P.3d at 1180.
[981] *Id.* at 1179.

use or sell for consumption of controlled substances offered the possibility that the possessor could be convicted of a violation based on a third party's view of the circumstances, rather than the possessor's actual intent.[982] This would violate Alaska's due process requirement of actual awareness of wrongdoing.[983] The court of appeals thus held that Sections 08.35.020 and 08.35.025 of the Anchorage Municipal Code were invalid; Section 08.35.020 because it was unconstitutionally vague, Section 08.35.025 because it made possible a conviction without proof of *mens rea*.[984]

Netling v. State

In *Netling v. State*,[985] the court of appeals held that manufacturing methamphetamine is a sufficiently serious crime to justify substantial imprisonment even in the absence of injury, but that the superior court failed to support its determination that manufacturing methamphetamine on a small scale could not qualify for mitigation as among the least serious conduct within the definition of the offense.[986] Netling pleaded guilty to second-degree controlled substance misconduct for manufacturing methamphetamine and was sentenced to the five-year presumptive term after the court rejected the mitigating factors that he proposed.[987] Netling appealed, arguing that his sentence should be eligible for mitigation because: (1) the harm caused by his conduct was consistently minor and inconsistent with a substantial term of imprisonment, and (2) his conduct of manufacturing methamphetamine on a small scale was among the least serious within the definition of the offense.[988] The court of appeals held that manufacturing methamphetamine was a sufficiently serious crime to justify substantial imprisonment even in the absence of injury, because the legislature viewed methamphetamine as a particularly dangerous drug and enacted provisions to severely punish its manufacture.[989] However, the superior court failed to provide support for its determination that Netling's small-scale operation could not qualify as among the least serious conduct within the range of methamphetamine manufacturing.[990] The court of appeals vacated the superior court's ruling in part, holding that while manufacturing methamphetamine is a sufficiently serious crime to justify substantial imprisonment, the superior court failed to support its determination that manufacturing methamphetamine on a small scale could not qualify for mitigation as among the least serious conduct within the definition of the offense.[991]

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[982] *Id.* at 1184.
[983] *Id.* at 1185.
[984] *Id.*
[985] No. A-9334, 2006 Alas. App. LEXIS 169 (Alaska Ct. App. Oct. 13, 2006).
[986] *Id.* at *5–9.
[987] *Id.* at *1–2.
[988] *Id.* at *3–6.
[989] *Id.* at *5.
[990] *Id.* at *8–9.
[991] *Id.* at *5–9.

Noyakuk v. State

In *Noyakuk v. State*,[992] the court of appeals held that statements made by a suspect during his first post-arrest interview with state officers were inadmissible because he was not properly advised of his *Miranda* rights,[993] but that this *Miranda* violation did not taint subsequent admissible statements[994] and that state officers honored his right to an attorney.[995] While Noyakuk was in custody for other criminal offenses, state troopers interviewed him regarding the murder of his girlfriend.[996] During this interview Noyakuk was repeatedly told he could have an attorney present and could stop the interview at any time but was never given a full *Miranda* warning.[997] Noyakuk confessed to the murder of his girlfriend.[998] Each subsequent interview or conversation was preceded with a full *Miranda* warning.[999] Noyakuk's motion at trial to suppress these statements was granted regarding the first interview, but denied regarding all others.[1000] The court of appeals held that, although the first interview was conducted the day after he was arrested, Noyakuk, who was being held incommunicado in a holding cell, was just as susceptible at that time to coercion as a new arrestee.[1001] The court of appeals also held that there was sufficient time between the first and second interview to eliminate any threat of coercion.[1002] Furthermore, Noyakuk was appointed an attorney, was properly Mirandized in subsequent interviews, and understood those warnings.[1003] Finally, Noyakuk, who had enough prior experience with the criminal justice system to understand his rights, knowingly and voluntarily waived his right to counsel.[1004] The court of appeals affirmed the decision of the superior court, holding that statements a suspect made during his first interview were appropriately suppressed because he was not properly advised of his *Miranda* rights,[1005] but that subsequent statements were not tainted and were admissible[1006] and that state troopers honored his right to an attorney.[1007]

State v. One

In *State v. One*,[1008] the court of appeals held that where an indigent petitioner files for post-conviction relief, his or her attorney who submits a "no arguable claims" certificate on grounds that the post-conviction petition is time-barred must explain why

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[992] 127 P.3d 856 (Alaska Ct. App. 2006).
[993] *Id.* at 862.
[994] *Id.* at 866.
[995] *Id.* at 871.
[996] *Id.* at 858.
[997] *Id.*
[998] *Id.*
[999] *Id.* at 859.
[1000] *Id.* at 859–60.
[1001] *Id.* at 862.
[1002] *Id.* at 864.
[1003] *Id.* at 864–66.
[1004] *Id.* at 866–70.
[1005] *Id.* at 862.
[1006] *Id.* at 866.
[1007] *Id.* at 871.
[1008] 127 P.3d 853 (Alaska Ct. App. 2006).

there is no arguable exception to the statute of limitations.[1009] One entered a plea of no contest to an assault charge.[1010] After sentencing, he filed a pro se petition for post-conviction relief.[1011] His court-appointed attorney, Zorea, concluded that One's claim was time-barred and filed a no arguable claims certificate stating that he believed One had no arguable claim for post-conviction relief.[1012] The superior court accepted the certificate, and One appealed, arguing that the certificate did not explain in detail why he had no grounds for relief.[1013] The court of appeals held that a no arguable claims certificate must fully explain all of the claims the attorney considered and why the attorney concluded these claims were frivolous.[1014] Zorea was obligated, but failed to provide, a full explanation of how he reached the conclusion that the claim was time-barred.[1015] The court of appeals reversed the decision of the superior court, holding that where an indigent petitioner files for post-conviction relief, his or her attorney who submits a "no arguable claims" certificate on grounds that the post-conviction petition is time-barred must explain why there is no arguable exception to the statute of limitations.[1016]

Parrish v. State

In *Parrish v. State*,[1017] the court of appeals held that, without a complete record that allows for meaningful review, the superior court's ruling cannot be reversed.[1018] Parrish was charged in 2005 with driving under the influence ("DUI") and felony breath-test refusal and agreed to a plea bargain with the State, whereby he would plead guilty to a prior 2004 DUI and the 2005 felony breath-test refusal in exchange for the dismissal of the 2005 DUI.[1019] Parrish appealed his sentence, arguing that it should have been reduced on account of two mitigating factors.[1020] The court of appeals rejected the first mitigating factor, that Parrish's history of minor violations was inconsistent with the imposition of substantial imprisonment, because Parrish was not appealing the 2004 DUI charge, and the court would not review a composite sentence unless all of the underlying cases were appealed.[1021] The second mitigating factor, that his conduct was among the least serious within the definition of the statute, was also rejected because Parrish had never before raised this argument in his defense, and thus the court had no record to establish whether that claim was true.[1022] The court of appeals upheld the judgment of

[1009] *Id.* at 856.
[1010] *Id.* at 853.
[1011] *Id.*
[1012] *Id.*
[1013] *Id.* at 854.
[1014] *Id.*
[1015] *Id.* at 854–55.
[1016] *Id.* at 856.
[1017] 132 P.3d 1172 (Alaska Ct. App. 2006).
[1018] *Id.* at 1173.
[1019] *Id.*
[1020] *Id.* at 1174–75.
[1021] *Id.* at 1174.
[1022] *Id.* at 1174–75.

the superior court, holding that the record was inadequate to allow the court to perform a meaningful review.[1023]

Peterson v. State

In *Peterson v. State*,[1024] the court of appeals held that a defendant's *Cooksey*[1025] plea was valid where the issue preserved for appeal was dispositive of all charges and that an investigative stop did not amount to a seizure where the individual obviously did not feel compelled to reply to the officer's questions.[1026] Officer Turnage noticed unusual movement coming from Peterson's car,[1027] stepped out of his car to investigate, and observed a possible sexual assault.[1028] Turnage knocked on the glass, to which Peterson replied with expletives, asking what the officer wanted.[1029] Peterson then gave a fake name and an obviously fake birth date.[1030] Drugs were subsequently discovered and Peterson was arrested.[1031] Peterson entered a *Cooksey* plea, reserving the right to appeal the issue of suppression, for three felony charges and a normal no contest plea for four misdemeanors.[1032] He did not appeal the misdemeanor charges.[1033] The court of appeals held that a *Cooksey* plea is only valid if the issue being appealed is dispositive,[1034] and Peterson's *Cooksey* plea was valid because the State failed to prove that the suppression issue here is not dispositive of the felony charges against Peterson.[1035] On the merits of the suppression motion, Turnage's actions did not constitute an illegal seizure,[1036] because when Turnage approached Peterson, Peterson clearly did not feel compelled to answer the officer's questions.[1037] Further, Peterson's fake name and birth date gave Turnage probable cause for arrest.[1038] The supreme court affirmed the denial of Peterson's suppression motion,[1039] holding that a defendant's *Cooksey* plea is valid where the issue preserved for appeal is dispositive of all the charges and that a police officer's questioning of an individual did not amount to a seizure where the individual obviously did not feel compelled to reply to the officer's questions.[1040]

[1023] *Id.* at 1174–76.
[1024] 133 P.3d 730 (Alaska Ct. App. 2006).
[1025] Cooksey v. State, 524 P.2d 1251 (Alaska 1974).
[1026] *Peterson,* 133 P.3d at 733–34.
[1027] *Id.* at 731.
[1028] *Id.*
[1029] *Id.*
[1030] *Id.* at 732.
[1031] *Id.*
[1032] *Id.*
[1033] *Id.*
[1034] *Id.*
[1035] *Id.* at 733.
[1036] *Id.* at 734.
[1037] *Id.*
[1038] *Id.*
[1039] *Id.*
[1040] *Id.* at 733–34.

State v. Rivers

In *State v. Rivers*,[1041] the court of appeals held that a person's statements made to an investigator of the Employment Security Division of the Department of Labor ("Division") at an interview are admissible in court when the person does not affirmatively exercise his or her right against self-incrimination during the interview.[1042] Rivers moved to suppress incriminating statements he had given during an interview with an investigator of the Division regarding his unemployment insurance.[1043] The investigator encouraged interviewees to participate and informed them that failure to do so could result in a loss of future benefits.[1044] The superior court judge suppressed the statements because he found that Rivers had been coerced into giving them.[1045] The court of appeals held that the statements were admissible because at the time they were made, Rivers was not in custody, was not coerced, and most importantly did not exercise his right to avoid self-incrimination.[1046] Alaska Statute section 23.20.070, which governs immunity from prosecution when making statements before the Division, falls within a category of statutes requiring individuals to affirmatively assert their right against self-incrimination in order to gain immunity from prosecution.[1047] The court of appeals relied heavily on the reasoning from *Minnesota v. Murphy*[1048] in finding that Rivers' situation did not fall under the two possible exceptions to the affirmative assertion requirement, because he was neither in custody nor compelled to give the incriminating testimony.[1049] The court of appeals reversed the superior court's decision, holding that a person's statements made to a Division investigator at an interview are admissible in court when the person does not affirmatively exercise his or her right against self-incrimination during the interview.[1050]

Serradell v. State

In *Serradell v. State*,[1051] the court of appeals held that the superior court could not deny a criminal offender's pro se application for post-conviction relief without adequate notice to the petitioner.[1052] Upon his counsel's advice, Serradell pleaded no contest to one count of second-degree murder.[1053] Serradell then sought to withdraw his plea by claiming that he was tricked into agreeing to the plea bargain by his attorneys.[1054] The State filed an "Answer and Opposition" asserting that Serradell had failed to rebut the presumption that his counsel was competent, and the superior court denied Serradell's

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[1041] 146 P.3d 999 (Alaska Ct. App. 2006).
[1042] *Id.* at 1000.
[1043] *Id.*
[1044] *Id.*
[1045] *Id.*
[1046] *Id.*
[1047] *Id.* at 1001.
[1048] 465 U.S. 104 (1984).
[1049] *Rivers*, 146 P.3d at 1002–04.
[1050] *Id.* at 1000, 1004.
[1051] 129 P.3d 461 (Alaska Ct. App. 2006).
[1052] *Id*. at 463.
[1053] *Id*. at 462.
[1054] *Id*.

application.[1055] Serradell argued that the superior court erred because he was never given notice of its intent to dismiss his application, thus preventing him from supplementing his pleading.[1056] The court of appeals held that the State's "Answer and Opposition" was not the functional equivalent of a motion for summary disposition, as claimed by the State, and thus Serradell had no notice of the possible dismissal of his petition, in violation of current Alaska rules of criminal procedure.[1057] The court of appeals reversed the judgment of the superior court, holding that a petitioner must receive adequate notice that his application for post-conviction relief will be denied.[1058]

Slwooko v. State

In *Slwooko v. State*,[1059] the court of appeals held that a reasonable person who initiated contact with the police herself would not believe she was in custody when she was interviewed in a polite, non-accusatory manner, even though it occurred in a police office,[1060] and that the interview did not become custodial when she refused to answer questions because officers assured her that she was not under arrest and remained non-accusatory.[1061] Although another person had already confessed to a murder, police went to question Slwooko after the confessor made suspicious statements and another person tipped police that Slwooko admitted involvement in the murder.[1062] Upon seeing the police, Slwooko told them that she needed to talk to them, prompting the police to take Slwooko to a closed interview room at the police station.[1063] There, the police read Slwooko her *Miranda*[1064] rights, but she said that she did not want to answer questions.[1065] The officers emphasized that Slwooko was not under arrest and continued to question her in a polite manner, after which she confessed to her involvement in the murder.[1066] The trial court ruled that Slwooko was not in custody when the interview started, but that the interview became custodial when the officers continued to ask her questions after she refused.[1067] The court of appeals held that Slwooko was not in custody when the interview began, since a reasonable person would not have believed that she had no choice to end the questioning.[1068] Furthermore, the interview did not become custodial when officers continued to ask her questions after she initially refused, because the tone remained polite and non-accusatory and the officers emphasized that she was not under arrest immediately afterwards.[1069] The court of appeals affirmed

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[1055] *Id*.
[1056] *Id*. at 463.
[1057] *Id*. at 463–64.
[1058] *Id*. at 464.
[1059] 139 P.3d 593 (Alaska Ct. App. 2006).
[1060] *Id.* at 598–600.
[1061] *Id.* at 604.
[1062] *Id.* at 595.
[1063] *Id.* at 595–96.
[1064] Miranda v. Arizona, 384 U.S. 436 (1966).
[1065] *Slwooko*, 139 P.3d at 596.
[1066] *Id.*
[1067] *Id.* at 597.
[1068] *Id.* at 598–600.
[1069] *Id.* at 600–01.

