THE YEAR IN REVIEW 2011

SELECTED CASES FROM THE ALASKA SUPREME COURT, THE ALASKA COURT OF APPEALS, THE 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 | CONTRACT LAW | CRIMINAL LAW | CRIMINAL PROCEDURE | ELECTION LAW | EMPLOYMENT LAW | ENVIRONMENTAL LAW | ETHICS AND PROFESSIONAL RESPONSIBILITY | FAMILY LAW | INSURANCE LAW | NATIVE LAW | PROPERTY LAW | TORT LAW | TRUSTS & ESTATES LAW

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

Alvarez v. State, Department of Administration

In *Alvarez v. State, Department of Administration*,[1] the supreme court held that driver's-license suspension hearings are not subject to speedy-trial limitations.[2] In September of 2003, Alvarez was pulled over and failed a breath test.[3] Her license suspension hearing was delayed until April of 2006.[4] The supreme court reasoned that, because a license suspension hearing is not a criminal proceeding, the policy reasons for speedy-trial limitations do not apply; thus, the delay did not violate Alvarez's right to a speedy trial.[5] Affirming, the supreme court held that driver's-license suspension hearings are not subject to speedy trial limitations.[6]

Monzulla v. Vorhees Concrete Cutting

In *Monzulla v. Vorhees Concrete Cutting*,[7] the supreme court held that: (1) the Alaska Workers' Compensation Appeals Commission has implied subject matter jurisdiction to

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[1] 249 P.3d 286 (Alaska 2011).
[2] *Id*. at 291.
[3] *Id*. at 289–90.
[4] *Id*.
[5] *Id*. at 291–93.
[6] *Id*. at 291.
[7] 254 P.3d 341 (Alaska 2011).

review interlocutory orders of the Alaska Workers' Compensation Board before a final Board decision and (2) the Commission's power to issue stays is not confined to compensation orders.[8] Monzulla appealed a grant of venue change by the Commission, arguing that the legislature had not provided the Commission with authority to review non-final Board decisions.[9] Vorhees contended that the legislature specifically granted jurisdiction to the Commission to review interlocutory orders.[10] After examining legislative history, persuasive precedent from other jurisdictions, and practical considerations,[11] the supreme court affirmed and held that (1) the Alaska Workers' Compensation Appeals Commission has implied subject matter jurisdiction to review interlocutory orders of the Alaska Workers' Compensation Board before a final Board decision and (2) the Commission's power to issue stays is not confined to compensation orders.[12]

Alaska Exchange Carriers Ass'n, Inc. v. Regulatory Commission of Alaska

In *Alaska Exchange Carriers Ass'n, Inc. v. Regulatory Commission of Alaska*,[13] the supreme court held that the general prohibition against retroactive ratemaking does not fully apply to procedural mistakes and that such mistakes may be retroactively corrected on a case-by-case basis.[14] After the Regulatory Commission of Alaska (RCA) closed its 2007 Access Charge Proceedings, the Alaska Exchange Carriers Association (AECA) discovered an error in the rates it had submitted.[15] AECA requested retroactive application of the corrected rates, but RCA denied the request because of the general prohibition against retroactive ratemaking.[16] On appeal, the supreme court affirmed that there is a general prohibition against retroactive ratemaking.[17] But the court reasoned that there might be a sound justification for retroactive ratemaking in procedural mistake cases and that each such case should be evaluated individually by the RCA.[18] The court thus recognized the correction of procedural mistakes as distinct from retroactive ratemaking.[19] Reversing, the supreme court held that the general prohibition against retroactive ratemaking does not fully apply to procedural mistakes and that such mistakes may be retroactively corrected on a case-by-case basis.[20]

Shea v. State, Department of Administration

In *Shea v. State, Department of Administration*,[21] the supreme court held that, with regard to occupational disability benefits, an applicant must prove only that an occupational

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[8] *Id*. at 346.
[9] *Id*. at 344.
[10] *Id*. at 345.
[11] *Id*. at 345–46.
[12] *Id*. at 346.
[13] 262 P.3d 204 (Alaska 2011).
[14] *Id*. at 213.
[15] *Id*. at 207.
[16] *Id*. at 208.
[17] *Id*. at 209–10.
[18] *Id*. at 213.
[19] *Id*. at 214.
[20] *Id*. at 213.
[21] 267 P.3d 624 (Alaska 2011).

