

THE YEAR IN REVIEW 2010

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

[ADMINISTRATIVE LAW](#) | [BUSINESS LAW](#) | [CIVIL PROCEDURE](#) | [CONSTITUTIONAL LAW](#) |
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INTRODUCTION

The *Alaska Law Review's* Year in Review is a collection of brief summaries of selected state and federal appellate cases concerning Alaska law. They are neither comprehensive in breadth, as several cases are omitted, nor in depth, as 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 to judicial decisions from the previous year. The summaries are grouped by subject matter.

ADMINISTRATIVE LAW

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Alaska Supreme Court

Anchorage Board of Adjustment v. LBJ

In *Anchorage Board of Adjustment v LBJ*,¹ the supreme court held that a road near a school qualifies as an urban improvement area and therefore must meet urban collector standards.² In 2005, the Platting Board determined that a section of road adjacent to a new school would have to be improved to meet standards similar to urban collector standards.³ The Board of Adjustment reversed the Platting Board's determination and found that it was not supported by substantial evidence.⁴ The superior court reversed the decision of the Board of Adjustment and reinstated the determination of the Platting Board.⁵ The superior court reasoned that the only way to read the administrative record was to conclude that the section of road was in an urban improvement area and to require by operation of law that the road be improved to meet urban collector standards.⁶ The superior court also found that the school board had supplied no reasonable basis to defend

¹ 228 P.3d 87 (Alaska 2010).

² *Id.* at 87. Citations to pages 88–93 are to the superior court's decision, which was attached as an appendix. *Id.*

³ *Id.* at 88. By requiring a road to meet "urban collector standards," the Board was requiring curbs, gutters, lighting, paved shoulders, and a multi-use path. *Id.*

⁴ *Id.*

⁵ *Id.* at 87.

⁶ *Id.* at 90, 92.

the Board of Adjustment's decision.⁷ Accordingly, the supreme court affirmed, holding that a road near a school qualifies as an urban improvement area and therefore must meet urban collector standards.⁸

Doubleday v. State, Commercial Fisheries Entry Commission

In *Doubleday v. State, Commercial Fisheries Entry Commission*,⁹ the supreme court held: (1) a fisherman cannot use the spoliation of evidence doctrine to shift the burden of proof when he is unable to make a showing that records were lost due to the fault of the state, and (2) he is required to exhaust his administrative remedies to challenge the number of fishery permits issued by the Commercial Fisheries Entry Commission (Commission) and could not be excused on grounds of futility.¹⁰ Doubleday's applications for permits for two fisheries were denied by the Commission because he failed to produce sufficient evidence of participation in either fishery.¹¹ Doubleday argued that he could not meet the burden of proof because the state destroyed or lost records necessary to prove his case, and therefore the spoliation of evidence doctrine supplied a rebuttable presumption that the missing documents would have established facts unfavorable to the Commission.¹² The supreme court held that even if the spoliation of evidence doctrine could apply to this type of case, Doubleday failed to produce any evidence in support of the claim that the government destroyed records negligently or intentionally.¹³ Doubleday's claim that the Commission violated the Limited Entry Act by incorrectly calculating the maximum number of fishery permits was denied because Doubleday did not exhaust his administrative remedies.¹⁴ Affirming the superior court, the supreme court held that: (1) a fisherman cannot use the spoliation of evidence doctrine to shift the burden of proof when he is unable to make a showing that records were lost due to the fault of the state, and (2) he is required to exhaust his administrative remedies to challenge the number of fishery permits issued by the Commercial Fisheries Entry Commission.¹⁵

Gottstein v. State, Department of Natural Resources

In *Gottstein v. State, Department of Natural Resources*,¹⁶ the supreme court held that the department does not necessarily violate the due process rights of interest holders in an oil and gas lease by refusing to hold a hearing before deciding an appeal of the approval of a proposed plan of development.¹⁷ Interest holders in a Cook Inlet oil and gas lease appealed three final agency decisions pertaining to their lease.¹⁸ The superior court affirmed the agency decisions,¹⁹ and the interest holders appealed.²⁰ In considering

⁷ *Id.* at 92.

⁸ *Id.* at 87.

⁹ 238 P.3d 100 (Alaska 2010).

¹⁰ *Id.* at 106–09.

¹¹ *Id.* at 101.

¹² *Id.*

¹³ *Id.* at 106–07.

¹⁴ *Id.* at 107–11.

¹⁵ *Id.* at 106–09.

¹⁶ 223 P.3d 609 (Alaska 2010).

¹⁷ *Id.* at 620–27.

¹⁸ *Id.*

¹⁹ *Id.*

whether the due process rights of the interest holders were violated, the court noted the Commissioner's conclusion that all information consulted and relied upon was available on the public record and that the interest holders did not subsequently object to this conclusion or give notice of any specific disputed material facts.²¹ Affirming the superior court's decision, the supreme court held that a department does not necessarily violate the due process rights of interest holders in an oil and gas lease by refusing to hold a hearing before deciding an appeal of the approval of a proposed plan of development, and the superior court did not abuse its discretion by denying a motion for trial de novo.²²

Hymes v. Deramus

In *Hymes v. Deramus*,²³ the supreme court held that a prison inmate is not required to exhaust administrative remedies for a medical malpractice claim based on an irreparable harm that cannot be corrected by the agency.²⁴ Hymes was a federal prisoner who was temporarily held at a state facility.²⁵ He brought suit against the physician and physician's assistant at that facility, alleging several instances of medical malpractice that caused him irreparable harm.²⁶ The superior court granted the physician's motion for summary judgment, holding that Hymes had not exhausted administrative remedies before bringing suit.²⁷ The supreme court reversed and remanded, holding that one of Hymes's claims was not subject to the exhaustion requirement.²⁸ Hymes was allegedly prescribed a medication that caused him irreparable harm, and the supreme court reasoned that the policy objectives of an exhaustion requirement are not advanced when the error is completely in the past and the agency has no way of correcting it.²⁹ Reversing the lower court, the supreme court held that a prison inmate is not required to exhaust administrative remedies for a medical malpractice claim based on an irreparable harm that cannot be corrected by the agency.³⁰

Kingik v. State, Department of Administration

In *Kingik v. State, Department of Administration*,³¹ the supreme court held that determining whether there has been a procedural due process violation requires considering the government's interest, the private individual's interest, and the risk that the private individual will be erroneously deprived of her interest.³² Kingik's husband submitted an Application for Retirement Benefits to the Division of Retirement and Benefits (Division).³³ Kingik provided a notarized signature on the application consenting to her husband's choice of a retirement option that did not include spousal

²⁰ *Id.*

²¹ *Id.* at 621.

²² *Id.* at 620–27.

²³ 222 P.3d 874 (Alaska 2010).

²⁴ *Id.* at 882–83.

²⁵ *Id.* at 878.

²⁶ *Id.*

²⁷ *Id.* at 880.

²⁸ *Id.* at 882–83.

²⁹ *Id.*

³⁰ *Id.*

³¹ 239 P.3d 1243 (Alaska 2010).

³² *Id.* at 1248.

³³ *Id.* at 1246.

benefits after his death.³⁴ After Kingik's husband died, the Division discontinued benefits to Kingik.³⁵ The superior court upheld the Division's denial of benefits.³⁶ Kingik appealed, arguing the Division violated her due process rights by failing to safeguard her right to survivor benefits.³⁷ The supreme court held that because the application's plain language was reasonably clear, an erroneous deprivation of survivor benefits was unlikely; consequently, Kingik's due process rights were not violated.³⁸ The court further held that Kingik's waiver of survivor benefits was effective.³⁹ Affirming the lower court, the supreme court held that determining whether there has been a procedural due process violation requires considering the government's interest, the private individual's interest, and the risk that the private individual will be erroneously deprived of her interest.⁴⁰

Nash v. Matanuska-Susitna Borough

In *Nash v. Matanuska-Susitna Borough*,⁴¹ the supreme court held that an individual's due process rights are violated when an agency, during an administrative hearing, bars that individual from presenting witnesses and relevant, material evidence that is essential for a fair trial.⁴² Nash entered a timber contract with the Matanuska-Susitna Borough (Mat-Su) on September 25, 1998, which they amended twelve times.⁴³ On October 25, 2002, Mat-Su notified Nash that due to breach, his contract was terminated.⁴⁴ Nash appealed his contract termination with the local board of adjustment and appeals.⁴⁵ Nash inquired about bringing witnesses to support his appeal and was informed that interested parties could testify, but only if they had testified previously.⁴⁶ Because this was not an appeal from a previous hearing, Nash moved to have parties speak on his behalf and sent the board a list of individuals for approval.⁴⁷ He received no response from the board and thus did not ask most of his witnesses to take time off to attend the hearing.⁴⁸ The board upheld Mat-Su's termination of Nash's contract, and Nash sued Mat-Su in superior court *inter alia* for breach of contract.⁴⁹ Nash argued that his trial should be de novo because the board hearing was unfair and violated his due process rights.⁵⁰ The superior court, finding no due process violation, affirmed the administrative agency's decision.⁵¹ Nash appealed, and the supreme court found that although due process in administrative hearings is not identical to court proceedings, it

³⁴ *Id.* at 1246–47.

³⁵ *Id.* at 1247.

³⁶ *Id.*

³⁷ *Id.*

³⁸ *Id.* at 1249.

³⁹ *Id.* at 1246.

⁴⁰ *Id.* at 1248.

⁴¹ 239 P.3d 692 (Alaska 2010).

⁴² *Id.* at 701.

⁴³ *Id.* at 693–94.

⁴⁴ *Id.* at 695.

⁴⁵ *Id.* at 696.

⁴⁶ *Id.*

⁴⁷ *Id.*

⁴⁸ *Id.*

⁴⁹ *Id.* at 697.

⁵⁰ *Id.*

⁵¹ *Id.*

should still be consistent with the essentials of a fair trial.⁵² Reversing the superior court and remanding for a trial de novo, the supreme court held that an individual's due process rights are violated when an agency, during an administrative hearing, bars that individual from presenting witnesses and relevant, material evidence that is essential for a fair trial.⁵³

Pietro v. UNOCAL

In *Pietro v. UNOCAL*,⁵⁴ the supreme court held that a Workers' Compensation Board must: (1) evaluate lay testimony and consider significant issues in order to determine whether an employee has proven claims by a preponderance of the evidence; and (2) must provide detailed reasons for its decisions.⁵⁵ After working at a UNOCAL plant where he was exposed to arsenic, Pietro developed peripheral neuropathy and eventually skin cancer.⁵⁶ Pietro asked for workers' compensation benefits, which the Workers' Compensation Board denied after finding UNOCAL had presented sufficient evidence to rebut the presumption of compensability.⁵⁷ Pietro appealed the decision and the supreme court found that UNOCAL presented sufficient evidence to rebut the presumption of compensability and thus the Board did not err.⁵⁸ However, the Board was required to then weigh testimony to determine whether Pietro had proven his claim by a preponderance of the evidence, which the court found the Board had failed to do.⁵⁹ The court also found the Board's conclusory statement did not provide enough information to assess its accuracy, as the Board did not give reasons to reject Pietro's experts' testimony and placed too much reliance on a 24-hour urine test.⁶⁰ Affirming in part and vacating in part, the supreme court held that a Workers' Compensation Board must: (1) evaluate lay testimony and consider significant issues in order to determine whether an employee has proven claims by a preponderance of the evidence; and (2) must provide detailed reasons for its decisions.⁶¹

Smart v. State, Department of Health & Social Services

In *Smart v. State, Department of Health & Social Services*,⁶² the supreme court held that: (1) the Department of Health and Social Services (DHSS) must give adequate notice of audit decisions and appeal periods; and (2) a DHHS promulgated audit protocol was not a regulation under Alaska's Administrative Policy Act (APA).⁶³ DHSS audited Smart, a care coordinator, for Medicaid overpayments.⁶⁴ In June 2007, DHHS sent Smart a final audit report indicating total DHHS payments during the audit; the letter failed to

⁵² *Id.* at 699.

⁵³ *Id.* at 701.

⁵⁴ 233 P.3d 604 (Alaska 2010).

⁵⁵ *Id.* at 613–617.

⁵⁶ *Id.* at 607–610.

⁵⁷ *Id.*

⁵⁸ *Id.* at 611–12.

⁵⁹ *Id.* at 612.

⁶⁰ *Id.* at 615.

⁶¹ *Id.* at 613–617.

⁶² 237 P.3d 1010 (Alaska 2010).

⁶³ *Id.* at 1016, 1018.

⁶⁴ *Id.* at 1013.

specify an overpayment and recoupment amount and Smart did not appeal.⁶⁵ Subsequently, in August 2007, DHSS issued a notice of recoupment for \$2,370 and provided no opportunity for appeal.⁶⁶ Smart filed a putative class action complaint alleging that DHHS's failure to promulgate its audit protocol violated the APA and that DHHS violated due process by failing to provide an opportunity to appeal notices of recoupment issued without support for the recoupment determination.⁶⁷ The superior court granted DHSS's motion to dismiss, finding that Smart failed to file a timely appeal with DHHS and thus failed to exhaust her administrative remedies.⁶⁸ Smart appealed the decision and the supreme court found that DHSS's notice to Smart did not comply with due process because the recoupment amount and the appeal period should have been clearly stated in the same letter as a description of DHHS's specific findings.⁶⁹ Additionally, the supreme court found that the protocol DHSS used for the audit process was not a regulation under the APA because it was a "statistically valid sampling methodolog[y]."⁷⁰ Reversing and remanding in part and affirming in part, the supreme court found that: (1) the DHSS must give adequate notice of audit decisions and appeal periods; and (2) a DHHS promulgated audit protocol was not a regulation under the APA.⁷¹

Yost v. State of Alaska, Dep't of Commerce

In *Yost v. State of Alaska, Department of Commerce*,⁷² the supreme court held that a doctor's civil action regarding her license application was properly treated as an administrative appeal.⁷³ Dr. Yost made a good faith answer to a licensing examination question that actually proved to be misleading.⁷⁴ During the course of the ensuing litigation, the superior court converted her civil action to an administrative appeal.⁷⁵ Dr. Yost argued that the case was fundamentally about her contract and not properly characterized as an administrative appeal.⁷⁶ Because the case required the court "to consider the propriety of an agency determination",⁷⁷ the supreme court held that the action was properly treated as an administrative appeal, irrespective of the framing of Dr. Yost's argument in contract terms.⁷⁸

⁶⁵*Id.* at 1012–13.

⁶⁶*Id.* at 1015–16.

⁶⁷*Id.* at 1013–14.

⁶⁸*Id.*

⁶⁹*Id.* at 1016.

⁷⁰*Id.* at 1018.

⁷¹*Id.* at 1016, 1018.

⁷² 234 P.3d 1264 (Alaska 2010).

⁷³ *Id.* at 1272.

⁷⁴ *Id.* at 1267.

⁷⁵ *Id.* at 1273.

⁷⁶ *Id.*

⁷⁷ *Id.*

⁷⁸ *Id.* at 1273–74.

BUSINESS LAW

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Alaska Supreme Court

Holmes v. Wolf

In *Holmes v. Wolf*,⁷⁹ the supreme court held that when a court finds that a corporation's directors have breached their fiduciary duty, the shareholders are not automatically entitled to an award of nominal damages.⁸⁰ Holmes, a shareholder of Lesnoi, Inc., joined as a plaintiff in a derivative shareholder lawsuit against three of Lesnoi's five directors.⁸¹ Holmes claimed, *inter alia*, that the directors had failed to obtain and send out audited financial reports.⁸² The superior court concluded that the directors had breached their fiduciary duty by failing to inform themselves about the federal audit requirement.⁸³ On appeal, Holmes argued that the superior court erred in not awarding nominal damages after finding the directors had breached their fiduciary duty.⁸⁴ Because the superior court found that the directors acted in good faith and in the interest of Lesnoi, the supreme court held that failing to award nominal damages was not an abuse of discretion.⁸⁵ Affirming the lower court, the supreme court held that when a court finds that a corporation's directors have breached their fiduciary duty, the shareholders are not automatically entitled to an award of nominal damages.⁸⁶

CIVIL PROCEDURE

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United States District Court for the District of Alaska

Dietzmann v. United States

In *Dietzmann v. United States*,⁸⁷ a magistrate judge held that the U.S. Department of Justice (DOJ) is not relieved from compliance with a previous order that required representatives from both parties be present at a settlement conference.⁸⁸ The judge previously ordered that every party have a representative, with full authority to settle claims, present at the settlement conference.⁸⁹ Ten days before the conference, DOJ stated that it would not have anyone in attendance with full authority to settle because only high-ranking officials had that authority and requiring a high-ranking official to attend would create a hardship.⁹⁰ The court noted that DOJ had notice of the settlement

⁷⁹ 243 P.3d 584 (Alaska 2010).

⁸⁰ *Id.* at 590.

⁸¹ *Id.* at 586.

⁸² *Id.*

⁸³ *Id.* at 589.

⁸⁴ *Id.*

⁸⁵ *Id.* at 590.

⁸⁶ *Id.*

⁸⁷ No. 3:09-CV-0019-RJB, 2010 U.S. Dist. LEXIS 133445 (D. Alaska Dec. 3, 2010).

⁸⁸ *Id.* at *18.

⁸⁹ *Id.* at *6–7.

⁹⁰ *Id.* at *8–10.

conference.⁹¹ The court also noted that DOJ only cited its own regulations—not a statute—for the proposition that only high-ranking officials have the authority to settle large cases.⁹² The court concluded that it has the power to review DOJ’s regulations and to require that someone with full authority to settle claims be present at a settlement conference.⁹³ Thus, the magistrate judge held that DOJ is not relieved from compliance with a previous order that required representatives from both parties be present at a settlement conference.⁹⁴

Alaska Supreme Court

Anderson v. Alyeska Pipeline Service Co.

In *Anderson v. Alyeska Pipeline Service Co.*,⁹⁵ the supreme court held that the operator of a pipeline pump station was a “project owner” under the exclusive liability provision of the Workers’ Compensation Act and was therefore immune from suit, but that an offer of judgment in the amount of ten dollars was a nominal offer and did not trigger the application of Alaska Civil Rule 68.⁹⁶ Anderson was injured at work, received workers’ compensation benefits, and filed a negligence action against Alyeska Pipeline Service (Alyeska) under the theory that Alyeska was not a statutory employer and should not be immune from suit under the Alaska Workers’ Compensation Act.⁹⁷ Alyeska responded, highlighting 2004 changes to the exclusive liability provisions of Alaska’s Workers’ Compensation Act that showed a strong likelihood that Alyeska would be considered a “project owner.”⁹⁸ Alyeska then made an offer of judgment for ten dollars, which Anderson rejected.⁹⁹ When the superior court dismissed Anderson’s claim, Alyeska was granted attorneys’ fees.¹⁰⁰ Anderson appealed the summary judgment and the award of attorneys’ fees.¹⁰¹ The court found, based on the legislative history of the 2004 changes and the statutory definition of “project owner,” that Alyeska clearly met the definition of “project owner” and was covered by the exclusive liability provisions of AS 23.30.055 and that the superior court was correct in granting summary judgment for Alyeska.¹⁰² However, the court acknowledged, and left open, the “difficult hypothetical examples” raised by Anderson about the potential for small businesses to abuse the exclusive liability provisions through the use of contractors.¹⁰³ Finally, the court held that a ten-dollar offer, made at the outset of a case that presented a novel legal question, did not serve the purpose of Rule 68 to encourage settlement and should be considered nominal.¹⁰⁴ The supreme court affirmed the superior court decision that the operator of a

⁹¹ *Id.* at *10–11.

⁹² *Id.* at *15–17.

⁹³ *Id.* at *14–17.

⁹⁴ *Id.* at *18.

⁹⁵ 234 P.3d 1282 (Alaska 2010).

⁹⁶ *Id.* at 1288, 1289–90.

⁹⁷ *Id.* at 1284.

⁹⁸ *Id.* at 1285.

⁹⁹ *Id.*

¹⁰⁰ *Id.* at 1285–86.

¹⁰¹ *Id.* at 1286.

¹⁰² *Id.* at 1288.

¹⁰³ *Id.*

¹⁰⁴ *Id.* at 1289.

pipeline pump station was a “project owner” under the exclusive liability provision of the Workers’ Compensation Act and was therefore immune from suit but reversed and remanded the lower court’s Rule 68 attorney’s fee award, holding that an offer of judgment in the amount of ten dollars was a nominal offer and did not trigger the application of Rule 68.¹⁰⁵

Angleton v. Cox

In *Angleton v. Cox*,¹⁰⁶ the supreme court held that members of a nonprofit organization did not have the right to bring a derivative action.¹⁰⁷ Following suspension of several members of various lodges, members of a fraternal organization brought suit against other members asserting claims for breach of settlement agreement and a derivative action on behalf of the organization.¹⁰⁸ The superior court dismissed the derivative suit.¹⁰⁹ On appeal, the supreme court held the derivative action was appropriately dismissed because Alaska law does not recognize a derivative right of action for members of nonprofit organizations.¹¹⁰ Affirming the dismissal of the derivative action, the supreme court held that members of a nonprofit organization did not have the right to bring a derivative action.¹¹¹

Armstrong v. Tanaka

In *Armstrong v. Tanaka*,¹¹² the supreme court held that a balancing test is required to weigh the parties’ interests and to determine whether stay is appropriate when an individual facing criminal charges brings a civil action and either party requests a stay of civil proceedings pending resolution of criminal charges.¹¹³ Tanaka reported Armstrong to the police after Armstrong gave Tanaka’s son an explicitly sexual and violent book.¹¹⁴ The police obtained a warrant to search Armstrong’s home and workplace and eventually charged Armstrong with several counts of felony possession and distribution of child pornography.¹¹⁵ After criminal charges were filed, Armstrong initiated a defamation suit against Tanaka.¹¹⁶ Armstrong refused to answer several deposition questions on the basis that they violated his right against self incrimination and he moved to stay civil proceedings pending the resolution of criminal charges.¹¹⁷ The superior court dismissed the civil suit and awarded Tanaka attorneys’ fees.¹¹⁸ The supreme court held that applying a balancing test best safeguards a criminal defendant’s right against self-incrimination and right to due process while maintaining a civil defendant’s right to

¹⁰⁵ *Id.* at 1288, 1289–90.

¹⁰⁶ 238 P.3d 610 (Alaska 2010).

¹⁰⁷ *Id.* at 614–618.

¹⁰⁸ *Id.* at 611–612.

¹⁰⁹ *Id.* at 611.

¹¹⁰ *Id.*

¹¹¹ *Id.* at 614–618.

¹¹² 228 P.3d 79 (Alaska 2010).

¹¹³ *Id.* at 85.

¹¹⁴ *Id.* at 81.

¹¹⁵ *Id.*

¹¹⁶ *Id.*

¹¹⁷ *Id.*

¹¹⁸ *Id.* at 82.

defend himself.¹¹⁹ The court remanded the case and held that a balancing test is required to weigh the parties' interests and to determine whether stay is appropriate when an individual facing criminal charges brings a civil action and either party requests a stay of civil proceedings pending resolution of criminal charges.¹²⁰

Berg v. Vandervest

In *Berg v. Vandervest*,¹²¹ the supreme court held that when a pro se litigant makes a clear effort to comply with court procedure, the court has an obligation to inform him of the procedural steps necessary to achieve his obvious objective.¹²² Due to a mistake in Berg's preparation of his 2007 taxes, the Child Support Services Division ("CSSD") complied with his request to submit a motion to modify his child support payments.¹²³ Berg submitted a memorandum and affidavit in support of the motion, as well as a motion to vacate his 2006 child support order.¹²⁴ However, after receiving additional information from Berg's ex-wife, the CSSD withdrew its motion,¹²⁵ and the superior court took no further action on his memorandum and affidavit.¹²⁶ The court considered Berg's motion to vacate as a relief from judgment.¹²⁷ However, the court denied his motion due to untimeliness.¹²⁸ After the CSSD withdrew its motion, Berg had no vehicle to achieve the payment modification himself.¹²⁹ Since his submitted materials made it clear that his goal was to modify his payments,¹³⁰ and he was operating in good faith,¹³¹ the supreme court determined that the superior court should have either interpreted Berg's accompanying memorandum and affidavit in a way that would have survived the withdrawal of the CSSD motion or provided him information about how to file his own motion.¹³² Remanding, the supreme court held that when a pro se litigant makes a clear effort to comply with court procedure, the court has an obligation to inform him of the procedural steps necessary to achieve his obvious objective.¹³³

Bolden v. State, Department of Corrections

In *Bolden v. State*,¹³⁴ the supreme court held that because it was unclear whether a prisoner's claim was an administrative appeal or a claim for damages under 42 U.S.C. § 1983, the superior court erred in dismissing the claim without notice or an opportunity to clarify the nature of the claim.¹³⁵ Bolden, a prisoner at the Fairbanks Correctional Center

¹¹⁹ *Id.* at 85.

¹²⁰ *Id.*

¹²¹ No. S-13136, No. 1364, 2010 Alas. LEXIS 60 (Alaska Jun. 23, 2010).

¹²² *Id.* at *11.

¹²³ *Id.* at *4-5.

¹²⁴ *Id.* at *6-7.

¹²⁵ *Id.*

¹²⁶ *Id.* at *7-8.

¹²⁷ *Id.* at *8.

¹²⁸ *Id.* at *8.

¹²⁹ *Id.* at *11.

¹³⁰ *Id.* at *12.

¹³¹ *Id.* at *14.

¹³² *Id.*

¹³³ *Id.* at *11.

¹³⁴ No. S-12925, 2010 Alas. LEXIS 75 (Alaska Jul. 14, 2010).

¹³⁵ *Id.* at *14.

(“FCC”), filed a grievance against the FCC asserting that his Eighth Amendment rights had been violated when his toilet overflowed, ruining the cast on his injured leg, and he was forced to remain in his cell overnight without getting a new cast.¹³⁶ Bolden’s grievance was denied by the FCC, as was his subsequent appeal to the Director of Institutions.¹³⁷ He filed a pro se claim with the superior court, which, *sua sponte*, interpreted Bolden’s claim as an administrative appeal and dismissed it for lack of subject matter jurisdiction.¹³⁸ On appeal, Bolden argued that the dismissal violated due process; that the superior court did have subject matter jurisdiction, and that his treatment in his cell did raise an Eighth Amendment constitutional issue.¹³⁹ The court found elements of a § 1983 claim based on the Eighth Amendment, but it was unclear that this was what Bolden intended because the superior court dismissed the action without affording Bolden an opportunity to be heard.¹⁴⁰ Reversing the lower court, the supreme court held that because it was unclear whether a prisoner’s claim was an administrative appeal or a claim for damages under 42 U.S.C. § 1983, the superior court erred in dismissing the claim without notice or an opportunity to clarify the nature of the claim.¹⁴¹

Bradshaw v. State, Department of Administration

In *Bradshaw v. State, Department of Administration*,¹⁴² the supreme court held that Alaska’s ten-year statute of limitations does not bar the Alaska Division of Motor Vehicles (DMV) from charging a \$100 statutory fee to reinstate a driver’s license.¹⁴³ Bradshaw’s license was suspended in 1995.¹⁴⁴ In 2007, Bradshaw applied to have his license reinstated and the DMV charged him a \$100 statutory reinstatement fee.¹⁴⁵ Bradshaw sued, arguing that the ten-year statute of limitations barred the DMV from charging the fee.¹⁴⁶ The supreme court affirmed the grant of summary judgment to the State,¹⁴⁷ holding that a government agency’s charging of a fee is not an “action for a cause” subject to the statute of limitations.¹⁴⁸ The court also held that the DMV properly charged Bradshaw the fee because the statute applies to the status of suspension and not the initial act of suspension.¹⁴⁹ Affirming the lower court, the supreme court held that Alaska’s ten-year statute of limitations does not bar the DMV from charging a \$100 statutory fee to reinstate a driver’s license.¹⁵⁰

¹³⁶ *Id.* at *1–2.