Slwooko's conviction, holding that her confession was admissible because it was made during a non-custodial interview with the police.[1070]

Stickman-Sam v. State

In *Stickman-Sam v. State*,[1071] the court of appeals held that a criminal defendant is entitled to a change of venue if an approved trial-site location is geographically closer to the site of the alleged crime than the original court.[1072] Stickman-Sam was charged with manslaughter, which allegedly occurred in Galena.[1073] Under the Alaska criminal rules, a criminal defendant may move for a change of venue to an approved trial site if that site is the closest one to the location of the alleged crime.[1074] Stickman-Sam, whose trial was originally located in Fairbanks, moved to change venue to Nenana.[1075] The trial judge denied his motion because, though Nenana is geographically closer to Galena than Fairbanks, the expense of travel and logistical convenience makes Fairbanks practically easier to access than Nenana.[1076] The court of appeals held that the underlying purpose of the criminal rule is to ensure that a defendant has access to a jury pool drawn from the community in which the crime occurred, particularly when the crime occurs in a rural community.[1077] The court of appeals reversed the decision of the trial judge, holding that the criminal rules allow a defendant to change his trial to the venue geographically closest to the site of the alleged crime.[1078]

Tritt v. State

In *Tritt v. State*,[1079] the court of appeals held that an appeal of a trial court's denial of a motion to dismiss based on double jeopardy should be decided on the merits of the double jeopardy claim even if no final judgment has been entered for the underlying criminal charges, unless the double jeopardy claim is patently without merit.[1080] Tritt was charged with felony driving under the influence, and the trial court declared a mistrial without his consent.[1081] When Tritt was brought to court a second time to face trial, he filed a motion to dismiss based on double jeopardy grounds, but the superior court denied the motion.[1082] In an unpublished order, the supreme court had decided a similar case.[1083] The court of appeals, realizing that attorneys and trial court judges may not be aware of the unpublished order, published this opinion following the order's

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[1070] *Id.*
[1071] 135 P.3d 1041 (Alaska Ct. App. 2006).
[1072] *Id.* at 1043.
[1073] *Id.* at 1042.
[1074] *Id.*
[1075] *Id.*
[1076] *Id.*
[1077] *Id.* at 1043.
[1078] *Id.*
[1079] 134 P.3d 364 (Alaska Ct. App. 2006).
[1080] *Id.* at 366.
[1081] *Id.* at 365.
[1082] *Id.*
[1083] *Id.* at 366.

precedent.[1084] The court of appeals granted Tritt's motion for review, holding that an appeal of a trial court's denial of a motion to dismiss based on double jeopardy should be decided on the merits of the double jeopardy claim even if no final judgment has been entered for the underlying criminal charges, unless the double jeopardy claim is patently without merit.[1085]

Tyler v. State

In *Tyler v. State*,[1086] the court of appeals held that when evidence establishing an aggravating factor is uncontested, and there is no reasonable possibility that a jury would find in the defendant's favor with regard to that factor, any potential error in failing to submit an issue to a jury is harmless and therefore not plain error.[1087] David Tyler was charged with felony driving while intoxicated and driving with a suspended license.[1088] Tyler pleaded no contest to the charges.[1089] Tyler conceded two aggravating factors, both of which were based on his prior convictions.[1090] He was sentenced to five years' imprisonment.[1091] Tyler appealed the decision, arguing that, under *Blakely v. Washington*,[1092] the superior court did not have the authority to issue a sentence longer than the presumptive three years because the aggravating factors were not found by a jury beyond a reasonable doubt.[1093] The court of appeals held that though under *Blakely*, the defendant has the right to demand that all aggravating factors of a criminal sentence be proved to a jury beyond a reasonable doubt, an exception exists for aggravating factors based on prior convictions.[1094] Because the State relied only upon Tyler's six prior convictions for driving under the influence in increasing his sentence,[1095] Tyler's case fell into the *Blakely* exception.[1096] The supreme court affirmed the judgment of the superior court, holding that when evidence establishing an aggravating factor is uncontested, and there is no reasonable possibility that a jury would find in the defendant's favor with regard to the aggravating factor, any potential *Blakely* error in failing to submit an issue to a jury is harmless and therefore not plain error.[1097]

[1084] *Id.*
[1085] *Id.*
[1086] 133 P.3d 686 (Alaska Ct. App. 2006).
[1087] *Id.* at 689.
[1088] *Id.* at 687.
[1089] *Id.*
[1090] *Id.* at 689.
[1091] *Id.* at 687.
[1092] 542 U.S. 296 (2004).
[1093] *Tyler*, 133 P.3d at 688.
[1094] *Id.* at 688–89.
[1095] *Id.* at 689.
[1096] *Id.*
[1097] *Id.*

Williams v. State

In *Williams v. State*,[1098] the court of appeals ruled that reasonable suspicion to conduct an investigative stop can be based on an anonymous tip from an informant when the informant provides intimate detailed information that can be corroborated by police.[1099] An anonymous informant told the police that Antonio Williams and two other men had rented a light green Mercury Mountaineer under an alias and were transporting drugs that day from Anchorage to Fairbanks.[1100] After corroborating that such an SUV had been rented under the same alias, the police set up surveillance and made an investigative stop when it found the vehicle in question.[1101] The court of appeals held that the reasonable suspicion required for an investigative stop existed because the informant provided detailed information that was corroborated by police.[1102] Thus, the court of appeals affirmed the superior court's denial of the suppression motion, holding that an anonymous tip from an informant can be enough for reasonable suspicion when information given can be corroborated.[1103]

Winterrowd v. Municipality of Anchorage

In *Winterrowd v. Municipality of Anchorage*,[1104] the court of appeals held that traffic stops do not constitute "custody" for *Miranda* purposes and that motorists have no Fifth Amendment right to refuse to produce vehicle registration and proof of insurance.[1105] On two occasions when he was stopped for speeding, Winterrowd failed to produce his vehicle registration or proof of insurance, invoking his Fifth Amendment privilege against self-incrimination and right to counsel.[1106] He was later convicted of failing to carry motor vehicle insurance and failing to produce proof of insurance.[1107] Winterrowd appealed, arguing that because he was "seized" under the Fourth Amendment and had invoked his Fifth Amendment privileges, he could not be punished for failing to produce registration and proof of insurance.[1108] The court of appeals held that although a traffic stop is a "seizure" under the Fourth Amendment, traffic stops do not constitute "custody" for *Miranda* purposes because some seizures of short duration, such as traffic stops, do not trigger the Fifth Amendment rights recognized in *Miranda*.[1109] Moreover, motorists have no Fifth Amendment rights to refuse to produce vehicle registration or proof of insurance.[1110] The court of appeals affirmed the judgment of the district court, holding that during traffic stops, motorists are not in "custody" for

[1098] 139 P.3d 1282 (Alaska Ct. App. 2006).
[1099] *Id.* at 1284.
[1100] *Id.* at 1283.
[1101] *Id.*
[1102] *Id.* at 1285.
[1103] *Id.*
[1104] 139 P.3d 590 (Alaska Ct. App. 2006).
[1105] *Id.* at 592.
[1106] *Id.* at 591.
[1107] *Id.*
[1108] *Id.*
[1109] *Id.* at 591–92.
[1110] *Id.* at 592.

Miranda purposes and have no Fifth Amendment right to refuse to produce vehicle registration or proof of insurance.[1111]

[1111] *Id.*

IX. ELECTION LAW

Alaska Supreme Court

Citizens for Implementing Medical Marijuana v. Municipality of Anchorage

In *Citizens for Implementing Medical Marijuana v. Municipality of Anchorage*,[1112] the supreme court held that a ballot proposition that was confusing and misleading was legally insufficient to be certified and placed on the ballot.[1113] Citizens for Implementing Medical Marijuana ("Citizens") submitted to the Anchorage municipal clerk a petition advocating the legalization of marijuana paraphernalia when used in a private and/or medicinal context.[1114] The Municipality refused to certify the petition for the ballot, and Citizens sued.[1115] The superior court dismissed the suit on summary judgment, and Citizens appealed.[1116] The supreme court held that a ballot proposition petition must be truthful and comprehensible,[1117] and Citizens' petition failed to meet this requirement because its title was confusing, it was misleading as to the conduct it sought to protect, and it failed to explain whether it abolished or created rights.[1118] The supreme court affirmed the decision of the superior court, holding that the ballot proposition was confusing and misleading and thus legally insufficient to be certified and placed on the ballot.[1119]

North West Cruise Ship Ass'n of Alaska v. State, Office of Lieutenant Governor

In *North West Cruise Ship Ass'n of Alaska v. State, Office of Lieutenant Governor*,[1120] the supreme court held that, despite technical deficiencies in the process of obtaining signatures for an initiative petition, the Division of Elections ("Division") construed its own regulations in a manner consistent with both the rule of liberal construction with regard to statutory initiative procedures and the regulations ensuring voters are well-informed when signing such a petition.[1121] A ballot initiative, which would have led to increased regulation of the cruise ship industry, was opposed by that industry on the grounds that the procedures followed in collecting signatures violated Alaska law.[1122] North West Cruise Ship Ass'n of Alaska argued that the signatures on the initiative petitions were invalid for four reasons.[1123] The supreme court held that, despite these technical deficiencies, the signatures on the initiative were valid because the deficiencies did not impede the purpose of the statutory initiative process.[1124] The supreme court affirmed the grant of summary judgment to the Division, holding that,

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[1112] 129 P.3d 898 (Alaska 2006).
[1113] *Id.* at 899.
[1114] *Id.*
[1115] *Id.* at 900.
[1116] *Id.*
[1117] *Id.* at 901.
[1118] *Id.* at 902–03.
[1119] *Id.* at 899.
[1120] 145 P.3d 573 (Alaska 2006).
[1121] *Id.* at 578.
[1122] *Id.* at 575.
[1123] *Id.* at 576.
[1124] *Id.* at 576–79.

despite technical deficiencies in the process of obtaining signatures for an initiative petition, the Division of Elections construed its own regulations in a manner consistent with both the rule of liberal construction with regard to statutory initiative procedures and the regulations ensuring voters are well-informed when signing petitions.[1125]

[1125] *Id.* at 578–59.

X. EMPLOYMENT LAW

Alaska Supreme Court

Board of Trustees v. Municipality of Anchorage

In *Board of Trustees v. Municipality of Anchorage*,[1126] the supreme court held that it was not unconstitutional for a retirement system to absorb the costs of a grievance settlement with a municipality, and the municipality is not required to absorb the impact of the settlement.[1127] Anchorage maintains a retirement program for former city police officers and firemen called the Anchorage Police and Fire Retirement System ("System").[1128] After a grievance action victory by a former police officer against the city resulted in increased liability for the System, a superior court judge ruled that the increased liability was inherent to the System, and Anchorage did not have to compensate the System for the increased liability.[1129] In a separate action, another grievance against Anchorage led to more increases in liability for the system, but this time a different judge ruled that forcing the System to absorb the costs without help from the city was an unconstitutional violation of the State's accrued benefits clause.[1130] The supreme court held that forcing the System to bear the increased costs was not unconstitutional and the municipality did not have to pay.[1131] Increased liability was inherent to the System and a settlement by the municipality was not an unconstitutional change to the plan.[1132] The supreme court affirmed the ruling of one superior court and reversed the ruling of another superior court, holding that it was not unconstitutional for a retirement system to absorb the costs of a grievance settlement with a municipality, and the municipality is not required to absorb the impact of the settlement.[1133]

Circle De Lumber Co. v. Humphrey

In *Circle De Lumber Co. v. Humphrey*,[1134] the supreme court held that disability payments to an injured employee were properly calculated by the Workers' Compensation Board using the employee's overall wage earnings rather than his wage earnings from the two years prior to the injury.[1135] Otto Humphrey was seriously injured in 1993 while employed by Circle De Lumber Company and, as a result of his injury, was first awarded Temporary Total Disability ("TTD") benefits and then, after it was determined in 1999 that his injuries were permanent, awarded Permanent Total Disability ("PTD") benefits.[1136] The Compensation Board ("Board") calculated Humphrey's TTD benefits based on the salary he was earning at the time of the accident, but calculated his

[1126] 144 P.3d 439 (Alaska 2006).
[1127] *Id.* at 451.
[1128] *Id.* at 441–42.
[1129] *Id.* at 444.
[1130] *Id.* at 445.
[1131] *Id.* at 451.
[1132] *Id.* at 446.
[1133] *Id.* at 451.
[1134] 130 P.3d 941 (Alaska 2006).
[1135] *Id*. at 954.
[1136] *Id*. at 943–44.

PTD benefits based on the salary for the position that Humphrey estimated he would have been holding in 1998.[1137] Circle De argued that the Compensation Board took too broad a view of Humphrey's employment history when determining the PTD compensation and should have only considered his salary from the two years before the accident when determining his average wage, as required by statute.[1138] The supreme court held that Humphrey's earnings in the two years prior to the accident were not an accurate predictor of wage losses, and thus the Board's alternative method of calculation was appropriate.[1139] Because Humphrey's salary from the two previous years was lower than the average of his entire career, and because substantial evidence showed his earning patterns were stabilizing and improving, it was reasonable to use his overall earnings history in the calculation.[1140] The supreme court upheld the Board's decision to calculate permanent disability payments for a permanently injured employee based on the employee's overall earning patterns rather than his earnings from the two years prior to his accident.[1141]

Leigh v. Seekins Ford

In *Leigh v. Seekins Ford*,[1142] the supreme court held that the Alaska Workers' Compensation Board ("Board") failed to make sufficient findings addressing an employee's evidence that he was incapacitated by pain and pain medication and that his employer failed to provide substantial evidence that work within his capabilities was regularly and continuously available.[1143] Leigh injured his back while working for Seekins Ford.[1144] Leigh applied to the Board for permanent total disability ("PTD") benefits, but the Board found that Seekins Ford rebutted Leigh's presumption of compensability and that Leigh failed to prove his PTD status, therefore denying his claim.[1145] The superior court upheld the Board's conclusions, and Leigh appealed, arguing that Seekins Ford did not rebut the presumption of compensability.[1146] The supreme court held that the Board failed to make adequate findings to support its conclusion that Leigh was not totally and permanently disabled, and failed to sufficiently address Leigh's contentions about the effect of his pain and pain medication on his employment.[1147] Also, Seekins Ford did not present substantial evidence that work that Leigh could undertake was regularly, continuously available.[1148] The supreme court vacated the superior court's decision and remanded to the Board for further proceedings, holding that the Board's findings were insufficient regarding an employee's evidence that he was incapacitated by pain and pain medications and that his employer failed to provide

[1137] *Id*. at 944.
[1138] *Id*. at 946–47.
[1139] *Id*. at 948.
[1140] *Id.* at 947–48.
[1141] *Id*. at 954.
[1142] 136 P.3d 214 (Alaska 2006).
[1143] *Id.* at 219, 221.
[1144] *Id.* at 215.
[1145] *Id.* at 215–16.
[1146] *Id.* at 216.
[1147] *Id.* at 217–19.
[1148] *Id.* at 220–21.

substantial evidence that work within his capabilities was regularly and continuously available.[1149]

Mahan v. Arctic Catering, Inc.