injury was "a" (not "the") substantial factor leading to the disability.[22] An administrative law judge determined that Shea's prolonged sitting at work was one among many factors contributing to her disability, not the substantial factor that caused her disability.[23] Because, by statute, Shea was required to prove that her occupational injury was a "substantial factor" in her disability, she was denied occupational disability benefits.[24] The superior court affirmed.[25] On appeal, Shea argued that AS 39.35.680(27), requiring that an occupational injury be a "substantial factor" in the disability, does not require the occupational injury to be "the" substantial factor leading to the disability.[26] The supreme court reasoned that, with respect to torts and to workers' compensation claims, it had previously held that "substantial factor" meant only "a" substantial factor or legal cause of injury, not "the" substantial factor or legal cause.[27] Importing this same analysis into the occupational disability arena, the court noted that, although an applicant need only show that the worker's injury was "a" substantial factor, the applicant must also show that the disability was actually and proximately caused by the injury.[28] Reversing, the supreme court held that, with regard to occupational disability benefits, an applicant must prove only that an occupational injury was "a" (not "the") substantial factor leading to the disability.[29]

Widmyer v. State, Commercial Fisheries Entry Commission

In *Widmyer v. State, Commercial Fisheries Entry Commission*,[30] the supreme court held that the Commercial Fisheries Entry Commission (CFEC) does not abuse its discretion by refusing to consider new evidence in a petition for reconsideration when the petitioner has had numerous opportunities to present evidence.[31] To gain entry to certain fisheries, applicants were required by the CFEC to present evidence that they had in years past obtained a requisite amount of fish from those fisheries; alternatively, documented extraordinary circumstances preventing them from obtaining the requisite amount of fish could suffice to obtain a permit.[32] Widmyer applied for entry, claiming that extraordinary circumstances had prevented him from obtaining the requisite amount of fish ordinarily required for entry.[33] The CFEC denied his application.[34] Twenty years later, Widmyer petitioned for reconsideration, attaching new affidavits and other new evidence to his petition, but the CFEC refused to allow any additions to his record.[35] On appeal, Widmyer argued that the CFEC had abused its discretion by refusing to consider new evidence in his petition for reconsideration.[36] The supreme court noted that the CFEC had

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[22] *Id.* at 633.
[23] *Id.* at 626.
[24] *Id.* at 630–31.
[25] *Id.* at 631.
[26] *Id.*
[27] *Id.* at 632–33.
[28] *Id.* at 633–34.
[29] *Id.* at 633.
[30] 267 P.3d 1169 (Alaska 2011).
[31] *Id.* at 1175–76.
[32] *Id.* at 1171.
[33] *Id.* at 1171–72.
[34] *Id.* at 1172–73.
[35] *Id.* at 1173.
[36] *Id.* at 1175.

been given the power to regulate its own procedures and that nothing in the Limited Entry Act requires the CFEC to consider new evidence (or prevents it from doing so).[37] The court further noted that Widmyer had had over 20 years to collect and present evidence and that he had been afforded numerous opportunities to present evidence.[38] The supreme court therefore affirmed, holding that the CFEC does not abuse its discretion by refusing to consider new evidence in a petition for reconsideration when the petitioner has had numerous opportunities to present evidence.[39]

J.P. v. Anchorage School District

In *J.P. v. Anchorage School District*,[40] the supreme court held that a school district's delay in evaluating a student for special education services does not render the district responsible for the costs of that student's elective private tutoring.[41] The parents of an elementary school student became concerned about their son's reading skills and requested that the school evaluate him for special education services.[42] When the school district failed to act, they reiterated their request and asked for a hearing under the Individuals with Disabilities Education Act (IDEA).[43] They then had an evaluation conducted by a private practitioner and sought tutoring for their son.[44] A hearing officer agreed with the school district that the child was ineligible for special education services, but the officer required the school district to reimburse his parents for half the cost of his tutoring.[45] The superior court held that the school district was not responsible for the costs of tutoring since the child had been found to be ineligible for tutoring services under IDEA.[46] On appeal, the parents argued that the school district's delay in conducting an evaluation should permit them to seek reimbursement for the tutoring service.[47] The supreme court disagreed with the parents, reasoning that procedural violations under IDEA should not render a school district responsible for services it would not have been required to provide.[48] Affirming, the supreme court held that a school district's delay in evaluating a student for special education services does not render the district responsible for the costs of that student's elective private tutoring.[49]