¹³⁷ *Id.* at *2–3.

¹³⁸ *Id.* at *4–5.

¹³⁹ *Id.* at *7.

¹⁴⁰ *Id.* at *10, *14.

¹⁴¹ *Id.* at *14.

¹⁴² 224 P.3d 118 (Alaska 2010).

¹⁴³ *Id.* at 120–21.

¹⁴⁴ *Id.* at 120.

¹⁴⁵ *Id.* at 121.

¹⁴⁶ *Id.* at 121–22.

¹⁴⁷ *Id.* at 120.

¹⁴⁸ *Id.* at 122–23.

¹⁴⁹ *Id.* at 123–26.

¹⁵⁰ *Id.* at 120–21.

Hertz v. Carothers

In *Hertz v. Carothers*,¹⁵¹ the supreme court held that: (1) the execution of a judgment is void if improperly served even when the debtor had actual knowledge of the execution; and (2) section 09.08.030(f)(5) of the Alaska Statute does not conflict with section 33.30.201(d) of the Alaska Statute.¹⁵² The state attempted to execute a judgment for attorneys' fees against Hertz, a state prisoner, by levying Hertz's prisoner trust account.¹⁵³ Hertz had actual knowledge of the execution and the state served Hertz with a faxed copy of the judgment delivered by a prison guard.¹⁵⁴ Hertz claimed he was improperly served and that section 09.08.030(f)(5) was invalid.¹⁵⁵ Alaska Rule of Civil Procedure 4 governs personal service and requires service to be made by a peace officer or a person specially designated to serve notice.¹⁵⁶ The supreme court held that the service violated civil rule 4, reasoning that strict adherence to the service rules was needed to protect the due process rights of litigants and debtors even when the debtor was not prejudiced by the error.¹⁵⁷ Section 09.08.030(f)(5) explains that prisoners do not receive protection from judgments that low-wage earners receive.¹⁵⁸ Section 33.30.201(d) provided for prisoners' wages to be placed in a trust account for the primary purpose of being available for prisoners.¹⁵⁹ Section 33.30.201 also identified the protocol for how prisoners' wages should be disbursed, including for the execution of judgments.¹⁶⁰ The supreme court reasoned that both statutes accommodated the execution of a judgment against prisoners' trust account and thus do not conflict.¹⁶¹ Reversing the lower court, the supreme court held that: (1) the execution of a judgment is void if improperly served even when the debtor had actual knowledge of the execution; and (2) section 09.08.030(f)(5) of the Alaska Statute does not conflict with section 33.30.201(d) of the Alaska Statute.¹⁶²

Hertz v. State, Department. of Corrections

In *Hertz v. State, Department of Corrections*,¹⁶³ the supreme court held that the Alaska Prison Litigation Reform Act ("APLRA") did not violate due process when barring an inmate's claim for reinstatement of gate money.¹⁶⁴ Hertz, a prisoner, filed a complaint claiming that the department of corrections had violated a 1990 Final Settlement Agreement ("FSA") when it decided to stop paying "gate money" to all prisoners upon release.¹⁶⁵ The superior court denied his claim, finding that Hertz had

¹⁵¹ 225 P.3d 571 (Alaska 2010).

¹⁵² *Id.* at 572.

¹⁵³ *Id.* at 573.

¹⁵⁴ *Id.*

¹⁵⁵ *Id.*

¹⁵⁶ *Id.* at 574.

¹⁵⁷ *Id.*

¹⁵⁸ *Id.* at 575.

¹⁵⁹ *Id.*

¹⁶⁰ *Id.*

¹⁶¹ *Id.*

¹⁶² *Id.* at 572.

¹⁶³ 230 P.3d 663 (Alaska 2010).

¹⁶⁴ *Id.* at 665.

¹⁶⁵ *Id.* at 666.

failed to state a right to gate money as required by the APLRA.¹⁶⁶ On appeal, Hertz argued that the FSA was a contract which created a right to gate money and he demanded continued prospective enforcement.¹⁶⁷ The supreme court rejected Hertz's argument and affirmed the lower court, reasoning that it was not the intentions of the parties to guarantee that all of the FSA's provisions would continue indefinitely.¹⁶⁸ Additionally, the supreme court held that the APLRA's termination of prospective enforcement did not violate property rights.¹⁶⁹ Affirming the lower court, the supreme court held that the APLRA did not violate due process when barring an inmate's claim for reinstatement of gate money.¹⁷⁰

Johnson v. Johnson

In *Johnson v. Johnson*,¹⁷¹ the supreme court held that it was improper to award full attorneys' fees in a divorce case when the former husband raised potentially meritorious claims in several motions and did not act in bad faith.¹⁷² The lower court, applying Alaska Civil Rule 82, awarded full attorneys' fees to Ms. Johnson at the end of the Johnsons' divorce proceedings.¹⁷³ Because Mr. Johnson's claims were not completely devoid of legal or factual merit, they did not support a finding that he made his motions in bad faith.¹⁷⁴ The supreme court held that it was improper to award full attorneys' fees in a divorce case when the former husband raised potentially meritorious claims in several motions and did not act in bad faith.¹⁷⁵

Krause v. Matanuska-Susitna Borough

In *Krause v. Matanuska-Susitna Borough*,¹⁷⁶ the supreme court held (1) while damages are not available for constitutional claims, declaratory or injunctive relief is an appropriate and traditional relief from an unconstitutional statute, and (2) a motion for leave to amend a complaint to apply equitable tolling should be granted unless the claim is legally insufficient on its face.¹⁷⁷ The Krauses objected to a decision made by the Mat-Su Borough that made access to and from their property difficult and dangerous.¹⁷⁸ After unsuccessful negotiations with the Borough and landowners, the Krauses filed a complaint with the superior court alleging a violation of a Mat-Su Borough Ordinance and violation of their equal protection and due process rights.¹⁷⁹ The superior court dismissed their constitutional claims, ruling that this claim is unavailable when there is alternative relief, and it dismissed the rest of the claims as being time-barred.¹⁸⁰ The

¹⁶⁶ *Id.*

¹⁶⁷ *Id.* at 667.

¹⁶⁸ *Id.* at 670.

¹⁶⁹ *Id.* at 669–70.

¹⁷⁰ *Id.* at 665.

¹⁷¹ 239 P.3d 393 (Alaska 2010).

¹⁷² *Id.* at 401–03.

¹⁷³ *Id.* at 397.

¹⁷⁴ *Id.* at 403.

¹⁷⁵ *Id.* at 401.

¹⁷⁶ 229 P.3d 168 (Alaska 2010).

¹⁷⁷ *Id.* at 175–176.

¹⁷⁸ *Id.* at 171.

¹⁷⁹ *Id.*

¹⁸⁰ *Id.* at 171–73.

Krauses then appealed.¹⁸¹ The supreme court reaffirmed the unavailability of a constitutional claim for damages when alternative remedies are available, but reversed the lower court's ruling on declaratory and injunctive relief. It found these types of relief are "traditional" and "particularly appropriate" where constitutional rights were allegedly violated.¹⁸² The court also reversed the lower court's denial of the Krauses' motion for leave to amend because leave should be freely given unless the amendment would be futile.¹⁸³ Reversing the superior court, the supreme court held (1) while damages are not available for constitutional claims, declaratory or injunctive relief is an appropriate and traditional relief from an unconstitutional statute, and (2) a motion for leave to amend a complaint to apply equitable tolling should be granted unless the claim is legally insufficient on its face.¹⁸⁴

Law Project for Psychiatric Rights, Inc. v. State

In *Law Project for Psychiatric Rights, Inc. v. State*,¹⁸⁵ the supreme court held that a public interest law firm lacked standing to bring a suit on behalf of minors who were compelled to take psychotropic drugs.¹⁸⁶ The Law Project for Psychiatric Rights (LPPR) filed suit against the State, seeking declaratory and injunctive relief regarding minors' rights in compelled psychotropic administration.¹⁸⁷ The State moved for judgment on the pleadings and to stay discovery, arguing that LPPR lacked standing for failing to "identify a single individual who has been harmed by the alleged violations."¹⁸⁸ LPPR argued that it satisfied citizen-taxpayer standing.¹⁸⁹ The superior court granted both of the State's motions, reasoning that LPPR "failed to establish any parent or guardian with a legitimate grievance on behalf of their . . . child," and awarded the State attorneys' fees.¹⁹⁰ The supreme court reasoned that LPPR did not establish standing because it had failed to demonstrate that the issues raised were of public significance or that it was an appropriate litigant.¹⁹¹ Affirming the superior court, the supreme court held that a public interest law firm lacked standing to bring a suit on behalf of minors who were compelled to take psychotropic drugs.¹⁹²

Mat-Su Regional Medical Center v. Burkhead

In *Mat-Su Regional Medical Center v. Burkhead*,¹⁹³ the supreme court held that patients cannot assign their personal injury claims to health care providers so they may not intervene or bring actions on behalf of patients.¹⁹⁴ Burkhead was injured by Voss in a

¹⁸¹ *Id.* at 173–74.

¹⁸² *Id.* at 175.

¹⁸³ *Id.* at 176.

¹⁸⁴ *Id.* at 175–176.

¹⁸⁵ 239 P.3d 1252 (Alaska 2010).

¹⁸⁶ *Id.* at 1256.

¹⁸⁷ *Id.* at 1254.

¹⁸⁸ *Id.*

¹⁸⁹ *Id.*

¹⁹⁰ *Id.*

¹⁹¹ *Id.* at 1255–56.

¹⁹² *Id.* at 1256.

¹⁹³ 225 P.3d 1097 (Alaska 2010).

¹⁹⁴ *Id.* at 1104.

car accident and received medical treatment at Mat-Su.¹⁹⁵ During the course of her treatment, Burkhead signed consent forms assigning all her claims for payment against third parties to the hospital, which also recorded a lien against Burkhead.¹⁹⁶ Mat-Su then brought an action against Voss to recover the cost of Burkhead's treatment.¹⁹⁷ The superior court granted summary judgment against Mat-Su, holding that the lien remedy in section 34.35.475 of the Alaska Statute was Mat-Su's exclusive remedy in such situations.¹⁹⁸ On appeal, Mat-Su argued that assignment of personal injury claims was a common law remedy for which it did not need statutory authorization¹⁹⁹ and that Alaska's lien statute did not prohibit such assignments.²⁰⁰ The supreme court reasoned that the legislature could have adopted a statutory assignment remedy as it did in other areas of tort law but instead chose to create the lien remedy,²⁰¹ and that if it did recognize assignment of personal injury claims to healthcare providers, there would be an increased risk of patients assigning their claims under duress or without informed consent.²⁰² In addition, assignments are less necessary because health care providers are still able to collect money from their patients as creditors.²⁰³ Affirming the lower court, the supreme court held that patients cannot assign their personal injury claims to health care providers so they may not intervene and bring actions on behalf of patients.²⁰⁴

Mullins v. Local Boundary Commission

In *Mullins v. Local Boundary Commission*,²⁰⁵ the supreme court held that a lawsuit seeking a stay of an election may be dismissed as moot when the result of the election obviates the need for judicial review of the claim.²⁰⁶ In such cases, only declaratory relief is available and relief is unnecessary because similar claims will frequently receive judicial review.²⁰⁷ Mullins appealed a decision by the Local Boundary Commission ("LBC") approving a petition to incorporate and sought an injunction to stay a public referendum necessary to certify the approval of LBC.²⁰⁸ The voters rejected the proposed incorporation.²⁰⁹ Mullins appealed to the supreme court.²¹⁰ The supreme court found that, although the superior court abused its discretion by failing to grant Mullins the full time period to which she was entitled to file her response to LBC's motion to dismiss, she was not prejudiced by the abuse because the superior court ultimately considered her motion for reconsideration and because the supreme court reviewed her

¹⁹⁵ *Id.* at 1099.

¹⁹⁶ *Id.*

¹⁹⁷ *Id.*

¹⁹⁸ *Id.* at 1100.

¹⁹⁹ *Id.* at 1101.

²⁰⁰ *Id.* at 1102–03.

²⁰¹ *Id.* at 1102.

²⁰² *Id.* at 1104.

²⁰³ *Id.*

²⁰⁴ *Id.*

²⁰⁵ 226 P.3d 1012 (Alaska 2010).

²⁰⁶ *Id.* at 1014.

²⁰⁷ *Id.*

²⁰⁸ *Id.*

²⁰⁹ *Id.* at 1014–15.

²¹⁰ *Id.* at 1015–17.

substantive objections *de novo*.²¹¹ The supreme court held that the election had rendered her claims against LBC moot, and that the public interest exception did not permit the court to rule here because any future misconduct by LBC would likely be challenged in court.²¹² Affirming the superior court, the supreme court held that a lawsuit seeking a stay of an election may be dismissed as moot when the result of the election obviates the need for judicial review of the claim.²¹³

Okagawa v. Yaple

In *Okagawa v. Yaple*,²¹⁴ the supreme court held that, under Alaska Rule of Civil Procedure 68, an award of attorneys' fees based on reasonable hourly rates is permissible even when a previous contingency agreement exists.²¹⁵ Yaple won damages from Okagawa in a tort suit and received attorneys' fees based on an hourly rate under Rule 68.²¹⁶ Okagawa argued that Yaple was not entitled to attorneys' fees because he had a contingency fee agreement and that the fees were unreasonable.²¹⁷ The supreme court held that it is permissible to award attorneys' fees even if a contingency fee agreement is in place.²¹⁸ The court also held that the trial court did not abuse its discretion in awarding attorneys' fees based on the nature and length of the case.²¹⁹ The award should be based on the value of the services rendered, not on a previous agreement.²²⁰ Affirming the lower court, the supreme court held that, under Alaska Rule of Civil Procedure 68, an award of attorneys' fees based on reasonable hourly rates is permissible even when a previous contingency agreement exists.²²¹

Roderer v. Dash

In *Roderer v. Dash*,²²² the supreme court held that dismissal, judgment notwithstanding the verdict, and a new trial are inappropriate sanctions for a party that failed to timely file an expert witness report where the violation was not willful, where there was little resulting prejudice to the other litigant, and where the nonconforming party ultimately filed the appropriate report.²²³ Dash sued Roderer for medical malpractice.²²⁴ Roderer moved to dismiss when Dash's attorney failed to file an expert report by the pre-trial deadline, even though Dash's attorney filed a "working draft" of the report.²²⁵ The superior court denied the motion, but issued an order requiring Dash's attorney to pay a sanction.²²⁶ Dash was awarded damages; Roderer moved for judgment

²¹¹ *Id.* at 1016.

²¹² *Id.* at 1017–20.

²¹³ *Id.* at 1014.

²¹⁴ 234 P.3d 1278 (Alaska 2010).

²¹⁵ *Id.* at 1281.

²¹⁶ *Id.* at 1279.

²¹⁷ *Id.* at 1282.

²¹⁸ *Id.* at 1281.

²¹⁹ *Id.* at 1282.

²²⁰ *Id.* at 1280–81.

²²¹ *Id.* at 1281.

²²² 233 P.3d 1101 (Alaska 2010).

²²³ *Id.* at 1106–11.

²²⁴ *Id.* at 1103–05.

²²⁵ *Id.* at 1104–05.

²²⁶ *Id.*

notwithstanding the verdict and, in the alternative, a new trial.²²⁷ The superior court denied these requests and Roderer appealed.²²⁸ The supreme court affirmed the denial because it was not “arbitrary, capricious, manifestly unreasonable” or the result of an “improper motive” and because the circumstances of the discovery violation were not sufficiently extreme to warrant dismissal.²²⁹ The denial of Roderer’s motion for a directed verdict was also upheld because Roderer’s counsel failed to move for a directed verdict at the close of evidence, pursuant to Alaska Civil Rule 50(b).²³⁰ Affirming the superior court, the supreme court held that dismissal, judgment notwithstanding the verdict, and a new trial are inappropriate sanctions for a party that failed to timely file an expert witness report where the violation was not willful, where there was little resulting prejudice to the other litigant, and where the nonconforming party ultimately filed the appropriate report.²³¹

Schofield v. City of St. Paul

In *Schofield v. City of St. Paul*,²³² the supreme court held that it is generally acceptable to exclude the results of an investigation by the district attorney or Police Standards Counsel, but it is an abuse of discretion to exclude statements made during the course of an investigation that potentially go to the core of an individual’s claim.²³³ Schofield, a police officer in St. Paul, met with the Chief of Police after evidence arose that he was married to two women.²³⁴ Because of the meetings, Schofield resigned.²³⁵ In 2006, Schofield filed suit alleging wrongful termination and constructive discharge.²³⁶ The jury found no constructive discharge.²³⁷ On appeal, Schofield argued that the superior court improperly excluded the content of the meetings from evidence.²³⁸ The supreme court reversed the lower court, reasoning that because Schofield had resigned immediately after the meetings, the content was extremely relevant and the relevance outweighed any potential to mislead.²³⁹ Furthermore, the court found that because Schofield was alleging constructive termination stemming from the meetings, the content could corroborate his key claim, and because admitting the content of the meetings did not require admitting the results of the investigation, the exclusion was sufficiently prejudicial to constitute a reversible error.²⁴⁰ The supreme court held that it is generally acceptable to exclude the results of an investigation by the district attorney or Police Standards Counsel, but it is an abuse of discretion to exclude statements made during the course of an investigation that potentially go to the core of an individual’s claim.²⁴¹

²²⁷ *Id.* at 1105.

²²⁸ *Id.* at 1105–06.

²²⁹ *Id.* at 1107.

²³⁰ *Id.* at 1108.

²³¹ *Id.* at 1106–11.

²³² 238 P.3d 603 (Alaska 2010).

²³³ *Id.* at 608.

²³⁴ *Id.* at 605.

²³⁵ *Id.*

²³⁶ *Id.*

²³⁷ *Id.* at 606.

²³⁸ *Id.* at 606–07.

²³⁹ *Id.* at 608–10.

²⁴⁰ *Id.* at 608–09.

²⁴¹ *Id.* at 608.

Schug v. Moore

In *Schug v. Moore*,²⁴² the supreme court held that discretionary acts made by the assistant attorney general, while working within the scope of authority as assistant attorney general, were protected by official immunity.²⁴³ Schug, after an unsuccessful suit against the Alaska Department of Corrections (DOC) for alleged personal injury while in DOC custody, filed a claim against Moore, the Assistant Attorney General, for “attorney malpractice” stemming from her role as defense attorney for DOC in Schug’s case.²⁴⁴ Moore filed a motion for summary judgment, which the superior court granted on the grounds that Moore had absolute immunity and that Schug’s claims were “unsustainable as a matter of law.”²⁴⁵ The supreme court first determined that the complaints against Moore involved actions taken by Moore in her official capacity as Assistant Attorney General.²⁴⁶ The court then found that Moore’s actions were discretionary, thereby triggering official immunity.²⁴⁷ Because Schug offered no evidence that Moore acted “corruptly, maliciously, or in bad faith,” the court did not determine whether Moore’s immunity was absolute or qualified.²⁴⁸ Affirming the lower court, the supreme court held that discretionary acts made by the assistant attorney general, while working within the scope of authority as assistant attorney general, were protected by official immunity.²⁴⁹

Shooshanian v. Dire

In *Shooshanian v. Dire*,²⁵⁰ the supreme court held that: (1) refusal to grant a continuance is valid when there is no “weighty reason” for a continuance; (2) it is not an abuse of discretion when a court does not inform a pro se litigant as to each step in litigating a claim; (3) an attorney is not a necessary witness at trial when his pretrial involvement is not material to the disputed facts; and (4) a tenant may be evicted when he has an option right to purchase the residence if a further contract is necessary to accomplish the purchase.²⁵¹ Shooshanian attempted to exercise an option right to purchase a condo that he had rented for several years.²⁵² In response, the property owner informed Shooshanian the property price had increased and accordingly tried to collect back rent.²⁵³ Nearly a year later, the owner attempted to evict Shooshanian, and the matter was transferred to superior court because of Shooshanian’s assertion he held “two option to buy leases.”²⁵⁴ Shooshanian’s motion for a continuance was denied, and Shooshanian appealed when the superior court granted the owner judgment for possession. Affirming the lower court, the supreme court held that: (1) refusal to grant a continuance is valid when there is no “weighty reason” for a continuance; (2) it is not an

²⁴² 233 P.3d 1114 (Alaska 2010).

²⁴³ *Id.* at 1117.

²⁴⁴ *Id.* at 1116.

²⁴⁵ *Id.*

²⁴⁶ *Id.* at 1117.

²⁴⁷ *Id.*

²⁴⁸ *Id.*

²⁴⁹ *Id.*

²⁵⁰ 237 P.3d 618 (Alaska 2010).

²⁵¹ *Id.* at 622–27.

²⁵² *Id.* at 621.

²⁵³ *Id.*

²⁵⁴ *Id.*

abuse of discretion when a court does not inform a pro se litigant as to each step in litigating a claim; (3) an attorney is not a necessary witness at trial when his pretrial involvement is not material to the disputed facts; and (4) a tenant may be evicted when he has an option right to purchase the residence if a further contract is necessary to accomplish the purchase.²⁵⁵

Smallwood v. Central Peninsula General Hospital, Inc.

In *Smallwood v. Central Peninsula General Hospital, Inc.*,²⁵⁶ the supreme court held that the superior court is without jurisdiction to substitute parties or dismiss a case while it is on appeal.²⁵⁷ The supreme court also held that a plaintiff does not abandon his claim when he has won an injunction but fails to contest whether the defendant has complied with the injunction.²⁵⁸ Smallwood won an injunction ordering Central Peninsula General Hospital to stop “balance billing” Medicaid patients, but when the hospital submitted an affidavit describing the procedures enacted to avoid balance billing, Smallwood did not dispute the affidavit.²⁵⁹ The supreme court held that because Smallwood already obtained an injunction, he did not abandon his claim merely by failing to contest the hospital’s compliance with the injunction.²⁶⁰ Smallwood passed away while the case was on appeal.²⁶¹ The superior court dismissed the case because another plaintiff was not substituted for Smallwood within ninety days, as required by Alaska Civil Rule 25(a)(1).²⁶² The supreme court stated that once a notice of appeal is filed, the appellate court holds the “supervision and control” of the proceedings.²⁶³ Therefore, superior courts lack jurisdiction to order substitution of parties, or dismissal due to the death of parties while cases are on appeal.²⁶⁴ Thus, the supreme court held that the superior court is without jurisdiction to substitute parties or dismiss a case while it is on appeal.²⁶⁵

State Dep’t of Corr. v. Anthony

In *State Department of Corrections v. Anthony*,²⁶⁶ the supreme court upheld a superior court ruling that designated an inmate as the “prevailing party” in a litigation because he prevailed on the main issue and affirmed the superior court’s award of costs to the inmate.²⁶⁷ Anthony, an inmate at Spring Creek Correctional Center (“SCCC”), was involved in an altercation while working in the kitchen.²⁶⁸ Anthony claimed before the SCCC disciplinary committee that he did not strike the other inmate who was involved in the incident and that security camera footage and eyewitness testimony would

²⁵⁵ *Id.* at 622–27.

²⁵⁶ 227 P.3d 457 (Alaska 2010).

²⁵⁷ *Id.* at 460.

²⁵⁸ *Id.* at 459.

²⁵⁹ *Id.*

²⁶⁰ *Id.* at 460.

²⁶¹ *Id.* at 459.

²⁶² *Id.*

²⁶³ *Id.* at 459–60.

²⁶⁴ *Id.* at 460.

²⁶⁵ *Id.* at 459.

²⁶⁶ 229 P.3d 164 (Alaska 2010).

²⁶⁷ *Id.* at 167–68.

²⁶⁸ *Id.* at 165.

confirm his story.²⁶⁹ However, the committee did not review the footage or hear any witness testimony and convicted Anthony for “mutual combat.”²⁷⁰ Anthony appealed his conviction to the superior court and argued that he was convicted of a more severe charge than the one of which he was actually guilty.²⁷¹ The court reduced his conviction to “using abusive or obscene language” and declared him to be the prevailing party in addition to awarding him costs of \$411.44 on his motion for the same.²⁷² The State appealed his designation as the prevailing party and the award of costs and argued that Anthony did not prevail on the main issue because he was still guilty of violating correctional rules.²⁷³ The supreme court affirmed the superior court’s holding that a prevailing party is the party that identifies and prevails on the main issue of the litigation.²⁷⁴

Weimer v. Continental Car & Truck, LLC

In *Weimer v. Continental Car & Truck, LLC*,²⁷⁵ the supreme court held that the statute of limitations of Alaska’s Unfair Trade Practices and Consumer Protection Act (UTPA) begins to run when the plaintiff discovers, or reasonably should have discovered, that the conduct in question caused a loss.²⁷⁶ Weimer brought a class action suit against an automobile dealership more than two years after purchasing his car, alleging that the dealership charged him a last minute preparation fee in violation of UTPA.²⁷⁷ The UTPA statute of limitation provides that “[a] person may not commence an action under this section more than two years after the person discovers or reasonably should have discovered that the loss resulted from an act or practice declared unlawful by [UTPA].²⁷⁸ Although Weimer did not know that the dealership’s act was unlawful until after more than two years,²⁷⁹ the supreme court held that the language of the statute made clear that the limitations period begins to run when the plaintiff discovers, or reasonably should have discovered, that the conduct in question caused a loss; the supreme court rejected Weimer’s assertion that the statute of limitations begins to toll when a plaintiff learns that the conduct was illegal.²⁸⁰ Affirming the superior court, the supreme court held that the statute of limitations of Alaska’s Unfair Trade Practices and Consumer Protection Act (UTPA) begins to run when the plaintiff discovers, or reasonably should have discovered, that the conduct in question caused a loss.²⁸¹

²⁶⁹ *Id.*

²⁷⁰ *Id.*

²⁷¹ *Id.* at 166.

²⁷² *Id.*

²⁷³ *Id.* at 166–67.

²⁷⁴ *Id.*

²⁷⁵ 237 P.3d 610 (Alaska 2010).

²⁷⁶ *Id.* at 614.

²⁷⁷ *Id.* at 612.

²⁷⁸ ALASKA STAT. § 45.50.471(f) (2010).

²⁷⁹ 237 P.3d at 611.

²⁸⁰ *Id.* at 614.

²⁸¹ *Id.* at 614.

CONSTITUTIONAL LAW

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United States Court of Appeals for the Ninth Circuit

Kirk v. Carpeneti

In *Kirk v. Carpeneti*,²⁸² the Ninth Circuit held that the nomination of state judges by a judicial council that is not popularly elected does not violate the Equal Protection Clause of the U.S. Constitution.²⁸³ In Alaska, judges are nominated by a council that consists of the chief justice of the state supreme court, three lay members, and three attorney members elected by the Board of Governors of the Alaska Bar Association.²⁸⁴ The plaintiffs alleged that the nomination of judges by a non-elected body violates the Equal Protection Clause.²⁸⁵ The court reasoned that the Alaska Bar Association is a “limited purpose entity” since it has no power to impose taxes or to enact laws,²⁸⁶ so its elections are not governed by the Equal Protection principle that citizens must be able to participate in elections on equal footing.²⁸⁷ Thus, the Ninth Circuit held that the nomination of state judges by a judicial council that is not popularly elected does not violate the Equal Protection Clause of the U.S. Constitution.²⁸⁸

Alaska Supreme Court

Croft v. Parnell

In *Croft v. Parnell*,²⁸⁹ the supreme court held that a ballot initiative that proposes a new government program and a new tax violates article II, section 13 of the Alaska Constitution when the only connection between the program and the tax is the “soft dedication” of the tax to fund the program.²⁹⁰ The Lieutenant Governor denied certification to a ballot initiative proposing: (1) a program that would provide public funding to state office candidates and (2) a tax on oil that the legislature “may appropriate” for the campaign finance program.²⁹¹ The initiatives’ sponsors sued, and the superior court granted summary judgment to The Lieutenant Governor.²⁹² On appeal, the sponsors argued that the initiative did not violate the Alaska Constitution’s single-subject rule because the tax was calibrated to collect the amount of revenue necessary to fund the campaign finance program and because there was a “soft dedication” of the tax to the program.²⁹³ The supreme court reasoned that because article IX, section 7 of the Alaska Constitution prohibits the binding dedication of state revenues for certain programs, a

²⁸² 623 F.3d 889 (9th Cir. 2010).