In *Mahan v. Arctic Catering, Inc.*,[1150] the supreme court held that an employee alleging wrongful termination did not present sufficiently strong circumstantial evidence that she was fired for retaliatory reasons.[1151] Bonita Mahan worked for Arctic Catering Inc. on two separate occasions and alleged that (1) during her first period of employment she was subject to sexual harassment and (2) her second period of employment was wrongfully terminated for retaliation associated with the sexual harassment that had occurred previously.[1152] The supreme court affirmed dismissal of her first claim on statute-of-limitations grounds.[1153] The supreme court held that with regard to the wrongful termination claim, Mahan did not offer enough circumstantial evidence that she was fired for retaliatory rather than legitimate reasons, thus failing to meet her burden under either the pretextual discharge framework test or the mixed-motives discharge framework test of wrongful termination, because she offered no evidence beyond her own personal feelings that she had been treated unfairly.[1154] The supreme court affirmed the superior court's order, holding that an employee alleging wrongful termination failed to present sufficiently strong circumstantial evidence that she was fired for retaliatory reasons.[1155]

McMullen v. Bell

In *McMullen v. Bell*,[1156] the supreme court held that a state employee had no legal or practical right to include substantial cashed-in leave in the calculation of his retirement benefits.[1157] Upon retiring from state service, McMullen sought to include substantial cashed-in leave in the calculation of his retirement benefits.[1158] The Public Employee's Retirement Board ("Board") excluded the cashed-in leave from the calculation of McMullen's benefits, and the superior court affirmed the Board's decision.[1159] McMullen appealed, arguing that the law in effect when he was hired entitled him to include leave in the calculation of benefits.[1160] The supreme court held that neither the law nor practice entitled McMullen to include his cashed-in leave when calculating his retirement benefits, because even though the statute in effect when he was hired did not expressly exclude cashed-in leave from the definition of compensation, McMullen failed

[1149] *Id.* at 219, 221.
[1150] 133 P.3d 655 (Alaska 2006).
[1151] *Id.* at 663.
[1152] *Id.* at 657–58.
[1153] *Id.* at 658–60.
[1154] *Id.* at 660–63.
[1155] *Id.* at 663.
[1156] 128 P.3d 186 (Alaska 2006).
[1157] *Id.* at 193.
[1158] *Id.* at 187.
[1159] *Id.* at 189.
[1160] *Id.* at 191.

to show that he was actually entitled to retirement benefits including the cashed-in leave under the original law.[1161] Also, McMullen was not a party to collective bargaining agreements that permitted the inclusion of cashed-in leave in retirement benefits, and he acknowledged that he did not actually expect that he would be able to include the leave in his retirement benefits.[1162] The supreme court affirmed the Board's decision, holding that the state employee was not entitled by law or practice to include his cashed-in leave to calculate his retirement benefits.[1163]

Olson v. Teck Cominco Alaska, Inc.

In *Olson v. Teck Cominco Alaska, Inc.*,[1164] the supreme court held that an employee's claim of wrongful termination was properly dismissed because the employee could not allege any facts to support that claim.[1165] Olson had a history of absences from work, was put on probation by his employer, Teck Cominco, and warned that continued absences beyond his allotment could result in termination.[1166] Olson claimed lead poisoning and filed a workers' compensation suit, missing days beyond his permitted "unplanned absence" time, and after the workers' compensation claim was found to be invalid, was terminated from Teck Cominco for excessive absences.[1167] Olson filed a wrongful termination suit, claiming that he was fired, not because of the absences, but in retaliation for the workers' compensation claim he filed against the company.[1168] The supreme court found that there was no factual support alleged for this claim, and so there was no genuine issue of material fact to be tried.[1169] The supreme court upheld the trial court's granting of summary judgment against Olson, holding that he could allege no facts to support his claim of wrongful termination.[1170]

Schmitz v. Yukon-Koyukuk School District

In *Schmitz v. Yukon-Koyukuk School District,*[1171] the supreme court held that a teacher, whose tenure contract incorporated the grievance provisions of the school district's collective bargaining agreement ("CBA") with the teachers' union, was required to exhaust all remedies under the grievance provisions before instigating litigation against the district.[1172] Schmitz, a teacher, signed a tenure contract with the Yukon-Koyukuk School District that incorporated the teachers' union's CBA terms regarding grievance procedures.[1173] When the district eliminated Schmitz's position and transferred him to a distant school, Schmitz complied with the first two steps of the grievance process and

[1161] *Id.* at 191–93.
[1162] *Id.* at 192–93.
[1163] *Id.* at 193.
[1164] 144 P.3d 459 (Alaska 2006).
[1165] *Id.* at 459–61.
[1166] *Id.* at 460–61.
[1167] *Id.* at 461–62.
[1168] *Id.* at 462–63.
[1169] *Id.* at 465.
[1170] *Id.* at 466–67.
[1171] 147 P.3d 720 (Alaska 2006).
[1172] *Id.* at 726–27.
[1173] *Id.* at 722.

then sued the district for breach of contract.[1174] Schmitz argued that he was not required to fulfill the grievance process steps because the school allegedly had breached his contract and not the CBA itself.[1175] Rejecting this argument, the superior court granted the school district's motion for summary judgment.[1176] The supreme court held that the contract fully incorporated the terms of the CBA and that Schmitz was required to exhaust all remedies under the CBA before pursuing litigation.[1177] The supreme court affirmed the decision of the superior court, holding that a teacher whose tenure contract incorporated the grievance provisions of the school district's CBA with the teacher's union was required to exhaust all remedies under those provisions before suing the district.[1178]

Alaska Court of Appeals

Ornelas v. State

In *Ornelas v. State*,[1179] the court of appeals held that The Alaska Employment Security Act ("AESA")[1180] does not preclude prosecuting individuals for theft who fraudulently obtain unemployment benefits.[1181] In order to receive unemployment benefits, Ornelas falsely reported that he had not worked and had not received earnings.[1182] Ornelas confessed and was convicted of twenty-three counts of making false statements in order to obtain unemployment benefits pursuant to AESA, as well as second degree theft.[1183] Ornelas appealed his conviction for theft, arguing that AESA provided exclusive remedies for those who fraudulently obtain unemployment benefits.[1184] The court of appeals held that, although AESA includes a remedy for general AESA violations, the legislature did not intend this to be the sole remedy for theft under AESA; it is merely the remedy for violations not covered elsewhere in AESA or by "another applicable statute," which in this case would be the statute criminalizing theft.[1185] The court further reasoned that it is unlikely that the legislature did not intend to criminalize the fraudulent receipt of benefits.[1186] The court of appeals affirmed the conviction for theft, holding that AESA does not preclude the prosecution of individuals for theft who fraudulently obtain unemployment benefits.[1187]

[1174] *Id.* at 723.
[1175] *Id.*
[1176] *Id.*
[1177] *Id.* at 725–26.
[1178] *Id.* at 726–27.
[1179] 129 P.3d 934 (Alaska Ct. App. 2006).
[1180] ALASKA STAT. § 23.20 (2006) (regulating employment compensation).
[1181] *Ornelas*, 129 P.3d at 936.
[1182] *Id.* at 935.
[1183] *Id.*
[1184] *Id.*
[1185] *Id.* at 936.
[1186] *Id.* at 935–36.
[1187] *Id.* at 936.

XI. ENVIRONMENTAL LAW

Ninth Circuit Court of Appeals

Northern Alaska Environmental Center v. Kempthorne

In *Northern Alaska Environmental Center v. Kempthorne*,[1188] the Ninth Circuit held that the Final Environmental Impact Statement ("FEIS") issued by the government when land in the Northwest Planning Area ("NWPA") is leased does not have to include site-specific analysis for particular locations, until actual leasing and exploration has occurred.[1189] The Northern Alaska Environmental Center ("NAEC") alleged that the government violated the National Environmental Policy Act ("NEPA") when it failed to analyze the environmental impact of oil drilling on specific parcels for lease, and that the government's analysis, which looked at the entire region, was insufficient.[1190] The government argued that once the parcels were leased and explored, the lessees would still have to apply for permits for drilling at those sites, and then site-specific analysis of the environmental effects would be possible.[1191] The Ninth Circuit held that a site-specific FEIS is not necessary during initial leasing authorization, before actual leasing and exploration, because uncertainty is inherent in multi-stage projects, and oil exploration in the WNPA is a multi-stage project.[1192] Thus, it is not unreasonable for a general analysis of the region at that early point in the project.[1193] The Ninth Circuit affirmed the decision of the district court, holding that a site-specific FEIS was not necessary during initial leasing authorization under the NEPA.[1194]

[1188] 457 F.3d 969 (9th Cir. 2006).
[1189] *Id.* at 973.
[1190] *Id.* at 974–75.
[1191] *Id.* at 973.
[1192] *Id.* at 976–77.
[1193] *Id.*
[1194] *Id.* at 977, 981.

XII. ETHICS AND PROFESSIONAL RESPONSIBILITY

Alaska Supreme Court

In re Ford

In *In re Ford*,[1195] the supreme court issued a ninety-day suspension to an attorney who knowingly violated a superior court order.[1196] Attorney Ford refused to follow a superior court's order to transfer a damage payment to opposing counsel.[1197] The Alaska Bar Association's hearing committee ruled on summary judgment that Ford knowingly disobeyed an order of the court in violation of Alaska Rule of Professional Conduct 3.4(c).[1198] The committee issued a thirty-day suspension, which was raised by the disciplinary board to ninety days, and Ford appealed.[1199] The supreme court held that Ford knowingly violated Alaska Rule of Professional Conduct 3.4(c) and independently issued a ninety-day suspension to deter further misconduct.[1200] The supreme court further found that a summary judgment ruling did not violate Ford's due process rights, given that there was no genuine issue of material fact.[1201] As for sanctions, the supreme court found that Ford's misconduct warranted a ninety-day suspension because there was no question that there was a knowledgeable breach of duty that harmed the reputation of lawyers and impeded efficiency.[1202] Although the recommended sanction was six-months,[1203] the aggravating circumstances did not outweigh the mitigating circumstances, and a ninety-day suspension was the typical length assessed in earlier cases.[1204] The supreme court thus suspended an attorney who knowingly violated a court's order for ninety days.[1205]

[1195] 128 P.3d 178 (Alaska 2006).
[1196] *Id.* at 186.
[1197] *Id.* at 179.
[1198] *Id.* at 180.
[1199] *Id.*
[1200] *Id.* at 179,186.
[1201] *Id.* at 180–81.
[1202] *Id.* at 183.
[1203] *Id.*
[1204] *Id.* at 183–84.
[1205] *Id.* at 186.

XIII. FAMILY LAW

Alaska Supreme Court

In re Adoption of Missy H. and Cameron H.

In *In re Adoption of Missy H. and Cameron H.*,[1206] the supreme court held that a two-part test governs whether the Office of Children's Services ("OCS") reasonably withheld its consent to an adoption, consisting of (1) whether the statutorily required consents had been obtained or excused and (2) whether adoption is in the best interests of the child.[1207] The Donnes had been foster parents for about thirty children.[1208] Due to child abuse allegations, their foster care license was revoked until a mental-health evaluation was completed on the mother and until the Donnes completed a plan of correction.[1209] The Donnes then tried to adopt two of their former foster children, Missy and Cameron.[1210] OCS withheld its consent, but the superior court found that OCS did so unreasonably because adoption was in the best interest of the children.[1211] The supreme court held that the correct test for determining the reasonableness of OCS's decision to withhold consent to adoption is a two-part inquiry, consisting of (1) whether the statutorily required consents had been obtained or excused and (2) whether adoption is in the best interests of the child, and that the superior court had improperly focused only on the best interest prong.[1212] The supreme court also held that OCS's withholding of consent was reasonable because it was properly following its rules for ensuring safety of the children in its custody.[1213] The supreme court remanded the case, holding that the correct test for whether OCS reasonably withheld its consent to an adoption is (1) whether the statutorily required consents had been obtained or excused and (2) whether adoption is in the best interests of the child.[1214]

Brotherton v. Brotherton

In *Brotherton v. Brotherton*,[1215] the supreme court held that allowing a writ of execution on a judgment five years after the order in a divorce was proper because the wife chose not to execute until the appeals process was complete.[1216] In 1995, Douglas and Tahni Brotherton divorced.[1217] There were several court orders and appeals,[1218] at the end of which Tahni was awarded half of the equity in a property, and Douglas also was ordered to pay her accrued interest at 10.5 percent.[1219] Douglas appealed the order,

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[1206] 133 P.3d 645 (Alaska 2006).
[1207] *Id.* at 655.
[1208] *Id.* at 646.
[1209] *Id.* at 647.
[1210] *Id.*
[1211] *Id.* at 648.
[1212] *Id.* at 649.
[1213] *Id.* at 653.
[1214] *Id.* at 655.
[1215] 142 P.3d 1187 (Alaska 2006).
[1216] *Id.* at 1188.
[1217] *Id.*
[1218] *Id.*
[1219] *Id.* at 1189.

arguing that Tahni had relinquished her right to execution since more than five years had passed since the judgment.[1220] The supreme court held that a court has the discretion in allowing executions on orders more than five years old if there are "just and sufficient reasons" for the delay.[1221] Here, Tahni did have "just and sufficient reasons" for delay because (1) there was a great deal of animosity in the case, and, more importantly, (2) Tahni was waiting for the appeals process to end before seeking an execution.[1222] The supreme court affirmed the ruling of the superior court, holding that allowing a writ of execution on a judgment five years after the order in a divorce was proper because the wife chose not to execute until the appeals process was complete.[1223]

Byers v. Ovitt

In *Byers v. Ovitt*,[1224] the supreme court held that, in altering a child support order, the trial court correctly permitted discovery of a father's tax returns, declined to call for a third hearing *sua sponte*, and imputed income to the father based on his expenses,[1225] but that the trial court incorrectly calculated the father's adjusted gross income by not deducting federal income tax payments and voluntary retirement contributions.[1226] In 2002, a court ordered Byers to pay Ovitt child support.[1227] Subsequently, Ovitt discovered evidence indicating that Byers' income was higher than initially reported and brought a suit to modify the child support order.[1228] The superior court master ordered discovery of Byers' tax returns to verify the claim.[1229] Byers was uncooperative.[1230] The superior court master thus imputed Byers' adjusted gross income based on his expenditures and ordered an increase in child support payments.[1231] Byers failed to request a third hearing, and the superior court affirmed.[1232] Byers appealed, arguing that the superior court impermissibly (1) ordered discovery of his tax returns; (2) failed to call a third hearing *sua sponte*; (3) imputed adjusted gross income; and (4) calculated adjusted gross income.[1233] The supreme court held that (1) it was within the superior court's broad discretion in discovery decisions to order Byers to turn over his tax returns; (2) the superior court was not obligated to initiate a third hearing *sua sponte* because it gave Byers clear notice that it was his obligation to request a hearing; (3) the superior court has the discretion to impute adjusted gross income where, as here, the defendant is uncooperative and the record is incomplete;[1234] but that (4) the superior court should have deducted Byers' retirement contributions and federal income tax in calculating adjusted