Alaskan Crude Corp. v. State, Department of Natural Resources

In *Alaskan Crude Corp. v. State, Department of Natural Resources*,[50] the supreme court held that a pending appeal does not constitute a "force majeure" for the purposes of releasing a unit operator from the terms of a unit agreement for oil and gas exploration if

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[37] *Id.* at 1175–76.
[38] *Id.* at 1175.
[39] *Id.* at 1175–76.
[40] 260 P.3d 285 (Alaska 2011).
[41] *Id.* at 295.
[42] *Id.* at 287.
[43] *Id.*
[44] *Id.* at 288.
[45] *Id.*
[46] *Id.* at 289.
[47] *Id.* at 291.
[48] *Id.* at 293.
[49] *Id.* at 295.
[50] 261 P.3d 412 (Alaska 2011).

the unit operator was aware of the appeal at the time the unit agreement was made.[51] Alaskan Crude operated an oil and gas well.[52] It had formed a unit agreement with the State Department of Natural Resources (DNR) setting forth deadlines for certain work obligations and providing that the violation of those deadlines would constitute a default of the agreement.[53] Alaskan Crude received notice that the Alaska Oil and Gas Conservation Commission (AOGCC) had designated the well gas only; Alaskan Crude modified the deadlines in its unit agreement while simultaneously appealing AOGCC's decision.[54] When Alaskan Crude failed to meet the modified deadlines, it argued that the pending appeal of AOGCC's decision was a "force majeure" which, under the terms of the unit agreement, released it from the obligation of meeting the deadlines.[55] The trial court held that the pending appeal was not a "force majeure."[56] The supreme court agreed, noting that Alaskan Crude had notice of AOGCC's decision and the pending appeal at the time that its unit agreement was modified; therefore, the appeal was not beyond Alaskan Crude's ability to foresee or control (as required by DNR's definition of "force majeure").[57] Affirming, the supreme court held that a pending appeal does not constitute a "force majeure" for the purposes of releasing a unit operator from the terms of a unit agreement for oil and gas exploration if the unit operator was aware of the appeal at the time the unit agreement was modified.[58]

Lewis-Walunga v. Municipality of Anchorage

In *Lewis-Walunga v. Municipality of Anchorage*,[59] the supreme court held that a "successful party" in an appeal to the Workers' Compensation Appeals Commission is a party that prevails on a significant issue in the appeal.[60] Lewis-Walunga won a workers' compensation claim and was awarded attorneys' fees, but the Workers' Compensation Board awarded 30 percent less in attorneys' fees than Lewis-Walunga had requested.[61] She appealed to the Workers' Compensation Appeals Commission, and, although the Commission did not agree with all of her points of appeal, it did agree to vacate the award and remanded to the Board for a factual finding that would justify the reduced award.[62] When Lewis-Walunga moved for attorneys' fees for the appeal, the Commission held that she had not been the "successful party" on appeal because she had not received an award of full attorneys' fees.[63] On appeal from the Commission's decision, the supreme court determined that the attorneys' fees award provision in AS 23.30.008(d) (which governs awards for Commission appeals) should be construed similarly to Appellate Rule 508(g)(2), which contains similar language.[64] The court determined that a

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[51] *Id.* at 420.
[52] *Id.* at 414.
[53] *Id.* at 414–415.
[54] *Id.* at 420.
[55] *Id.*
[56] *Id.* at 414.
[57] *Id.*
[58] *Id.* at 420.
[59] 249 P.3d 1063 (Alaska 2011).
[60] *Id.* at 1068.
[61] *Id.* at 1065.
[62] *Id.* at 1066.
[63] *Id.*
[64] *Id.* at 1068.

"successful party" in a Commission appeal is a party that prevails on a significant issue in the appeal.[65] Because one of the remedies requested by Lewis-Walunga from the Commission was a remand for additional fact-finding, Lewis-Walunga was a "successful party" under the attorneys' fees provision.[66] Reversing, the supreme court held that a "successful party" in an appeal to the Workers' Compensation Appeals Commission is a party that prevails on a significant issue in the appeal.[67]