²⁸³ *Id.* at 896.

²⁸⁴ *Id.* at 891.

²⁸⁵ *Id.*

²⁸⁶ *Id.* at 896–98.

²⁸⁷ *See id.* at 896.

²⁸⁸ *Id.*

²⁸⁹ 236 P.3d 369 (Alaska 2010).

²⁹⁰ *Id.* at 370–74.

²⁹¹ *Id.* at 370–71.

²⁹² *Id.* at 371.

²⁹³ *Id.* at 371–72.

“soft dedication” of funds is not enough to unite two provisions of an initiative into a single subject.²⁹⁴ Because there was no single subject embracing both the campaign finance program and the oil tax, the certification was correctly denied.²⁹⁵ Affirming the lower court, the supreme court held that a ballot initiative that proposes a new government program and a new tax violates article II, section 13 of the Alaska Constitution when the only connection between the program and the tax is the “soft dedication” of the tax to fund the program.²⁹⁶

Kohlhaas v. State, Office of the Lieutenant Governor

In *Kohlhaas v. State, Office of the Lieutenant Governor*,²⁹⁷ the supreme court held that a ballot initiative may be denied if it either seeks secession from the Union or a change to the Alaska Constitution to allow secession.²⁹⁸ Kohlhaas proposed an initiative seeking a statewide vote on whether Alaska should secede from the United States and the lieutenant governor refused to certify it.²⁹⁹ Kohlhaas challenged the decision, and the superior court held that the refusal was proper because secession is an unconstitutional end.³⁰⁰ Kohlhaas drafted a second initiative calling for a statewide vote on whether the Alaska Constitution should be changed to allow secession.³⁰¹ The lieutenant governor again refused to certify the initiative and the superior court affirmed the decision.³⁰² Kohlhaas appealed and the supreme court affirmed the superior court’s decision on two grounds.³⁰³ First, the state may deny a proposed initiative seeking unconstitutional ends because Alaska is committed to an “indestructible Union” and to upholding the United States Constitution.³⁰⁴ Because secession was at the core of Kohlhaas’s second initiative, it too was unconstitutional and an “improper subject for the initiative process.”³⁰⁵ Affirming the lower court, the supreme court held that a ballot initiative may be denied if it either seeks secession or a change to the Alaska Constitution to allow secession.³⁰⁶

West v. State, Board of Game

In *West v. State, Board of Game*,³⁰⁷ the supreme court held that the “sustained yield clause” of the Alaska Constitution and the “intensive game management statute” require the Board of Game (Board) to apply principles of sustained yield when managing predator species.³⁰⁸ West filed suit to challenge the Board’s 2006 predator control plans.³⁰⁹ The supreme court first held that, based on the history and plain language of the

²⁹⁴ *Id.* at 373–74.

²⁹⁵ *Id.* at 374.

²⁹⁶ *Id.* at 370–74.

²⁹⁷ 223 P.3d 105 (Alaska 2010).

²⁹⁸ *Id.* at 113.

²⁹⁹ *Id.* at 106.

³⁰⁰ *Id.*

³⁰¹ *Id.*

³⁰² *Id.*

³⁰³ *Id.* at 113.

³⁰⁴ *Id.* at 110, 112.

³⁰⁵ *Id.* at 110–11.

³⁰⁶ *Id.* at 113.

³⁰⁷ No. 6497, 2010 Alas. LEXIS 80 (Alaska Aug. 6, 2010).

³⁰⁸ *Id.* at *2.

³⁰⁹ *Id.* at *8.

sustained yield clause, the clause applies to both predator and prey species; however, management preference to prey populations over predator populations is not unconstitutional.³¹⁰ Next, the court held that, based upon the text of the intensive game management statute and the preference for statutory construction consistent with constitutional principles, the sustained yield principle in the intensive management statute applies to predator species.³¹¹ However, because the Board's 2006 predator control plans include safeguards to ensure that predator populations do not fall below certain levels, West did not demonstrate that the plans fail to comply with constitutional or statutory sustainable yield principles.³¹² Affirming the lower court, the supreme court held that the "sustained yield clause" of the Alaska Constitution and the "intensive game management statute" require the Board to apply principles of sustained yield when managing predator species.³¹³

Alaska Court of Appeals

Vann v. State

In *Vann v. State*,³¹⁴ the court of appeals held that a lab technician testifying about a genetic test performed in part by another technician does not violate the confrontation clause of the Sixth Amendment of the United States Constitution even though the other employee did not testify.³¹⁵ The state charged Vann with kidnapping and sexual assault.³¹⁶ Lab technician Duda testified for the state about the results of comparing DNA samples from the victim and defendant against five DNA samples from items at the crime scene.³¹⁷ Duda tested three of the five samples, an associate, Cohen, tested two of the samples, and Duda interpreted and verified Cohen's results.³¹⁸ Vann objected to Duda's testimony as a violation of his right to confront Cohen as a witness against him.³¹⁹ The trial judge overruled Vann's objection and held that Duda's testimony needed only to fulfill the requirements for an expert testifying about another's work under Rule of Evidence 703.³²⁰ In determining the extent that the confrontation clause limited an expert testifying about another person's work, the court of appeals decided that an expert cannot act as a mere conduit for another's opinion but can offer an independent analysis based in part on another person's work.³²¹ The court of appeals held that because Duda examined Cohen's results and made an independent verification of Cohen's conclusions, Duda's testimony about all five DNA samples did not violate Vann's right to confront witnesses against him.³²² Affirming the lower court, the court of appeals held that a lab technician testifying about a genetic test performed in part by another technician does not violate the

³¹⁰ *Id.* at *15–22.

³¹¹ *Id.* at *25.

³¹² *Id.* at *2, *29–35.

³¹³ *Id.* at *2.

³¹⁴ 229 P.3d 197 (Alaska Ct. App. 2010).

³¹⁵ *Id.* at 199–200.

³¹⁶ *Id.* at 199.

³¹⁷ *Id.*

³¹⁸ *Id.*

³¹⁹ *Id.* at 202.

³²⁰ *Id.*

³²¹ *Id.* at 205–06.

³²² *Id.* at 207–08.

confrontation clause of the Sixth Amendment of the United States Constitution even though the other employee did not testify.³²³

CONTRACT LAW

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Alaska Supreme Court

Commercial Recycling Center, Ltd. v. Hobbs Industries, Inc.

In *Commercial Recycling Center, Ltd. v. Hobbs Industries, Inc.*,³²⁴ the supreme court held that a party to a contract cannot unilaterally rescind the agreement and a court will not equitably rescind the agreement if the only remaining obligation is monetary.³²⁵ Austin and Lori Hobbs contracted with Tiplady and Cucullu to buy their Hobbs Industries, Inc ("HIAK") shares.³²⁶ After the Hobbs failed to perform on their payment obligations, Tiplady and Cucullu sent a letter purporting to rescind the contract and sold their shares to Commercial Recycling Center ("CRC").³²⁷ CRC sought a court order to establish its ownership interest in HIAK.³²⁸ The supreme court held that the letter attempting to rescind the agreement was invalid because one cannot rescind a contract unilaterally.³²⁹ It remanded for consideration whether there exists an equitable rescission based on a breach of fiduciary duty.³³⁰ Equity demands a rescission when one party fails to perform but will not grant the rescission if the only remaining performance is a monetary payment, because the preferred outcome is a remedy for a breach.³³¹ An equitable rescission is available if a fiduciary induces a contract through unfair persuasion.³³² The supreme court affirmed in part and reversed in part, holding that a party to a contract cannot unilaterally rescind the agreement and a court will not equitably rescind the agreement if the only remaining obligation is monetary.³³³

Wenzell v. Ingrim

In *Wenzell v. Ingrim*,³³⁴ the supreme court held that while working as a dentist at a federal nonprofit agency is “the practice of dentistry,” but it is a disputed question of fact whether that practice violated a covenant not to compete.³³⁵ Ingrim sold his dental practice to Wenzell and signed a covenant not to compete.³³⁶ The covenant stated that Ingrim could not “engage in the practice of dentistry” within a fifteen mile radius for two

³²³ *Id.* at 199–200.

³²⁴ 228 P.3d 93 (Alaska 2010).

³²⁵ *Id.* at 96, 99–100.

³²⁶ *Id.*

³²⁷ *Id.* at 97.

³²⁸ *Id.*

³²⁹ *Id.* at 99.

³³⁰ *Id.* at 100–01.

³³¹ *Id.* at 100.

³³² *Id.* at 101.

³³³ *Id.* at 96, 99–100.

³³⁴ 228 P.3d 103 (Alaska 2010).

³³⁵ *Id.* at 105.

³³⁶ *Id.*

years.³³⁷ Ingrim then began working as a dentist at the Alaska Native Medical Center (ANMC), a federally-funded clinic providing free services to Alaska Natives, which was located within fifteen miles of his former practice.³³⁸ Wenzell sued, claiming that Ingrim had violated the covenant.³³⁹ The superior court held that Ingrim’s new position at ANMC did not constitute the “practice of dentistry” based on Alaska Statute 08.36.350(a).³⁴⁰ On appeal, the supreme court re-examined the covenant terms and held that the purpose of the contract was to prevent Ingrim from competing with Wenzell, not to bar Ingrim from the practice of all dentistry.³⁴¹ The supreme court also noted that the superior court had misinterpreted AS 08.36.350, because Ingrim’s work constituted the “practice of dentistry.”³⁴² But the supreme court stated that when a party attempts to enforce a covenant not to compete against a person employed by a federally-funded non-profit organization offering low-cost services, competition is not presumed; it must be proven.³⁴³ The supreme court then remanded to determine whether Ingrim’s practice actually competed with Wenzell’s.³⁴⁴ The supreme court held that a dentist working for the Alaska Native Service is “practicing dentistry,” and that it is a question for the fact-finder whether this conduct violated a covenant not to compete.³⁴⁵

CRIMINAL LAW

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United States Court of Appeals for the Ninth Circuit

United States v. Hunter

In *U.S. v. Hunter*,³⁴⁶ the Ninth Circuit held that ordering people convicted of mail fraud to repay wages earned through employment obtained fraudulently was an appropriate interpretation of the Mandatory Victims Restitution Act.³⁴⁷ Hunter stole the identity of a nurse in order to obtain a nursing license, which she used to obtain employment as a school nurse and with the Department of Labor where she was paid \$12,558 and \$5,457 respectively.³⁴⁸ Hunter was arrested, sentenced to ninety-six months incarceration, and ordered to pay back the \$12,558 and \$5,457, which she appealed.³⁴⁹ The Ninth Circuit affirmed the decision, holding that the Mandatory Victims Restitution Act “requires courts to order restitution to victims of certain criminal offenses, such as mail fraud.”³⁵⁰ Loss is determined by comparing what would have happened if the

³³⁷ *Id.*

³³⁸ *Id.* at 105–06.

³³⁹ *Id.* at 106.

³⁴⁰ *Id.*

³⁴¹ *Id.* at 107–08.

³⁴² *Id.* at 108–09.

³⁴³ *Id.* at 109.

³⁴⁴ *Id.* at 109–12.

³⁴⁵ *Id.* at 105.

³⁴⁶ 618 F.3d 1062 (9th Cir. 2010).

³⁴⁷ *Id.* at 1064.

³⁴⁸ *Id.* at 1063–64.

³⁴⁹ *Id.* at 1064.

³⁵⁰ *Id.*

criminal had acted lawfully and what actually happened.³⁵¹ The employers paid for the services of a registered nurse which they never received and loss requires no reduction from all wages paid for the value of work Hunter performed.³⁵² Affirming the lower court, the Ninth Circuit held that ordering people convicted of mail fraud to repay wages earned through employment obtained fraudulently was an appropriate interpretation of the Mandatory Victims Restitution Act.³⁵³

United States v. Lozano

In *United States v. Lozano*,³⁵⁴ the Ninth Circuit held that: (1) evidence found in probation and consensual searches was admissible as evidence of prior bad acts; and (2) transporting a package from Barrow to Anchorage and detention of the same package for twenty-two hours was reasonable.³⁵⁵ Lozano appealed his conviction of attempted possession of marijuana with intent to distribute after a package sent to his P.O. box in Barrow was found to contain eleven pounds of marijuana.³⁵⁶ The Ninth Circuit held that cash and a photograph of Lozano at a marijuana “grow” were admissible under Rule of Evidence 404(b) because evidence of Lozano’s prior possession or sale of drugs was material to the charges and not too remote in time.³⁵⁷ The Ninth Circuit also held that the decision to detain the package was reasonable because Lozano had earlier asked whether mail could be searched for drugs and the package listed a fictitious sender and addressee.³⁵⁸ Further, the delay was reasonable because it was less than one day and part of the delay came from the remoteness of Barrow.³⁵⁹ Affirming the lower court, the Ninth Circuit held that: (1) evidence found in probation and consensual searches was admissible as evidence of prior bad acts; and (2) transporting a package from Barrow to Anchorage and detention of the same package for twenty-two hours was reasonable.³⁶⁰

United States District Court for the District of Alaska

Stavenjord v. Schmidt

In *Stavenjord v. Schmidt*,³⁶¹ a magistrate judge recommended the denial of a prisoner’s habeas petition because the state court of appeals’ rejection of the prisoner’s ineffective assistance of counsel claim was not contrary to federal law and was not an unreasonable application of federal law.³⁶² Stavenjord was convicted of first-degree murder.³⁶³ On appeal, his lawyers did not argue that that the police lacked probable cause to substantiate search warrants of Stavenjord’s home.³⁶⁴ After reviewing the

³⁵¹ *Id.*

³⁵² *Id.* at 1064–65.

³⁵³ *Id.* at 1064.

³⁵⁴ 623 F.3d 1055 (9th Cir. 2010).

³⁵⁵ *Id.* at 1059–61.

³⁵⁶ *Id.* at 1058–59.

³⁵⁷ *Id.* at 1059–60.

³⁵⁸ *Id.* at 1060.

³⁵⁹ *Id.* at 1061.

³⁶⁰ *Id.* at 1059–61.

³⁶¹ 2010 U.S. Dist. LEXIS 71028 (D. Alaska July 14, 2010).

³⁶² *Id.* at *7–*9.

³⁶³ *Id.* at *2.

³⁶⁴ *Id.* at *3.

record, the magistrate judge determined that Stavenjord's appellate lawyers made a strategic choice in their argument selection.³⁶⁵ The magistrate judge noted that attorneys have the obligation to winnow out less meritorious claims on appeal.³⁶⁶ Because Stavenjord did not identify acts or omissions by his lawyers that were outside the range of competent legal assistance, the state court of appeals did not err when denying his claim.³⁶⁷ Thus, the magistrate judge recommended the denial of a prisoner's habeas petition because the state court of appeals' rejection of the prisoner's ineffective assistance of counsel claim was not contrary to federal law and was not an unreasonable application of federal law.³⁶⁸

U.S. v. Mujahid

In *U.S. v. Mujahid*,³⁶⁹ the district court held that the Anchorage Division's jury selection process did not violate constitutional or statutory law even though African-Americans were underrepresented in jury pools.³⁷⁰ Mujahid, an African-American, moved for an alternative jury selection process because African-Americans constitute 5.2% of the Anchorage Division's population but only 2.06% of master jury wheels in the district.³⁷¹ He argued that the 60% comparative disparity violated constitutional and statutory fair cross-section requirements, and that the jury wheels could be more representative by using a different selection process.³⁷² The court reasoned that district courts must look at absolute disparities, not comparative disparities, and that an absolute disparity of 3.14% is not sufficient to change the jury selection process.³⁷³ In addition, reliance on voter lists is facially neutral and not susceptible to abuse.³⁷⁴ The district court held that the Anchorage Division's jury selection process did not violate constitutional or statutory law even though African-Americans were underrepresented in jury pools.³⁷⁵

Alaska Supreme Court

Diaz v. State

In *Diaz v. State*,³⁷⁶ the supreme court held that an inmate in electronic monitoring is still in custody and therefore complaints relating to custody and interrogation by Department of Correction (DOC) officers should be examined under the Fourteenth Amendment, and not the Fourth Amendment.³⁷⁷ While serving in an electronic monitoring program, Diaz was accused of misconduct, taken into custody for questioning, and eventually returned to jail.³⁷⁸ Diaz filed a § 1983 claim against the DOC

³⁶⁵ *Id.* at *7.

³⁶⁶ *Id.* at *8–*9.

³⁶⁷ *Id.* at *7–*8.

³⁶⁸ *Id.* at *7–*9.

³⁶⁹ No. 3:10-cr-00091 JWS, 2010 U.S. Dist. LEXIS 128738 (D. Alaska Dec. 3, 2010).

³⁷⁰ *Id.* at *4.

³⁷¹ *Id.* at *2.

³⁷² *Id.* at *2, *3.

³⁷³ *Id.* at *2.

³⁷⁴ *Id.* at *3.

³⁷⁵ *Id.* at *4.

³⁷⁶ 239 P.3d 723 (Alaska 2010).

³⁷⁷ *Id.* at 724–32.

³⁷⁸ *Id.* at 724–26.

for violating her rights under the Fourth and Fourteenth Amendments during the questioning.³⁷⁹ Because inmates in electronic monitoring are still considered in custody, Diaz was in DOC custody when the officers picked her up.³⁸⁰ Accordingly, her complaints are not evaluated under the Fourth Amendment, only under the Fourteenth Amendment.³⁸¹ Affirming the lower court, the supreme court held that an inmate in electronic monitoring is still in custody and therefore complaints relating to custody and interrogation by DOC officers should be examined under the Fourteenth Amendment, and not the Fourth Amendment.³⁸²

Greenwood v. State

In *Greenwood v. State*,³⁸³ the supreme court held that a defendant arrested for drunk driving is entitled to a jury instruction on the necessity defense as long as there is some evidence that: (1) the defendant sought to prevent significant evil; (2) the defendant reasonably believed there was no adequate alternative; (3) given the facts perceived by the defendant, the harm avoided was not disproportionate to the harm caused; and (4) the defendant stopped driving as soon as she reasonably believed the necessity ended.³⁸⁴ After drinking with Way, Greenwood overheard Way mumble that he was going to burn down Greenwood's camper and his parents' home and leave no witnesses.³⁸⁵ Greenwood witnessed Way throw candles inside her camper, hit her dog, and start driving around on his four wheeler.³⁸⁶ In response, Greenwood called the police, drove to Way's parents' house, honked her horn in warning, and then drove to the main road to meet the police.³⁸⁷ The trial court refused to instruct the jury on the necessity defense, and Greenwood was convicted of drunk driving.³⁸⁸ The supreme court reversed, reasoning that there was some evidence showing that until Greenwood stopped to wait for the police, she saw driving as the only way to prevent arson and physical harm to herself and Way's parents.³⁸⁹ The court further reasoned that because Greenwood took precautions, there was some evidence that Greenwood's drunk driving was relatively less serious than the harms she sought to prevent.³⁹⁰ The supreme court held that a defendant arrested for drunk driving is entitled to a jury instruction on the necessity defense as long as there is some evidence that: (1) the defendant sought to prevent significant evil; (2) the defendant reasonably believed there was no adequate alternative; (3) given the facts perceived by the defendant, the harm avoided was not disproportionate to the harm caused; and (4) the defendant stopped driving as soon as she reasonably believed the necessity ended.³⁹¹

³⁷⁹ *Id.* at 726–27.

³⁸⁰ *Id.* at 727–28.

³⁸¹ *Id.* at 729.

³⁸² *Id.* at 724–32.

³⁸³ 237 P.3d 1018 (Alaska 2010).

³⁸⁴ *Id.* at 1021–27.

³⁸⁵ *Id.* at 1020.

³⁸⁶ *Id.* at 1020–21.

³⁸⁷ *Id.* at 1021.

³⁸⁸ *Id.*

³⁸⁹ *Id.* at 1023–27.

³⁹⁰ *Id.* at 1027.

³⁹¹ *Id.* at 1021–27.

Kalmakoff v. State

In *Kalmakoff v. State*,³⁹² the supreme court held that the trial court must determine certain issues of fact before considering whether an individual was in custody for purposes of determining the legality of subsequent statements.³⁹³ Kalmakoff gave statements to Alaska State Troopers during a series of four interviews.³⁹⁴ The trial court admitted ostensibly confessional statements made during two of these interviews and portions of a third interview.³⁹⁵ Kalmakoff appealed the decision and argued that the interviews were inadmissible because they were tainted by portions of the interviews which were found inadmissible.³⁹⁶ To determine whether subsequent interviews have “purge[d] the taint” of prior inadmissible interviews, courts must consider several factors related to the defendant’s condition in between the interviews.³⁹⁷ The supreme court held that earlier, inadmissible inculpatory statements may have played a role in Kalmakoff’s participation in the interviews, which were found to be admissible.³⁹⁸ Therefore, the court remanded, holding that the trial court must determine certain issues of fact before considering whether an individual was in custody for purposes of determining the legality of subsequent statements.³⁹⁹

Marshall v. State

In *Marshall v. State*,⁴⁰⁰ the supreme court held that the right against self-incrimination requires a trial court to hold a hearing on the affirmative defense of entrapment even when the defendant fails to submit evidence supporting each element of the defense.⁴⁰¹ Marshall was convicted of selling OxyContin pills to an undercover police officer.⁴⁰² The superior court denied his motion for a hearing on an entrapment defense because he failed to allege specific evidence that supported his claim that the pills did not belong to him.⁴⁰³ The supreme court held that the trial court was required to hold a hearing on the affirmative defense of entrapment in this situation because requiring the defendant to submit an affidavit alleging specific evidence is contrary to Alaska’s right against self-incrimination.⁴⁰⁴ In such a hearing, the defendant may establish his or her defense by relying on methods outside of his or her own testimony.⁴⁰⁵ The supreme court remanded the case to the superior court, holding that the right against self-incrimination requires a trial court to hold a hearing on the affirmative defense of entrapment even when the defendant fails to submit evidence supporting each element of the defense.⁴⁰⁶

³⁹² 232 P.3d 1223 (Alaska 2010).

³⁹³ *Id.* at 1225.

³⁹⁴ *Id.* at 1223.

³⁹⁵ *Id.*

³⁹⁶ *Id.* at 1224.

³⁹⁷ *Id.*

³⁹⁸ *Id.* at 1225.

³⁹⁹ *Id.*

⁴⁰⁰ 238 P.3d 590 (Alaska 2010).

⁴⁰¹ *Id.* at 590.

⁴⁰² *Id.* at 591.

⁴⁰³ *Id.*

⁴⁰⁴ *Id.* at 593–94.

⁴⁰⁵ *Id.* at 593.

⁴⁰⁶ *Id.* at 593–94.

Alaska Court of Appeals

Andrew v. State

In *Andrew v. State*,⁴⁰⁷ the court of appeals held that: (1) pursuant to section 11.16.100 of the Alaska Statutes, there is no distinction between proving a defendant's culpability with evidence related to her own personal conduct and proving a defendant's culpability with evidence related to her vicarious responsibility for the conduct of an accomplice; and (2) juries are not required to specify any such distinction in their verdict.⁴⁰⁸ Andrew and her boyfriend, Haws, burglarized a home, stole several items, and concealed the items among several other stolen items from earlier burglaries.⁴⁰⁹ Andrew appeared to have played a lesser role in the burglary than Haws.⁴¹⁰ Andrew was convicted of burglary of a residence and theft.⁴¹¹ Andrew argued on appeal that (1) the evidence may have supported a conviction based on her vicarious liability but did not support a conviction based on her personal conduct; and (2) the jury's failure to specify the theory under which she was convicted renders the verdicts invalid.⁴¹² The court of appeals disagreed, noting that it is immaterial whether the defendant is convicted for her own acts or those of an accomplice for whom she is legally responsible.⁴¹³ Additionally, so long as only one criminal act is alleged, the jury does not have to unanimously articulate one theory for conviction if multiple theories are sufficient to prove the defendant's guilt.⁴¹⁴ Affirming the superior court, the court of appeals held that: (1) pursuant to section 11.16.100 of the Alaska Statutes, there is no distinction between proving a defendant's culpability with evidence related to her own personal conduct and proving a defendant's culpability with evidence related to her vicarious responsibility for the conduct of an accomplice; and (2) juries are not required to specify any such distinction in their verdict.⁴¹⁵

B.F.L. v. State

In *B.F.L. v. State*,⁴¹⁶ the court of appeals held that when the superior court determines that a minor in a juvenile delinquency proceeding needs ongoing government supervision, the superior court must impose the least restrictive alternative that will satisfy the minor's rehabilitative needs and protect the public.⁴¹⁷ B.F.L. had a three year history of juvenile delinquency that included failures on probation and in non-detention placements.⁴¹⁸ Following a hearing in 2009, the superior court imposed the most restrictive of the three dispositions in Alaska Statute 47.12.120(b).⁴¹⁹ On appeal, B.F.L.

⁴⁰⁷ 237 P.3d 1027 (Alaska Ct. App. 2010).

⁴⁰⁸ *Id.* at 1038–40.

⁴⁰⁹ *Id.* at 1029–32.

⁴¹⁰ *Id.*

⁴¹¹ *Id.* at 1032.

⁴¹² *Id.* at 1038.

⁴¹³ *Id.* at 1034–37.

⁴¹⁴ *Id.* at 1040–41.

⁴¹⁵ *Id.* at 1038–40.

⁴¹⁶ 233 P.3d 1118 (Alaska Ct. App. 2010).

⁴¹⁷ *Id.* at 1119.

⁴¹⁸ *Id.* at 1118–21.

⁴¹⁹ *Id.* at 1119, 1122.

argued that the superior court failed to adequately consider the two less-restrictive dispositions, both of which would have kept B.F.L. out of a detention facility.⁴²⁰ The court of appeals first held that its prior holdings—which required courts to refrain from removing children from their homes “in all but extreme cases”—had been superseded by Delinquency Rule 11(e) and Alaska Statute 47.12.140(2),⁴²¹ which require courts to impose the least restrictive alternative given the needs of the minor and the need to protect the public.⁴²² The court then held that the record supported the conclusion that a detention disposition was the least restrictive alternative for B.F.L.⁴²³ Affirming the lower court, the court of appeals held that in a juvenile delinquency proceeding, the superior court must choose the least restrictive disposition that will satisfy the two goals of rehabilitating the minor and protecting the public.⁴²⁴

Chase v. State

In *Chase v. State*,⁴²⁵ the court of appeals: (1) held that Alaska’s mandatory seatbelt law was supported by a sufficient public interest; and (2) rejected the defendant’s claim that it was an unconstitutional means of providing pretext for police stops.⁴²⁶ Chase was pulled over in Fairbanks for driving while not wearing a seatbelt.⁴²⁷ During the traffic stop, the officer discovered that Chase’s drivers’ license had been revoked.⁴²⁸ He was arrested and convicted on several misdemeanors.⁴²⁹ Chase claimed that the seatbelt law facially violates Article I, Section I of the Alaska Constitution, which guarantees liberty and autonomy and argued that there was no public benefit from the law.⁴³⁰ The court of appeals cited legislative history that the Alaska law would reduce deaths and injuries from car accidents.⁴³¹ Finally, the court of appeals held the seatbelt law was not merely a pretext for officers to stop citizens looking for other crimes.⁴³² The court of appeals: (1) held that Alaska’s mandatory seatbelt law was supported by a sufficient public interest; and (2) rejected the defendant’s claim that it was an unconstitutional means of providing pretext for police stops.⁴³³

Clark v. State

In *Clark v. State*,⁴³⁴ the court of appeals held that police properly seized and opened property left in a stolen vehicle based on the vehicle owner’s consent to the search and the property owner’s reduced privacy interest in the item left in the car.⁴³⁵

⁴²⁰ *Id.* at 1118.