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[1220] *Id.*
[1221] *Id.* at 1190.
[1222] *Id.* at 1190–91.
[1223] *Id.* at 1192.
[1224] 133 P.3d 676 (Alaska 2006).
[1225] *Id.* at 682.
[1226] *Id.* at 683.
[1227] *Id.* at 678.
[1228] *Id.* at 677.
[1229] *Id*. at 678.
[1230] *Id.* at 679–80.
[1231] *Id.* at 680.
[1232] *Id.*
[1233] *Id.* at 678.
[1234] *Id.* at 682.

gross income.[1235] The supreme court thus affirmed in part, reversed in part, and remanded the case, holding that the trial court correctly permitted discovery of a father's tax returns, declined to call for a third hearing *sua sponte*, and imputed income to the father based on his expenses in altering a child support order;[1236] but that it incorrectly calculated the father's adjusted gross income by not deducting federal income tax payments and voluntary retirement contributions.[1237]

Debbie G. v. State, Department of Health & Social Services

In *Debbie G. v. State, Department of Health & Social Services*,[1238] the supreme court held that designating a relative to raise a minor child did not remedy the risk of harm posed in the home and that termination of parental rights was therefore appropriate.[1239] Debbie G. and Charles F., the birth parents of John G., both had a history of substance abuse, mental illness, and criminal activity, and acknowledged that they were either unwilling or unable to take care of John G.[1240] The Office of Children's Services began proceedings to terminate parental rights and determined that John should be placed with the same family that had adopted John's half-brother.[1241] The superior court ruled to terminate parental rights, and both parents appealed, arguing that they had remedied their conduct by designating a relative to care for John.[1242] The supreme court held that parents who place a child at risk of harm do not remedy the situation by designating a relative to step into their parental role, because the designation would not ensure permanent placement for the child, nor would it prevent the parents from trying to regain physical custody.[1243] The supreme court affirmed the holding of the superior court terminating Debbie G. and Charles F.'s parental rights, holding that the designation of a relative to raise a minor did not remedy the conduct that placed the child at risk.[1244]

Dunlap v. Dunlap

In *Dunlap v. Dunlap*,[1245] the supreme court held that a divorced father's appeal ten years after an initial ruling did not meet the "exceptional circumstances" and "clear error constituting manifest injustice" standard for timeliness,[1246] and that a contract between divorced parents requiring one party to contribute to an educational fund was enforceable despite failing to identify the exact procedure for administering such a fund.[1247] According to James and Ann Dunlap's divorce settlement, James was to put a

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[1235] *Id.* at 683.
[1236] *Id.* at 682.
[1237] *Id.* at 683.
[1238] 132 P.3d 1168 (Alaska 2006).
[1239] *Id.* at 1172.
[1240] *Id.* at 1169.
[1241] *Id.*
[1242] *Id.* at 1169–70.
[1243] *Id.* at 1170.
[1244] *Id.* at 1172.
[1245] 131 P.3d 471 (Alaska 2006).
[1246] *Id.* at 474–75.
[1247] *Id.* at 476.

percentage of his retirement buyout into educational accounts for their children.[1248] James created such accounts, but subsequently closed them.[1249] The supreme court held James' claim that a prior judgment requiring him to contribute a portion of his retirement payout to both the educational fund and to child support was improper was barred, because James waited ten years to appeal the order and failed to show the requisite "exceptional circumstances" and "manifest injustice."[1250] The supreme court also held that the clause of the divorce settlement requiring James to establish an educational fund for the children was enforceable, even though the clause did not specify the exact procedure for administering the educational fund, because the essential terms of the provision were clear, and thus fairness and justice required it to be upheld.[1251] The supreme court affirmed the superior court's judgment, holding that a divorced father's appeal ten years after an initial ruling did not meet the "exceptional circumstances" and "clear error constituting manifest injustice" standard for timeliness, and that a divorce agreement requiring contribution to an educational fund was enforceable despite its failure to identify the exact procedure for administering the fund.[1252]

Elliott v. Elliott

In *Elliott v. Elliott*,[1253] the supreme court held that the superior court erred in not holding an evidentiary hearing or making factual findings before modifying a child custody arrangement.[1254] After their divorce, Darlis and Nathan Elliot amicably agreed to set a visitation schedule for their two children.[1255] However, Darlis Elliott eventually moved for a modification of child custody and support, which Nathan Elliott opposed.[1256] The superior court denied the motion and ordered the visitation schedule proposed by Nathan Elliott without holding a hearing or making any factual findings.[1257] The supreme court held that, while not specifically required in the state child custody statute, procedural due process and the court's ability to make an "informed and principled determination" required a hearing.[1258] A hearing is not required only when the modifications are sufficiently minor.[1259] Furthermore, this case required that factual findings regarding the best interests of the child and the changed circumstances accompany modifications in the arrangements.[1260] The supreme court vacated and remanded the case for further proceedings, holding that the superior court's modification of a child custody arrangement without holding a hearing and without making any factual findings was reversible error.[1261]

[1248] *Id.* at 472.
[1249] *Id.*
[1250] *Id.*
[1251] *Id.* at 476.
[1252] *Id.* at 474–76.
[1253] 129 P.3d 449 (Alaska 2006).
[1254] *Id.* at 450.
[1255] *Id.*
[1256] *Id.*
[1257] *Id.*
[1258] *Id.* at 450–51.
[1259] *Id.* at 451.
[1260] *Id.*
[1261] *Id.* at 451–52.

Fortson v. Fortson

In Fortson v. Fortson,[1262] the supreme court held that a 60-40 division of marital assets in a divorce proceeding was not an abuse of discretion because the court had properly considered outside factors, such as the health of the parties, in making its decision.[1263] Blanton Fortson challenged the court's allocation of property in divorce proceedings between himself and his wife Jayne, a dermatologist and paraplegic with significant ongoing medical expenses.[1264] Blanton argued that there was a discrepancy between his and Jayne's earning power, because Jayne's earning capacity was ten times that of Blanton.[1265] The supreme court held that the superior court did not abuse its discretion in dividing the Fortsons' marital assets unequally, giving sixty percent to Jayne and forty percent to Blanton, despite the initial presumption that an equal division of property is most equitable.[1266] Stating that the statutory factors under consideration include the age and health of the parties, the supreme court noted that Blanton had a reasonable earning capacity, whereas Jayne's health care costs were already substantial and likely to increase if her health declined further, which would also substantially reduce her high earning capacity.[1267] The supreme court also reviewed several other questions pertaining to the division of assets, addressing issues such as capital gains taxes, repayment of loans, and property valuations.[1268] The supreme court affirmed the superior court's judgment in all of its holdings save one, holding that an unequal division of assets in favor of the higher-earning party is not an abuse of discretion when other factors reasonably prompt the court to divide it in this manner.[1269]

Gilbert M. v. State

In *Gilbert M. v. State*,[1270] the supreme court held that a grandfather did not have standing to appeal the revocation of his daughter's parental rights.[1271] After his daughter Jan's parental rights over his granddaughter, Belinda, were terminated and Belinda was adopted, Gilbert attempted to appeal the termination of his daughter's parental rights.[1272] Jan chose not to appeal the termination herself.[1273] The supreme court held that Gilbert could not appeal the termination of parental rights because he and Jan did not have a "special relationship," such as that between a parent and their minor child, thus Gilbert did not have the third party standing required to appeal the termination of parental rights on Jan's behalf.[1274] The supreme court also held that Gilbert had no right to appeal as Belinda's Indian custodian, because he was never found do be her Indian custodian by a court and because he would "almost certainly" be in prison for the remainder of Belinda's

[1262] 131 P.3d 451 (Alaska 2006).
[1263] *Id.* at 458.
[1264] *Id.* at 453–54.
[1265] *Id.* at 456–57.
[1266] *Id.*
[1267] *Id.* at 457.
[1268] *Id.* at 459–64.
[1269] *Id.* at 464.
[1270] 139 P.3d 581 (Alaska 2006).
[1271] *Id.* at 583.
[1272] *Id.* at 583–86.
[1273] *Id.* at 585–86.
[1274] *Id.* at 587.

minority.[1275] The supreme court affirmed the judgment of the superior court, holding that a grandparent who did not have a "special relationship" with his daughter and who was not an Indian custodian of his granddaughter lacked standing to appeal his daughter's loss of parental rights.[1276]

Ginn-Williams v. Williams

In *Ginn-Williams v. Williams*,[1277] the supreme court held that a divorce settlement agreement need not be modified because no evidence was presented that affected the children's best interests, that a non-custodial father could claim his son as a dependent, and that a second mortgage and a car debt were marital property.[1278] Melanie Ginn-Williams and Channing Williams divorced after five years of marriage and executed a voluntary agreement for joint legal custody of their children.[1279] Five days after the agreement, Ginn-Williams filed a motion to amend the agreement,[1280] claiming for the first time that Williams had a history of domestic abuse.[1281] The superior court denied Ginn-Williams' motion, concluding that the agreement was entered into voluntarily in the best interests of the children.[1282] Additionally, the court denied Ginn-Williams' motions to bar Williams from claiming their son as a dependent and held that a second mortgage and car debt were marital property.[1283] The supreme court held that there were no changed circumstances justifying the modification of the divorce settlement agreement, that Williams could claim his son as a dependent, and that the second mortgage and car debt were marital property.[1284] Ginn-Williams' proposed revision of the settlement agreement was motivated by previously expressed concerns that Williams was unreliable rather than any fear for the safety of the children.[1285] As for the dependency claim, since their son was a "qualifying child" under the federal tax laws, Williams could claim him as a dependent.[1286] Finally, the car debt was marital property because it was acquired during the marriage;[1287] the mortgage was marital property because even though Williams' acquired it before the marriage, Ginn-Williams evidenced the intent to accept the property upon marriage.[1288] The supreme court affirmed the decision of the superior court, holding that a divorce settlement need not be modified because no evidence was presented that affected the children's best interests, that a non-custodial father could claim his son as a dependent, and that a second mortgage and a car debt were marital property.[1289]

[1275] *Id*. at 588–89.
[1276] *Id.* at 590.
[1277] 143 P.3d 949 (Alaska 2006).
[1278] *Id.* at 950–51.
[1279] *Id.* at 951.
[1280] *Id.*
[1281] *Id.* at 952.
[1282] *Id.* at 953.
[1283] *Id.* at 951.
[1284] *Id.* at 950–51.
[1285] *Id.* at 953–54.
[1286] *Id.* at 955.
[1287] *Id.* at 956.
[1288] *Id.* at 957.
[1289] *Id.* at 950–51.

King v. Carey

In *King v. Carey*,[1290] the supreme court held that a non-custodial parent failed to demonstrate a change in circumstances and thus was not entitled to an evidentiary hearing for modification of custody.[1291] King moved for modification of custody of her son because of changed circumstances,[1292] but her only evidence of changed circumstances was an affidavit signed by her son stating that he now preferred to live with both parents.[1293] Carey, the boy's father, opposed the motion, alleging that King manipulated the son into signing the affidavit.[1294] King replied, alleging for the first time that the boy had begun using alcohol and drugs and felt threatened by his step-brother while living with his father.[1295] The supreme court held that the only evidence King properly raised was the affidavit, which was not enough to meet her burden of demonstrating a significant change in circumstances, and thus did not warrant an evidentiary hearing for custody change.[1296] The supreme court affirmed the superior court, holding that the non-custodial parent failed to produce sufficient evidence to indicate a change of circumstances and was not entitled to an evidentiary hearing or modification of her son's custody.[1297]

Krize v. Krize

In *Krize v. Krize*,[1298] the supreme court held that, where a husband regularly deposited lease income into a joint bank account, the transmutation doctrine did not apply to future lease income.[1299] In dividing Robert and Judy Krize's property during their divorce proceeding, the superior court ruled that although the real property was Robert's separate property, future lease income from a long-term lease on the property was marital property.[1300] Robert appealed, claiming that the deposits of lease income into the joint account constituted individual gifts, not a transmutation of the income into marital property.[1301] The supreme court held that the depositing of funds into the joint account was insufficient evidence to support a finding that the lease proceeds were marital property, because transmutation requires intent to change separate property into marital property, and there was no evidence that Robert intended for the future lease income to be marital property.[1302] The title to the property was in Robert's name only, and Judy did not help manage the property or the lease, nor did she use her credit to help improve the property.[1303] Additionally, Robert had retained the right to stop depositing the lease

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[1290] 143 P.3d 972 (Alaska 2006).
[1291] *Id.* at 973.
[1292] *Id.*
[1293] *Id.*
[1294] *Id.*
[1295] *Id.*
[1296] *Id.* at 974.
[1297] *Id.*
[1298] 145 P.3d 481 (Alaska 2006).
[1299] *Id.* at 481, 486.
[1300] *Id.* at 483, 484.
[1301] *Id.* at 484.
[1302] *Id.* at 484–86.
[1303] *Id.* at 485.

income into the account.[1304] On a separate question, the supreme court held that it was proper to take the likelihood of future inheritance into account in property divisions, even if speculative, since property divisions are not subject to later revision.[1305] The supreme court reversed the ruling of the superior court, holding that placing funds earned from separate property into a joint account was insufficient evidence to justify the application of the transmutation doctrine to future lease income.[1306]

Mattfield v. Mattfield

In *Mattfield v. Mattfield*,[1307] the supreme court held that a husband's appeal of a superior court decision to disburse to the IRS funds from a dissolved family business was premature and that his appeal of a decision to reconsider a child support order was not supported by a showing of reversible error.[1308] Six years after Rodney and Tamara Mattfield's divorce, the IRS filed a levy against, and after trial recovered, funds from the Mattfield's dissolved marital business.[1309] At roughly the same time, the superior court referred the issue of child support to the Child Support Enforcement Division, which calculated Rodney's support obligation based on estimated instead of actual earnings.[1310] Though this order was contrary to the superior court's mandate, the court signed it, apparently by oversight.[1311] Tamara moved to reconsider and vacate the IRS and child support orders, the superior court agreed, and Rodney appealed.[1312] The supreme court held that Rodney's appeal of the disbursement of IRS funds was premature because the order was not a final judgment subject to appeal, and that the appeal of the decision to reconsider the child support order was unsupported by the record, because reconsideration of the order was consistent with the court's previous orders to calculate child support using actual income.[1313] Rodney was given opportunity but failed to respond to Tamara's motion to reconsider, and the lower court sufficiently explained its child support order.[1314] The supreme court dismissed appeal regarding disbursement and affirmed the superior court's reconsideration of the child support order, holding that a husband's appeal of the superior court's decision to disburse to the IRS funds from a dissolved family business was premature, and his appeal of the decision to reconsider a child support order was not supported by a showing of reversible error.[1315]