Marathon Oil Co. v. State, Department of Natural Resources

In *Marathon Oil Co. v. State, Department of Natural Resources*,[68] the supreme court held that it will defer to agency interpretation of an ambiguous statute when the agency's interpretation is long-standing.[69] By statute, royalties from natural gas production on land leased from the State can be calculated in two ways: "higher of" pricing or contract pricing.[70] "Higher of" pricing is the default.[71] Marathon had been paying royalties under the default option for five years; it then requested that the State apply contract pricing retroactively to its royalty calculations for the previous five years.[72] The Department of Natural Resources (DNR) refused, determining that the applicable statute, AS 38.05.180(aa), does not authorize DNR to grant retroactive approval of a change in the method of royalty calculation; DNR determined that it could only approve a change in method for future production.[73] On appeal, Marathon argued that the statute does give DNR the authority to grant retroactive approval for past production.[74] The supreme court first determined that the statute is ambiguous and that the legislative history did not resolve the ambiguity.[75] But the court noted that DNR had interpreted the ambiguous statute, for at least ten years, to prevent retroactive approval of the kind that Marathon requested.[76] Because the interpretation was long-standing, the court deferred to DNR's interpretation.[77] Affirming, the supreme court held that it will defer to agency interpretation of an ambiguous statute when the agency's interpretation is long-standing.[78]

Rivera v. Wal-Mart Stores, Inc.

In *Rivera v. Wal-Mart Stores, Inc.*,[79] the supreme court held that the state's Workers' Compensation Board does not err in denying a claim when it assigns greater weight to the testimony of one of several medical experts.[80] Rivera injured her back on two occasions

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[65] *Id*.
[66] *Id*. at 1069.
[67] *Id*. at 1068.
[68] 254 P.3d 1078 (Alaska 2011).
[69] *Id*. at 1085–86.
[70] *Id*. at 1081.
[71] *Id*.
[72] *Id*.
[73] *Id*. at 1082.
[74] *Id*. at 1083.
[75] *Id*. at 1083–85.
[76] *Id*. at 1085–86.
[77] *Id*. at 1086.
[78] *Id*. at 1085–86.
[79] 247 P.3d 957 (Alaska 2011).
[80] *Id*. at 964, 966.

while employed by Wal-Mart and she was paid workers' compensation benefits.[81] The store filed a controversion after its doctor examined Rivera and concluded that her ongoing back pain was caused by an underlying degenerative condition and not by the injuries she had received in the course of her employment.[82] Rivera filed for temporary total disability benefits, citing the opinion of several other doctors that the injuries had exacerbated her degenerative condition and were the cause of her back pain.[83] The Workers' Compensation Board denied her claim for benefits based on the testimony of Wal-Mart's doctor, and the Workers' Compensation Appeals Commission affirmed the Board's decision.[84] On appeal, the supreme court cited existing case law suggesting that the Board can assign unequal credence to conflicting testimony of medical experts in reaching its decision so long as it weighs all testimony and identifies which opinion it considers more persuasive.[85]The supreme court affirmed, holding that the Workers' Compensation Board does not err in denying a claim when it assigns greater weight to the testimony of one of several medical experts.[86]

State, Department of Corrections v. Hendricks-Pearce

In *State, Department of Corrections v. Hendricks-Pearce*,[87] the supreme court held that, under AS 33.30.028, a former prisoner can be liable to the State for the cost of medical care that he received while he was a prisoner.[88] While incarcerated, Pearce received medical care at the State's expense.[89] He obtained a medical malpractice award for the care that he had received and the Department of Corrections (DOC) withheld from that award the amount that it claimed the DOC had spent on his medical care.[90] In a declaratory judgment action filed by DOC after Pearce had been released, the superior court granted Pearce's motion for summary judgment, holding that AS 33.30.028, which states that medical care costs are the responsibility of the prisoner, does not apply to former prisoners.[91] On appeal, the supreme court noted that, although the statute is applicable to "prisoner[s]," statutes often identify parties based on a prior status.[92] The court also noted that applying the statute to former prisoners would further the legislature's goal of curbing prison costs.[93] Finally, the court reasoned that a narrower interpretation would lead to anomalous results because it would condition the State's right to reimbursement on the timing of medical care.[94] Reversing, the supreme court held that, under AS 33.30.028, a former prisoner can be liable to the State for the cost of medical care that he received while he was a prisoner.[95]

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[81] *Id.* at 958–59.
[82] *Id.* at 959.
[83] *Id.* at 960–61.
[84] *Id.* at 961.
[85] *Id.* at 964.
[86] *Id.* at 964, 966.
[87] 254 P.3d 1088 (Alaska 2011).
[88] *Id.* at 1093.
[89] *Id.* at 1090.
[90] *Id.*
[91] *Id.* at 1090–91.
[92] *Id.* at 1091.
[93] *Id.* at 1092–93.
[94] *Id.* at 1093.
[95] *Id.*