⁴²¹ *Id.* at 1124.

⁴²² *Id.* at 1119.

⁴²³ *Id.* at 1125.

⁴²⁴ *Id.* at 1124–25.

⁴²⁵ 243 P.3d 1014 (Alaska Ct. App. 2010).

⁴²⁶ *Id.* at 1019–20.

⁴²⁷ *Id.* at 1015.

⁴²⁸ *Id.*

⁴²⁹ *Id.*

⁴³⁰ *Id.* at 1016.

⁴³¹ *Id.*

⁴³² *Id.* at 1019–20.

⁴³³ *Id.*

⁴³⁴ 231 P.3d 366 (Alaska Ct. App. 2010).

⁴³⁵ *Id.* at 366.

Officers detained Clark after she got into the passenger seat of a vehicle that had been reported stolen.⁴³⁶ With the permission of the vehicle's owner, Roatch, the officers searched the car and found a cigarette case containing packets of cocaine, which Clark later admitted belonged to her.⁴³⁷ Clark argued that the evidence regarding the cocaine and her statements about it should be suppressed because the officers did not have a warrant to search the car.⁴³⁸ However, the court determined that the search was appropriate because Roatch consented to it, and officers are empowered to conduct warrantless searches, including opening contents related to the search, if they have the general consent of the person who has control of the place to be searched.⁴³⁹ The court also noted that Roatch could agree to the search of the property Clark left in the car because someone who leaves property in a stolen vehicle has no expectation of privacy with respect to that property.⁴⁴⁰ In response to Clark's argument that she did not know the car was stolen, the court explained that the salient issue was actually whether the officers on the scene could have reasonably believed that the car was stolen and were therefore justified in concluding that Clark had a reduced privacy interest in any property she left in the vehicle.⁴⁴¹ Since the officers reasonably concluded that the car was stolen, the court of appeals held that it was proper to determine that the owner of any property left in the car had a reduced expectation of privacy and that the property was subject to search with the consent of the vehicle's owner.⁴⁴²

Davis v. State

In *Davis v. State*,⁴⁴³ the court of appeals held that the State was entitled to enforce laws that were adopted from federal regulations, and that a tractor-trailer was considered a commercial motor vehicle, even if it was not used exclusively for commercial purposes.⁴⁴⁴ During a routine commercial vehicle inspection, Davis's tractor-trailer was ordered "out of service" for noncompliance with state rules for commercial vehicles.⁴⁴⁵ Davis was stopped four hours later and cited for operating a commercial vehicle that had been placed "out of service."⁴⁴⁶ A year later, he was cited for driving a commercial vehicle without the required medical examiner's certificate.⁴⁴⁷ Though Davis asserted that the State lacked the authority to enforce federal law regulating commercial vehicles, the court disagreed because the federal regulations had been adopted as state law; therefore, it was state law that Davis violated.⁴⁴⁸ Davis also disputed that he was driving a commercial motor vehicle because he was using his truck for non-commercial purposes.⁴⁴⁹ The court rejected this argument because the only tractor-trailers that are

⁴³⁶ *Id.* at 366–67.

⁴³⁷ *Id.* at 367.

⁴³⁸ *Id.*

⁴³⁹ *Id.*

⁴⁴⁰ *Id.* at 368.

⁴⁴¹ *Id.*

⁴⁴² *Id.*

⁴⁴³ 235 P.3d 1017 (Alaska Ct. App. 2010).

⁴⁴⁴ *Id.* at 1019–22.

⁴⁴⁵ *Id.* at 1019.

⁴⁴⁶ *Id.*

⁴⁴⁷ *Id.* The two claims are consolidated on appeal. *Id.*

⁴⁴⁸ *Id.* at 1019–20.

⁴⁴⁹ *Id.* at 1020.

excluded from the scope of these commercial vehicle regulations laws are those that are used exclusively for non-commercial purposes.⁴⁵⁰ Davis could not show that his tractor-trailer was used exclusively for non-commercial purposes and thus fell under the exception.⁴⁵¹ Affirming the lower courts, the court of appeals held that the State was entitled to enforce state laws adopted from federal regulations, and that a tractor-trailer was considered a commercial motor vehicle, even if it was sometimes used for non-commercial purposes.⁴⁵²

Fallon v. State

In *Fallon v. State*,⁴⁵³ the court of appeals held that a trooper's stop was a valid caretaker stop and the trooper was authorized to request the defendant's driver's license, and the defendant resisted arrest by force because his conduct went beyond non-submission.⁴⁵⁴ Fallon was arrested after a trooper saw his vehicle in a ditch.⁴⁵⁵ The trooper concluded Fallon had been drinking and arrested him for driving under the influence.⁴⁵⁶ During the arrest, Fallon pushed his body away from the car and became belligerent, so the trooper had to use pepper spray.⁴⁵⁷ Fallon was convicted of driving under the influence and resisting arrest.⁴⁵⁸ Fallon appealed, arguing that he was illegally seized when the trooper retained his driver's license for several minutes and that the court should have suppressed the evidence as a result.⁴⁵⁹ The court of appeals found the trooper's stop to be a valid community caretaker stop, allowing seizure without suspicion of criminal activity because Fallon's vehicle was in a ditch, where the driver might have needed help.⁴⁶⁰ Defining "force," the court concluded Fallon's behavior and continual struggle differed from mere non-submission.⁴⁶¹ The court of appeals affirmed the superior court's ruling, holding that a trooper's stop was a valid caretaker stop and the trooper was authorized to request the defendant's driver's license, and the defendant resisted arrest by force because his conduct went beyond non-submission.⁴⁶²

Felber v. State

In *Felber v. State*,⁴⁶³ the court of appeals held that a defendant who pleads guilty to multiple crimes and receives a composite sentence cannot successfully appeal the length of his sentence if the sentence is within the aggregated guideline ranges of crimes.⁴⁶⁴ Felber was a third-felony offender⁴⁶⁵ who pled guilty, *inter alia*, to second-

⁴⁵⁰ *Id.* at 1020–21.

⁴⁵¹ *Id.* at 1021–22.

⁴⁵² *Id.* at 1019–22.

⁴⁵³ 221 P.3d 1016 (Alaska Ct. App. 2010).

⁴⁵⁴ *Id.* at 1019–21.

⁴⁵⁵ *Id.* at 1017.

⁴⁵⁶ *Id.* at 1017–18.

⁴⁵⁷ *Id.* at 1018.

⁴⁵⁸ *Id.* at 1017.

⁴⁵⁹ *Id.*

⁴⁶⁰ *Id.* at 1018–19.

⁴⁶¹ *Id.* at 1020–21.

⁴⁶² *Id.* at 1019–21.

⁴⁶³ 243 P.3d 1007 (Alaska Ct. App. 2010).

⁴⁶⁴ *Id.* at 1009.

⁴⁶⁵ *Id.* at 1008.

degree murder, vehicle theft, and four counts of first-degree assault in exchange for a sentence of between fifty and eighty-five years.⁴⁶⁶ At the sentencing hearing, Felber asked the superior court judge to rescind the plea agreement because he felt the proposed sentence was too long for what he had done.⁴⁶⁷ The judge refused and sentenced Felber to sixty-six years in prison.⁴⁶⁸ On appeal, Felber argued that because a second-degree murder conviction would only result in a thirty-year sentence, the judge should have rescinded the plea agreement.⁴⁶⁹ When reviewing a composite sentence, however, the court of appeals looks at the potential aggregated sentences for all of the crimes to which the defendant pleaded guilty.⁴⁷⁰ The aggregated potential sentences for Felber's multiple crimes would have been 246 years.⁴⁷¹ Affirming the lower court, the court of appeals held that a defendant who pleads guilty to multiple crimes and receives a composite sentence cannot successfully appeal the length of his sentence if the sentence is within the aggregated guideline ranges of crimes.⁴⁷²

Forster v. State

In *Forster v. State*,⁴⁷³ the court of appeals held that one illegally obtained statement does not taint future legal interrogations where *Miranda* rights were waived; good-time credit or mandatory parole cannot be withheld without further findings.⁴⁷⁴ Forster shot and killed a uniformed police officer.⁴⁷⁵ Forster was interrogated five times in a five-day span, with four instances occurring after his first court appearance.⁴⁷⁶ The superior court suppressed the first and fifth interrogations due to *Miranda* and Sixth Amendment violations, respectively, but convicted Forster of murder based on the other interrogations and sentenced him to 99 years in prison.⁴⁷⁷ Forster appealed on grounds that the three other interrogations should have been suppressed due to violations of his rights.⁴⁷⁸ The State cross-appealed on grounds that the trial court erred in its sentencing.⁴⁷⁹ The court of appeals found that, while Forster's mental state did not permit him to competently waive his *Miranda* rights for the first interrogation, the intervening court appearance between the first and second interrogations sufficiently reduced his stress levels enough for him to knowingly waive his rights thereafter.⁴⁸⁰ Addressing the State's cross appeal, the court ruled that murder of a uniformed police officer engaged in official duties carries a 99-year mandatory sentence without the possibility of any parole or credit under Alaska law.⁴⁸¹ In Forster's case, the jury was not asked to find whether the

⁴⁶⁶ *Id.*

⁴⁶⁷ *Id.*

⁴⁶⁸ *Id.*

⁴⁶⁹ *Id.* at 1009.

⁴⁷⁰ *Id.*

⁴⁷¹ *Id.*

⁴⁷² *Id.*

⁴⁷³ 236 P.3d 1157 (Alaska Ct. App. 2010).

⁴⁷⁴ *Id.* at 1175.

⁴⁷⁵ *Id.* at 1160.

⁴⁷⁶ *Id.*

⁴⁷⁷ *Id.* at 1159–61.

⁴⁷⁸ *Id.*

⁴⁷⁹ *Id.*

⁴⁸⁰ *Id.* at 1165.

⁴⁸¹ *Id.* at 1169.

murdered officer was engaged in official duties, and the trial judge ruled that this did not permit the mandatory sentence; he instead imposed the maximum sentence within the normal first-degree murder range and left Forster eligible for good-time credit and both discretionary and mandatory parole.⁴⁸² Thus, the court of appeals held that one illegally obtained statement does not taint future legal interrogations where *Miranda* rights were waived; good-time credit or mandatory parole cannot be withheld without further findings.⁴⁸³

Lestenkof v. State

In *Lestenkof v. State*,⁴⁸⁴ the court of appeals affirmed a trial court's decision to move a trial to another location because the judge made a reasonable, diligent attempt to seat a jury where the alleged offense occurred.⁴⁸⁵ The trial judge encountered problems trying to seat a jury for Lestenkof's trial in Saint Paul and, after four days of jury selection, only 11 prospective jurors had not been excused.⁴⁸⁶ After examining several options, the trial judge determined that the only alternative was to change venue.⁴⁸⁷ The judge eventually transferred the trial to Dillingham.⁴⁸⁸ The court of appeals found that the trial judge made considerable efforts to empanel a jury before moving the trial and that any additional steps the judge could have taken to empanel a jury in Saint Paul were unreasonable.⁴⁸⁹ The court of appeals also found that the Dillingham jury was a fair cross section of the Saint Paul community because the Dillingham community has a similar composition to Saint Paul⁴⁹⁰ and there was no record of any cognizable group being underrepresented in Dillingham.⁴⁹¹ Therefore, the court of appeals affirmed a trial court's decision to move a trial to another location because it made a reasonable, diligent attempt to seat a jury where the alleged offense occurred.⁴⁹²

Proctor v. State

In *Proctor v. State*,⁴⁹³ the court of appeals held using evidence of behavior in prison to establish patterns does not violate a person's right to confrontation even though he would have to admit he had been incarcerated in order to cross-examine witnesses testifying about his time in prison.⁴⁹⁴ Proctor was arrested after a neighbor, who had witnessed him yelling and hitting a woman, called the police. In a jury trial, Proctor was convicted of second and third degree assault.⁴⁹⁵ On appeal, Proctor argued that the trial

⁴⁸² *Id.*

⁴⁸³ *Id.* at 1175.

⁴⁸⁴ 229 P.3d 182 (Alaska Ct. App. 2010).

⁴⁸⁵ *Id.* at 184.

⁴⁸⁶ *Id.* at 184–85.

⁴⁸⁷ *Id.*

⁴⁸⁸ *Id.*

⁴⁸⁹ *Id.* at 189.

⁴⁹⁰ *See id.* at 192 (“Dillingham is a rural and predominantly Native community in the same senate election district as Saint Paul”).

⁴⁹¹ *Id.* at 193.

⁴⁹² *Id.* at 184.

⁴⁹³ 236 P.3d 375 (Alaska Ct. App. 2010).

⁴⁹⁴ *Id.* at 376.

⁴⁹⁵ *Id.*

court improperly admitted evidence of his behavior in prison.⁴⁹⁶ The court noted that while “character evidence is generally inadmissible” because Proctor had claimed he was not the aggressor, the state could introduce such evidence to rebut his claim.⁴⁹⁷ The court of appeals affirmed the trial court’s decision to allow the state to introduce evidence of Proctor’s behavior while incarcerated because it was a community with which he habitually associated.⁴⁹⁸ Proctor argued that his right to confrontation was violated by the correctional officer’s testimony because he could not cross-examine him without revealing that he had previously been incarcerated.⁴⁹⁹ The court held that Proctor’s right had not been violated because his decision not to cross-examine the officer was a strategic move.⁵⁰⁰ Affirming the lower court, the court of appeals held using evidence of behavior in prison to establish patterns does not violate a person’s right to confrontation even though he would have to admit he had been incarcerated in order to cross-examine witnesses testifying about his time in prison.⁵⁰¹

Rogers v. State

In *Rogers v. State*,⁵⁰² the court of appeals held that a defendant in a felony prosecution can be convicted of an offense other than the one charged in the indictment as long as the grand jury’s findings include the essential elements of that offense.⁵⁰³ Rogers’s gun discharged in a bar, killing the victim.⁵⁰⁴ Rogers was indicted for first-degree murder.⁵⁰⁵ At trial, the prosecution alleged that Rogers intentionally fired the gun at the victim, while the defense argued that Rogers’s gun had accidentally fired.⁵⁰⁶ The jury convicted Rogers of manslaughter.⁵⁰⁷ Rogers appealed, arguing that there was a “fatal variance” between the trial jury’s manslaughter verdict and the grand jury’s indictment for first-degree murder.⁵⁰⁸ The court of appeals held that a defendant can be found guilty of a lesser offense that is “necessarily included” in the charged offense.⁵⁰⁹ Whether a lesser offense is included in the charged offense depends on the facts charged in the indictment and the evidence presented at trial.⁵¹⁰ Because Rogers’s manslaughter conviction flowed from the evidence presented at trial,⁵¹¹ and because the grand jury finding of intentional killing included the essential elements of reckless killing, the court held that there was no fatal variance.⁵¹² Affirming the superior court’s denial of Rogers’s motion to dismiss, the court of appeals held that a defendant in a felony prosecution can

⁴⁹⁶ *Id.*

⁴⁹⁷ *Id.* at 377.

⁴⁹⁸ *Id.* at 377–78.

⁴⁹⁹ *Id.* at 378–89.

⁵⁰⁰ *Id.*

⁵⁰¹ *Id.* at 376.

⁵⁰² 232 P.3d 1226 (Alaska Ct. App. 2010).

⁵⁰³ *Id.* at 1240–41.

⁵⁰⁴ *Id.* at 1229.

⁵⁰⁵ *Id.*

⁵⁰⁶ *Id.*

⁵⁰⁷ *Id.* at 1233.

⁵⁰⁸ *Id.* at 1236.

⁵⁰⁹ *Id.*

⁵¹⁰ *Id.*

⁵¹¹ *Id.* at 1237.

⁵¹² *Id.* at 1241.

be convicted of an offense other than the one charged in the indictment as long as the grand jury's findings include the essential elements of that offense.⁵¹³

Silvera v. State

In *Silvera v. State*,⁵¹⁴ the court of appeals held that words or actions directed at third parties could be evidence of serious provocation with respect to mitigating factors.⁵¹⁵ Silvera along with Surina (his fiancée), Moore, and others took a taxi cab after spending the night drinking.⁵¹⁶ An argument ensued and Moore allegedly called Surina a “whore” and then kicked her.⁵¹⁷ Silvera then jumped up and cut the side of Moore’s face with a knife.⁵¹⁸ At sentencing, the trial judge rejected the mitigating factor of serious provocation because the provoking acts and words were not directed at Silvera.⁵¹⁹ Silvera appealed.⁵²⁰ The court of appeals held that provocation can be found when the actions were directed either at the defendant or at someone the defendant was defending.⁵²¹ The court reasoned that to find otherwise would prohibit a finding of serious provocation in circumstances in which the heat of passion defense has traditionally been allowed.⁵²² Reversing the lower court, the court of appeals held that words or actions directed at third parties could be evidence of serious provocation with respect to mitigating factors.⁵²³

Smith v. State

In *Smith v. State*,⁵²⁴ the court of appeals held that a sixteen-year-old defendant involved in a shooting is not entitled to statutory mitigation of his sentence for duress or compulsion based on a theory that he was provoked, but the defendant may be entitled to non-statutory mitigation because of his extraordinary potential for rehabilitation and his developmental immaturity.⁵²⁵ Smith, a sixteen year old, entered a plea of guilty as an adult to first-degree assault for providing a cohort with a handgun, with which the cohort then wounded another teenager.⁵²⁶ At sentencing, Smith requested mitigation on three grounds: (1) duress, coercion, threat, or compulsion; (2) extraordinary potential for rehabilitation; and (3) developmental immaturity.⁵²⁷ Developmental immaturity is a mitigating factor that Alaska courts have not yet recognized.⁵²⁸ Despite evidence that the victim provoked Smith, the superior court rejected Smith’s request for mitigation based on duress mental or emotional compulsion does not meet the standards for provocation as

⁵¹³ *Id.* at 1240–41.

⁵¹⁴ 244 P.3d 1138 (Alaska Ct. App. 2010).

⁵¹⁵ *Id.* at 1147–49.

⁵¹⁶ *Id.* at 1141.

⁵¹⁷ *Id.* at 1141–42.

⁵¹⁸ *Id.*

⁵¹⁹ *Id.* 1142, 1148.

⁵²⁰ *Id.*

⁵²¹ *Id.* at 1147–48.

⁵²² *Id.* at 1148.

⁵²³ *Id.* at 1147–49.

⁵²⁴ 229 P.3d 221 (Alaska Ct. App. 2010).

⁵²⁵ *Id.* at 223.

⁵²⁶ *Id.* at 223–24.

⁵²⁷ *Id.* at 223.

⁵²⁸ *Id.*

defined in Alaska statutes.⁵²⁹ The superior court also rejected Smith's non-statutory mitigating factors despite considerable testimony by Smith's experts supporting his position without making any findings of fact as to the merit of the mitigating factors in Smith's case.⁵³⁰ The court of appeals affirmed the superior court's rejection of Smith's statutory duress mitigating factor argument but vacated the superior court's rulings as to the non-statutory mitigating factors and remanded the case for reconsideration to include findings of fact.⁵³¹ In addition, the court of appeals tepidly supported developmental immaturity as a new mitigating factor, citing United States Supreme Court precedent.⁵³² Affirming in part and vacating in part, the court of appeals held that a sixteen-year-old defendant involved in a shooting is not entitled to statutory mitigation of his sentence for duress or compulsion based on a theory that he was provoked, but the defendant may be entitled to non-statutory mitigation because of his extraordinary potential for rehabilitation and his developmental immaturity.⁵³³

Solomon v. State

In *Solomon v. State*,⁵³⁴ the court of appeals held that although Alaska recognizes a defense of unwitting intoxication to a DUI charge, the defense is available only if the defendant became intoxicated due to a reasonable, non-negligent mistake about the intoxicating nature of the substance the defendant ingested.⁵³⁵ Solomon was arrested for driving under the influence and argued at his trial that he had not been drinking but had ingested a quart of NyQuil.⁵³⁶ Solomon stated that he had not read the label on the bottle and did not realize that NyQuil contains ten percent alcohol.⁵³⁷ Solomon requested a jury instruction on the defense of unwitting intoxication because he did not have actual knowledge that he had consumed an intoxicating substance, but the superior court judge denied the request.⁵³⁸ The court of appeals affirmed the denial of the jury instruction.⁵³⁹ Solomon contended that this defense should be allowed when a defendant does not knowingly consume an intoxicant and that the State should be forced to prove beyond a reasonable doubt that the intoxicant was knowingly consumed.⁵⁴⁰ The court of appeals found cases from other jurisdictions persuasive that limited the defense to instances in which a defendant non-negligently consumed a substance that he reasonably believed was not intoxicating.⁵⁴¹ Because no reasonable juror could have believed that Solomon's failure to read the label on the NyQuil bottle was non-negligent, the court of appeals affirmed the lower court ruling.⁵⁴² The court of appeals held that although Alaska recognizes a defense of unwitting intoxication to a DUI charge, the defense is available

⁵²⁹ *Id.* at 225–28.

⁵³⁰ *Id.* at 228–31.

⁵³¹ *Id.* at 231–32.

⁵³² *Id.* at 230.

⁵³³ *Id.* at 223.

⁵³⁴ 227 P.3d 461 (Alaska Ct. App. 2010).

⁵³⁵ *Id.* at 468.

⁵³⁶ *Id.* at 462.

⁵³⁷ *Id.* at 463.

⁵³⁸ *Id.* at 464.

⁵³⁹ *Id.* at 469.

⁵⁴⁰ *Id.* at 464.

⁵⁴¹ *Id.* at 467.

⁵⁴² *Id.* at 469.

only if the defendant became intoxicated due to a reasonable, non-negligent mistake about the intoxicating nature of the substance the defendant ingested.⁵⁴³

Starkweather v. State

In *Starkweather v. State*,⁵⁴⁴ the court of appeals held that when criminal defendants are convicted of both first degree assault and attempted murder, the crimes must be merged for sentencing purposes.⁵⁴⁵ Starkweather was convicted of burglary, theft, sexual assault, attempted murder, and first-degree assault after attacking his neighbor.⁵⁴⁶ Starkweather argued during sentencing in the superior court that he should not receive separate sentences and punishments for attempted murder and first degree assault because they arose from the same act and, if not merged, would constitute double jeopardy.⁵⁴⁷ The superior court denied his claim, reasoning that assault and attempted murder were sufficiently discrete crimes to support separate convictions and punishments.⁵⁴⁸ The court of appeals reversed, holding that legislative indicated attempted murder and assault were not meant to be punished as separate crimes, and that the nature of the conduct should instead be considered only as an aggravating or mitigating circumstance in sentencing.⁵⁴⁹ The court of appeals held that criminal defendants may be charged with both attempted murder and assault, but if the jury finds both crimes to be proven, they must be merged into a single conviction for attempted murder.⁵⁵⁰

State v. Shetters

In *State v. Shetters*,⁵⁵¹ the court of appeals held that a defendant is entitled to good time credit for time spent in a correctional center or halfway house as a condition of mandatory parole and for time spent there pending final decision about parole revocation.⁵⁵² Shetters was released on mandatory parole, but he was taken back into custody, based on concerns of parole violation, and released to a “correctional restitution center” (CRC) while the parole board determined whether to revoke his parole.⁵⁵³ The Board permitted him to stay on parole so long as he remained at the CRC for four additional months.⁵⁵⁴ He was arrested for another parole violation, after which he returned to jail; he was not given credit toward his release date for his time spent in the CRC.⁵⁵⁵ The court determined that serving mandatory parole is tantamount to serving time in prison and does not mitigate a sentence like parole.⁵⁵⁶ Reversing the lower court, the court of appeals held that a defendant is entitled to good time credit for time spent in a

⁵⁴³ *Id.* at 468.

⁵⁴⁴ 244 P.3d 522 (Alaska Ct. App. 2010).

⁵⁴⁵ *Id.* at 532–33.

⁵⁴⁶ *Id.* at 523, 533–34.

⁵⁴⁷ *Id.* at 528.

⁵⁴⁸ *Id.*

⁵⁴⁹ *Id.* at 529–33.

⁵⁵⁰ *Id.* at 532.

⁵⁵¹ 246 P.3d 332 (Alaska Ct. App. 2010).

⁵⁵² *Id.* at 333.

⁵⁵³ *Id.* at 333–34.

⁵⁵⁴ *Id.*

⁵⁵⁵ *Id.* at 336.

⁵⁵⁶ *Id.*

correctional center or halfway house as a condition of mandatory parole and for time spent there pending final decision about parole revocation.⁵⁵⁷

State v. Shetters (On Rehearing)

In *State v. Shetters*,⁵⁵⁸ the court of appeals held that mandatory parolees remanded to a non-prison correctional center by the Parole Board are entitled to credit for time served and good time credit if they are later ordered to serve their remaining sentence.⁵⁵⁹ The State of Alaska petitioned the court of appeals to reconsider a prior holding.⁵⁶⁰ The state challenged the court's prior holding by making two arguments: (1) parolees that reside at non-prison correctional centers are entitled to good time credit but not time served credit; and (2) the Parole Board may use its discretion in awarding credit for time served to parolees residing at non-prison correctional centers.⁵⁶¹ The court of appeals rejected both of these arguments, reasoning that there are no situations where an inmate may be entitled to good time credit but not for time served.⁵⁶² The court of appeals also held that credit for time served is not a discretionary reduction of the defendant's time to serve.⁵⁶³ Re-affirming its prior decision, the court of appeals held that mandatory parolees remanded to a non-prison correctional center by the Parole Board are entitled to credit for time served and good time credit if they are later ordered to serve their remaining sentence.⁵⁶⁴

State v. Siftsoff

In *State v. Siftsoff*,⁵⁶⁵ the court of appeals held that the hot pursuit warrant exception did not apply when a police officer followed a speeder home and entered his home without showing a compelling need for immediate action.⁵⁶⁶ A police officer was in pursuit of Siftsoff for a speeding violation and eventually ended up at his trailer home.⁵⁶⁷ The officer told him not to enter the trailer, but Siftsoff ignored him.⁵⁶⁸ The officer then entered the trailer and observed that Siftsoff was intoxicated.⁵⁶⁹ The trial court judge excluded the evidence of intoxication.⁵⁷⁰ The court of appeals reasoned that because the officer had not shown "a compelling need for official action and no time to secure a warrant" the judge correctly suppressed the evidence.⁵⁷¹ The court of appeals affirmed the district court and held that the hot pursuit warrant exception did not apply when a

⁵⁵⁷ *Id.* at 333.

⁵⁵⁸ 246 P.3d 338 (Alaska Ct. App. 2010).

⁵⁵⁹ *Id.* at 342.

⁵⁶⁰ *Id.* at 339.

⁵⁶¹ *Id.* at 340.

⁵⁶² *Id.*

⁵⁶³ *Id.*

⁵⁶⁴ *Id.* at 342.

⁵⁶⁵ 229 P.3d 214 (Alaska Ct. App. 2010).

⁵⁶⁶ *Id.* at 214–15.

⁵⁶⁷ *Id.*

⁵⁶⁸ *Id.* at 215.