[1304] *Id.*
[1305] *Id.* at 488–89.
[1306] *Id.* at 486.
[1307] 133 P.3d 667 (Alaska 2006).
[1308] *Id.* at 669.
[1309] *Id.* at 670.
[1310] *Id.* at 671.
[1311] *Id.*
[1312] *Id.* at 672–73.
[1313] *Id.* at 673–74.
[1314] *Id.* at 674–76.
[1315] *Id.*

Melendrez v. Melendrez

In *Melendrez v. Melendrez*,[1316] the supreme court held that the superior court did not give undue weight to the value of keeping siblings together in granting a father primary custody of four children.[1317] During their divorce proceedings, Valerie and Michael Melendrez, Sr., established a custody agreement whereby their four children would reside with Valerie in California during the school year.[1318] A year later, the two oldest children requested to relocate to Alaska to be with their father, Michael, which Valerie did not oppose.[1319] Michael then proposed a modification of custody for the two youngest children as well, which would grant him primary custody of all four children.[1320] The superior court granted Michael custody, and Valerie appealed, claiming that the court gave undue weight to the benefit of keeping all four children together, and undervalued the importance of maintaining stability and continuity in the lives of the youngest children, by keeping them with her.[1321] The supreme court held that Valerie did not present clear evidence that the relationship between the older and younger children was overvalued, and thus did not demonstrate that the superior court's factual findings were clearly erroneous.[1322] In addition, sibling relationships can be heavily weighed in considering custody placements, and so the superior court did not abuse its discretion in their custody assignment.[1323] The supreme court affirmed the custody modification, holding that the superior court did not abuse its discretion or clearly err in its decision to grant primary custody to the father for all four children in question.[1324]

Odom v. Odom

In *Odom v. Odom*,[1325] the supreme court held that the superior court's award of primary physical custody of the children and award of the family home to the wife in a divorce proceeding was not an abuse of discretion, and that the husband's interests in his family business were separate property that could be invaded only if an equitable division could not be achieved through an unequal division of marital property.[1326] In Bill and Carey Odom's divorce proceeding, the superior court awarded Carey the family home and primary physical custody of both children.[1327] The superior court found that Bill's interests in Odom Enterprises were separate property but demanded that it be invaded in order to achieve an equitable distribution.[1328] Bill appealed the award of custody and the family home and the invasion of his separate property.[1329] Carey appealed the ruling that

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[1316] 143 P.3d 957 (Alaska 2006).
[1317] *Id.* at 961–62.
[1318] *Id.* at 958.
[1319] *Id.* at 958–59.
[1320] *Id.*
[1321] *Id.* at 959.
[1322] *Id.* at 961–62.
[1323] *Id.* at 963.
[1324] *Id.*
[1325] 141 P.3d 324 (Alaska 2006).
[1326] *Id.* at 342.
[1327] *Id.* at 329.
[1328] *Id* at 329–30.
[1329] *Id.* at 330.

Bill's interests were separate property and the amount of invasion.[1330] The supreme court held that the superior court did not abuse its discretion in awarding primary physical custody of the children to Carey, because the superior court properly considered that Carey had been the primary caregiver on a full-time basis and was an excellent mother.[1331] Similarly, the award of the family home was not an abuse of discretion because the superior court properly linked the award of the home to the award of primary physical custody of the children.[1332] Moreover, Bill's interests in Odom Enterprises were separate property because Bill had made active efforts to keep the property separate (thereby eliminating the possibility of transmutation), no marital contributions had been made to the property, and Carey failed to prove that the property had appreciated as a result of the marriage.[1333] Separate property should not be invaded unless equitable division of the marital property is impossible,[1334] and Bill's separate property should only have been invaded if all of the marital assets would not be enough to meet Carey's reasonable needs.[1335] The supreme court affirmed the awards of primary physical custody and the home to Carey and affirmed the finding that Bill's interests in Odom Enterprises were separate property but vacated and remanded the invasion of the separate property to determine if unequal division of marital property would properly balance the equities.[1336]

Peter A. v. State, Department of Health & Social Services

In *Peter A. v. State, Department of Health & Social Services,*[1337] the supreme court held that a father could not appeal an adjudication order finding his children to be in need of aid, because the issue was moot.[1338] Peter A.'s two children were found, in an adjudication order by the superior court, to be in need of aid because of their mother's alcohol abuse problem.[1339] Though the case was dismissed and the children remained with their father, Peter A. appealed the entry of the order, arguing that the superior court could not adjudicate children to be in need of aid based only on one parent's actions where there is a second, fit parent willing and able to care for the child.[1340] The supreme court held that the issue on appeal was moot, because the adjudication order was a dead letter and there was no actual controversy.[1341] However, equity required vacatur of the adjudication order.[1342] The public interest exception to the mootness doctrine did not apply because the primary legal issue in the case was not likely to be "repeatedly circumvented" in future litigation.[1343] The supreme court vacated the superior court's

[1330] *Id.*
[1331] *Id.* at 331.
[1332] *Id.* at 331–32.
[1333] *Id.* at 332–39.
[1334] *Id.* at 340.
[1335] *Id.* at 341.
[1336] *Id.* at 342.
[1337] 146 P.3d 991 (Alaska 2006).
[1338] *Id.* at 992.
[1339] *Id.*
[1340] *Id.* at 993.
[1341] *Id.* at 994.
[1342] *Id.* at 996.
[1343] *Id.* at 997.

adjudication order, but dismissed Peter A.'s appeal as moot, holding that he could not appeal an adjudication order finding his children to be in need of aid because the issue was moot.[1344]

Rodvik v. Rodvik

In *Rodvik v. Rodvik*,[1345] the supreme court held that unsupervised visits by a father were appropriate, that adequate supporting evidence must be shown to award marital property unequally, that federal income taxes should be subtracted from income for child support purposes, that bad faith and vexatious conduct warrant attorneys' fees award, and that a judge does not need to recuse himself solely because a party has criticized one of his previous decisions.[1346] Karsten and Maureen Rodvik obtained a divorce in superior court, where Maureen was awarded sole custody of the children and Karsten was allowed supervised visits.[1347] Four protective orders were issued against Karsten, and he did not cooperate with many of the superior court's instructions.[1348] Maureen was awarded over half the marital property and legal fees.[1349] The superior court judge declined to recuse himself after Karsten noted that the judge had cited Karsten for his opposing viewpoint in a previous controversial case.[1350] Karsten appealed.[1351] The supreme court held that the unsupervised visits were appropriate pending a psychological evaluation because of evidence that Karsten's behavior had an adverse effect on the children.[1352] The court remanded the marital property issue because further supporting evidence was needed to show why Maureen needed over half the marital property, in addition to child support, to meet the children's needs.[1353] The court also held that Karsten's income should be recalculated because federal income taxes were not subtracted before child support payments were calculated.[1354] The court held that the legal fees award was appropriate, despite the spouses' roughly equal economic positions, because Karsten's behavior made litigation significantly more expensive for Maureen.[1355] The court also held that the judge did not need to recuse himself when a party had publicly disagreed with his previous decision because judicial decisions often spark public comment and such comments do not prevent a judge from rendering an unbiased verdict.[1356] The supreme court affirmed in part, and remanded in part, the decision of the superior court, holding that unsupervised visits were appropriate, that adequate support is needed to award marital property unequally, that federal income taxes should be deducted from child

[1344] *Id.* at 992, 997.
[1345] 151 P.3d 338 (Alaska 2006).
[1346] *Id*. at 353.
[1347] *Id*. at 338.
[1348] *Id*. at 341–42.
[1349] *Id*. at 342–43.
[1350] *Id*. at 352.
[1351] *Id*.
[1352] *Id*. at 345.
[1353] *Id*. at 347–48.
[1354] *Id*. at 350–51.
[1355] *Id*.
[1356] *Id*. at 352.

support income, that the legal fees award was appropriate, and that the judge did not need to recuse himself.[1357]

Rowland v. Monsen

In *Rowland v. Monsen*,[1358] the supreme court held that a father in a custody dispute was entitled to attorneys' fees against the mother because the mother did not prove that the order of fees was void or that extraordinary circumstances warranted relief, and her own motion for relief and appeal of the underlying order for attorneys' fees were untimely.[1359] Several years after separating, Rowland petitioned for a protective order on behalf of her children against their father, Monsen, who had custody.[1360] Rowland failed to prove her allegations, and Monsen retained custody and moved for attorneys' fees.[1361] Rowland served her opposition but did not file the pleading with the court, which subsequently ordered Rowland to pay the full amount.[1362] Rowland filed for relief, arguing that the court's order was void and that extraordinary circumstances warranted relief, but her motion was denied as untimely.[1363] The supreme court held that Monsen was entitled to attorneys' fees against Rowland.[1364] Rowland's argument that the order was void was without merit because neither the untimeliness nor the inadequacy of findings of Monsen's motion for attorneys' fees were fundamental flaws.[1365] Also, Rowland's motion for relief based on extraordinary circumstances and appeal of the underlying order for attorneys' fees were not brought within a reasonable time since she did not explain the nearly four-year delay.[1366] The supreme court affirmed the superior court's judgment that a father in a custody dispute was entitled to attorneys' fees against the mother because the mother did not prove that the order of fees was void or that extraordinary circumstances warranted relief, and her own motion for relief and appeal of the underlying order for attorneys' fees were untimely.[1367]

Van Sickle v. McGraw

In *Van Sickle v. McGraw*,[1368] the supreme court held that amendments to the child custody statute, Alaska Statute section 25.24.150,[1369] do not apply to a case in which the evidence closed after the amendments' effective date and that the superior court did not abuse its discretion by awarding custody to the father in a custody dispute.[1370] Joshua McGraw and Jennifer Van Sickle parented a child out of wedlock, separated within

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[1357] *Id*. at 353.
[1358] 135 P.3d 1036 (Alaska 2006).
[1359] *Id.* at 1038–41.
[1360] *Id.* at 1037.
[1361] *Id.*
[1362] *Id.*
[1363] *Id.* at 1038.
[1364] *Id.* at 1038–41.
[1365] *Id.* at 1038.
[1366] *Id.* at 1040–41.
[1367] *Id.* at 1038–41.
[1368] 134 P.3d 338 (Alaska 2006).
[1369] ALASKA STAT. § 25.24.150 (2006) (amended 2004).
[1370] *Van Sickle*, 134 P.3d at 339.

months of the child's birth, and now live in separate states.[1371] Van Sickle appealed the superior court's decision to grant primary custody to McGraw, claiming that the court erred by not applying the amended version of the child custody statute and that the court abused its discretion by misapplying various sections of the previous statute.[1372] The supreme court held that the amended statute did not apply here because the evidence closed before the effective date of the amendments.[1373] Also, trial courts are vested with broad discretion when determining child custody,[1374] and the superior court did not abuse its discretion in finding that McGraw was better at achieving an open and loving relationship between the child and the other parent,[1375] in finding that Sitka is a better home for the child,[1376] or by failing to make specific findings regarding the geographic distance between the two parents.[1377] The supreme court affirmed the decision of the superior court, holding that the amendments to the child custody statute do not apply to this case because the evidence closed before the amendments' effective date and that the superior court did not abuse its discretion by awarding custody to McGraw.[1378]

Watega v. Watega

In *Watega v. Watega*,[1379] the supreme court held that the superior court abused its discretion in granting a man's motion to compel the sale of the family house during divorce proceedings over his wife's objections, because no exceptional circumstances existed.[1380] Craig Watega filed for divorce from his wife, Lesley, in 2002.[1381] A court gave Craig custody of the couple's house for the duration of the divorce proceedings, but he failed to make payments on the deed of trust.[1382] Fearful of foreclosure, Craig petitioned the court to allow the property to be sold.[1383] Without granting a hearing, the court agreed to the sale.[1384] Lesley fought the sale, but the superior court found the buyers had a valid and enforceable interest in the house.[1385] Lesley appealed.[1386] The supreme court held that the superior court abused its discretion in granting Craig's motion to compel the sale of the house, because though the relevant statute did authorize the superior court to permit the sale of property pending a divorce in exceptional circumstances,[1387] the Wategas' case did not qualify as exceptional circumstances, since the house was not in imminent danger of foreclosure and the sale did nothing to increase

[1371] *Id.*
[1372] *Id.* at 340.
[1373] *Id.* at 341.
[1374] *Id.* at 340.
[1375] *Id.* at 341–42.
[1376] *Id.* at 342.
[1377] *Id.* at 342–43.
[1378] *Id.* at 339, 343.
[1379] 143 P.3d 658 (Alaska 2006).
[1380] *Id.* at 664.
[1381] *Id.* at 659.
[1382] *Id.*
[1383] *Id.*
[1384] *Id.*
[1385] *Id.* at 660.
[1386] *Id.*
[1387] *Id.* at 662–63.

or preserve the value of the marital estate, and because protecting Lesley's credit was not a valid reason for the sale given her own objections to the sale.[1388] Because Lesley's opposition to the sale was stated in the file, the buyers had at least constructive knowledge that she might challenge an ownership claim and, therefore, could not have been bona fide purchasers for value.[1389] The supreme court reversed and remanded the superior court's decision to grant motion for compelled sale of a couple's home, holding that no exceptional circumstances existed.[1390]

Winston v. State, Department of Health and Social Services

In *Winston v. State, Department of Health and Social Services*,[1391] the supreme court held that the Office of Children's Services ("OCS") made reasonable efforts at parental re-unification before terminating a father's parental rights and had good reason for believing the children were in need of aid because of the father's abuse of their mother.[1392] OCS took Winston's children away at birth, while he was incarcerated for abusing their mother.[1393] Winston delayed establishing contact with his children until after he had been out of prison for some time.[1394] When he did contact OCS about establishing contact, OCS referred him to several programs.[1395] He did not complete these programs, and OCS terminated his parental rights.[1396] The trial court upheld the termination order, and Winston appealed.[1397] The supreme court held that, given the father's varying level of interest in his children, the State did make reasonable efforts to unite the family by paying his travel expenses and referring him to programs.[1398] Also, there was good cause for believing the children were in need of aid, because of Winston's prior abuses of women.[1399] The supreme court affirmed the decision of the trial court, holding that the State made reasonable efforts at parental re-unification before terminating the father's parental rights and had good reason to believe the children were in need of aid due to the father's prior abuse of the mother.[1400]

[1388] *Id.* at 664.
[1389] *Id.*
[1390] *Id.*
[1391] 134 P.3d 343 (Alaska 2006).
[1392] *Id.* at 344.
[1393] *Id.* at 345.
[1394] *Id.*
[1395] *Id.*
[1396] *Id.*
[1397] *Id.*
[1398] *Id.* at 347.
[1399] *Id.* at 348.
[1400] *Id.* at 344.