James v. State, Department of Corrections

In *James v. State, Department of Corrections*,[96] the supreme court held that (1) disciplinary proceedings for alleged "low-moderate" infractions by a prisoner can, when the charges are serious enough and when the punishment is severe enough, constitute a "major disciplinary proceeding" entitling the inmate to due process rights (including the right to produce documentary evidence, the right to confront and cross-examine witnesses, and the right to have the disciplinary hearing recorded);[97] and (2) the 24-hour written-notice requirement, which applies when the inmate desires to call witnesses at the disciplinary hearing, does not apply to a request for the presence of the inmate's accusers.[98] The superior court upheld James' disciplinary adjudication, which had resulted in a punishment of 20 days of solitary confinement, because James had not given written notice in advance of the disciplinary hearing that he desired to confront his accuser.[99] James appealed the decision, arguing that his due process rights had been violated because the adjudication was entirely based on hearsay information and because the hearing had not been audio recorded.[100] After examining court precedent and state regulations,[101] the supreme court reversed.[102] It held that (1) disciplinary proceedings for alleged "low-moderate" infractions by a prisoner can, when the charges are serious enough and when the punishment is severe enough, constitute a "major disciplinary proceeding" entitling the inmate to expanded due process rights (including the right to produce documentary evidence, the right to confront and cross-examine witnesses, and the right to have the disciplinary hearing recorded);[103] and (2) the 24-hour written-notice requirement, which applies when the inmate desires to call witnesses at the disciplinary hearing, does not apply to a request for the presence of the inmate's accusers.[104]

BUSINESS LAW

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Alaska Supreme Court

Henrichs v. Chugach Alaska Corp.

In *Henrichs v. Chugach Alaska Corp.*,[105] the supreme court held that the business judgment rule does not necessitate finding that a corporate director acted with gross negligence before imposing liability on the director.[106] A jury found Henrichs liable for breaching his fiduciary duty to Chugach Alaska Corporation under an ordinary negligence standard of care.[107] Separately, the superior court determined that Henrichs

[96] 260 P.3d 1046 (Alaska 2011).
[97] *Id.* at 1051–52.
[98] *Id.* at 1054.
[99] *Id.* at 1049.
[100] *Id.* at 1050.
[101] *Id.* at 1052–53.
[102] *Id.* at 1055.
[103] *Id.* at 1051–52.
[104] *Id.* at 1054.
[105] 250 P.3d 531 (Alaska 2011).
[106] *Id.* at 536–37.
[107] *Id.* at 539.

had abused his authority.[108] On appeal, Henrichs argued that the business judgment rule protects directors from liability unless their conduct is determined to be grossly negligent and that, therefore, the superior court had erred by instructing the jury that he could be liable for breaching his fiduciary duties under an ordinary negligence standard of care.[109] The supreme court noted that, although the common law business judgment rule protects corporate directors from liability absent a showing of bad faith, a breach of fiduciary duty, or an act contrary to public policy, the court had never adopted a "gross negligence" standard and refused to do so for Henrichs.[110] The court reasoned that because the jury had found that Henrichs breached his fiduciary duty, and because the superior court had found that Henrichs had abused his authority, the business judgment rule did not protect Henrichs from liability.[111] Affirming, the supreme court held that the business judgment rule does not necessitate finding that a corporate director acted with gross negligence before imposing liability on the director.[112]

Henrichs v. Chugach Alaska Corp.

In *Henrichs v. Chugach Alaska Corp.*,[113] the supreme court held that a corporation does not have an affirmative duty to deliver books, records, or documents to shareholders or directors.[114] Three former directors of Chugach Alaska Corporation each sought reelection to the corporation's board of directors.[115] They requested a list of shareholder addresses and the number of shares owned by each shareholder.[116] Chugach sent the former directors an email containing that information, but did not send it as quickly as the directors wanted.[117] The former directors sued the corporation, claiming that the corporation had a duty to deliver the requested information to them.[118] The superior court granted summary judgment to the corporation because the former directors had not sought to inspect the shareholder list at the corporation's registered office or principal place of business.[119] On appeal, the supreme court determined that state law provides directors the right to inspect and copy books, records, and documents, but it does not provide directors with the right to have books, records, or documents personally delivered to them.[120] Affirming, the supreme court held that a corporation does not have an affirmative duty to deliver books, records, or documents to shareholders or directors.[121]