⁵⁶⁹ *Id.*

⁵⁷⁰ *Id.*

⁵⁷¹ *Id.*

police officer followed a speeder home and entered his home without showing a compelling need for immediate action.⁵⁷²

Twogood v. State

In *Twogood v. State*,⁵⁷³ the court of appeals held that: (1) the amendment of a prior judgment did not constitute a new sentencing act that would entitle a defendant to an appearance before the court;⁵⁷⁴ (2) it was not plain error to require a sex offender to submit to random drug testing if he had a history of substance abuse;⁵⁷⁵ and (3) the Department of Correction's (DOC) elimination of programs a defendant was required to complete while incarcerated should have been addressed in a civil action against DOC.⁵⁷⁶ Twogood was indicted on multiple felony counts.⁵⁷⁷ As part of his plea, Twogood was permitted to serve his sentences consecutively, though the judge refused to specify the order of the sentences.⁵⁷⁸ On appeal, the court of appeals clarified the order and directed the superior court to amend its earlier judgment.⁵⁷⁹ Twogood appealed.⁵⁸⁰ He argued that the modifications effectively served as a new sentence, entitling him to address the judge in person.⁵⁸¹ The court of appeals held that the amendments were merely ministerial because the superior court judge had no discretion in making them.⁵⁸² Twogood also appealed a requirement that he submit to random drug screenings, arguing that the necessary "direct relationship" between this condition and his crime was absent.⁵⁸³ The court held that because "direct relationship" requirement is interpreted broadly the judge did not commit plain error by including this condition based on Twogood's history of drug abuse.⁵⁸⁴ Twogood further claimed that, because the DOC had stopped counseling incarcerated prisoners, he was denied his right to the rehabilitative treatment that he was ordered to complete.⁵⁸⁵ The court of appeals referred him to the DOC.⁵⁸⁶ Affirming the lower court, the court of appeals held that: (1) the amendment of a prior judgment did not constitute a new sentencing act that would entitle a defendant to an appearance before the court,⁵⁸⁷ (2) it was not plain error to require a sex offender to submit to random drug testing if he had a history of substance abuse;⁵⁸⁸ and (3) the DOC's elimination of programs a defendant was required to complete while incarcerated should have been addressed in a civil action against the DOC.⁵⁸⁹

⁵⁷² *Id.* at 214–15.

⁵⁷³ 223 P.3d 641 (Alaska Ct. App. 2010).

⁵⁷⁴ *Id.* at 646.

⁵⁷⁵ *Id.* at 647.

⁵⁷⁶ *Id.* at 649.

⁵⁷⁷ *Id.* at 644.

⁵⁷⁸ *Id.*

⁵⁷⁹ *Id.* at 645.

⁵⁸⁰ *Id.*

⁵⁸¹ *Id.* at 646.

⁵⁸² *Id.*

⁵⁸³ *Id.* at 647.

⁵⁸⁴ *Id.*

⁵⁸⁵ *Id.* at 649.

⁵⁸⁶ *Id.*

⁵⁸⁷ *Id.* at 646.

⁵⁸⁸ *Id.* at 647.

⁵⁸⁹ *Id.* at 649.

Wilson v. State

In *Wilson v. State*,⁵⁹⁰ the court of appeals held that a prima facie case of ineffective assistance of counsel is established when an individual is advised that entering a no-contest plea in a criminal trial will not prejudice a later civil case against that individual.⁵⁹¹ Wilson pled no-contest to a charge of assault in the second degree.⁵⁹² Wilson's attorney advised him that entering the no-contest plea could not be used in a civil trial as proof of the plaintiff's allegations.⁵⁹³ The court of appeals reasoned that, while there is normally a presumption of competence in ineffective assistance of counsel claims, this presumption does not apply to advice relating to whether or not to enter a plea to a criminal charge.⁵⁹⁴ Thus, the court of appeals held that a prima facie case of ineffective assistance of counsel is established when an individual is advised that entering a no-contest plea in a criminal trial will not prejudice a later civil case against that individual.⁵⁹⁵

CRIMINAL PROCEDURE

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United States Court of Appeals for the Ninth Circuit

United States v. Lightfoot

In *United States v. Lightfoot*,⁵⁹⁶ the Ninth Circuit held that, when a criminal defendant pleading guilty waives his right to appeal his sentence, the waiver does not encompass his right to appeal a subsequent decision by the district court not to reduce the defendant's sentence under section 3582(c)(2) of the United States Code, unless the waiver expressly states as much.⁵⁹⁷ Lightfoot pled guilty to, *inter alia*, possession of crack cocaine with intent to distribute; his plea included a broad waiver of his right to appeal the resulting sentence, and he was sentenced within the then-applicable guidelines range.⁵⁹⁸ Subsequently, the United States Sentencing Commission reduced the guidelines range for possession of crack cocaine and gave the reduction retroactive effect.⁵⁹⁹ Lightfoot filed a motion for reduction of his sentence pursuant to section 3582(c)(2) of the United States Code, which the government opposed, asserting that Lightfoot posed a continuing danger to society.⁶⁰⁰ The court held that motions for reduction of sentence are "discretionary decision[s] separate from the original sentencing," and the parties to the original plea agreement probably did not contemplate whether the waiver encompassed the right to appeal a section 3582(c)(2) decision, or else the agreement would have

⁵⁹⁰ 244 P.3d 535 (Alaska Ct. App. 2010).

⁵⁹¹ *Id.* at 539.

⁵⁹² *Id.* at 537.

⁵⁹³ *Id.*

⁵⁹⁴ *Id.* at 538.

⁵⁹⁵ *Id.* at 539.

⁵⁹⁶ 626 F.3d 1092 (9th Cir. 2010).

⁵⁹⁷ *Id.* at 1095.

⁵⁹⁸ *Id.* at 1093.

⁵⁹⁹ *Id.*

⁶⁰⁰ *Id.*

“expressly included or expressly excluded” a statement to that effect.⁶⁰¹ Moreover, because section 3582(c)(2) motions are substantially different proceedings, they do not constitute an attack on the original sentence to which the waiver applied.⁶⁰² Thus, the Ninth Circuit held that, when a criminal defendant pleading guilty waives his right to appeal his sentence, the waiver does not encompass his right to appeal a subsequent decision by the district court not to reduce the defendant’s sentence under section 3582(c)(2) of the United States Code, unless the waiver expressly states as much.⁶⁰³

Alaska Supreme Court

Bailey v. State, Department of Corrections

In *Bailey v. State, Department of Corrections*,⁶⁰⁴ the supreme court held that parole should not be revoked for failure to participate in a substance abuse program when the parole board did not inform the parolee that failure to participate in a program would result in automatic revocation of parole.⁶⁰⁵ Bailey’s judgment mandated that he successfully *complete* substance abuse treatment if offered during his incarceration.⁶⁰⁶ After Bailey unsuccessfully applied to various programs, a parole violation hearing was held and Bailey was instructed to *apply* for substance abuse treatment.⁶⁰⁷ Bailey applied to the program but was not admitted,⁶⁰⁸ and, after a year, his parole was revoked for failure to complete offered substance abuse treatment.⁶⁰⁹ The superior court affirmed the revocation.⁶¹⁰ On appeal, Bailey alleged that he did not have sufficient notice that his failure to be accepted into the program would result in revocation of his parole.⁶¹¹ The court acknowledged that due process required reasonable notice of what conditions must be met to prevent parole revocation and reasoned that, during the parole violation hearing, the parole board had simply ordered Bailey to *apply* to programs and had not made it clear that if Bailey’s application was rejected his parole would be automatically revoked.⁶¹² The court found that Bailey’s original judgment did not provide constructive notice, because it only required him to enter a program if it was offered.⁶¹³ Reversing the decision of the lower court, the supreme court held that parole should not be revoked for failure to participate in a substance abuse program when the parole board did not inform the parolee that failure to participate in a program would result in automatic revocation of parole.⁶¹⁴

⁶⁰¹ *Id.* at 1095.

⁶⁰² *Id.*

⁶⁰³ *Id.* at 1095.

⁶⁰⁴ 224 P.3d 111 (Alaska 2010).

⁶⁰⁵ *Id.* at 112.

⁶⁰⁶ *Id.* at 113 (emphasis added) (citation omitted).

⁶⁰⁷ *Id.* at 113–14.

⁶⁰⁸ *Id.* at 114.

⁶⁰⁹ *Id.* at 115.

⁶¹⁰ *Id.*

⁶¹¹ *Id.* at 116.

⁶¹² *Id.* at 117.

⁶¹³ *Id.*

⁶¹⁴ *Id.* at 112.

Bradshaw v. State, Department of Administration

In *Bradshaw v. State, Department of Administration*,⁶¹⁵ the supreme court held that Alaska's ten-year statute of limitations does not bar the Alaska Division of Motor Vehicles ("DMV") from charging a \$100 statutory fee to reinstate the driver's license of a person whose license suspension began over ten years prior to applying for reinstatement.⁶¹⁶ Bradshaw's license was suspended in 1995.⁶¹⁷ In 2007, Bradshaw applied to have his license reinstated, and the DMV charged him a \$100 statutory reinstatement fee.⁶¹⁸ Bradshaw sued, arguing that the ten-year statute of limitations barred the DMV from charging the fee.⁶¹⁹ The supreme court affirmed the grant of summary judgment to the State,⁶²⁰ holding that a government agency's charging of a fee is not an "action for a cause" subject to the statute of limitations.⁶²¹ The court also held that the DMV properly charged Bradshaw the fee under Alaska Statute 28.15.271(b)(3)(A), which requires the fee if the license has been suspended "within the 10 years preceding the application."⁶²² The court held that the statute applies to the status of suspension and not the initial act of suspension.⁶²³ Affirming the lower court, the supreme court held that Alaska's ten-year statute of limitations does not bar the Alaska DMV from charging a \$100 statutory fee to reinstate the driver's license of a person whose license suspension began over ten years prior to applying for reinstatement.⁶²⁴

Farmer v. State

In *Farmer v. State*,⁶²⁵ the supreme court held that judicial expungement of criminal records should only be an exceptional or extraordinary remedy.⁶²⁶ The FBI prevented Farmer, a convicted felon, from purchasing a gun.⁶²⁷ Farmer proceeded to file a *pro se* petition in superior court to expunge his record, arguing that ever since finishing probation "he has led an honest and upright life," that he needed the gun for hunting and self defense, and that refusal to expunge would violate his Second Amendment "constitutional right to bear arms."⁶²⁸ The superior court denied Farmer's petition and held that there is no constitutionally protected right to purchase arms.⁶²⁹ Farmer appealed the denial and argued on appeal that the superior court prevented his motion for reconsideration of the court's judgment.⁶³⁰ In declining to decide if Alaska courts possess the authority to expunge, the court found that even if it did, Farmer's circumstances were not extraordinary; first, because Farmer failed to prove that his conviction and record

⁶¹⁵ 224 P.3d 118 (Alaska 2010).

⁶¹⁶ *Id.* at 120–21.

⁶¹⁷ *Id.* at 120.

⁶¹⁸ *Id.* at 121.

⁶¹⁹ *Id.* at 121–22.

⁶²⁰ *Id.* at 120.

⁶²¹ *Id.* at 122–23.

⁶²² *Id.* at 125–26.

⁶²³ *Id.* at 123–26.

⁶²⁴ *Id.* at 120–21.

⁶²⁵ 235 P.3d 1012 (Alaska 2010).

⁶²⁶ *Id.* at 1012–17.

⁶²⁷ *Id.* at 1012–13.

⁶²⁸ *Id.* at 1013.

⁶²⁹ *Id.*

⁶³⁰ *Id.*

were unlawful or invalid, and second, because restricting felons' ability to purchase firearms does not violate the limited Second Amendment right to bear arms.⁶³¹ Finally, the court found that the superior court did not abuse its discretion when the superior court dismissed Farmer's action with prejudice because absent Farmer's filing a defective motion, there was no reason for the superior court to know Farmer needed guidance.⁶³² Affirming the lower court, the supreme court held that judicial expungement of criminal records should only be an exceptional or extraordinary remedy.⁶³³

Majaev v. State

In *Majaev v. State*,⁶³⁴ the supreme court held that a peace officer's simple hand signal directing an individual driver to stop, or come back to the officer, is a seizure when it would compel a reasonable individual not to leave.⁶³⁵ Majaev began to drive away from a turnout after an Alaska State Trooper pulled up next to Majaev's truck.⁶³⁶ The trooper stepped out behind Majaev's truck then waved Majaev back and gave him a sobriety test.⁶³⁷ Majaev was charged with driving under the influence and moved to dismiss the charge, arguing that he was subjected to an unlawful seizure.⁶³⁸ The district court denied Majaev's motion, and the court of appeals affirmed, reasoning that a hand signal is not sufficient to lead a reasonable person to believe that he is not free to leave; thus, there was no seizure.⁶³⁹ The supreme court found that there is a seizure when an officer's use of authority would cause an objectively reasonable individual to feel compelled to stay.⁶⁴⁰ The Court reasoned that because section 28.35.182 of the Alaska Statute subjects persons to criminal penalties for failure to stop vehicles at the signal (including hand signals) or request of a peace officer, an objectively reasonable individual in Majaev's position would have felt compelled to stay and follow the trooper's instructions in order to avoid criminal penalty.⁶⁴¹ Reversing the lower courts, the supreme court held that a peace officer's simple hand signal directing an individual driver to stop, or come back to the officer, is a seizure when it would compel a reasonable individual not to leave.⁶⁴²

Alaska Court of Appeals

Alexie v. State

In *Alexie v. State*,⁶⁴³ the court of appeals held that first-time felony offenders convicted of first-degree assault under section 11.41.200(a)(1) of the Alaska Statutes are subject to the sentencing range of 7 to 11 years specified in section 12.55.125(c)(2) of the

⁶³¹ *Id.* at 1014–16.

⁶³² *Id.* at 1016–17.

⁶³³ *Id.* at 1012–17.

⁶³⁴ 223 P.3d 629 (Alaska 2010).

⁶³⁵ *Id.* at 632–34.

⁶³⁶ *Id.* at 631.

⁶³⁷ *Id.*

⁶³⁸ *Id.*

⁶³⁹ *Id.*

⁶⁴⁰ *Id.* at 632.

⁶⁴¹ *Id.* at 633–34.

⁶⁴² *Id.* at 632–34.

⁶⁴³ 229 P.3d 217 (Alaska Ct. App. 2010).

Alaska Statutes.⁶⁴⁴ Alexie pled no contest to first-degree assault under section 11.41.200(a)(1) of the Alaska Statutes, which involved recklessly causing serious physical injury to another using a dangerous instrument.⁶⁴⁵ The superior court sentenced Alexie under section 12.55.125(c) of the Alaska Statutes; subsection (2) of the statute stated that if the defendant caused serious physical injury or death during the offense then the presumptive sentencing range is 7 to 11 years.⁶⁴⁶ The supreme court had interpreted a previous version of the sentencing statute not to provide a shorter sentence for reckless manslaughter than reckless assault.⁶⁴⁷ Alexie challenged the current statute using similar reasoning as the challenge to the earlier statute—that it was illogical for the legislature to provide the same punishment for reckless manslaughter and reckless assault.⁶⁴⁸ The court of appeals affirmed the superior court’s sentence, reasoning that it was the province of the legislature, not the judiciary, to set the sentencing guidelines.⁶⁴⁹ The court of appeals held that first-time felony offenders convicted of first-degree assault under section 11.41.200(a)(1) of the Alaska Statutes are subject to the sentencing range of 7 to 11 years specified in section 12.55.125(c)(2) of the Alaska Statutes.⁶⁵⁰

Borchgrevink v. State

In *Borchgrevink v. State*,⁶⁵¹ the court of appeals held that “first complaint” evidence is admissible and may include a victim’s identification of the perpetrator only if the victim testifies at the defendant’s trial.⁶⁵² Borchgrevink was convicted of first-degree assault and for a merged count of first-degree sexual assault and first-degree sexual abuse of a minor.⁶⁵³ During a medical examination for injuries to her head and genitals, E.P., the minor-victim, identified Borchgrevink as her assailant.⁶⁵⁴ Before the trial the superior court judge ruled that E.P.’s identification of Borchgrevink during the “first complaint” would be allowed at trial; but when E.P. took the stand, Borchgrevink’s attorney had E.P. declared incompetent as a witness.⁶⁵⁵ Borchgrevink appealed his convictions claiming the “first complaint” evidence was improperly admitted in light of E.P.’s failure to testify.⁶⁵⁶ The court of appeals held that the superior court erred in admitting the “first complaint” identification information as evidence.⁶⁵⁷ While admitting E.P.’s “first complaint” testimony at trial was an error, because Borchgrevink did not object during trial to the admittance of the identification information, the court of appeals further held it was reasonable to assume Borchgrevink made a tactical decision not to object and therefore it was not a reversible error.⁶⁵⁸ Affirming the lower court, the court of appeals

⁶⁴⁴ *Id.* at 221.

⁶⁴⁵ *Id.* at 218.

⁶⁴⁶ *Id.*

⁶⁴⁷ *Id.* at 219.

⁶⁴⁸ *Id.* at 220.

⁶⁴⁹ *Id.* at 221.

⁶⁵⁰ *Id.* at 221.

⁶⁵¹ 239 P.3d 410 (Alaska Ct. App. 2010).

⁶⁵² *Id.* at 422.

⁶⁵³ *Id.* at 412.

⁶⁵⁴ *Id.*

⁶⁵⁵ *Id.* at 420.

⁶⁵⁶ *Id.* at 412.

⁶⁵⁷ *Id.* at 421.

⁶⁵⁸ *Id.* at 424.

held that while a trial judge has the discretion to redact identification information from “first complaint” testimony, such identification testimony is admissible only if the victim testifies at trial.⁶⁵⁹

Cleveland v. State

In *Cleveland v. State*,⁶⁶⁰ the court of appeals held: (1) an appellate decision becomes final when the time for filing a petition for hearing expires or the day after the Alaska Supreme Court denies a petition for hearing; and (2) the statute of limitations for filing for post conviction relief is not tolled while a motion to correct an illegal sentence is pending.⁶⁶¹ Cleveland’s petition for a hearing on an assault conviction was denied by the supreme court in 2004.⁶⁶² In 2007, Cleveland filed for post-conviction relief. The superior court granted the State’s motion to dismiss because the petition was untimely.⁶⁶³ Cleveland appealed, arguing that because he had filed a motion to correct an illegal sentence in the superior court before the supreme court had denied his petition for hearing, the statute of limitations was tolled.⁶⁶⁴ The court of appeals first stated that section 12.72.020(a)(3) of the Alaska Statutes requires criminal defendants who were unsuccessful on appeal to file for post-conviction relief within one year of the court of appeals’ final decision.⁶⁶⁵ The court then determined that an appellate decision becomes final either when the time for filing a petition for hearing expires or the day after Alaska Supreme Court denies a petition for hearing.⁶⁶⁶ Since the decision affirming Cleveland’s conviction became final when the Supreme Court denied his petition for hearing in 2004, his 2007 application for post conviction relief was untimely.⁶⁶⁷ The statute of limitations was not tolled while Cleveland’s motion to correct an illegal sentence was pending.⁶⁶⁸ Affirming the lower court, the court of appeals held: (1) an appellate decision becomes final when the time for filing a petition for hearing expires or the day after the Alaska Supreme Court denies a petition for hearing; and (2) the statute of limitations for filing for post conviction relief is not tolled while a motion to correct an illegal sentence is pending.⁶⁶⁹

Deemer v. State

In *Deemer v. State*,⁶⁷⁰ the court of appeals held that when the police have probable cause to believe that physical evidence of a driver's identity is evidence of a crime, they may search the passenger compartment and places where one would reasonably expect to find that evidence.⁶⁷¹ A state trooper stopped Deemer for a traffic violation.⁶⁷² Deemer

⁶⁵⁹ *Id.* at 419, 424–26.

⁶⁶⁰ 241 P.3d 504 (Alaska Ct. App. 2010).

⁶⁶¹ *Id.* at 506–07.

⁶⁶² *Id.* at 505.

⁶⁶³ *Id.*

⁶⁶⁴ *Id.* at 505–06.

⁶⁶⁵ *Id.* at 506.

⁶⁶⁶ *Id.*

⁶⁶⁷ *Id.* at 507.

⁶⁶⁸ *Id.* at 506.

⁶⁶⁹ *Id.*

⁶⁷⁰ 244 P.3d 69 (Alaska Ct. App. 2010).

⁶⁷¹ *Id.* at 72.

⁶⁷² *Id.* at 70.

lied to the trooper about her identity, but another trooper recognized Deemer and ran her name through the computer.⁶⁷³ The search revealed an outstanding warrant, so the troopers arrested Deemer then searched her car and found a handgun and cocaine.⁶⁷⁴ Deemer challenged the search and the court of appeals initially found the search lawful.⁶⁷⁵ The United States Supreme Court later issued a decision altering federal search and seizure law and the Alaska Supreme Court ordered the court of appeals to reconsider Deemer's case.⁶⁷⁶ Police have the authority to search a vehicle incident to an arrest if they have a reasonable belief that evidence relevant to the crime of arrest might be found in the vehicle.⁶⁷⁷ Because Deemer had just committed the offense of falsely identifying herself, the officers had the authority to search the vehicle for evidence of her identification.⁶⁷⁸ Affirming the lower court, the court of appeals held that when the police have probable cause to believe that physical evidence of a driver's identity is evidence of a crime, they may search the passenger compartment and places where one would reasonably expect to find that evidence.⁶⁷⁹

Evans v. State

In *Evans v. State*,⁶⁸⁰ the court of appeals held that a defendant is entitled to a mistrial when the State discloses information mid-trial that should have been disclosed earlier and fails to prove that the late disclosure was not prejudicial to the defendant.⁶⁸¹ Evans was convicted of burglary, theft, and criminal mischief.⁶⁸² On appeal, Evans argued that the trial judge should have declared a mistrial because the State waited until the middle of his trial to disclose exculpatory statements made by Evan's co-defendant during a police interview.⁶⁸³ The court of appeals noted that the State was required to disclose the contents of the interview pursuant to Criminal Rules 16(b)(1)(A)(iii) and 16(b)(3).⁶⁸⁴ Because the interview was not disclosed, Evans's attorney had no reason to believe the interview contained exculpatory statements.⁶⁸⁵ After the interview statements were disclosed mid-trial, Evans's co-defendant claimed privilege and would not testify as a witness.⁶⁸⁶ Consequently, the State failed to prove that its late disclosure was not prejudicial, and Evans was entitled to a mistrial.⁶⁸⁷ The court of appeals held that a defendant is entitled to a mistrial when the State discloses information mid-trial that should have been disclosed earlier and fails to prove that the late disclosure was not prejudicial to the defendant.⁶⁸⁸

⁶⁷³ *Id.*

⁶⁷⁴ *Id.*

⁶⁷⁵ *Id.* at 70–71.

⁶⁷⁶ *Id.* at 71.

⁶⁷⁷ *Id.* at 73.

⁶⁷⁸ *Id.* at 75.

⁶⁷⁹ *Id.* at 72.

⁶⁸⁰ 231 P.3d 918 (Alaska Ct. App. 2010).

⁶⁸¹ *Id.* at 919–20.

⁶⁸² *Id.* at 918.

⁶⁸³ *Id.* at 918–19.

⁶⁸⁴ *Id.* at 920.

⁶⁸⁵ *Id.*

⁶⁸⁶ *Id.* at 919.

⁶⁸⁷ *Id.*

⁶⁸⁸ *Id.* at 919–20.

Ferguson v. State

In *Ferguson v. State*,⁶⁸⁹ the court of appeals held that the failure of an attorney to adequately convey the implications of a plea agreement that a defendant accepts constitutes incomplete legal advice, and the defendant is entitled to withdraw the plea.⁶⁹⁰ After consulting with his attorney, Ferguson accepted the State's plea agreement under the assumption that four years of his seven-year term of imprisonment would be suspended.⁶⁹¹ He also believed he would be eligible for good time credit against the three-year portion of the sentence that he would actually serve, so he would only have to serve two years.⁶⁹² After realizing that he would not receive the good time credit, Ferguson filed petition for post-conviction relief based on incompetent legal advice concerning the plea agreement.⁶⁹³ On appeal, the court held that a defendant is entitled to withdraw a plea if: (1) the defendant was given incomplete advice concerning the nature of the sentence he would receive upon accepting a plea bargain; and (2) the defendant would not have entered into the plea bargain if he had received accurate advice.⁶⁹⁴ Reversing the lower court, the court of appeals held that the failure of an attorney to adequately convey the implications of a plea agreement that a defendant accepts constitutes incomplete legal advice, and the defendant is entitled to withdraw the plea.⁶⁹⁵

Guthrie v. State

In *Guthrie v. State*,⁶⁹⁶ the court of appeals held that a jury cannot convict an individual for failure to appear unless the appearance is required and a defendant challenging a court's denial to sever charges must show that joinder of the charges created a prejudice against him.⁶⁹⁷ Guthrie failed to attend a scheduled court proceeding regarding his upcoming assault trial.⁶⁹⁸ The State charged Guthrie with misdemeanor failure to appear and consolidated both charges.⁶⁹⁹ The court denied Guthrie's request to sever the charges and the jury convicted Guthrie of both crimes.⁷⁰⁰ The court of appeals reversed, finding that under section 12.30.060 of the Alaska Statutes, a jury cannot convict an individual for failure to appear unless the state presents evidence that appearance is required.⁷⁰¹ Here, the State presented no evidence proving that the trial judge imposed an obligation for Guthrie to appear.⁷⁰² Additionally, the court of appeals declined to determine Guthrie's severance request because Guthrie failed to present evidence showing that the joinder created any jury prejudice.⁷⁰³ Reversing in part and

⁶⁸⁹ 242 P.3d 1042 (Alaska Ct. App. 2010).

⁶⁹⁰ *Id.* at 1048–49.

⁶⁹¹ *Id.* at 1044.

⁶⁹² *Id.*

⁶⁹³ *Id.*

⁶⁹⁴ *Id.* at 1049.

⁶⁹⁵ *Id.* at 1048–49.

⁶⁹⁶ 222 P.3d 890 (Alaska Ct. App. 2010).

⁶⁹⁷ *Id.*

⁶⁹⁸ *Id.* at 891.

⁶⁹⁹ *Id.*

⁷⁰⁰ *Id.*

⁷⁰¹ *Id.* at 893.

⁷⁰² *Id.* at 892–94.

⁷⁰³ *Id.* at 894–95.

affirming in part, the court of appeals held that a jury cannot convict an individual for failure to appear unless the appearance is required, and a defendant challenging a court's denial to sever charges must show that joinder of the charges created a prejudice against him.⁷⁰⁴

Lamkin v. State

In *Lamkin v. State*,⁷⁰⁵ the court of appeals held that sentencing judges may not suspend the imposition of sentence for a defendant convicted of felony assault.⁷⁰⁶ Lamkin pled guilty to one count of assault in the third degree.⁷⁰⁷ At his sentencing hearing, he argued that the court should suspend his sentence pursuant to section 12.55.125 of the Alaska Statutes, under which he was convicted.⁷⁰⁸ The superior court judge refused, citing section 12.55.085, which restricts a judge's authority to suspend a sentence if the offender is convicted of certain crimes, including assault in the third degree.⁷⁰⁹ The court of appeals affirmed, resolving the apparently contradicting authority by using a rule of statutory construction that favors specific statutes to more general ones.⁷¹⁰ Here, although the statute criminalizing Lamkin's assault allows a judge to suspend the sentence of certain offenders, a more focused statute that deals primarily with suspension of sentence forbids the judge from doing so.⁷¹¹ Affirming the lower court, the court of appeals held that sentencing judges may not suspend the imposition of sentence for a defendant convicted of felony assault.⁷¹²

Lindoff v. State

In *Lindoff v. State*,⁷¹³ the court of appeals held that a defendant requesting to withdraw a previously-accepted plea of guilty or no contest by arguing that he was not advised on the consequences of the plea must, at a minimum, unequivocally assert that he would not have entered the plea had he had been told the consequences.⁷¹⁴ Lindoff, who had already been convicted of a sex offense, was indicted for a second sex offense and agreed to plead guilty.⁷¹⁵ Under Criminal Rule 11(c)(4), a judge must advise two-time sex offenders that they must register as sex offenders for life, but the judge did not do so in this case.⁷¹⁶ Lindoff moved to withdraw his guilty plea because he had not been warned that he would be forced to register for life.⁷¹⁷ After an evidentiary hearing, the superior court judge denied Lindoff's motion.⁷¹⁸ The court of appeals noted that when Lindoff was asked whether he would have pled guilty had he had known of the registry

⁷⁰⁴ *Id.*

⁷⁰⁵ 244 P.3d 540 (Alaska Ct. of App. 2010).