XIV. HEALTH LAW

Alaska Supreme Court

Smallwood v. Central Peninsula General Hospital

In *Smallwood v. Central Peninsula General Hospital*,[1401] the supreme court held that a Medicaid patient had standing to sue a hospital for balance billing in violation of the hospital's contract with Medicaid.[1402] Smallwood sued Central Peninsula General Hospital after he was billed for amounts exceeding Medicaid reimbursement, in violation of the hospital's contract with Medicaid not to bill recipients.[1403] The superior court entered judgment against Smallwood, stating it was doubtful that he had a private right of action to enforce the balance-billing prohibition.[1404] The supreme court held that Smallwood had standing as a third-party beneficiary of the contract, because he was the intended beneficiary of the clause.[1405] The supreme court remanded the case to the superior court, holding that Smallwood had standing to sue to enforce the balance-billing prohibition.[1406]

[1401] 151 P.3d 319 (Alaska 2006).
[1402] *Id.* at 321.
[1403] *Id.*
[1404] *Id.* at 322.
[1405] *Id.* at 324.
[1406] *Id.* at 332.

XV. INSURANCE LAW

Alaska Supreme Court

Cole v. State Farm Insurance Co.

In *Cole v. State Farm Insurance Co.*,[1407] the supreme court held that a live-in companion was not covered under a car insurance policy that unambiguously defined "spouse" as a currently, legally married husband or wife.[1408] Cole was divorced from, but living with, the insured when a motorist hit and injured him.[1409] Cole sued State Farm Insurance Co. ("State Farm") after being denied his claims for medical and underinsured motorist payments as a "spouse" under the policy.[1410] The superior court granted partial summary judgment to State Farm, ruling that Cole was not covered because he was not legally married to the policy holder.[1411] Cole appealed, arguing that the spousal coverage provision of the policy should be broadly construed because its terms were ambiguous and for public policy reasons.[1412] The supreme court held that a reasonable purchaser of the policy would not have expected spousal coverage to extend to a cohabitating companion to whom he or she was not legally married, having considered the policy language, relevant extrinsic evidence, and precedent interpreting similar provisions.[1413] The supreme court also rejected Cole's public policy argument, finding that he produced no evidence of marital status discrimination.[1414] The supreme court affirmed the order of the superior court, holding that Cole was not covered under his live-in companion's car insurance policy that unambiguously defined "spouse" as a currently, legally married husband or wife.[1415]

State Farm Mutual Automobile Insurance Co. v. Lestenkof

In *State Farm Mutual Automobile Insurance Co. v. Lestenkof*,[1416] the supreme court held that, where a policyholder is not underinsured with regard to attorneys' fees, the insurer does not have to pay additional attorneys' fees.[1417] Following a fatal accident in which an automobile driven by Odden collided with a motor home, resulting in the death of Lestenkof, Lestenkof's widow pursued a wrongful death claim against Odden.[1418] State Farm Mutual Automobile Insurance Co. ("State Farm"), Odden's insurer, paid Lestenkof an advance payment of over $62,000 pursuant to Odden's uninsured/underinsured motorist ("UIM") coverage.[1419] After the parties agreed to assume that a hypothetical jury trial would result in a verdict for Lestenkof of

[1407] 128 P.3d 171 (Alaska 2006).
[1408] *Id.* at 172–73.
[1409] *Id.* at 173.
[1410] *Id.*
[1411] *Id.*
[1412] *Id* at 174.
[1413] *Id.* at 174–75.
[1414] *Id.* at 176.
[1415] *Id.* at 177–78.
[1416] 144 P.3d 504 (Alaska 2006).
[1417] *Id.* at 505.
[1418] *Id.* at 505–06.
[1419] *Id.* at 506.

$1,000,000, State Farm offered to settle the claim with Lestenkof for approximately $172,000, which included attorneys' fees of $115,600 calculated from the hypothetical jury award.[1420] Lestenkof accepted this offer, but demanded an additional $110,000 so that the UIM coverage offered the same protection as the liability coverage.[1421] The superior court agreed with Lestenkof, holding that State Farm was required to pay additional attorneys' fees under its UIM coverage, and State Farm appealed.[1422] The supreme court held that Odden was fully insured with respect to attorneys' fees and that State Farm was therefore not obligated to pay the additional amount.[1423] Odden's policy did not contain a valid limitation on attorneys' fees, so Odden was not underinsured with regard to the $115,600 attorneys' fees.[1424] The supreme court reversed the decision of the superior court and held that the insurer was not required to pay additional attorneys' fees pursuant to the policyholder's UIM coverage.[1425]

[1420] *Id.*
[1421] *Id.*
[1422] *Id.* at 507.
[1423] *Id.* at 509.
[1424] *Id.*
[1425] *Id.*

XVI. NATIVE LAW

Alaska Supreme Court

Jimerson v. Tetlin Native Corp.

In *Jimerson v. Tetlin Native Corp.*,[1426] the supreme court held that a settlement agreement between a Native corporation and its directors and shareholders was invalid because the agreement violated the Alaska Native Claims Settlement Act ("ANCSA").[1427] Tetlin Native Corporation ("TNC") transferred a large portion of its land to the Tetlin Tribal Council.[1428] In protest, shareholders Jimerson and David led a successful campaign to recall TNC's board of directors and subsequently filed a complaint on behalf of TNC against the shareholders and directors who had been involved in the land transfer.[1429] A resulting settlement agreement provided dissenting TNC shareholders with the opportunity to exchange their TNC ANCSA stock for shares in a new corporation formed by TNC.[1430] The supreme court held that the settlement agreement was unenforceable because it violated ANCSA section 7(h)(1)(B),[1431] which prohibits the alienation of ANCSA stock.[1432] The supreme court further held that the settlement agreement did not fit into any of the statutory exceptions to section 7(h)(1)(B).[1433] The supreme court affirmed the superior court's denial of Jimerson's motion for enforcement, holding that the agreement was invalid because it violated ANCSA.[1434]

State, Department of Health and Social Services v. Native Village of Curyung

In *State, Department of Health and Social Services v. Native Village of Curyung*,[1435] the supreme court held that Alaska Native villages can bring suit as *parens patriae* to enforce rights created by the Adoption Assistance Act and the Indian Child Welfare Act, but that the villages cannot bring suit on their own behalf or sue the State directly.[1436] Several Alaska Native villages brought suit against the State and the Director of the Division of Family and Youth Services ("Director"), alleging violations of the Adoption Assistance Act and the Indian Child Welfare Act.[1437] After the superior court refused to dismiss several of the villages' claims, the State filed a petition for interlocutory review, arguing that the villages were not proper plaintiffs and that the State was not a proper defendant.[1438] The supreme court held that the villages could bring a claim as *parens patriae* under 42 U.S.C. § 1983 because violations of the Adoption

[1426] 144 P.3d 470 (Alaska 2006).
[1427] *Id.* at 471.
[1428] *Id.*
[1429] *Id.*
[1430] *Id.*
[1431] 43 U.S.C. § 1606(h)(1)(B) (2006).
[1432] *Jimerson*, 144 P.3d at 472.
[1433] *Id.* at 473–74.
[1434] *Id.* at 474 .
[1435] 151 P.3d 388 (Alaska 2006).
[1436] *Id.* at 392.
[1437] *Id.*
[1438] *Id.* at 395–96.

Assistance Act and Indian Child Welfare Act were quasi-sovereign interests that affected the well-being of the villages' families, which was intertwined with the villages' integrity.[1439] The Adoption Assistance Act created a right to a state plan and case review system that the villages could enforce through a § 1983 action.[1440] Similarly, the Indian Child Welfare Act created enforceable rights that supplement § 1983.[1441] However, the villages could not bring a claim on their own behalf because villages cannot use § 1983 to enforce sovereign rights.[1442] The supreme court also held that while the villages could sue the Director in his official capacity, they could not sue the State directly because § 1983 does not authorize suits against states.[1443] The supreme court affirmed the superior court's decision in part, holding that Alaska Native villages can bring suit as *parens patriae* claims under § 1983 and reversed in part, holding that villages cannot bring suit on their own behalf or sue the State directly.[1444]

[1439] *Id.* at 402.
[1440] *Id.* at 407–08.
[1441] *Id.* at 408.
[1442] *Id.* at 402.
[1443] *Id.* at 392, 402–04.
[1444] *Id.* at 392, 413.

XVII. PROPERTY LAW

Alaska Supreme Court

Alaska Construction Equipment, Inc. v. Star Trucking, Inc.

In *Alaska Construction Equipment, Inc. v. Star Trucking, Inc.*,[1445] the supreme court held that a lessor may obtain loss-of-use damages for leased property that is completely destroyed.[1446] Alaska Construction Equipment, Inc. ("ACE") leased a rock dump truck to Star Trucking, Inc. ("Star"), which Star totaled shortly after the start of the lease.[1447] ACE agreed to settle its claim against Star, but the parties disagreed about the scope of the settlement.[1448] Believing the settlement covered only property damage, ACE refused to release Star of all liability.[1449] Star withheld the settlement check from ACE, prompting ACE to sue Star for both the check and loss of use damages.[1450] After the trial court granted Star's motion for summary judgment, ACE appealed.[1451] The supreme court held that loss-of-use damages are available where leased property is totally destroyed, finding that this enables damage awards to most accurately reflect the expectation interest of a lessor seeking damages.[1452] The supreme court reversed the superior court's grant of summary judgment and remanded, holding that a lessor may obtain loss-of-use damages for leased property that is completely destroyed.[1453]

Alaska Railroad Corp. v. Native Village of Eklutna

In *Alaska Railroad Corp. v. Native Village of Eklutna*,[1454] the supreme court held that the Alaska Railroad Corp. ("Railroad") was subject to a local zoning ordinance and thus had to apply for a conditional use permit before drilling on culturally sensitive land in the Native Village of Eklutna.[1455] In a 2004 decision, the supreme court held that the Alaska Railroad Corporation Act did not clearly exempt the Railroad from a municipal zoning ordinance that restricted drilling on culturally sensitive land, and required the Railroad to obtain a conditional use permit before drilling.[1456] The Railroad Commission responded to the ruling by enacting an emergency regulation permitting the Railroad to drill absent the conditional use permit[1457] and asked the legislature to clarify that it was exempt from municipal zoning laws.[1458] The legislature declined to exempt the Railroad, setting up a task force to explore the issue further.[1459] The Native Village of Eklutna

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[1445] 128 P.3d 164 (Alaska 2006).
[1446] *Id.* at 171.
[1447] *Id.* at 165–66.
[1448] *Id.* at 166–67.
[1449] *Id.*
[1450] *Id.* at 167.
[1451] *Id.*
[1452] *Id.* at 169–70.
[1453] *Id.* at 171.
[1454] 142 P.3d 1192 (Alaska 2006).
[1455] *Id.* at 1194.
[1456] *Id.* at 1195–96.
[1457] *Id.* at 1196.
[1458] *Id.* at 1196–97.
[1459] *Id.* at 1197.

filed suit, alleging that the emergency regulation impermissibly authorized the Railroad to drill without a conditional use permit.[1460] The superior court entered summary judgment for the Native Village of Eklutna.[1461] The supreme court held that the Railroad did not have statutory power to exempt itself from zoning ordinances because it merely has statutory power to regulate third party conduct on its own lands, not the power to override local ordinances.[1462] Moreover, the court was precluded from reconsidering the issue of whether the statute immunized the railroad from municipal zoning ordinances by the "law of the case" doctrine.[1463] The supreme court affirmed the grant of summary judgment, holding that the Railroad was subject to a local zoning ordinance and thus had to apply for a conditional use permit before drilling on culturally sensitive land in the Native Village of Eklutna.[1464]

Forshee v. Forshee

In *Forshee v. Forshee*,[1465] the supreme court held that a pro se litigant's property division appeal is reviewed, similarly to a represented litigant, for: abuse of discretion in the characterization of property and denial of motions, application of the correct legal standard, clear error of the factual findings, and clearly unjust distribution of assets.[1466] After Shan and Jack Forshee's divorce trial, in which Jack represented himself,[1467] Jack appealed the superior court's judgments on the value of various marital assets and its decision not to consider additional debts.[1468] The supreme court held that, although less stringent standards are applied to pro se litigants, the standard of review remains abuse of discretion.[1469] The supreme court found that Jack voluntarily proceeded without counsel and did not establish that he was unable to represent himself.[1470] The superior court's judgments regarding the value of marital assets and the lack of evidence of fraud and duress in the divorce settlement were not clearly erroneous.[1471] Finally, Jack was given repeated opportunities to introduce debts and did not.[1472] The supreme court affirmed the superior court's judgments, holding that in considering a pro se litigant's property division, it did not abuse its discretion, it correctly applied the legal standard, it made no clear errors in factual findings, and it made no clearly unjust distribution of assets.[1473]

[1460] *Id.*
[1461] *Id.*
[1462] *Id.* at 1200.
[1463] *Id.* at 1200–01.
[1464] *Id.* at 1194.
[1465] 145 P.3d 492 (Alaska 2006).
[1466] *Id.* at 497–98, 503.
[1467] *Id.* at 494.
[1468] *Id.* at 495–97.
[1469] *Id.* at 497–98.
[1470] *Id.* at 498.
[1471] *Id.* at 499, 502–03.
[1472] *Id.* at 503.
[1473] *Id.*

St. Paul Church, Inc. v. Board of Trustees of the Alaska Missionary Conference of the United Methodist Church, Inc.

In *St. Paul Church, Inc. v. Board of Trustees of the Alaska Missionary Conference of the United Methodist Church, Inc.*,[1474] the supreme court held that property disputes from a schism of two religious groups should be resolved using a neutral principles approach and that the new religious group should be entitled to its former name.[1475] The Board of Trustees of the Alaska Missionary Conference of the United Methodist Church, Inc. ("AMC") is the regional conference of the United Methodist Church ("UMC").[1476] St. Paul Church, Inc. ("St. Paul Church") had signed agreements subjecting their property to UMC.[1477] AMC filed a complaint against St. Paul Church for breach of contract, trespass, and other offenses.[1478] The supreme court held that the disputed properties belonged to AMC under a neutral principles approach,[1479] which examines "the deeds to the church property, the charter of the local church, the book of order or discipline of the general church organization, and the state statutes governing the holding of the church property . . . ."[1480] Under this approach, the disputed property belonged to AMC despite St. Paul Church's claims that there had not been unequivocal intent or property when the trust was formed. [1481] The supreme court affirmed the superior court's ruling, holding that a trust was created by St. Paul that granted UMC ownership of the disputed property.[1482]

Young v. Embley

In *Young v. Embley*,[1483] the supreme court held that a junior lienholder has the right to cure a senior interest holder's default on a deed of trust, and a foreclosure cannot occur unless the junior lienholder has had an opportunity to cure the default.[1484] Young and Dang operated a bed-and-breakfast together, but Dang held sole title to the property and executed a deed of trust on it, which eventually came to be held by Embley, without the knowledge of Young.[1485] Dang defaulted on the deed of trust and, with a foreclosure sale pending, granted a lien on the property to Young.[1486] Young attempted to stop the foreclosure sale, arguing that she had the right to cure the default but was not told the amount owed until the morning of the foreclosure sale and thus did not have time to cure the default before the property was sold.[1487] The supreme court held that deeds of trust, like mortgages, also carry the equity of redemption, and this right to equitable redemption also extends to junior interest holders, since their interest would be completely cut off at

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[1474] 145 P.3d 541 (Alaska 2006).
[1475] *Id*. at 553, 561.
[1476] *Id*. at 544.
[1477] *Id*. at 547.
[1478] *Id*. at 549.
[1479] *Id*. at 553, 561.
[1480] *Id*.
[1481] *Id*. at 553.
[1482] *Id*. at 553, 561.
[1483] 143 P.3d 936 (Alaska 2006).
[1484] *Id.* at 938–47.
[1485] *Id.* at 938–39.
[1486] *Id.* at 939.
[1487] *Id.*

foreclosure.[1488] The supreme court then interpreted Alaska Statute section 34.20.070(b) to extend the right of cure beyond the obligor.[1489] Because Young did not learn the amount owed within a reasonable time before foreclosure, the foreclosure sale was invalid.[1490] The supreme court reversed the grant of summary judgment to Embley, holding that the junior lienholder has a right to cure the default on a deed of trust and that the junior lienholder must be given a reasonable amount of time to do so before a foreclosure sale can be held.[1491]

[1488] *Id.* at 942–43.
[1489] *Id.* at 944–46.
[1490] *Id.* at 947.
[1491] *Id.* at 948.