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[108] *Id.*
[109] *Id.* at 536–37.
[110] *Id.* at 538–39.
[111] *Id.* at 537.
[112] *Id.* at 536–37.
[113] 260 P.3d 1036 (Alaska 2011).
[114] *Id.* at 1041.
[115] *Id.* at 1038.
[116] *Id.* at 1039.
[117] *Id.*
[118] *Id.*
[119] *Id.* at 1041.
[120] *Id.*
[121] *Id.*

Roberson v. Southwood Manor Associates, LLC

In *Roberson v. Southwood Manor Associates, LLC*,[122] the supreme court held that Alaska's Unfair Trade Practices and Consumer Protection Act (UTPA) does not apply to real property transactions.[123] Southwood Manor owned a trailer park in Anchorage, where Roberson rented space.[124] When Roberson was late with rent payments, Southwood sued, seeking late charges.[125] Roberson filed a counterclaim, arguing that the late charges violated the UTPA.[126] The superior court held that the UTPA did not apply to residential leases.[127] On appeal, the supreme court noted that, although the UTPA's list of unfair trade practices is not exhaustive, disputes between landlords and tenants were not listed in the UTPA, and the court further noted that it had never previously held that the UTPA applied to transactions involving real property.[128] Affirming, the supreme court held that the UTPA does not apply to real property transactions.[129]

ASRC Energy Services Power & Communications, LLC v. Golden Valley Electric Ass'n, Inc.

In *ASRC Energy Services Power & Communications, LLC v. Golden Valley Electric Ass'n, Inc.*,[130] the supreme court held that the Alaska Unfair Trade Practices and Consumer Protection Act's (UTPA) directive that, when interpreting the UTPA, courts give due consideration and great weight to the FTC Act and its interpretations, does not require a court to abandon Alaskan precedent when the FTC Act later changes.[131] Golden awarded ASRC two construction bids.[132] A contract dispute arose due to ASRC's requesting additional compensation.[133] During the trial, both parties amended their pleadings and answers to include UTPA claims and counterclaims.[134] The UTPA directs courts to give due consideration and great weight to the FTC Act and its interpretations when interpreting the UTPA.[135] The supreme court relied on the FTC Act interpretations when defining the UTPA's standards.[136] Congress later amended the FTC Act, including the portions that the supreme court had previously relied upon to determine the scope of the UTPA.[137] On appeal, ASRC claimed that using the previous Alaska standard would violate the UTPA's directive to give due consideration and great weight to the FTC Act and its interpretations.[138] The supreme court reasoned that the state legislature that had passed the UTPA had referred to the FTC Act that existed at that time, and that the

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[122] 249 P.3d 1059 (Alaska 2011).
[123] *Id.* at 1063.
[124] *Id.* at 1059.
[125] *Id.* at 1060.
[126] *Id.*
[127] *Id.*
[128] *Id.* at 1060–61.
[129] *Id.* at 1063.
[130] 267 P.3d 1151 (Alaska 2011).
[131] *Id.* at 1161.
[132] *Id.* at 1154.
[133] *Id.*
[134] *Id.* at 1154–55.
[135] *Id.* at 1158.
[136] *Id.*
[137] *Id.* at 1159.
[138] *Id.* at 1160–61

legislature had not intended that the courts would abandon state precedent if the federal law later changed.[139] The supreme court held that the UTPA directive that, when interpreting the UTPA, courts give due consideration and great weight to the FTC Act and its interpretations, does not require a court to abandon Alaskan precedent when the FTC Act later changes.[140]

CIVIL PROCEDURE

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Alaska Supreme Court

Miller v. Handle Construction Co.

In *Miller v. Handle Construction Co.*,[141] the supreme court held that the offeror in a Rule 68 settlement agreement is entitled to offset the settlement amount by any other amount collected by the offeree that rightfully belongs to the offeror.[142] Miller bought a pre-fabricated building from VP Buildings (VP); he then contracted with Handle Construction Company (Handle) to assemble the building.[143] Handle incurred more costs than it expected due to design defects caused by VP.[144] Miller authorized Handle to negotiate with VP to recover its costs without assigning his contractual rights to Handle.[145] Handle then sued Miller for the extra costs and Miller made a Rule 68 settlement offer.[146] Handle accepted Miller's offer and simultaneously accepted a settlement offer from VP.[147] Miller argued that the settlement offer amount should have been offset by the amount that Handle had collected from VP, but the superior court rejected his argument because the settlement offer had not explicitly allowed for an offset if Handle recovered from VP.[148] On appeal, the supreme court reasoned that every Rule 68 settlement offer implies that the offeror will give up a specific amount of money in exchange for certainty that the specified amount is the only money he will lose with respect to those claims.[149] Therefore, if the money was rightfully Miller's, then he should have been entitled to an offset.[150] Reversing, the supreme court held that the offeror in a Rule 68 settlement agreement is entitled to offset the settlement amount by any other amount collected by the offeree that rightfully belongs to the offeror.[151]