⁷⁰⁶ *Id.* at 541.

⁷⁰⁷ *Id.* at 540.

⁷⁰⁸ *Id.* at 541.

⁷⁰⁹ *Id.*

⁷¹⁰ *Id.*

⁷¹¹ *Id.* at 541–42.

⁷¹² *Id.* at 541.

⁷¹³ 224 P.3d 152 (Alaska Ct. App. 2010)

⁷¹⁴ *Id.* at 157.

⁷¹⁵ *Id.* at 153–54.

⁷¹⁶ *Id.*

⁷¹⁷ *Id.* at 154.

⁷¹⁸ *Id.*

requirement, he stated, “I do not know that I would have.”⁷¹⁹ The court held that Lindoff bore the burden of producing evidence showing the judge’s violation of Rule 11(c) prejudiced him, and this equivocal assertion made Lindoff’s request to withdraw the plea insufficient as a matter of law.⁷²⁰ Affirming the lower court, the court of appeals held that a defendant attempting to withdraw a previously-accepted plea of guilty or no contest by arguing that he was not advised of the consequences of the plea must, at a minimum, unequivocally assert that he would not have entered the plea had he had been told the consequences.⁷²¹

Linehan v. State

In *Linehan v. State*,⁷²² the court of appeals held that: (1) hearsay evidence of a murder victim’s statement evincing his state of mind before the murder is admissible only if it is relevant to proving something about the victim’s conduct that will be disputed at trial;⁷²³ and (2) testimony regarding a criminal defendant’s expression of admiration for a movie is not admissible unless there is a close nexus between the movie and the defendant that shows the testimony is being presented for a reason other than circumstantial evidence of bad character.⁷²⁴ Linehan was convicted of first-degree murder.⁷²⁵ On appeal, Linehan argued that the trial court improperly admitted evidence of a letter, written by the victim, asserting that Linehan had a split personality and that if the victim was killed, Linehan would likely be responsible.⁷²⁶ Linehan also argued that the trial court improperly admitted evidence of his admiration of a character in a movie.⁷²⁷ On appeal, the court reasoned that the trial court erred in admitting evidence of the letter because there was no dispute regarding any aspect of Leppink’s mental state or conduct that was alluded to in the letter.⁷²⁸ The court then held that because the case was based mostly on circumstantial evidence and the letter essentially contained an “accusation from the grave,” it was likely that the letter affected the verdict.⁷²⁹ The court also held that Alaska Rule of Evidence 404 barred testimony that Linehan admired the main character in the movie.⁷³⁰ The nexus between Linehan and the movie was not close enough for the evidence to have been anything more than impermissible circumstantial character evidence.⁷³¹ Reversing the lower court, the court of appeals held that: (1) hearsay evidence of a murder victim’s statement evincing his state of mind before the murder is admissible only if it is relevant to proving something about the victim’s conduct that will be disputed at trial;⁷³² and (2) testimony regarding a criminal defendant’s expression of admiration for a movie is not admissible unless there is a close

⁷¹⁹ *Id.* at 157.

⁷²⁰ *Id.* at 156–57.

⁷²¹ *Id.* at 157.

⁷²² 224 P.3d 126 (Alaska Ct. App. 2010).

⁷²³ *Id.* at 130, 134.

⁷²⁴ *Id.* at 146–49.

⁷²⁵ *Id.* at 129.

⁷²⁶ *Id.* at 129, 132.

⁷²⁷ *Id.* at 129.

⁷²⁸ *Id.* at 133–38.

⁷²⁹ *Id.* at 142–43.

⁷³⁰ *Id.* at 146–49.

⁷³¹ *Id.*

⁷³² *Id.* at 130, 134.

nexus between the movie and the defendant that shows the testimony is being presented for a reason other than circumstantial evidence of bad character.⁷³³

Ulak v. State

In *Ulak v. State*,⁷³⁴ the court of appeals held that unproven assertions in a presentence report must be removed.⁷³⁵ Ulak plead guilty to assault in the third degree for injuring C.S., a three-year old child, and admitted to aggravating factors, specifically that she manifested deliberate cruelty.⁷³⁶ After her sentencing, however, she denied that she ever injured C.S. and moved to strike her grandchildren's hearsay statements that she deliberately injured C.S. from the presentence report.⁷³⁷ The superior court denied the motion but supplemented the record with Ulak's version.⁷³⁸ On appeal, the court of appeals held that when a defendant denies hearsay assertions, the burden is on the State to present live testimony to support the assertions.⁷³⁹ The court noted that the superior court failed to explicitly make a determination of fact and that it was not sufficient to merely note disputed assertions in the presentence report.⁷⁴⁰ Remanding the case, the court of appeals held that unproven assertions in a presentence report must be removed.⁷⁴¹

West v. State

In *West v. State*,⁷⁴² the court of appeals held that when a jury does not address a factor upon which a presumptive sentencing range hinges, and the factor is raised by the defense prior to sentencing, a new jury trial on that factor does not violate the double jeopardy clause.⁷⁴³ West was convicted of first-degree robbery following a jury trial.⁷⁴⁴ Under Alaska's sentencing law, West's presumptive sentencing range depended on whether he personally possessed or used a firearm during the robbery.⁷⁴⁵ During the trial, that specific issue of fact was not asked to, or answered by the jury.⁷⁴⁶ After his conviction West challenged the jury instruction, arguing that he was entitled to have a jury decide whether he was personally armed during the robbery.⁷⁴⁷ The trial court granted the new trial, but West appealed, arguing that it would violate the Double Jeopardy Clause.⁷⁴⁸ The court of appeals reasoned that even if the jury instructions had omitted an essential element of the crime, West could not be acquitted under the double jeopardy clause.⁷⁴⁹ Affirming the lower court, the court of appeals held that when a jury

⁷³³ *Id.* at 146–49.

⁷³⁴ 238 P.3d 1254 (Alaska Ct. App. 2010).

⁷³⁵ *Id.* at 1257–58.

⁷³⁶ *Id.*

⁷³⁷ *Id.* at 1256.

⁷³⁸ *Id.*

⁷³⁹ *Id.*

⁷⁴⁰ *Id.* at 1257–58.

⁷⁴¹ *Id.*

⁷⁴² 223 P.3d 634 (Alaska Ct. App. 2010).

⁷⁴³ *Id.* at 640–41.

⁷⁴⁴ *Id.* at 635.

⁷⁴⁵ *Id.*

⁷⁴⁶ *Id.*

⁷⁴⁷ *Id.*

⁷⁴⁸ *Id.*

⁷⁴⁹ *Id.* at 639–40.

does not address a factor upon which a presumptive sentencing range hinges, and the factor is raised by the defense prior to sentencing, a new jury trial on that factor does not violate the double jeopardy clause.⁷⁵⁰

ELECTION LAW

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United States District Court for the District of Alaska

Miller v. Treadwell

In *Miller v. Treadwell*,⁷⁵¹ the United States District Court for the District of Alaska held that: (1) counting ballots that misspell a candidate's name does not violate the Elections Clause; and (2) the failure to create uniform rules for counting ballots does not violate the Equal Protection Clause when it is done uniformly by the same panel of officials.⁷⁵² Miller filed claims contesting the results of the election for Lisa Murkowski's U.S. Senate seat because she did not appear on the ballot but was declared the winner of the race after receiving enough write-in votes to defeat both Miller and the Democratic candidate.⁷⁵³ Miller claimed that counting the numerous write-in ballots for Murkowski that misspelled her name violated the Elections Clause of the Constitution because Alaska law requires voters write in the candidate name "as it appears on the write-in declaration of candidacy."⁷⁵⁴ The district court agreed with the Alaska Supreme Court in rejecting this claim, stating that the intent of the voter was paramount.⁷⁵⁵ Next, citing *Bush v. Gore*, Miller claimed the Division of Elections' failure to create "specific standards" and "uniform rules" for elections violated the Equal Protection Clause of the U.S. Constitution.⁷⁵⁶ The district court also rejected this claim, distinguishing the case from *Bush* because, though subjectivity was involved in accepting or rejecting the write-in ballots, it was all done uniformly by the same panel of officials.⁷⁵⁷ Affirming the lower court, the United States District Court for the District of Alaska held that: (1) counting ballots that misspell a candidate's name does not violate the Elections Clause; and (2) the failure to create uniform rules for counting ballots does not violate the Equal Protection Clause when it is done uniformly by the same panel of officials.⁷⁵⁸

⁷⁵⁰ *Id.* at 640–41.

⁷⁵¹ 736 F. Supp. 2d 1240 (D. Alaska 2010).

⁷⁵² *Id.* at 1246.

⁷⁵³ *Id.* at 1241.

⁷⁵⁴ *Id.* at 1242.

⁷⁵⁵ *Id.* at 1243.

⁷⁵⁶ *Id.* at 1243–44 (citing *Bush v. Gore*, 531 U.S. 98 (2000)).

⁷⁵⁷ *Id.* at 1244–45.

⁷⁵⁸ *Id.* at 1246.

Alaska Supreme Court***Apone v. Fred Meyer, Inc.***

In *Apone v. Fred Meyer, Inc.*,⁷⁵⁹ the supreme court held: (1) the Alaska Workers' Compensation Board may recognize a worker's expert witnesses while giving little weight to their testimony; and (2) while the Board's duty to assist pro se litigants is similar to that of a court, the Board is not required to give guidance on strategy decisions.⁷⁶⁰ Apone, a Fred Meyer gas station attendant, sought workers' compensation benefits for a physical illness he attributed to workplace exposure to gasoline fumes.⁷⁶¹ At a workers' compensation hearing, the Alaska Workers' Compensation Board allowed the testimony of Apone's expert witnesses—a chiropractor with no certification in toxicology and an anti-toxins advocate who did not examine Apone or the work environment at Fred Meyer.⁷⁶² However, the Board gave their testimony less weight than the testimony of the physician who conducted the employer's independent medical evaluation (EIME).⁷⁶³ The Board determined that Apone had failed to prove his claim.⁷⁶⁴ Apone appealed to the superior court, arguing that the Board did not adequately assist him in preparing his case and that the Board abused its discretion by not recognizing his expert witnesses.⁷⁶⁵ The superior court affirmed the Board's decision, and Apone appealed to the supreme court.⁷⁶⁶ The supreme court held that it was reasonable for the Board to give less weight to Apone's witnesses because Apone's chiropractor did not have training specific to toxins and because the toxins expert was not a medical doctor capable of linking Apone's illness to exposure at work.⁷⁶⁷ Additionally, because the EIME physician was specifically trained in toxicology, the court found it reasonable for the Board to rely more heavily on his testimony.⁷⁶⁸ The court also held that because medical testimony is not required in all workers' compensation cases, whether to present a medical expert is a strategy decision.⁷⁶⁹ Therefore, the Board was not required to advise Apone, a pro se litigant, on the use of expert testimony.⁷⁷⁰ Affirming the superior court, the supreme court held: (1) the Board may recognize a worker's expert witnesses while giving little weight to their testimony; and (2) pro se litigants are not entitled to guidance on strategy decisions from the Board.⁷⁷¹

⁷⁵⁹ 226 P.3d 1021 (Alaska 2010).

⁷⁶⁰ *Id.* at 1028–29.

⁷⁶¹ *Id.* at 1023.

⁷⁶² *Id.* at 1024–25.

⁷⁶³ *Id.* at 1025–26.

⁷⁶⁴ *Id.* at 1026.

⁷⁶⁵ *Id.*

⁷⁶⁶ *Id.*

⁷⁶⁷ *Id.* at 1027–28.

⁷⁶⁸ *Id.* at 1029.

⁷⁶⁹ *Id.*

⁷⁷⁰ *Id.*

⁷⁷¹ *Id.* at 1028–29.

Burke v. Houston NANA, L.L.C.

In *Burke v. Houston NANA, L.L.C.*,⁷⁷² the supreme court held: (1) when an employee is already receiving temporary total disability (TTD) benefits, the burden is on the employer to show that the employee is no longer disabled;⁷⁷³ and (2) denial of reimbursement for travel costs to a workers' compensation hearing is an abuse of agency discretion when the employee was unable to know in advance whether his credibility would be an issue and his attendance necessary.⁷⁷⁴ Burke, an employee of Houston NANA, L.L.C., was injured while working as a pipe fitter on the Alaska pipeline.⁷⁷⁵ The Alaska Workers' Compensation Board denied certain portions of Burke's claim for medical and disability benefits, and Burke contested the denials.⁷⁷⁶ The superior court affirmed the Board's decision, and Burke appealed.⁷⁷⁷ The supreme court held that since Burke was already receiving TTD benefits, there was a presumption of disability that Houston NANA had the burden to disprove.⁷⁷⁸ Since Houston NANA did not provide substantial evidence to rebut the presumption, the Board erred in denying Burke's request for TTD benefits.⁷⁷⁹ The court also held that the Board abused its discretion by denying Burke's travel costs to attend his workers' compensation hearing because he did not know prior to the hearing whether his credibility would be an issue.⁷⁸⁰ Reversing in part the superior court, the supreme court held: (1) when an employee is already receiving TTD benefits, the burden is on the employer to show that the employee is no longer disabled;⁷⁸¹ and (2) denial of reimbursement for travel costs to a workers' compensation hearing is an abuse of agency discretion when the employee was unable to know in advance whether his credibility would be an issue and his attendance necessary.⁷⁸²

Okpik v. City of Barrow

In *Okpik v. City of Barrow*,⁷⁸³ the supreme court held that a former employee's wrongful termination claim can survive summary judgment when she presents admissible evidence disputing the justification for her demotion that is sufficient to raise an issue of material fact regarding whether the employer violated its implied covenant of good faith and fair dealing.⁷⁸⁴ The city of Barrow overpaid Mayor Nathaniel Olemaun.⁷⁸⁵ Both Mayor Olemaun and finance director Lucy Okpik knew about the overpayment.⁷⁸⁶ Olemaun demoted Okpik and the day after her demotion Okpik resigned.⁷⁸⁷ Okpik brought suit alleging she was demoted in retaliation for her role in Olemaun's

⁷⁷² 222 P.3d 851 (Alaska 2010).

⁷⁷³ *Id.* at 862–63.

⁷⁷⁴ *Id.* at 863–64.

⁷⁷⁵ *Id.* at 854.

⁷⁷⁶ *Id.*

⁷⁷⁷ *Id.* at 858.

⁷⁷⁸ *Id.* at 862.

⁷⁷⁹ *Id.* at 863.

⁷⁸⁰ *Id.* at 863–64.

⁷⁸¹ *Id.* at 862–63.

⁷⁸² *Id.* at 863–64.

⁷⁸³ 230 P.3d 672 (Alaska 2010).

⁷⁸⁴ *Id.* at 674–682.

⁷⁸⁵ *Id.* at 675.

⁷⁸⁶ *Id.*

⁷⁸⁷ *Id.* at 676.

overpayment.⁷⁸⁸ The superior court granted Barrow’s motion for summary judgment and Okpik appealed the court’s summary judgment on her due process, whistleblower and wrongful termination claims.⁷⁸⁹ The supreme court affirmed summary judgment on the due process and whistleblower claims but reversed the wrongful termination claim, finding that a breach of “the implied covenant of good faith,” along with actual termination, will support a wrongful conviction claim.⁷⁹⁰ The supreme court found that Okpik’s rebuttal of some of the reasons for her demotion, her presentation of positive employment evaluations, and evidence that Olemaun was personnel director, was sufficient to create an issue of material fact regarding whether Barrow breached the implied covenant of good faith and demoted Okpik for reasons other than her performance and Olemaun’s overpayment.⁷⁹¹ Thus, the supreme court held that a former employee’s wrongful termination claim can survive summary judgment when she presents admissible evidence disputing the justification for her demotion that is sufficient to raise an issue of material fact regarding whether the employer violated its implied covenant of good faith and fair dealing.⁷⁹²

Peterson v. State, Department of Natural Resources

In *Peterson v. State, Department of Natural Resources*,⁷⁹³ the supreme court held that (1) review of a summary judgment should be based only on information available to the lower court;⁷⁹⁴ (2) an employer does not breach the implied covenant of good faith when its employment decisions were made in good faith;⁷⁹⁵ (3) a discrimination claim fails if the employee cannot demonstrate that his employer’s justifications for its decision are merely pretext;⁷⁹⁶ and, (4) a hostile work environment claim requires evidence of persistent and abusive conduct.⁷⁹⁷ An employee claimed his employer breached its implied covenant of good faith and fair dealing by withdrawing his firefighting qualifications.⁷⁹⁸ The employee claimed that the employer discriminated against him when it gave a position he had applied to someone else,⁷⁹⁹ and created a hostile work environment because other employees made demeaning comments about him.⁸⁰⁰ The superior court granted summary judgment against the employee.⁸⁰¹ The employee then submitted additional information to be considered by the supreme court.⁸⁰² The supreme court refused to consider the additional information, concluding that it would only review information available to the lower court.⁸⁰³ The court found no breach of the employment

⁷⁸⁸ *Id.*

⁷⁸⁹ *Id.*

⁷⁹⁰ *Id.* at 679.

⁷⁹¹ *Id.* at 680–81.

⁷⁹² *Id.* at 674–682.

⁷⁹³ 236 P.3d 355 (Alaska 2010).

⁷⁹⁴ *Id.* at 362.

⁷⁹⁵ *Id.* at 369.

⁷⁹⁶ *Id.* at 367.

⁷⁹⁷ *Id.* at 364.

⁷⁹⁸ *Id.* at 359, 368.

⁷⁹⁹ *Id.* at 366.

⁸⁰⁰ *Id.* at 360, 363.

⁸⁰¹ *Id.* at 358.

⁸⁰² *Id.*

⁸⁰³ *Id.* at 361–62.

contract because the decision to withdraw the employee's qualifications had been made by a good faith reliance on the available evidence about his professional conduct.⁸⁰⁴ The court determined that the discrimination claim failed because he could not show that the non-discriminatory justifications the employer cited for its employment decision were mere pretext.⁸⁰⁵ Finally, the supreme court rejected the employee's hostile work environment claims because the comments at issue were too ambiguous, isolated, and inoffensive to produce a hostile environment.⁸⁰⁶ The supreme court affirmed, holding that (1) review of a summary judgment should be based only on information available to the lower court,⁸⁰⁷ (2) an employer does not breach the implied covenant of good faith when its employment decisions were made in good faith,⁸⁰⁸ (3) a discrimination claim fails if the employee cannot demonstrate that his employer's justifications for its decision are merely pretext,⁸⁰⁹ and, (4) a hostile work environment claim requires evidence of persistent and abusive conduct.⁸¹⁰

Shehata v. Salvation Army

In *Shehata v. Salvation Army*,⁸¹¹ the supreme court held that in workers' compensation cases, employees can only be forced to repay benefits obtained via fraud when the fraud directly led to the procurement of the benefits.⁸¹² Shehata injured his shoulder while working for the Salvation Army and received disability benefits.⁸¹³ Without notifying the Salvation Army, Shehata began working part-time for pay.⁸¹⁴ When the Salvation Army confronted Shehata about the job, he denied that he was being paid.⁸¹⁵ The Salvation Army petitioned the Alaska Workers' Compensation Board for reimbursement of benefits pursuant to section 23.30.250(b) of the Alaska Statutes, which permits the Board to order repayment of fraudulently earned benefits.⁸¹⁶ The Board ruled that Shehata lied and was required to repay all of the disability benefits he received as well as more than \$14,500 in attorneys' fees.⁸¹⁷ Shehata immediately appealed to the Alaska Workers' Compensation Appeals Commission, but the commission affirmed the decision and further awarded the Salvation Army over \$5200 in additional attorneys' fees because Shehata's appeal was "frivolous."⁸¹⁸ The supreme court agreed with the Commission that employers are entitled to reimbursement of benefits gained via fraud, and also agreed that the employers need not fully prove all elements of common law fraud to be repaid.⁸¹⁹ However, the court held that Shehata's misrepresentation did not

⁸⁰⁴ *Id.* at 369.

⁸⁰⁵ *Id.* at 366–67.

⁸⁰⁶ *Id.* at 364.

⁸⁰⁷ *Id.* at 362.

⁸⁰⁸ *Id.* at 369.

⁸⁰⁹ *Id.* at 367.

⁸¹⁰ *Id.* at 364.

⁸¹¹ 225 P.3d 1106 (Alaska 2010).

⁸¹² *Id.* at 1120.

⁸¹³ *Id.* at 1109.

⁸¹⁴ *Id.*

⁸¹⁵ *Id.* at 1109–10.

⁸¹⁶ *Id.* at 1110.

⁸¹⁷ *Id.* at 1111.

⁸¹⁸ *Id.* at 1111–12.

⁸¹⁹ *Id.* at 1114–15.

directly cause him to receive benefits, as the false statement came more than a month after he began receiving disability payments.⁸²⁰ Additionally, the court held that Shehata's appeal was not frivolous because it was brought in good faith and material questions of law and fact remained.⁸²¹ Therefore, the court overturned the attorneys' fees awarded for the appeal and the repayment of any benefits received prior to the fraud.⁸²² Reversing in part, the supreme court held that in workers' compensation cases, employees can only be forced to repay benefits obtained via fraud when the fraud directly led to the procurement of the benefits.⁸²³

Smith v. Anchorage School District

In *Smith v. Anchorage School District*,⁸²⁴ the supreme court held that terminated employees must offer sufficient material evidence to prove claims of employment discrimination and breach of the covenant of good faith and fair dealing against the school district where they were employed.⁸²⁵ The Anchorage School District terminated Smith from his security position and he sued claiming race, age, and disability discrimination as well as breach of the covenant of good faith and fair dealing.⁸²⁶ The supreme court held summary judgment was proper on all claims because Smith failed to present any evidence raising a genuine issue of material fact.⁸²⁷ Affirming the lower court decision, the supreme court held that terminated employees must offer sufficient material evidence to prove claims of employment discrimination and breach of the covenant of good faith and fair dealing against the school district where they were employed.⁸²⁸

State v. Public Safety Employees Association

In *State v. Public Safety Employees Association*,⁸²⁹ the supreme court held that arbitrators' decisions are entitled to substantial deference when parties bargain for a binding arbitration agreement, even if the court would have reached a different outcome.⁸³⁰ After a Department of Transportation officer was terminated because of inappropriate comments he made while intoxicated, the Public Safety Employees Association ("PSEA") filed a grievance with the State that went to arbitration.⁸³¹ The arbitrator determined that mitigating factors made termination excessive, and he ordered the Department to reinstate the officer without back pay.⁸³² The State appealed to the superior court, which granted summary judgment to PSEA.⁸³³ The supreme court affirmed, holding that the arbitrator's decision was entitled to deference because the State

⁸²⁰ *Id.* at 1115.

⁸²¹ *Id.* at 1119.

⁸²² *Id.* at 1120.

⁸²³ *Id.*

⁸²⁴ 240 P.3d 834 (Alaska 2010).

⁸²⁵ *Id.* at 838.

⁸²⁶ *Id.*

⁸²⁷ *Id.* at 841.

⁸²⁸ *Id.* at 838.

⁸²⁹ 235 P.3d 197 (Alaska 2010).

⁸³⁰ *Id.* at 199.

⁸³¹ *Id.* at 199–200.

⁸³² *Id.* at 200–01.

⁸³³ *Id.* at 201.

failed to show the arbitrator had committed gross error.⁸³⁴ Affirming the lower court, the supreme court held that arbitrators' decisions are entitled to substantial deference when parties bargain for a binding arbitration agreement, even if the court would have reached a different outcome.⁸³⁵

ENVIRONMENTAL LAW

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Alaska Court of Appeals

Charles v. State

In *Charles v. State*,⁸³⁶ the court of appeals held that a defendant was not entitled to raise a subsistence defense after violating regulations that require hunters to have harvest tickets, and that for a state regulation to be inconsistent with federal law there must be some deficiency in the administrative proceedings or the regulation must have been arbitrary or unreasonable.⁸³⁷ The superior court convicted Charles for unlawful possession and transportation of game and hunting without the required harvest tickets for his involvement in a situation where deer were shot on federal land on Prince Wales Island.⁸³⁸ Charles argued that the subsistence priority found in the Alaska National Interest Lands Conservation Act of 1980 (ANILCA) entitled him to defend against the charges by claiming the hunting was needed for subsistence.⁸³⁹ The court determined that Charles was not entitled to raise a subsistence defense because, without a regulation authorizing subsistence hunting, he had no right to violate the current regulations.⁸⁴⁰ Charles also argued that the current state regulations conflicted with the ANILCA and the state regulations were therefore invalid.⁸⁴¹ Charles' hunting of does, however, violated both federal and state regulations, which weighs against a conflict.⁸⁴² Further, Charles provided no record of deficiencies in the administrative proceedings that developed the regulations or that the regulations were arbitrary and unreasonable when enacted, which would be required to challenge the regulations.⁸⁴³ Affirming the lower court, the court of appeals held that a defendant was not entitled to raise a subsistence defense after violating regulations that require hunters to have harvest tickets, and that for a state regulation to be inconsistent with federal law there must be some deficiency in the administrative proceedings or the regulation must have been arbitrary or unreasonable.⁸⁴⁴

⁸³⁴ *Id.* at 202.

⁸³⁵ *Id.* at 199.

⁸³⁶ 232 P.3d 739 (Alaska Ct. App. 2010).

⁸³⁷ *Id.* at 744–45.

⁸³⁸ *Id.* at 741.

⁸³⁹ *Id.*

⁸⁴⁰ *Id.* at 743–44.

⁸⁴¹ *Id.* at 744.

⁸⁴² *Id.*

⁸⁴³ *Id.* at 744–45.

⁸⁴⁴ *Id.* at 744–45.

ETHICS AND PROFESSIONAL RESPONSIBILITY

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Stewart v. Elliott

In *Stewart v. Elliott*,⁸⁴⁵ the supreme court held that when a driver's attorney in a criminal action is not a party to the post-conviction relief action and neither directed nor controlled that litigation, the post-conviction relief decision does not have preclusive effect in a malpractice action.⁸⁴⁶ A driver was arrested for a felony driving under the influence (DUI) on the day a new DUI law took effect.⁸⁴⁷ The driver pleaded no contest to the DUI charge in exchange for a reduction from a felony to a misdemeanor.⁸⁴⁸ The superior court later granted the driver post-conviction relief, concluding his counsel was ineffective in failing to recognize that the new DUI law became effective at the time of the arrest.⁸⁴⁹ The driver brought a malpractice suit against the attorney, relying on the decision in the post-conviction relief action to demonstrate the attorney did not recognize the date discrepancy.⁸⁵⁰ The superior court declined to give the post-conviction decision preclusive effect and ruled that the driver presented insufficient evidence to prove negligence.⁸⁵¹ The supreme court agreed, holding there was no privity for the defendant attorney with the prior decision, and there was insufficient evidence to prove a breach of attorney duty.⁸⁵² Affirming the lower court, the supreme court held that when a driver's attorney in a criminal action is not a party to the post-conviction relief action and neither directed nor controlled that litigation, the post-conviction relief decision does not have preclusive effect in a malpractice action.⁸⁵³

FAMILY LAW

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Alaska Supreme Court

Barbara P. v. State, Department of Health and Social Services

In *Barbara P. v. State, Department of Health and Social Services*,⁸⁵⁴ the supreme court determined that a finding that a parent has not remedied the conduct or conditions that places his or her child at risk is a question of fact that will only be reviewed for clear error.⁸⁵⁵ The Office of Children's Services ("OCS") filed a petition to terminate Barbara's parental rights and the father's parental rights to their two children.⁸⁵⁶ The superior court terminated both parents' parental rights because both children were in need

⁸⁴⁵ 239 P.3d 1236 (Alaska 2010).