XVIII. TAX LAW

Alaska Supreme Court

Interior Cabaret, Hotel, Restaurant & Retailers Ass'n v. Fairbanks North Star Borough

In *Interior Cabaret, Hotel & Retailers Ass'n v. Fairbanks North Star Borough*,[1492] the supreme court held that a proposed borough tax on alcohol was legal, because it was area-wide and because the non-discrimination statute that requires the imposition of other sales taxes is fulfilled by a single hotel tax.[1493] The Interior Cabaret, Hotel & Retailers Association ("Association") sued the Fairbanks North Star Borough ("Borough") to challenge a proposed sales tax on alcohol on grounds that it was not "areawide" as required by statute and that it violated a non-discrimination law that required another sales tax to be imposed in the area.[1494] The superior court granted summary judgment for the Borough, and the Association appealed.[1495] The supreme court held that, though the ordinance exempted alcoholic beverage sales to the extent that they were already taxed by cities, the tax was still "areawide" because the exemptions were defined by the application of another tax rather than by geography.[1496] Furthermore, the supreme court held that the statute prohibiting municipalities from imposing an alcohol tax without taxing at least one other commodity can be fulfilled by the imposition of a sales tax on just one single source other than alcohol[1497] and was fulfilled by the Borough's room tax on hotels.[1498] The supreme court affirmed the decision of the superior court, holding that the proposed tax on alcohol was legal because it was area-wide and because it was non-discriminatory, since hotel rooms were also taxed.[1499]

Northwest Medical Imaging, Inc. v. State, Department of Revenue

In *Northwest Medical Imaging, Inc. v. State, Department of Revenue*,[1500] the supreme court held that Alaska may tax a corporation if it continues to do business in Alaska after it has been administratively dissolved in its state of incorporation.[1501] Dr. James Pister incorporated Northwest Medical Imaging, Inc. ("Northwest") under the laws of the State of Washington in 1988.[1502] Effective 1990, Northwest was administratively dissolved by Washington State.[1503] However, Northwest continued to act as a corporation in Alaska, providing radiology services and signing contracts as a corporation

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[1492] 135 P.3d 1000 (Alaska 2006).
[1493] *Id.* at 1001.
[1494] *Id*.
[1495] *Id*. at 1002.
[1496] *Id*. at 1003.
[1497] *Id.* at 1005.
[1498] *Id.* at 1006–07.
[1499] *Id.* at 1001.
[1500] 151 P.3d 434 (Alaska 2006).
[1501] *Id.* at 436.
[1502] *Id.*
[1503] *Id.*

until 1998.[1504] The Alaska Department of Revenue sued to collect taxes on corporate activity between 1991 and 1995.[1505] The Office of Tax Appeals determined that Northwest did not have to pay taxes because it had been dissolved, but the superior court reversed.[1506] The supreme court held that the Office of Tax Appeals had original subject matter jurisdiction because it was legislatively created to hear tax disputes, such as the question of whether a corporation exists for tax purposes.[1507] The Department of Revenue, in turn, has the right to hold hearings to decide tax disputes.[1508] Federal law adopted by Alaska, rather than Washington law, decides when a corporation ceases to exist for tax purposes.[1509] Under federal law, a corporation ceases to exist when it has been dissolved, has stopped business activity, and has relinquished all assets.[1510] Here, the corporation did not stop business activity.[1511] Therefore, it remained a taxable corporation despite being administratively dissolved.[1512] The supreme court affirmed the superior court, holding that Alaska may tax a corporation if it continues to do business in Alaska after it has been administratively dissolved in its state of incorporation.[1513]

[1504] *Id.*
[1505] *Id.*
[1506] *Id.*
[1507] *Id.* at 439.
[1508] *Id.*
[1509] *Id.* at 440.
[1510] *Id.*
[1511] *Id.* at 441.
[1512] *Id.* at 442.
[1513] *Id.* at 444.

XIX. TORT LAW

Ninth Circuit Court of Appeals

In re Exxon Valdez

In *In re Exxon Valdez*,[1514] the Ninth Circuit held that the ratio of punitive damages to harm suffered in the *Exxon Valdez* oil spill was excessive and ordered a $2 billion remittitur of damages, reducing the punitive-damages award to $2.5 billion.[1515] The original $5 billion punitive-damages award in the *Exxon Valdez* suit following the 1989 oil spill had been reduced to $4.5 billion by the district court after two remands, representing an 8.93-to-1 ratio of punitive damages to harm suffered.[1516] Both parties appealed.[1517] The Ninth Circuit held that, under *BMW v. Gore*[1518] and *State Farm*,[1519] punitive damages are reviewed under three guideposts: (1) reprehensibility of misconduct, (2) ratio of punitive damages to harm suffered, and (3) comparable statutory penalties.[1520] Here, (1) under the *State Farm* sub-factors, Exxon's conduct was at a high level of reprehensibility, but its mitigation efforts reduced this level to mid-range;[1521] (2) Exxon's pre-judgment compensatory payments were properly included in harm when calculating the appropriate punitive damages-to-harm ratio,[1522] but a ratio above 5-to-1 would violate due process because the conduct was not intentional and because Exxon took mitigating action, including cleanup efforts and monetary compensation;[1523] and (3) legislatures have taken oil spills seriously.[1524] In sum, Exxon's reckless conduct justified severe, but not the most severe, punitive damages, and a ratio of 5-to-1 was appropriate.[1525] The Ninth Circuit vacated the judgment of the district court and remanded the case, holding that the ratio between punitive damages to harm suffered from the *Exxon Valdez* oil spill exceeded the appropriate ratio by a material factor and ordering that the punitive-damage award be reduced to $2.5 billion.[1526]

Alaska Supreme Court

Anderson v. PPCT Management Systems, Inc.

In *Anderson v. PPCT Management Systems, Inc.*,[1527] the supreme court held that damages could not be awarded based on retained control or vicarious liability theories because there was no agency or master-servant relationship, but that summary judgment

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[1514] 472 F.3d 600 (9th Cir. 2006).
[1515] *Id.* at 602.
[1516] *Id.* at 602, 623.
[1517] *Id.* at 611.
[1518] BMW of North America Inc. v. Gore, 517 U.S. 559 (1996).
[1519] State Farm Mut. Auto Ins. Co. v. Campbell, 538 U.S. 408 (2003).
[1520] *In re* Exxon Valdez, 472 F.3d at 613.
[1521] *Id.* at 614, 618.
[1522] *Id.* at 623.
[1523] *Id.* at 623–24.
[1524] *Id.* at 624.
[1525] *Id.* at 625.
[1526] *Id.* at 602.
[1527] 145 P.3d 503 (Alaska 2006).

was improperly awarded on the negligence claim because the creator of the training programs had a duty of care that could create legal liability.[1528] Anderson alleged that she was injured during a training program given by an instructor certified by PPCT Management Systems, Inc. ("PPCT").[1529] PPCT designs use-of-force training programs for use by criminal justice agencies.[1530] Rather then send out their own trainers, PPCT creates a training manual and trains agency employees on how to teach the course.[1531] Anderson appealed the superior court's summary judgment rulings with respect to the existence of a master-servant relationship, agency, control retained by PPCT, and a breach of duty of PPCT towards Anderson.[1532] The supreme court held that there was no agency or master-servant relationship, primarily because PPCT did not maintain sufficient control over the instructors in their work.[1533] Specifically, PPCT did not have the right to perform safety inspections, order a training stopped or resumed, and, although it could make suggestions, the agencies were not required to abide by them.[1534] However, the superior court had framed Anderson's negligence claim too narrowly, that PPCT had a duty of care, and it was a jury question as to whether PPCT had provided sufficient warnings and safety precautions for instructor trainers and instructors.[1535] The supreme court affirmed part and reversed part of the superior court's summary judgment rulings, holding that damages could not be awarded on retained control or vicarious liability theories because there was no agency or master-servant relationship, but that summary judgment was improperly awarded on the negligence claim because the creator of the training programs had a duty of care that could create legal liability.[1536]

B.R. v. State, Department of Corrections

In *B.R. v. State, Department of Corrections*,[1537] the supreme court held that a complaint against the state should not be dismissed if at least one claim falls outside of intentional-tort immunity, thus leaving a triable issue.[1538] B.R. was a federal prisoner who alleged that during a visit to the jail's medical center, a physician's assistant ("PA") assaulted her sexually.[1539] During a subsequent visit to the medical center, B.R. alleged that she was assaulted again and it is unclear whether she was provided a protective escort as she had requested.[1540] In her suit, B.R. alleged that the Alaska Department of Corrections ("ADC") was liable for the PA's assault and was negligent in hiring the assistant and in failing to adequately train employees to handle occurrences of such misconduct.[1541] The ADC invoked intentional-tort immunity, and the superior court

[1528] *Id.* at 505.
[1529] *Id.*
[1530] *Id.*
[1531] *Id.* 505–506.
[1532] *Id.* at 507.
[1533] *Id.* at 508, 509.
[1534] *Id.* at 511.
[1535] *Id.* at 511–12.
[1536] *Id.* at 505, 512.
[1537] 144 P.3d 431 (Alaska 2006).
[1538] *Id*. at 432.
[1539] *Id*.
[1540] *Id*.
[1541] *Id*.

granted summary judgment in its favor.[1542] The supreme court held that while the state is not liable for the actual assault by their employee, it can still be liable for breaching the independent duty to protect B.R. from assault.[1543] In order for that claim to succeed, it must be grounded in a governmental duty that is distinct from the intentional tort duty and that exists even if the assailant were not a government employee.[1544] The supreme court held that B.R.'s complaint had at least one theory of liability based on the ADC's failure to supervise other employees in protecting B.R. from assault, and as such, summary judgment was inappropriate.[1545] The supreme court reversed the grant of summary judgment and remanded the case for trial, holding that the prisoner's complaint presented triable issues as to whether the ADC had violated its duty to protect her from assault.[1546]

DeNardo v. Bax

In *DeNardo v. Bax*,[1547] the supreme court held that there exists a conditional privilege for communications among co-workers about personal safety and that a showing of ill will on the part of the communicator is not per se evidence that the privilege has been abused.[1548] DeNardo and Bax were co-workers.[1549] Bax made statements to her co-workers that she believed DeNardo was stalking her, and as a result DeNardo filed a lawsuit claiming that Bax's statements were maliciously made and libelous.[1550] The supreme court first held that, because it had previously recognized privilege for statements made to protect business interests and also for public safety, there should be a conditional privilege when a co-worker makes a statement to another co-worker concerning the safety of the workplace.[1551] Regarding DeNardo's claim that Bax had made the statements maliciously and had thus abused the privilege,[1552] it is possible for malice to be a violation of the privilege, but even where there is malice, if the proper motives are predominant, the publisher's personal ill will toward the alleged victim does not control.[1553] The supreme court affirmed the grant of summary judgment to Bax, holding that there is a conditional privilege for communications among co-workers about personal safety and that a showing of malice is not per se evidence that the privilege has been abused.[1554]

[1542] *Id*. at 432–33.
[1543] *Id*. at 434.
[1544] *Id*.
[1545] *Id*. at 437.
[1546] *Id*.
[1547] 147 P.3d 672 (Alaska 2006).
[1548] *Id.* at 679–81.
[1549] *Id.* at 675.
[1550] *Id.*
[1551] *Id.* at 679.
[1552] *Id.* at 679–81.
[1553] *Id.* at 681.
[1554] *Id.* at 679–82.