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[139] *Id.* at 1161–62.
[140] *Id.* at 1161.
[141] 255 P.3d 984 (Alaska 2011).
[142] *Id.* at 990.
[143] *Id.* at 985.
[144] *Id.*
[145] *Id.* at 986.
[146] *Id.*
[147] *Id.*
[148] *Id.* at 986–87.
[149] *Id.* at 990.
[150] *Id.*
[151] *Id.*

Stevens v. State, Alcoholic Beverage Control Board

In *Stevens v. State, Alcoholic Beverage Control Board*,[152] the supreme court held that, when a municipality's subordinate improperly exercises the power of the municipality, the procedural defect can be remedied by the municipality's endorsement and adoption of the subordinate's action.[153] Stevens owned a bar that violated its Borough's noise ordinance.[154] The Borough's Director of Planning and Land Use (Director) protested the bar's liquor license before the Alcoholic Beverage Control Board (ABC) and the Borough's attorneys advocated the Director's position.[155] ABC revoked the bar's liquor license and the superior court affirmed the revocation.[156] On appeal, Stevens argued that the Borough, not its employee, should have been required to file the protest or to officially delegate its powers to protest to the Director.[157] The supreme court first noted that, under the municipal statute, it appeared that the Director did have authority to file a protest.[158] But the court also noted that the Borough's attorneys had litigated the Director's position at every step of the way.[159] The court reasoned that, even if there had been some procedural irregularity, the Borough's endorsement of the Director's action cured any possible procedural defect.[160] The supreme court held that, when a municipality's subordinate improperly exercises the power of the municipality, the procedural defect can be remedied by the municipality's endorsement and adoption of the subordinate's action.[161]

Kalenka v. Infinity Insurance Co.

In *Kalenka v. Infinity Insurance Co.*,[162] the supreme court held that, although an injured party usually is allowed to choose its forum for litigation, the injured party waives that right by filing a counterclaim against an insurance company that is seeking a declaration that its policy does not cover the injured party.[163] Kalenka's car was rear-ended.[164] The driver of the other vehicle became enraged and stabbed Kalenka, killing him.[165] Infinity sought a declaratory judgment that it did not owe payments to Kalenka's estate.[166] Kalenka's estate filed a counterclaim for money allegedly owed under Kalenka's insurance policy.[167] The superior court did not completely dispose of the claims until after Kalenka's estate had obtained a judgment against the owner of the vehicle that had rear-ended Kalenka's car, over four years later.[168] The superior court then held that

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[152] 257 P.3d 1154 (Alaska 2011).
[153] *Id*. at 1158–59.
[154] *Id*. at 1155.
[155] *Id*. at 1156, 1158.
[156] *Id*.
[157] *Id*. at 1157.
[158] *Id*. at 1158.
[159] *Id*.
[160] *Id*. at 1159.
[161] *Id*. at 1158–59.
[162] 262 P.3d 602 (Alaska 2011).
[163] *Id*. at 612–13.
[164] *Id*. at 604–05.
[165] *Id*.
[166] *Id*. at 605.
[167] *Id*.
[168] *Id*. at 605–07.

Kalenka's insurance policy did not cover the circumstances surrounding Kalenka's death.[169] On appeal, Kalenka's estate argued that the superior court should not have entered judgment for Infinity because there were still material factual issues related to the underlying tort claims.[170] The supreme court noted that, generally, an injured party is allowed to choose the forum in which to litigate a tort claim.[171] It also noted that an insurer's interest in obtaining a declaratory judgment should not displace the injured party's right to choose its own forum.[172] Here, however, Infinity had initiated the declaratory judgment action to determine a very limited question; it was Kalenka's estate that had chosen to litigate the underlying tort claims by filing a counterclaim.[173] Further, the court had waited to dispose of the claims until Kalenka's estate had litigated the underlying tort claims.[174] Affirming, the supreme court held that, although an injured party usually is allowed to choose its forum for litigation, the injured party waives that right by filing a counterclaim against an insurance company that is seeking a declaration that its policy does not cover the injured party.[175]