⁸⁴⁶ *Id.* at 1243.

⁸⁴⁷ *Id.* at 1237.

⁸⁴⁸ *Id.*

⁸⁴⁹ *Id.*

⁸⁵⁰ *Id.*

⁸⁵¹ *Id.* at 1239.

⁸⁵² *Id.* at 1242–43.

⁸⁵³ *Id.* at 1243.

⁸⁵⁴ 234 P.3d 1245 (Alaska 2010).

⁸⁵⁵ *Id.* at 1253.

⁸⁵⁶ *Id.* at 1252.

of aid⁸⁵⁷ due to: (1) domestic violence by both parents, substance abuse by both parents, Barbara’s mental health issues, and abandonment by the father, (2) the parents’ failure to remedy the conduct and conditions that placed the children at risk of harm, and (3) OCS made reasonable efforts to provide services to reunite the family.⁸⁵⁸ The supreme court held that determinations of whether or not a parent has remedied conduct that places a child at risk is best determined by a trial court and will be reviewed for clear error.⁸⁵⁹ The supreme court then found that the superior court’s findings were adequately supported by the record.⁸⁶⁰ Affirming the lower court, the supreme court determined that a finding that a parent has not remedied the conduct or conditions that places his or her child at risk is a question of fact that will only be reviewed for clear error.⁸⁶¹

Barnett v. Barnett

In *Barnett v. Barnett*,⁸⁶² the supreme court held that courtship costs do not qualify as marital debt under Alaska law for purposes of calculating spousal support, and that immigration sponsorship pledges are not actionable for support under federal law.⁸⁶³ Mr. Bennett paid for his courtship visits and the entire costs of Mrs. Bennett’s pre-marital move from Belarus to Fairbanks.⁸⁶⁴ These expenses included the filing of immigration paperwork for Mrs. Bennett and her daughter, in which Mr. Bennett pledged to be their sponsor and to support them.⁸⁶⁵ After Mr. Bennett filed for divorce, Mrs. Bennett requested spousal support and attorneys’ fees under both state and federal law, contending that the immigration sponsor pledge required Mr. Bennett to support her for ten years after her entry into the country.⁸⁶⁶ On appeal, the supreme court affirmed the superior court’s award of no support under federal law, but remanded the state law spousal support question.⁸⁶⁷ The supreme court found that the superior court had improperly treated Mr. Bennett’s “courtship costs” as “marital debt” that reduced the state law spousal support award and therefore remanded for reconsideration of Mrs. Bennett’s monthly spousal support and for more factual findings regarding her earning capacity and educational expenses.⁸⁶⁸ The supreme court held that courtship costs do not qualify as marital debt under Alaska law for purposes of calculating spousal support, and that immigration sponsorship pledges are not actionable for support under federal law.⁸⁶⁹

Brotherton v. Warner

In *Brotherton v. Warner*,⁸⁷⁰ the supreme court held that superior courts may order child custody payments beyond the child’s eighteenth birthday, even if the parents have

⁸⁵⁷ *Id.* at 1254.

⁸⁵⁸ *Id.* at 1252.

⁸⁵⁹ *Id.* at 1253.

⁸⁶⁰ *Id.* at 1255–59.

⁸⁶¹ *Id.* at 1253.

⁸⁶² 238 P.3d 594 (Alaska 2010).

⁸⁶³ *Id.* at 596.

⁸⁶⁴ *Id.*

⁸⁶⁵ *Id.*

⁸⁶⁶ *Id.* at 596–97.

⁸⁶⁷ *Id.* at 603.

⁸⁶⁸ *Id.* at 602.

⁸⁶⁹ *Id.* at 596.

⁸⁷⁰ 240 P.3d 1225

designated another person to care for the child.⁸⁷¹ Brotherton was ordered to pay child custody payments under section 25.24.170(a) of the Alaska Statutes after his child turned eighteen.⁸⁷² On appeal, he argued that the statute did not apply to him because his child's caretakers were not parents, guardians, or designees.⁸⁷³ He argued that the caretakers may have been designees before the child turned eighteen, they could no longer be considered designees because after turning eighteen his child could not be subject to the legal custody of another person.⁸⁷⁴ The supreme court noted that the statute was enacted to protect children who were still in high school when they turned eighteen; the court noted that Brotherton's interpretation would render the statute meaningless.⁸⁷⁵ The supreme court held that superior courts may order child custody payments beyond the child's eighteenth birthday, even if the parents have designated another person to care for the child.⁸⁷⁶

Cartee v. Cartee

In *Cartee v. Cartee*,⁸⁷⁷ the supreme court held that a 60/40 property division was not an abuse of discretion and that property awards made to facilitate career training should be analyzed under the property division statute and not under the rehabilitative alimony standard.⁸⁷⁸ In a divorce action, the husband appealed the trial court's award of sixty percent of the marital property to his former wife, arguing in part that the court had improperly awarded rehabilitative alimony.⁸⁷⁹ While there is a presumption that an equal division of marital property is equitable, section 25.24.106(a)(4) of the Alaska Statutes allows for an unequal property division if a court, after taking into consideration the "Merrill factors," determines that an unequal property division would fairly allocate the economic effects of divorce.⁸⁸⁰ The standard for determining rehabilitative alimony is narrower than for property division and serve the specific purpose of funding a spouse's education or job training.⁸⁸¹ Here, because the wife sacrificed career advancement to care for the couple's child, the court gave her a greater percentage of the marital property.⁸⁸² Because the allocation did not require the wife to return to school but rather provided the opportunity, the more general property division was held to be the appropriate standard rather than the more rigid rehabilitative alimony standard.⁸⁸³ The supreme court affirmed the trial court decision, holding that a 60/40 property division was not an abuse of discretion and that property awards made to facilitate career training should be analyzed under the property division statute and not under the rehabilitative alimony standard.⁸⁸⁴

⁸⁷¹ *Id.* at 1230.

⁸⁷² *Id.* at 1228.

⁸⁷³ *Id.* at 1230.

⁸⁷⁴ *Id.*

⁸⁷⁵ *Id.*

⁸⁷⁶ *Id.* at 1230.

⁸⁷⁷ 239 P.3d 707 (Alaska 2010).

⁸⁷⁸ *Id.* at 712–14.

⁸⁷⁹ *Id.* at 709.

⁸⁸⁰ *Id.* at 712. "AS 25.24.160(a)(4) codifies and expands the factors articulated in *Merrill v. Merrill*, 368 P.2d 546, 547–48 n.4 (Alaska 1962)." *Id.* at 712 n.9.

⁸⁸¹ *Id.* at 714.

⁸⁸² *Id.* at 713.

⁸⁸³ *Id.* at 714.

⁸⁸⁴ *Id.* at 712–14.

Charles v. State

In *Charles v. State*,⁸⁸⁵ the supreme court held that it was appropriate to terminate parental rights where the Office of Children's Services (OCS) made active efforts to prevent the break-up of an Alaska Native family and where returning the children to the parent's custody would result in harm to the children.⁸⁸⁶ To terminate parental rights, the court must find that active efforts were made to rehabilitate the parent and keep the family intact.⁸⁸⁷ The trial court determined that OCS's repeated referrals of Charles to substance abuse and anger management programs, scheduling of visitation with his children, provision of bus passes and phone cards, and creation of a personalized case plan were sufficient to meet this standard.⁸⁸⁸ Termination of rights also requires a showing, including testimony by an expert witness, that returning the children to the parent's care would likely result in "serious emotional or physical damage" to the children.⁸⁸⁹ Charles disputed the testimony provided by the expert in his trial, claiming that it was based only on generalizations.⁸⁹⁰ The trial court disagreed.⁸⁹¹ Affirming the lower court, the supreme court held that it was appropriate to terminate parental rights where OCS made active efforts to prevent the break-up of an Alaska Native family and where returning the children to the parent's custody would result in harm to the children.⁸⁹²

Colton v. Colton

In *Colton v. Colton*,⁸⁹³ the supreme court held that, when dividing property in a divorce proceeding, the court should employ contract law principles that unexpressed intentions and mental reservations do not override objective indications of assent to terms of an agreement.⁸⁹⁴ This case arose out of a divorce proceeding in which the parties reached an agreement on all property division issues.⁸⁹⁵ The trial court entered into the record that the husband was to make a cash payment to his wife.⁸⁹⁶ The husband appealed, arguing (1) the superior court erred in finding the husband agreed to make this payment to his wife because he did not understand it would result in unequal property division, and (2) the superior court abused its discretion in enforcing this agreement because it was made without the husband's full understanding.⁸⁹⁷ The supreme court held that all objective evidence pointed against the husband's assent being contingent on an "equal" division and therefore the lower court did not err in enforcing the agreement.⁸⁹⁸ Affirming the judgment of the trial court, the supreme court held that,

⁸⁸⁵ No. S-13794, 2010 Alas. LEXIS 131 (Alaska 2010).

⁸⁸⁶ *Id.* at *5, *10.

⁸⁸⁷ *Id.* at *5–*6.

⁸⁸⁸ *Id.* at *8–*10.

⁸⁸⁹ *Id.* at *10.

⁸⁹⁰ *Id.* at *11.

⁸⁹¹ *Id.* at *12.

⁸⁹² *Id.* at *5, *10.

⁸⁹³ 244 P.3d 1121 (Alaska 2010).

⁸⁹⁴ *Id.* at 1128–29.

⁸⁹⁵ *Id.* at 1123.

⁸⁹⁶ *Id.*

⁸⁹⁷ *Id.* at 1122–23.

⁸⁹⁸ *Id.* at 1128–29.

when dividing property in a divorce proceeding, the court should employ contract law principles that unexpressed intentions and mental reservations do not override objective indications of assent to terms of an agreement.⁸⁹⁹

Doug Y. v. State, Dep't of Health & Social Services

In *Doug Y. v. State, Dep't of Health & Social Services*,⁹⁰⁰ the supreme court held that an Office of Children's Services (OCS) petition to terminate parental rights should be granted when a parent fails to change behavior that put his child at risk despite receiving adequate time and reasonable family services.⁹⁰¹ First in 2005, and then in 2007, OCS was called to investigate Doug Y. for beating his son, Damien.⁹⁰² OCS created a case plan for Doug with the goal of allowing him to regain custody.⁹⁰³ In 2009, due to Doug's failure to fully comply with the plan and Damien's continuing trauma, the superior court granted a termination of Doug's parental rights.⁹⁰⁴ Doug appealed, arguing that Damien was not a child in need of aid due to Doug's substance abuse, OCS did not prove that Doug failed to change his harmful behavior, OCS failed to make a reasonable effort to provide Doug with family support services, and terminating Doug's parental rights was not in Damien's best interest.⁹⁰⁵ The supreme court first held that a finding that a child is in need of aid for any of the reasons in section 47.10.011 of the Alaska Statutes is sufficient to support termination. Since Doug conceded physically harming Damien, his substance abuse was irrelevant.⁹⁰⁶ Next, the court applied the factors listed in section 47.10.088(b) and found that Doug did not remedy the behavior that put Damien at risk for substantial harm.⁹⁰⁷ Finally, the court found that OCS provided adequate family support services, despite not hiring a counselor for Doug, and that the superior court was justified in finding termination of Doug's rights to be in Damien's best interest.⁹⁰⁸ Affirming the lower court, the supreme court held that an OCS petition to terminate parental rights should be granted when a parent fails to change behavior that put his child at risk despite receiving adequate time and reasonable family services.⁹⁰⁹

Hill v. Bloom

In *Hill v. Bloom*,⁹¹⁰ the supreme court held that five months of income data was not sufficient to qualify as new evidence requiring the modification of child support and that, even if the data did qualify, it was not sufficient to show a material and permanent change in circumstances.⁹¹¹ The superior court calculated Hill's child support payments to Bloom based on a five-year average of Hill's income from her business, excluding

⁸⁹⁹ *Id.*

⁹⁰⁰ 243 P.3d 217 (Alaska 2010).

⁹⁰¹ *Id.* at 224–30.

⁹⁰² *Id.* at 219.

⁹⁰³ *Id.* at 220–21.

⁹⁰⁴ *Id.* at 221–23.

⁹⁰⁵ *Id.* at 224–30.

⁹⁰⁶ *Id.* at 224.

⁹⁰⁷ *Id.* at 224–26.

⁹⁰⁸ *Id.* at 227–30.

⁹⁰⁹ *Id.* at 224–30.

⁹¹⁰ 235 P.3d 215 (Alaska 2010).

⁹¹¹ *Id.* at 218, 220.

dramatically lower income from 2007, which the court found an “aberration.”⁹¹² Later, Hill filed a motion to modify child support, arguing that business changes depressed her earnings during the first six months of 2008 and her income would be dramatically less than anticipated.⁹¹³ The court found that concerns over prompt modification of payments must be balanced with the need to let sufficient time pass to prove a change in income.⁹¹⁴ Here, the superior court averaged income over five years and only five months had passed since the decision.⁹¹⁵ Because small businesses are prone to dramatic fluctuations, the supreme court held that it was not error to deny Hill’s motion for child support modification without an evidentiary hearing.⁹¹⁶ The supreme court affirmed the superior court’s denial of Hill’s motion to modify child support without an evidentiary hearing, finding that five months of income data was not sufficient to qualify as new evidence requiring the modification of child support and that, even if the data were considered new evidence, it was not sufficient to show a material and permanent change in circumstances.⁹¹⁷

Husseini v. Husseini

In *Husseini v. Husseini*,⁹¹⁸ the supreme court held: (1) a divorce decree dissolving a marriage is a final judgment even when some issues have been reserved;⁹¹⁹ and (2) in the absence of exceptional circumstances, it is error for a trial court to sell marital assets prior to issuing a divorce judgment.⁹²⁰ After separating from her husband, Janice continued to occupy the marital residence.⁹²¹ At a hearing held before the divorce was finalized, the trial court gave Janice thirty days to refinance the home in her name and, against her objections, bifurcated the divorce from the property proceedings.⁹²² Janice was unable to refinance, so the court ordered the sale of the house.⁹²³ Janice appealed, arguing the trial court erred in bifurcating the divorce proceedings and in ordering the sale of the home prior to a final judgment on property division.⁹²⁴ The supreme court held that Janice’s appeal of the bifurcation was untimely and a divorce decree is a final judgment even when some issues have been reserved.⁹²⁵ Because that rule had not been announced prior to this decision, the supreme court considered the merits of Janice’s claim.⁹²⁶ The supreme court determined that the trial court committed harmless error in bifurcating the divorce proceedings but erred in ordering the pre-judgment sale of the house because it did not make factual findings showing a pressing reason for the sale.⁹²⁷

⁹¹² *Id.* at 217.

⁹¹³ *Id.* at 217–18.

⁹¹⁴ *Id.*

⁹¹⁵ *Id.*

⁹¹⁶ *Id.* at 218–19.

⁹¹⁷ *Id.* at 218, 220.

⁹¹⁸ 230 P.3d 682 (Alaska 2010) (per curiam).

⁹¹⁹ *Id.* at 686.

⁹²⁰ *Id.* at 688.

⁹²¹ *Id.* at 684.

⁹²² *Id.*

⁹²³ *Id.*

⁹²⁴ *Id.*

⁹²⁵ *Id.* at 686.

⁹²⁶ *Id.*

⁹²⁷ *Id.* at 688.

Vacating and remanding, the court held: (1) a divorce decree dissolving a marriage is a final judgment even when some issues have been reserved;⁹²⁸ and (2) in the absence of exceptional circumstances, it is error for a trial court to sell marital assets prior to issuing a divorce judgment.⁹²⁹

Kent V. v. State, Department of Health & Social Services

In *Kent V. v. State, Department of Health & Social Services*,⁹³⁰ the supreme court held that the state's second petition to terminate a father's parental rights was not barred by the doctrine of res judicata because the state raised new material facts.⁹³¹ The defendant appealed the superior court's decision to allow the state to relitigate its parental rights termination case after a prior holding that termination of parental rights was not necessary.⁹³² The court held that new psychological evidence, which suggested the child would not be able to develop properly if he were kept with his parents, was a new material fact, and that the state's second petition therefore was not barred by res judicata.⁹³³ Thus, the supreme court held that the state's second petition to terminate a father's parental rights was not barred by the doctrine of res judicata because the state raised new material facts.⁹³⁴

Millette v. Millette

In *Millette v. Millette*,⁹³⁵ the supreme court held that the cost of nutritional supplements recommended by a physician and purchased from a clinic are reasonable health care expenses for reimbursement pursuant to a child support order.⁹³⁶ Pursuant to a child support order requiring payment for cost of natural health care, the divorced mother of an autistic child sought reimbursement from her ex-husband for nutritional supplements that were recommended to her by a health care practitioner.⁹³⁷ The superior court ordered the ex-husband to pay for the nutritional supplements.⁹³⁸ On appeal, the ex-husband argued that he should not have to pay these expenses because the supplements are part of the child's nutritional expenses, not health care expenses.⁹³⁹ The supreme court reasoned, however, that the cost of these nutritional supplements could be considered health care expenses because the nutritional supplements had been purchased directly from a clinic, the invoices for the supplements also contained charges for appointments, and the supreme court has consistently interpreted "health expenses" for child support broadly.⁹⁴⁰ Affirming the lower court, the supreme court held that the cost

⁹²⁸ *Id.* at 686.

⁹²⁹ *Id.* at 688.

⁹³⁰ 233 P.3d 597 (Alaska 2010).

⁹³¹ *Id.* at 602–03.

⁹³² *Id.* at 597.

⁹³³ *Id.* at 602–03.

⁹³⁴ *Id.* at 602–03.

⁹³⁵ 240 P.3d 1217 (Alaska 2010).

⁹³⁶ *Id.* at 1225.

⁹³⁷ *Id.* at 1219.

⁹³⁸ *Id.*

⁹³⁹ *Id.* at 1220.

⁹⁴⁰ *Id.* at 1221.

of nutritional supplements recommended by a physician and purchased from a clinic are reasonable health care expenses for reimbursement pursuant to a child support order.⁹⁴¹

Misyura v. Misyura

In *Misyura v. Misyura*,⁹⁴² the supreme court held: (1) is not an abuse of discretion for a trial court to find a history of domestic violence based solely on the testimony of a the battered spouse; and (2) a trial court errs by allowing a spouse to condition continued visitation rights on participation in an intervention program.⁹⁴³ Lyudmila Misyura obtained a domestic violence protective order against her husband, Sergey Misyura, after testifying of two separate instances of abuse.⁹⁴⁴ During the divorce proceeding, she testified about many other instances of domestic violence that occurred during the marriage.⁹⁴⁵ The trial court found a history of domestic violence, awarded sole legal and physical child custody to Lyudmila, and ordered that Lyudmila could require Sergey to attend an intervention program as a prerequisite to exercising his unsupervised visitation rights.⁹⁴⁶ The trial court had discretion to determine the credibility of the plaintiff's testimony, even without any corroborating evidence or witnesses.⁹⁴⁷ The court, not a spouse, decides whether a party must attend an intervention program to maintain visitation rights.⁹⁴⁸ Affirming in part and reversing in part, the supreme court held: (1) is not an abuse of discretion for a trial court to find a history of domestic violence based solely on the testimony of a the battered spouse; and (2) a trial court errs by allowing a spouse to condition continued visitation rights on participation in an intervention program.⁹⁴⁹

Osterkamp v. Stiles (I)

In *Osterkamp v. Stiles*,⁹⁵⁰ the supreme court held that in determining whether a foster parent has established psychological parent status, a court may rely on the short length of the parent-child relationship, the child's young age, and the fact that the foster parent allowed somebody else to adopt the child.⁹⁵¹ Osterkamp and Stiles were foster parents for a child until Stiles adopted the child when he was sixteen months old.⁹⁵² The two domestic partners separated after the adoption.⁹⁵³ Stiles began limiting Osterkamp's custody and visitation and he filed a complaint, asking for custody and visitation.⁹⁵⁴ The superior court awarded sole physical and legal custody to Stiles and Osterkamp appealed.⁹⁵⁵ The supreme court determined that for Osterkamp to establish custody

⁹⁴¹ *Id.* at 1225.

⁹⁴² 242 P.3d 1037 (Alaska 2010).

⁹⁴³ *Id.* at 1041–42.

⁹⁴⁴ *Id.* at 1038.

⁹⁴⁵ *Id.* at 1038–39.

⁹⁴⁶ *Id.* at 1039.

⁹⁴⁷ *Id.* at 1041.

⁹⁴⁸ *Id.* at 1042.

⁹⁴⁹ *Id.* at 1041–42.

⁹⁵⁰ 235 P.3d 178 (Alaska 2010).

⁹⁵¹ *Id.* at 189.

⁹⁵² *Id.* at 181.

⁹⁵³ *Id.*

⁹⁵⁴ *Id.*

⁹⁵⁵ *Id.* at 182.

despite Stiles's objections, he would have to first prove that he was the child's psychological parent at the time of the custody application by clear and convincing evidence.⁹⁵⁶ Since the relevant time period for determining the relationship was so short, the child was so young, and Osterkamp voluntarily allowed Stiles to adopt the child by herself, the supreme court affirmed the superior court's decision that psychological parent status was not established.⁹⁵⁷ Affirming the superior court's ruling, the supreme court held that in determining whether a foster parent has established psychological parent status, a court may rely on the short length of the parent-child relationship, the child's young age, and the fact that the foster parent allowed somebody else to adopt the child.⁹⁵⁸

Osterkamp v. Stiles (II)

In *Osterkamp v. Stiles*,⁹⁵⁹ the supreme court held that an adoptive mother could not be equitably estopped from withholding consent for her partner to adopt her child when she never unconditionally agreed to allow the adoption.⁹⁶⁰ Stiles adopted a foster child that she and Osterkamp had raised for sixteen months.⁹⁶¹ At the adoption hearing Osterkamp did not object to Stiles adopting the child individually and did not request post-adoption rights.⁹⁶² Osterkamp and Stiles originally agreed that Osterkamp's adoption of the child was dependent upon an improvement in their relationship.⁹⁶³ After the couple separated, Osterkamp filed for joint custody; the superior court denied because Osterkamp had proved neither psychological parent status nor that denying custody would be detrimental to the child.⁹⁶⁴ Osterkamp then filed a petition for adoption.⁹⁶⁵ In response to Stiles' motion to dismiss, Osterkamp argued that Stiles could be equitably estopped from withholding consent.⁹⁶⁶ The superior court judge allowed that equitable estoppel might sometimes be applicable but found that the evidence did not support the claim and Osterkamp appealed.⁹⁶⁷ The supreme court did not decide whether equitable estoppel might apply in some petitions for adoption, but explained that reasonable reliance and resulting prejudice are generally required for equitable estoppel.⁹⁶⁸ Thus, the supreme court held that an adoptive mother could not be equitably estopped from withholding consent for her partner to adopt her child when she never unconditionally agreed to allow the adoption.⁹⁶⁹

⁹⁵⁶ *Id.* at 185–86.

⁹⁵⁷ *Id.* at 188–89.

⁹⁵⁸ *Id.* at 189.

⁹⁵⁹ 235 P.3d 193 (Alaska 2010).

⁹⁶⁰ *Id.* at 194.

⁹⁶¹ *Id.*

⁹⁶² *Id.*

⁹⁶³ *Id.* at 197.

⁹⁶⁴ *Id.* at 195.

⁹⁶⁵ *Id.* at 195.

⁹⁶⁶ *Id.*

⁹⁶⁷ *Id.*

⁹⁶⁸ *Id.* at 196, 196 n.19.

⁹⁶⁹ *Id.* at 194.

Partridge v. Partridge

In *Partridge v. Partridge*,⁹⁷⁰ the supreme court held that a lower court's fair evaluation of the economic effect of a divorce is a three-step process reviewable under the abuse of discretion standard.⁹⁷¹ During the divorce proceedings, the trial court determined that an even division of assets at the legal date of separation was appropriate.⁹⁷² James Partridge challenged the court's allocation of assets claiming the court mischaracterized assets and failed to consider his contributions of separate property to the marriage.⁹⁷³ The supreme court articulated a three-step property division test to be reviewed under the abuse of discretion standard as: (1) the characterization of property as separate or marital; (2) the value placed upon the property; and (3) the allocation of property as equitable.⁹⁷⁴ The supreme court found that not crediting James for marital debt he paid and a failure to determine the existence of pension funds at the time of trial were an abuse of discretion, and all other evaluations by the trial court were neither clearly erroneous nor an abuse of discretion.⁹⁷⁵ The supreme court reversed and remanded, holding that a lower court's fair evaluation of the economic effect of a divorce is a three-step process reviewable under the abuse of discretion standard.⁹⁷⁶

Sparks v. Sparks

In *Sparks v. Sparks*,⁹⁷⁷ the supreme court held that proceeds from a court settlement are marital property when the evidence shows an intent to donate the disputed portion of the settlement proceeds to the marital estate.⁹⁷⁸ Shelia Sparks retired early due to a disability and sued her disability insurance carrier for discontinuing payments; she settled the case in 2004.⁹⁷⁹ A portion of the settlement provided monthly payments for Shelia and Richard Sparks that would continue in reduced payments if Shelia predeceased Richard.⁹⁸⁰ The supreme court reasoned that the inclusion of Richard Sparks as a payee in the settlement and the continuation of payments to him if Shelia died demonstrated an intent to donate those settlement payments to the marriage.⁹⁸¹ The supreme court affirmed the superior court's holding that damage payments replacing long-term disability payments which served as retirement benefits should be divided based on the length of the marriage⁹⁸² and that the superior court did not clearly err in finding an intent to donate damages when the settlement listed the husband as a payee.⁹⁸³ Affirming the lower court, the supreme court held that proceeds from a court settlement

⁹⁷⁰ 239 P.3d 680 (Alaska 2010).

⁹⁷¹ *Id.* at 682–85.

⁹⁷² *Id.* at 682.

⁹⁷³ *Id.*

⁹⁷⁴ *Id.* at 685.

⁹⁷⁵ *Id.* at 685–92.

⁹⁷⁶ *Id.* at 692.

⁹⁷⁷ 233 P.3d 1091 (Alaska 2010).

⁹⁷⁸ *Id.* at 1093.

⁹⁷⁹ *Id.*

⁹⁸⁰ *Id.*

⁹⁸¹ *Id.* at 1096.

⁹⁸² *Id.* at 1095.