Hagen Insurance, Inc. v. Roller

In *Hagen Insurance, Inc. v. Roller*,[1555] the supreme court held that an injured worker was eligible for non-economic damages for emotional distress when an insurer's negligence caused physical injury, that allowing expert testimony was not an abuse of discretion given the complexity of calculating workers' compensation benefits, and that it was not an error to grant a directed verdict on the issue of punitive damages when there was no evidence of malice or reckless indifference.[1556] Roller applied for workers' compensation insurance through Hagen Insurance, Inc. ("Hagen"), but when Roller was injured on the job, the policy had not yet taken effect.[1557] A jury found that Hagen was negligent in securing the coverage and awarded damages to Roller; Hagen and Roller both appealed.[1558] Hagen argued that there was insufficient evidence to support an award of emotional distress damages and that the testimony of Roller's expert should have been excluded.[1559] Roller argued that it was an error for the court to grant a directed verdict motion on the issue of punitive damages.[1560] The supreme court held that Roller was eligible for non-economic damages for emotional distress because the jury could have found that Hagen's negligence prolonged Roller's physical injury by preventing him from receiving treatment or forcing him to return to work prematurely.[1561] Also, allowing the expert testimony was not an abuse of discretion, because the calculation of workers' compensation benefits was complex.[1562] Finally, to recover punitive damages, the plaintiff must show malice or reckless indifference, and Roller failed to do so.[1563] The supreme court affirmed the decision of the superior court, holding that an injured worker was eligible for emotional distress damages when an insurer's negligence prolonged physical injury, that it was not an abuse of discretion to allow expert testimony on the complex calculation of workers' compensation benefits, and that it was not error to grant a directed verdict on the issue of punitive damages when there was no evidence of malice or reckless indifference.[1564]

Harrold v. Artwohl

In *Harrold v. Artwohl,*[1565] the supreme court held that a patient who was not told by the surgeon that a CT scan could rule out the need for an immediate appendectomy raised a genuine issue of material fact requiring a trial.[1566] After a preliminary CT scan, Harrold was diagnosed with appendicitis.[1567] Artwohl, the surgeon, confirmed the diagnosis and recommended immediate surgery without an additional CT scan; Harrold

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[1555] 139 P.3d 1216 (Alaska 2006).
[1556] *Id.* at 1218.
[1557] *Id.*
[1558] *Id.*
[1559] *Id.* at 1219, 1222–23.
[1560] *Id.* at 1225.
[1561] *Id.* at 1220–21.
[1562] *Id.* at 1223–24.
[1563] *Id.* at 1226.
[1564] *Id.* at 1218.
[1565] 132 P.3d 276 (Alaska 2006).
[1566] *Id.* at 277.
[1567] *Id.*

consented, and the appendix was removed but was found to be healthy.[1568] The superior court, finding that Harrold had enough information and had given informed consent, granted Artwohl's motion for summary judgment.[1569] The supreme court held that a patient who was not told by his surgeon that a second CT scan could rule out the need for an immediate appendectomy raised a genuine issue of material fact requiring a trial, because a reasonable patient could deem that information crucial to his treatment decision.[1570] Harrold asserted in an affidavit that no one told him that the second CT scan could confirm the diagnosis with ninety-eight percent accuracy, which would have changed his treatment decision.[1571] Because a reasonable patient could view this additional knowledge as important in deciding whether to give consent, the issue must be decided at trial.[1572] The supreme court reversed the superior court's grant of summary judgment, holding that a patient who was not told by the surgeon that a second CT scan could rule out the need for an immediate appendectomy raised a genuine issue of material fact requiring a trial.[1573]

Haynes v. McComb

In *Haynes v. McComb*,[1574] the supreme court held that an attorney was not entitled to judgment as a matter of law in a legal malpractice action because the attorney's client's criminal conviction had been vacated.[1575] A former criminal defendant sued his attorney and her employer, the Alaska Public Defender Agency (collectively "attorney"), for legal malpractice.[1576] The superior court granted the attorney's motion for summary judgment based on the affirmative defense of actual guilt, and the client appealed.[1577] Because the attorney relied solely on an appellate court opinion which was subsequently vacated, the supreme court held that the appellate opinion could be used neither as a collateral estoppel bar nor for evidentiary purposes.[1578] As such, the attorney had not made a prima facie case of actual guilt, and was thus not entitled to judgment as a matter of law.[1579] The supreme court reversed the judgment of the superior court and remanded the case, holding that the attorney was not entitled to judgment as a matter of law in a legal malpractice action where the client's conviction, the sole basis of the attorney's defense, had been vacated.[1580]

[1568] *Id.* at 277–78.
[1569] *Id.* at 278–79.
[1570] *Id.* at 281–82.
[1571] *Id.* at 279.
[1572] *Id.* at 281–82.
[1573] *Id.*
[1574] 147 P.3d 700 (Alaska 2006).
[1575] *Id.* at 701.
[1576] *Id.*
[1577] *Id.*
[1578] *Id.*
[1579] *Id.*
[1580] *Id.*

Kinegak v. State, Department of Corrections

In *Kinegak v. State, Department of Corrections,*[1581] the supreme court held that a plaintiff's claim of negligent record keeping was not materially distinct from a false imprisonment claim that was blocked by state immunity.[1582] Due to an oversight by the Department of Corrections ("DOC"), Kinegak was falsely incarcerated for seven days past the completion of his sentences.[1583] Kinegak filed a civil suit against the DOC alleging negligent computation of release date leading to negligent, unjustified continued incarceration.[1584] The DOC responded by claiming sovereign immunity under a state statute authorizing immunity against claims arising out of false imprisonment.[1585] The superior court granted the DOC summary judgment and Kinegak appealed. [1586] The supreme court overruled its own prior case, *Zebre v. State*,[1587] and held that, in order to prevail, a plaintiff must claim harm that is materially distinct from claims for which the state is entitled to immunity.[1588] The supreme court affirmed the superior court's dismissal of the complaint, holding that a plaintiff's claim of negligent record keeping was not materially distinct from a false imprisonment claim that was blocked by state immunity.[1589]

Kirk v. Demientieff

In *Kirk v. Demientieff*,[1590] the supreme court held that an attorney's attempt to intervene in a former client's appeal was untimely.[1591] Demientieff retained Kirk to represent her in a tort action against United Companies.[1592] Kirk mailed the complaint to the court the day before the statute of limitations ran, but the court did not receive delivery on time and dismissed the case.[1593] Kirk wanted to petition for reconsideration because he believed that the complaint was late due to a mishap with the mail; however, Demientieff hired other counsel and filed a malpractice suit.[1594] Nearly a year after the original action, Demientieff agreed to allow Kirk to petition for reconsideration in her name.[1595] Reconsideration was denied.[1596] Demientieff withdrew the suit against United Companies, and Kirk tried to intervene by claim of right.[1597] The trial court denied the intervention because it was untimely.[1598] The supreme court held that the intervention

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[1581] 129 P.3d 887 (Alaska 2006).
[1582] *Id.* at 893.
[1583] *Id.* at 887.
[1584] *Id.* at 888.
[1585] *Id.* at 887.
[1586] *Id.* at 888.
[1587] 578 P.2d 597 (Alaska 1978).
[1588] *Kinegak*, 129 P.3d at 893.
[1589] *Id.*
[1590] 145 P.3d 512 (2006).
[1591] *Id.* at 519–20.
[1592] *Id.* at 513.
[1593] *Id.* at 513–14.
[1594] *Id.* at 514.
[1595] *Id.*
[1596] *Id.* at 514–15.
[1597] *Id.*
[1598] *Id.* at 515.

was not timely because Kirk had knowledge that his interests had diverged from Demientieff's eighteen months prior to the intervention[1599] and because reopening the case would be prejudicial to United Companies but not significantly prejudicial to Kirk.[1600] The supreme court affirmed the decision of the superior court, holding that an attorney's attempt to intervene in a former client's appeal was untimely.[1601]

Lamb v. Anderson

In *Lamb v. Anderson*,[1602] the supreme court held that a conviction for a crime collaterally estops a defendant in a civil trial from re-litigating the essential elements of the crime of which he was convicted.[1603] Anderson drove drunk and crashed into Lamb's motorcycle, severely injuring Lamb.[1604] Anderson pled no contest to three separate criminal charges.[1605] Lamb filed a civil suit against Anderson for negligence and sought punitive damages for "outrageous or reckless conduct."[1606] Lamb moved for summary judgment as to the liability for punitive damages because Anderson had already pled guilty to the assault, but the superior court denied the motion.[1607] The supreme court held that current law already collaterally estopped a civil plaintiff from re-litigating essential elements of the crime to which they had pled no contest, and the court extended this to apply to civil defendants as well.[1608] Under the *Scott*[1609] test, there are three elements to collaterally estop a defendant from denying an essential element of the offense: (1) the conviction was for a serious criminal offense, (2) the defendant had a full and fair hearing, and (3) it was clear to the jury which facts have been determined and which have not.[1610] All three elements were satisfied in this situation, so Anderson was collaterally estopped from denying recklessness, but because punitive damages are available, yet not required, the inquiry as to the punitive damages remained open.[1611] The supreme court held that a plea of no contest in the criminal case prevented defendant from denying the elements of that offense in the civil trial but did not necessarily require punitive damages.[1612]

[1599] *Id.* at 516–18.
[1600] *Id.* at 518–19.
[1601] *Id.* at 519–20.
[1602] 147 P.3d 736 (Alaska 2006).
[1603] *Id*. at 738.
[1604] *Id*.
[1605] *Id*.
[1606] *Id*.
[1607] *Id*. at 738–39.
[1608] *Id*. at 741–42.
[1609] Scott v. Robertson, 583 P.2d 188, 193 & n.27 (Alaska 1978).
[1610] *Lamb,* 147 P.3d at 744.
[1611] *Id*. at 745.
[1612] *Id*.

Lightle v. State

In *Lightle v. State*,[1613] the supreme court held that fraudulent misrepresentation does not require an intent to deceive, but only knowledge of some falsity of the misrepresentation by the maker and intent that the recipient act in reliance.[1614] Lightle, a real estate agent, listed a house as an "active listing" with a note indicating a previous pending offer.[1615] When Seeley asked about the house, Lightle stated that the previous offer was "dead."[1616] Seeley made an offer on the house and Lightle eventually assured her that the house was hers.[1617] Seeley cancelled her lease and incurred moving expenses.[1618] Upon learning that a "Back-up Addendum" had been added, stating that Seeley's offer was only a back-up offer in case the original one fell through, Seeley refused to accept the agreement.[1619] She filed a claim with the Alaska Real Estate Commission's ("Commission") real estate surety fund.[1620] The Commission's hearing officer concluded that Lightle had committed fraudulent misrepresentation, and the superior court confirmed the conclusion.[1621] The supreme court held that fraudulent misrepresentation does not require an intent to deceive, but only knowledge of the fraudulence of the statement and that the recipient will act in reliance of that statement.[1622] Even though Lightle asserted that his statements were literally true at the time, the supreme court found that they constituted half-truths, and as such still qualified as misrepresentations.[1623] Since Lightle intended that Seely rely on his statements, Lightle's actions did constitute fraudulent misrepresentation.[1624] The supreme court affirmed the superior court's ruling, holding that fraudulent misrepresentation does not require an intent to deceive, but only knowledge of some falsity of the misrepresentation by the maker and intent that the recipient act in reliance.[1625]

Marsingill v. O'Malley

In *Marsingill v. O'Malley*,[1626] the supreme court held that the superior court properly instructed the jury on the reasonable patient standard with respect to physician informed consent, did not allow inadmissible expert testimony, but awarded excessive and improper attorneys' fees.[1627] Marsingill, suffering of stomach pains, called Dr. O'Malley.[1628] O'Malley advised her to go to the emergency room, but did not speculate

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[1613] 146 P.3d 980 (Alaska 2006).
[1614] *Id*. at 981, 986.
[1615] *Id*. at 981.
[1616] *Id*.
[1617] *Id*. at 981–82.
[1618] *Id*.
[1619] *Id.* at 982.
[1620] *Id*.
[1621] *Id*.
[1622] *Id*. at 983–84, 986.
[1623] *Id*. at 985.
[1624] *Id*. at 986.
[1625] *Id*. at 981, 986.
[1626] 128 P.3d 151 (Alaska 2006).
[1627] *Id.* at 153.
[1628] *Id.*

as to the seriousness of her condition.[1629] Marsingill did not go to the hospital and subsequently suffered brain damage and partial paralysis.[1630] O'Malley won a jury verdict and attorneys' fees, and Marsingill appealed.[1631] The supreme court held that the jury instructions properly stated the reasonable patient standard,[1632] and that the expert evidence of other doctors was relevant because the doctors had expertise due to experience in knowing what advice patients desire and respond to.[1633] The supreme court further found that the attorneys' fees were excessive, because they included non-compensable work involving lobbying appellate efforts.[1634] The supreme court affirmed the decision of the superior court, holding that the superior court properly instructed the jury on the reasonable patient standard with respect to physician informed consent and did not allow inadmissible expert testimony, but vacated and remanded the improper award of attorneys' fees.[1635]

Pederson v. Barnes

In *Pederson v. Barnes*,[1636] the supreme court held that a guardian's lawyer is liable to the ward for the guardian's wrongdoing only where the lawyer knew or had reason to know of the wrongdoing and that pure several liability applies to duty-to-protect cases.[1637] After becoming guardian for his orphaned niece, Aiken was convicted of stealing and spending her estate assets.[1638] Pederson, Aiken's attorney, had failed to confirm the validity of Aiken's suspicious financial statements and had refuted claims of wrongdoing on Aiken's behalf.[1639] A jury found Pederson forty percent at fault and Aiken sixty percent at fault for compensatory damages arising from Aiken's fraud.[1640] The supreme court held that the proper liability standard for a guardian's lawyer with respect to a ward was the lawyer knowing or having "reason to know" (as opposed to "should know") of wrongdoing.[1641] Also, pure several liability applies to duty-to-protect cases, and thus damages should have been apportioned between Aiken and Pederson according to the jury's determination of fault.[1642] The supreme court vacated the award of compensatory damages and remanded the case, holding that a guardian's lawyer is liable to the ward for the guardian's wrongdoing only where the lawyer knew or had reason to know of the wrongdoing and that pure several liability applies to duty-to-protect cases.[1643]

[1629] *Id.*
[1630] *Id.* at 154.
[1631] *Id.* at 155.
[1632] *Id.* at 162.
[1633] *Id.* at 159.
[1634] *Id.* at 163–64.
[1635] *Id.* at 153, 164.
[1636] 139 P.3d 552 (Alaska 2006).
[1637] *Id.* at 555–56, 561.
[1638] *Id.* at 555.
[1639] *Id.* at 554–55.
[1640] *Id.* at 556.
[1641] *Id.* at 557–58.
[1642] *Id.* at 561.
[1643] *Id.* at 555–56, 561, 563.

XX. TRUSTS AND ESTATES LAW

Alaska Supreme Court

Blodgett v. Blodgett

In *Blodgett v. Blodgett*,[1644] the supreme court held that no manifest injustice resulted from applying Alaska's "slayer statute" to a son who negligently killed his father.[1645] Richard Blodgett pled no contest to the negligent homicide of his father in 2003, and then attempted to participate in the probate proceedings for his father's will.[1646] The other beneficiaries of the will contended that, pursuant to the "slayer statute,"[1647]—which prevents an heir from inheriting from a decedent he has killed—Blodgett was precluded from benefiting.[1648] The superior court agreed, explaining that under the statute forfeiture is mandatory for negligent homicides unless there is a showing of manifest injustice, which Blodgett failed to prove.[1649] The supreme court held that, under the "slayer statute," Blodgett failed to demonstrate manifest injustice sufficient to warrant participating in the probate proceedings, because Blodgett failed to show that his conduct differed from that of others convicted of negligent homicide.[1650] Additionally, the court rejected: (1) Blodgett's claim of being deprived due process because he was given sufficient notice and a hearing;[1651] (2) his allegation that forfeiture under the "slayer statute" violated the Forfeiture of Estate Clause of the Alaska Constitution because the clause is not implicated by the "slayer statute";[1652] and (3) his claim that the *ex post facto* clause of the Alaska Constitution applied to a life insurance policy he procured for his father before the "slayer statute" was passed because it concerned a non-probate asset.[1653] The supreme court affirmed the decision of the superior court, holding that applying Alaska's "slayer statute" to Richard Blodgett would not result in manifest injustice.[1654]

[1644] 147 P.3d 702 (Alaska 2006).
[1645] *Id.* at 703.
[1646] *Id.* at 703–04.
[1647] ALASKA STAT. § 13.12.803 (2007).
[1648] *Blodgett*, 147 P.3d at 704.
[1649] *Id.*
[1650] *Id.* at 705–09.
[1651] *Id.* at 709–10.
[1652] *Id.* at 710–11.
[1653] *Id.* at 711.
[1654] *Id.* at 703.

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