⁹⁸³ *Id.* at 1096.

are marital property when the evidence shows an intent to donate the disputed portion of the settlement proceeds to the marital estate.⁹⁸⁴

Wee v. Eggener

In *Wee v. Eggener*,⁹⁸⁵ the supreme court held that: (1) a trial court errs when it awards joint custody and fails to address a presumption against custody for a party with a history of domestic violence; and (2) an independent basis must exist with respect to each party when a mutual restraining order is ordered.⁹⁸⁶ The domestic relationship between Wee and Eggener was plagued by abuse allegations by Wee, which resulted in a protective order being issued against Eggener.⁹⁸⁷ Eggener and Wee both filed for sole legal and primary physical custody of their child, and the trial court ordered joint physical custody and granted a mutual no contact order.⁹⁸⁸ The supreme court denied custody to Eggener because the trial court found that Eggener had a history of domestic violence, but did not address a statutory rebuttable presumption against awarding custody to a parent who has a history of domestic violence.⁹⁸⁹ Further, the court vacated the no-contact order as it applied to Wee because no independent basis existed for a no-contact order against Wee.⁹⁹⁰ Vacating the lower court, the supreme court held that: (1) a trial court errs when it awards joint custody and fails to address a presumption against custody for a party with a history of domestic violence; and (2) an independent basis must exist with respect to each party when a mutual restraining order is ordered.⁹⁹¹

Williams v. Barbee

In *Williams v. Barbee*,⁹⁹² the supreme court held that, when allegations of domestic violence arise in custody hearings, the superior court must make a finding as to whether there has been a “history of domestic violence” under section 25.24.150(h) of the Alaska Statutes.⁹⁹³ During a custody hearing, Williams presented evidence that Barbee had been convicted of assaulting her while they were married.⁹⁹⁴ The trial court weighed this evidence against other factors and granted both parents joint custody.⁹⁹⁵ On appeal, Williams argued that Barbee should not have been granted custody because he had a history of domestic violence and section 25.24.150(h) creates a rebuttable presumption against the violent parent.⁹⁹⁶ The supreme court noted that a single instance of domestic violence can be considered a “history of domestic violence” for purposes of the statute.⁹⁹⁷ It also noted that the superior court had not made a finding as to whether there was a

⁹⁸⁴ *Id.* at 1093.

⁹⁸⁵ 225 P.3d 1120 (Alaska 2010).

⁹⁸⁶ *Id.* at 1122–27.

⁹⁸⁷ *Id.*

⁹⁸⁸ *Id.* at 1123–24.

⁹⁸⁹ *Id.* at 1125.

⁹⁹⁰ *Id.* at 1127.

⁹⁹¹ *Id.* at 1122–27.

⁹⁹² 243 P.3d 995 (Alaska 2010).

⁹⁹³ *Id.* at 1004.

⁹⁹⁴ *Id.* at 996–97.

⁹⁹⁵ *Id.* at 999.

⁹⁹⁶ *Id.* at 997.

⁹⁹⁷ *Id.* at 1004.

history of domestic violence.⁹⁹⁸ The supreme court held that, when allegations of domestic violence arise in custody hearings, the superior court must make a finding as to whether there has been a “history of domestic violence” under section 25.24.150(h) of the Alaska Statutes.⁹⁹⁹

Worland v. Worland

In *Worland v. Worland*,¹⁰⁰⁰ the supreme court held: (1) courts may not equitably divide total retirement pay; and (2) when issuing sanctions courts must identify either the nature of the sanction or the rule upon which they relied to impose the sanction.¹⁰⁰¹ Jacqueline Worland filed for divorce against her former husband, Charles.¹⁰⁰² The superior court entered an amended divorce decree assigning Jacqueline 50% of Charles’s gross military retirement pay as a sanction for him removing Jacqueline from the survivor benefits plan.¹⁰⁰³ On appeal, Charles argued that the court erred in awarding Jacqueline 50% of his gross retirement pay and that he was sanctioned erroneously.¹⁰⁰⁴ The supreme court held that “a court may not equitably divide total retired pay; it may equitably divide only the amount of retired pay remaining after the court deducts waived retired pay and the cost of purchasing survivor benefits.”¹⁰⁰⁵ As for the possibility that dividing the total retirement pay was a sanction against Charles, the court held that while trial courts have the authority to sanction through the use of fines, they must identify either the nature of the sanction or the rule upon which it relied.¹⁰⁰⁶ Because the superior court did neither, the supreme court vacated the sanction.¹⁰⁰⁷ Remanding the issue of the proper allocation of Charles’s retirement pay, the supreme court held: (1) courts may not equitably divide total retirement pay; and (2) when issuing sanctions courts must identify either the nature of the sanction or the rule upon which they relied to impose the sanction.¹⁰⁰⁸

INSURANCE LAW

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⁹⁹⁸ *Id.*

⁹⁹⁹ *Id.*

¹⁰⁰⁰ 240 P.3d 825 (Alaska 2010).

¹⁰⁰¹ *Id.* at 831.

¹⁰⁰² *Id.* at 827.

¹⁰⁰³ *Id.* at 828, 831.

¹⁰⁰⁴ *Id.* at 830–31.

¹⁰⁰⁵ *Id.* at 831 (quoting *Young v. Lowery*, 221 P.3d 1006, 1011 (Alaska 2009)).

¹⁰⁰⁶ *Id.*

¹⁰⁰⁷ *Id.*

¹⁰⁰⁸ *Id.* at 831.

Alaska Supreme Court

Dale H. v. State, Department of Health & Social Services

In *Dale H. v. State, Department of Health & Social Services*,¹⁰⁰⁹ the supreme court held a father's parental rights can be terminated under ICWA when he has a history of abandonment and domestic violence.¹⁰¹⁰ Dale pled no contest to a fourth degree assault charge against a woman while she was pregnant.¹⁰¹¹ After another incident involving the newborn, OCS petitioned the superior court to recognize the child as a "child in need of aid" under the ICWA.¹⁰¹² The court found probable cause sufficient to award OCS temporary custody of the child and set forth a case plan for Dale that allowed him to pursue reunification subject to violence, parenting, and substance abuse counseling.¹⁰¹³ In the spring of 2009, OCS received three protective services reports involving domestic incidents between Dale and a new wife and stepson and subsequently moved to terminate Dale's parental rights.¹⁰¹⁴ The superior court terminated Dale's parental rights, and he appealed.¹⁰¹⁵ Citing prior precedent, the supreme court affirmed, stating that Dale's one-year abandonment of his child and his "propensity" for domestic violence made emotional and physical damage to the child if reunited "almost certain."¹⁰¹⁶ The court reaffirmed that the "best interests" standard is related chiefly to the bonds developed between the child and his foster family, and found that the child was happy and thriving.¹⁰¹⁷ Affirming the lower court, the supreme court held a father's parental rights can be terminated under ICWA when he has a history of abandonment and domestic violence.¹⁰¹⁸

Lucy v. State, Department of Health & Social Services

In *Lucy v. State, Department of Health & Social Services*¹⁰¹⁹ the supreme court held that to terminate parental rights under the Indian Child Welfare (ICWA) and Child in Need of Aid (CINA) statutes, a court must find by clear and convincing evidence that the child has been exposed to conditions resulting in mental injury; that the parent failed to remedy unsuitable conduct; that active efforts were made to prevent the breakup of the family; that, as established by an expert witness, continued custody by the parent will result in damage to the child; and finally, that termination of parental rights is in the best interests of the child.¹⁰²⁰ In October 2004, the Office of Children's Services (OCS) took

¹⁰⁰⁹ 235 P.3d 203 (Alaska 2010).

¹⁰¹⁰ *Id.* at 205–15.

¹⁰¹¹ *Id.* at 206.

¹⁰¹² *Id.*

¹⁰¹³ *Id.*

¹⁰¹⁴ *Id.* at 209.

¹⁰¹⁵ *Id.*

¹⁰¹⁶ *Id.* at 210–14.

¹⁰¹⁷ *Id.* at 215.

¹⁰¹⁸ *Id.* at 205–215.

¹⁰¹⁹ 244 P.3d 1099 (Alaska 2010).

¹⁰²⁰ *Id.* at 1110. Lucy is affiliated with the Tlingit and Haida Tribes, and her children are Indian children. *Id.* at 1102.

custody of Jack and filed an Emergency Petition for Adjudication of Child in Need of Aid.¹⁰²¹ Lucy sought various forms of treatment for substance abuse until the fall of 2005, when she relapsed before the birth of her second child.¹⁰²² Over the next few years, her behavior included several incidences of child neglect, continual substance abuse, and refusal to seek treatment.¹⁰²³ In 2006, the children were put in foster care.¹⁰²⁴ She had a third child in 2007.¹⁰²⁵ Her substance abuse and neglect continued, and in 2009, OCS terminated Lucy’s parental rights.¹⁰²⁶ On appeal, the supreme court found that Lucy did not remedy her drug and alcohol abuse; that active efforts were made to prevent the break up of the family; and that terminating Lucy’s rights was in the children’s best interests.¹⁰²⁷ Affirming the trial court, the supreme court held that to terminate parental rights under ICWA and CINA statutes, a court must find by clear and convincing evidence that the child has been exposed to conditions resulting in mental injury; that the parent failed to remedy unsuitable conduct; that active efforts were made to prevent the breakup of the family; that, as established by an expert witness, continued custody by the parent will result in damage to the child; and finally, that termination of parental rights is in the best interests of the child.¹⁰²⁸

PROPERTY LAW

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Alaska Supreme Court

Dias v. State, Dep’t of Transportation and Public Facilities

In *Dias v. State, Dep’t of Transportation and Public Facilities*,¹⁰²⁹ the supreme court held that the state’s easement over private property unambiguously included a right of passage and the right to construct a road when the easement conveyed a “right of way.”¹⁰³⁰ The state was conveyed an easement over the disputed property in 1969; in 1992, the Diases were conveyed the land subject to the easement.¹⁰³¹ When the state attempted to negotiate future road construction along the encumbered land, the Diases filed suit to quiet title, claiming that the easement was solely for mineral removal, not for road construction.¹⁰³² The state moved for summary judgment and the superior court granted the motion, finding that the state’s right of way easement included road construction.¹⁰³³ According to the definition of right of way and past supreme court decisions, the “right of passage” was unambiguously included in the state’s easement.¹⁰³⁴

¹⁰²¹ *Id.* at 1102.

¹⁰²² *Id.* at 1102-4.

¹⁰²³ *Id.* at 1104-05.

¹⁰²⁴ *Id.* at 1106.

¹⁰²⁵ *Id.* at 1108.

¹⁰²⁶ *Id.* at 1108-10.

¹⁰²⁷ *Id.* at 1112-21.

¹⁰²⁸ *Id.* at 1110.

¹⁰²⁹ 240 P.3d 272 (Alaska 2010).

¹⁰³⁰ *Id.* at 274 -75.

¹⁰³¹ *Id.* at 273-74.

¹⁰³² *Id.* at

¹⁰³³ *Id.* at

¹⁰³⁴ *Id.* at 274-75.

Affirming the lower court, the supreme court held that the state's easement over private property unambiguously included a right of passage and the right to construct a road when the easement conveyed a "right of way."¹⁰³⁵

State, Department of Natural Resources v. Alaska Riverways, Inc.

In *State, Department of Natural Resources v. Alaska Riverways, Inc.*,¹⁰³⁶ the supreme court held that the Alaska Department of Natural Resources ("DNR") had authority to mandate that commercial riparian landowners enter into leases for exclusive use of state-owned public trust shorelands but that rent amounts in such leases cannot be based on the number of passengers transported.¹⁰³⁷ Alaska Riverways, a tour boat company, owned property along the Chena River.¹⁰³⁸ Alaska Riverways and DNR tried and failed to agree on terms for a lease.¹⁰³⁹ DNR later issued a final decision, stating that riparian owners "wharfing out" for commercial use had no natural property rights and that Alaska Riverways must enter into a lease for \$1000 per year or \$0.25 per paying customer, whichever was greater.¹⁰⁴⁰ Alaska Riverways appealed, claiming both that the lease structure discriminated against commercial users and that the fee structure violated federal law.¹⁰⁴¹ Although the superior court held that DNR had no authority to bind Alaska Riverways to any lease, such a lease structure would not violate Alaska Riverways' equal protection rights or federal law.¹⁰⁴² The supreme court held that the public trust doctrine does not itself require riparian owners to sign leases with the government but that the legislature had created such authority independently.¹⁰⁴³ The court held that DNR was permitted to require Alaska Riverways to sign a lease and that such a lease did not violate equal protection rights.¹⁰⁴⁴ However, court held the \$0.25 per passenger component of the lease agreement unconstitutional.¹⁰⁴⁵ Federal law requires that states levy fees directly proportional to the benefit provided by the state.¹⁰⁴⁶ Since the value of the state's service was the same regardless of how many passengers boarded, the lease fee was set at \$1000.¹⁰⁴⁷ The supreme court held that DNR had the authority to bind riparian landowners to leases but that the choice of lease fees based on passenger counts violated federal law.¹⁰⁴⁸

Williams v. Fagnani

In *Williams v. Fagnani*,¹⁰⁴⁹ the supreme court held that owners of servient estates may not maintain a gate obstructing the dominant owners' implied easements unless the

¹⁰³⁵ *Id.* at 274 –75.

¹⁰³⁶ 232 P.3d 1203 (Alaska 2010).

¹⁰³⁷ *Id.* at 1222–23.

¹⁰³⁸ *Id.* at 1206.

¹⁰³⁹ *Id.*

¹⁰⁴⁰ *Id.* at 1206–07.

¹⁰⁴¹ *Id.* at 1207.

¹⁰⁴² *Id.*

¹⁰⁴³ *Id.* at 1211–15.

¹⁰⁴⁴ *Id.* at 1220.

¹⁰⁴⁵ *Id.*

¹⁰⁴⁶ *Id.* at 1222.

¹⁰⁴⁷ *Id.* at 1222–23.

¹⁰⁴⁸ *Id.*

¹⁰⁴⁹ 228 P.3d 71 (Alaska 2010).

benefit to the servient estate outweighs the inconveniences to the dominant estate.¹⁰⁵⁰ The superior court held that Fagnani was entitled to maintain a locked gate that limited access to the roadway because the easement only provided for private use.¹⁰⁵¹ The supreme court reasoned that a locked gate imposes a significant burden on a homeowner's right to access his or her property.¹⁰⁵² Therefore, locked gates would only be allowed where the locked gate provides a substantial benefit to the servient estate, such as providing security.¹⁰⁵³ In situations where both benefit to the servient estate and detriment to the dominant estate are present, the two must be weighed against one another.¹⁰⁵⁴ Vacating and remanding, the supreme court held that owners of servient estates may not maintain a gate obstructing the dominant owners' implied easements unless the benefit to the servient estate outweighs the inconveniences to the dominant estate.¹⁰⁵⁵

TORT LAW

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Alaska Supreme Court

Allstate Ins. Co. v. Dooley

In *Allstate Ins. Co. v. Dooley*,¹⁰⁵⁶ the supreme court held that the tort of spoliation is not appropriate when evidence is concealed but not destroyed, and instead the newly recognized tort of fraudulent concealment of evidence is the proper cause of action.¹⁰⁵⁷ After a slip and fall trial, Dooley discovered that Allstate failed to produce a material piece of evidence and sued Allstate for spoliation of evidence and fraud and misrepresentation.¹⁰⁵⁸ On partial summary judgment for the spoliation claim, the supreme court held that spoliation is not the proper tort when evidence is concealed but not destroyed.¹⁰⁵⁹ Spoliation is a remedy if evidence is completely inaccessible and any damage calculation would be speculative, but evidence that is not destroyed can still be submitted to a fact-finder.¹⁰⁶⁰ Instead, the proper claim should be under a newly recognized tort in Alaska, fraudulent concealment of evidence, which applies when: (1) the defendant concealed material evidence; (2) the plaintiff's cause of action was viable; (3) the evidence could not reasonably have been procured from another source; (4) the defendant concealed the evidence with the intent to disrupt or prevent litigation; (5) the withholding damaged the plaintiff from having to rely on an incomplete evidentiary record; and (6) the plaintiff had no available remedy when the evidence was discovered.¹⁰⁶¹ Remanding for further proceedings, the supreme court held that the tort of

¹⁰⁵⁰ *Id.* at 75–76.

¹⁰⁵¹ *Id.*

¹⁰⁵² *Id.* at 75.

¹⁰⁵³ *Id.*

¹⁰⁵⁴ *Id.* at 76.

¹⁰⁵⁵ *Id.* at 75–76.

¹⁰⁵⁶ 243 P.3d 197 (2010).

¹⁰⁵⁷ *Id.* at 203–04.

¹⁰⁵⁸ *Id.* at 198–199.

¹⁰⁵⁹ *Id.* at 199–200.

¹⁰⁶⁰ *Id.* at 203.

¹⁰⁶¹ *Id.* at 204.

spoliation is not appropriate when evidence is concealed but not destroyed, and instead the tort of fraudulent concealment of evidence is the proper cause of action.¹⁰⁶²

Christoffersen v. State

In *Christoffersen v. State*,¹⁰⁶³ the supreme court held that court-appointed child custody investigators retain “absolute quasi-judicial immunity,” which also extends to the state, that shields them from civil lawsuits resulting from the performance of their duties.¹⁰⁶⁴ A court-appointed investigator did not immediately notify the Christoffersens that their minor son had previously been accused of inappropriately touching a minor child.¹⁰⁶⁵ After receiving the custody report that included the information about the inappropriate touching, the Christoffersens learned that the son had “sexually abused” their daughter and sued the state, claiming that the investigator failed in her duty to protect children from abuse and immediately report any sexual abuse that she discovered.¹⁰⁶⁶ The superior court granted both of the state’s motions for summary judgment, holding that “custody investigators are entitled to absolute quasi-judicial immunity” from tort suits related to their official duties, and that the custody investigator in this case had no duty to warn the Christoffersens.¹⁰⁶⁷ The supreme court affirmed the superior court’s disposition of the immunity issue without reaching the duty to warn.¹⁰⁶⁸ The doctrine of absolute judicial immunity extends to court-appointed experts and to others whose duties are “sufficiently related to the judicial process,” including custody investigators.¹⁰⁶⁹ Finally, the court held that the state was not vicariously liable for these experts because “a government employee’s official immunity from suit bars vicarious liability claims against the government for the same conduct.”¹⁰⁷⁰ Affirming the lower court, the supreme court held that court-appointed child custody investigators retain “absolute quasi-judicial immunity,” which also extends to the state, that shields them from civil lawsuits resulting from the performance of their duties.¹⁰⁷¹

Lindsey v. E&E Automotive & Tire Service, Inc.

In *Lindsey v. E&E Automotive & Tire Service, Inc.*,¹⁰⁷² the supreme court held that a plaintiff’s negligence claim against a mechanic does not withstand a motion for summary judgment when the mechanic fulfilled the duty to: (1) not “increase the risk of harm” during vehicle repairs; (2) not induce reliance on a vehicle that is unsafe; and (3) warn the vehicle owner of dangers the mechanic knows, or should have known, result from any unrepaired aspects of the vehicle.¹⁰⁷³ Lindsey was injured when a truck rolled backwards over him due to a parking brake failure.¹⁰⁷⁴ The truck had previously been

¹⁰⁶² *Id.* at 203–04.

¹⁰⁶³ 242 P.3d 1032 (Alaska 2010).

¹⁰⁶⁴ *Id.* at 1033.

¹⁰⁶⁵ *Id.*

¹⁰⁶⁶ *Id.*

¹⁰⁶⁷ *Id.* at 1034.

¹⁰⁶⁸ *Id.*

¹⁰⁶⁹ *Id.* at 1034–35.

¹⁰⁷⁰ *Id.* at 1036.

¹⁰⁷¹ *Id.* at 1033.

¹⁰⁷² 241 P.3d 880 (Alaska 2010).

¹⁰⁷³ *Id.* at 882–89.

¹⁰⁷⁴ *Id.* at 882–83.

sent to E&E Automotive to repair its brakes.¹⁰⁷⁵ The mechanic who worked on the truck did not know how to fix the parking brake and told the owner that it still did not work.¹⁰⁷⁶ Nonetheless, the owner put the truck back in service.¹⁰⁷⁷ Lindsey sued E&E for negligence, and E&E moved for summary judgment.¹⁰⁷⁸ The superior court found that a mechanic's duty of care is to inform a vehicle owner that a vehicle is still impaired or that a repair has not been made.¹⁰⁷⁹ Because it was not disputed that the mechanic told the owner that the brake still did not work, the court granted the motion for summary judgment.¹⁰⁸⁰ On appeal, the supreme court found that E&E did not negligently make the truck more dangerous, did not induce the owner's reliance on the truck, and did warn him that the truck was not repaired.¹⁰⁸¹ Affirming the lower court, the supreme court held that a plaintiff's negligence claim against a mechanic does not withstand a motion for summary judgment when the mechanic fulfilled the duty to: (1) not "increase the risk of harm" during vehicle repairs; (2) not induce reliance on a vehicle that is unsafe; and (3) warn the vehicle owner of dangers the mechanic knows, or should have known, result from any unrepaired aspects of the vehicle.¹⁰⁸²

Mueller v. Buscemi

In *Mueller v. Buscemi*,¹⁰⁸³ the supreme court held that the trial court did not abuse its discretion when excluding evidence alleging (1) inadequate maintenance; (2) substantially similar events; and (3) habitual practice.¹⁰⁸⁴ Mueller slipped on ice and hurt herself in Buscemi's parking lot.¹⁰⁸⁵ She sued Buscemi arguing that Buscemi's failure to remove ice and provide lighting in the lot proximately caused Mueller's injuries.¹⁰⁸⁶ At trial, the jury returned a verdict in favor of Buscemi.¹⁰⁸⁷ Mueller appealed, arguing that the trial court incorrectly excluded evidence.¹⁰⁸⁸ The supreme court affirmed,¹⁰⁸⁹ holding that the trial court did not abuse its discretion when it excluded evidence of inadequate maintenance. Mueller failed to offer proof as to the substance of the evidence both during pretrial motions, and at trial.¹⁰⁹⁰ Additionally, the supreme court reasoned that the trial court did not abuse its discretion when excluding proffered evidence of substantially similar accidents because Mueller failed to overcome the burden of substantial similarity.¹⁰⁹¹ Finally, the supreme court reasoned that the trial court did not abuse its discretion when excluding evidence of habitual failed maintenance because the

¹⁰⁷⁵ *Id.*

¹⁰⁷⁶ *Id.*

¹⁰⁷⁷ *Id.* at 883.

¹⁰⁷⁸ *Id.*

¹⁰⁷⁹ *Id.*

¹⁰⁸⁰ *Id.*

¹⁰⁸¹ *Id.*

¹⁰⁸² *Id.* at 882–89.

¹⁰⁸³ 230 P.3d 1153 (Alaska 2010).

¹⁰⁸⁴ *Id.* at 1154–57.

¹⁰⁸⁵ *Id.* at 1154.

¹⁰⁸⁶ *Id.*

¹⁰⁸⁷ *Id.*

¹⁰⁸⁸ *Id.*

¹⁰⁸⁹ *Id.* at 1157.

¹⁰⁹⁰ *Id.* at 1155–57.

¹⁰⁹¹ *Id.* at 1155–56.

photographs Mueller provided were not dated and were thus insufficient to support an inference of habit.¹⁰⁹² Affirming the trial court, the supreme court found the lower court did not abuse its discretion when it excluded evidence alleging (1) inadequate maintenance; (2) substantially similar events; and (3) habitual practice.¹⁰⁹³

Smith v. Radecki

In *Smith v. Radecki*,¹⁰⁹⁴ the supreme court held that a physician performing an independent medical examination is not liable for medical malpractice because he does not have a physician-patient relationship with the examinee.¹⁰⁹⁵ Smith injured his back and filed a workers' compensation claim, prompting his employer to arrange for Radecki to conduct an independent medical examination.¹⁰⁹⁶ Prior to the examination, Smith was informed that no physician-patient relationship would develop as a result of the examination.¹⁰⁹⁷ Radecki did not discover several spinal injuries during this examination, causing Smith to file suit.¹⁰⁹⁸ The superior court decided Radecki's summary judgment motion in his favor and Smith appealed.¹⁰⁹⁹ The supreme court reasoned that a physician that conducts an independent medical examination arranged by an employer does not owe the examinee the duty of care that accompanies a traditional physician-patient relationship.¹¹⁰⁰ The court also refused to extend a limited duty of care to Radecki's actions because that limited duty was not implicated in Smith's case.¹¹⁰¹ Thus, the supreme court held that a physician performing an independent medical examination is not liable for medical malpractice because he does not have a physician-patient relationship with the examinee.¹¹⁰²

Weed v. Bachner Co. Inc.

In *Weed v. Bachner Co. Inc.*,¹¹⁰³ the supreme court held that state procurement officials are only entitled to qualified immunity when defending against common law claims arising out of bid evaluation processes.¹¹⁰⁴ Bachner was not awarded a state contract and sued the procurement officials as individuals, alleging that they had intentionally interfered with Bachner's prospective economic opportunity.¹¹⁰⁵ The officials moved to dismiss the claim on the basis of absolute immunity.¹¹⁰⁶ The superior court denied the motion and held that the procurement officials only had qualified immunity.¹¹⁰⁷ The supreme court affirmed, applying a three factor test.¹¹⁰⁸ The first

¹⁰⁹² *Id.* at 1156–57.

¹⁰⁹³ *Id.* at 1154–57.

¹⁰⁹⁴ 238 P.3d 111 (Alaska 2010).

¹⁰⁹⁵ *Id.* at 112.

¹⁰⁹⁶ *Id.*

¹⁰⁹⁷ *Id.*

¹⁰⁹⁸ *Id.* at 113.

¹⁰⁹⁹ *Id.* at 114.

¹¹⁰⁰ *Id.* at 115.

¹¹⁰¹ *Id.* at 116–17.

¹¹⁰² *Id.* at 117.

¹¹⁰³ 230 P.3d 697 (Alaska 2010).

¹¹⁰⁴ *Id.* at 703.

¹¹⁰⁵ *Id.* at 698–99.

¹¹⁰⁶ *Id.* at 699.

¹¹⁰⁷ *Id.*

factor, the nature and importance of the officials' function to the administration of government, weighed in favor of qualified immunity.¹¹⁰⁹ The second factor, the likelihood that the officials will face frequent litigation and the difficulty of defending themselves, also weighed in favor of qualified immunity.¹¹¹⁰ The final factor, the availability of alternative remedies to the bidders, weighed in favor of absolute immunity.¹¹¹¹ The supreme court affirmed the superior court and held that state procurement officials are only entitled to qualified immunity when defending against common law claims arising out of the bid evaluation process.¹¹¹²

TRUSTS & ESTATES LAW

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Alaska Supreme Court

Farmer v. Farmer

In *Farmer v. Farmer*,¹¹¹³ the supreme court held that the superior court did not abuse its discretion by appointing a temporary limited conservator for a person who demonstrated an inability to manage his property and finances.¹¹¹⁴ A probate master found Robert Farmer was “incapacitated” because he could not manage his finances and appointed his daughter Barbara as partial limited conservator.¹¹¹⁵ The superior court conducted a hearing de novo and approved the probate master’s findings.¹¹¹⁶ Robert appealed, arguing that the evidence was insufficient to support a conservator appointment.¹¹¹⁷ Applying a clearly erroneous standard of review, the supreme court held that the superior court’s factual findings supported the conclusion that Robert was unable to manage his property and affairs.¹¹¹⁸ The supreme court noted that “incapacity” necessitating a conservator, under § 13.26.165(2)(A) of the Alaska Statutes, is different from “incapacity” necessitating guardianship; establishing “incapacity” necessitating a conservator focuses on the individual’s ability to manage his property and affairs.¹¹¹⁹ The superior court found that Robert was unable to prioritize his finances.¹¹²⁰ The supreme court held that the superior court did not abuse its discretion by appointing a temporary limited conservator for a person who demonstrated an inability to manage his property and finances.¹¹²¹

¹¹⁰⁸ *Id.* at 698.

¹¹⁰⁹ *Id.* at 700–01.

¹¹¹⁰ *Id.* at 702.

¹¹¹¹ *Id.* at 703.

¹¹¹² *Id.*

¹¹¹³ 230 P.3d 689 (Alaska 2010).

¹¹¹⁴ *Id.* at 691, 693.

¹¹¹⁵ *Id.* at 692.

¹¹¹⁶ *Id.*

¹¹¹⁷ *Id.* at 693.

¹¹¹⁸ *Id.* at 693–95.

¹¹¹⁹ *Id.* at 693.

¹¹²⁰ *Id.* at 695.

¹¹²¹ *Id.* at 691, 693.