In re Alaska Network on Domestic Violence and Sexual Assault

In *In re Alaska Network on Domestic Violence and Sexual Assault*,[176] the supreme court held that the Alaska Network on Domestic Violence and Sexual Assault (ANDVSA) constitutes a public agency, therefore requiring the Office of Public Advocacy (OPA) to provide representation to an indigent party in a child custody dispute in which the other party is represented by ANDVSA.[177] A mother was represented by ANDVSA in a child custody dispute and the superior court appointed counsel from OPA for the indigent father.[178] OPA sought to withdraw its representation and appealed, arguing that ANDVSA did not qualify as a public agency because it was funded by discretionary grants, because it was not a creature of any legislature, and because its Board of Directors was not appointed by any member of the Alaska or federal executive branch.[179] The supreme court had previously limited the constitutional right to counsel in custody cases to situations where an indigent party's opponent was represented by counsel provided by a public agency.[180] The supreme court concluded that a public agency is an organization supported in large part by public funding sources, even if it is a private corporation; thus, ANDVSA qualified as a public agency because it received over 99 percent of its funding from federal and state government sources.[181] Affirming, the supreme court held that ANDVSA constitutes a public agency, therefore requiring OPA to provide representation

[169] *Id*. at 606.
[170] *Id*. at 612.
[171] *Id*.
[172] *Id*.
[173] *Id*.
[174] *Id*. at 613.
[175] *Id*. at 612–13.
[176] 264 P.3d 835 (Alaska 2011).
[177] *Id*. at 836.
[178] *Id*.
[179] *Id*. at 836–37.
[180] *Id*. at 837.
[181] *Id*. at 838–39.

to an indigent party in a child custody dispute in which the other party is represented by ANDVSA.[182]

Griswold v. City of Homer

In *Griswold v. City of Homer*,[183] the supreme court held that an individual does not have standing to appeal the grant of a land-use permit when the permit will not adversely affect the use, enjoyment, or value of his personal property.[184] Griswold appealed the grant of a conditional-use permit that he believed would create congestion and a visual blight on a public beach that he frequented.[185] The city clerk denied his appeal for lack of standing because his interest in the property was no different from that of the general public.[186] On appeal, Griswold argued that the standing requirement violated equal protection by discriminating against him as a litigant.[187] The supreme court rejected this contention because there was a legitimate reason for disparate treatment: limiting standing to individuals with a substantial, direct and immediate interest in the outcome of the litigation prevents excessive litigation and undue delay of a final disposition.[188] The supreme court also concluded that the standing requirement bore a fair and substantial relationship to that legitimate reason and thus did not violate Griswold's due process rights.[189] The supreme court dismissed Griswold's appeal, holding that an individual does not have standing to appeal the grant of a land-use permit when the permit will not adversely affect the use, enjoyment, or value of his personal property.[190]

Trask v. Ketchikan Gateway Borough

In *Trask v. Ketchikan Gateway Borough*,[191] the supreme court held that an individual has standing to assert a claim under 42 U.S.C. § 1983 when a municipality files a civil complaint that actually and prospectively violates her First Amendment rights.[192] Trask, a resident of the Ketchikan Gateway Borough, painted a religious message on her roof after receiving approval from the Borough that the message would not require a permit.[193] The Borough subsequently sent Trask letters stating that the message violated the Borough's code, threatened citations if she failed to remove the message, sought to enjoin her from displaying the message, and sought to fine her.[194] Trask brought a § 1983 claim, but the superior court dismissed it after concluding that Trask lacked standing to litigate the constitutionality of the ordinance.[195] On appeal, the supreme court noted that standing in Alaska is interpreted leniently.[196] Thus, an individual with an identifiable trifle has

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[182] *Id.* at 836.
[183] 252 P.3d 1020 (Alaska 2011).
[184] *Id.* at 1031–32.
[185] *Id.* at 1024.
[186] *Id.*
[187] *Id.* at 1030–31.
[188] *Id.* at 1031.
[189] *Id.*
[190] *Id.* at 1031–32.
[191] 253 P.3d 616 (Alaska 2011).
[192] *Id.* at 620.
[193] *Id.* at 617–18.
[194] *Id.* at 618.
[195] *Id.* at 619.
[196] *Id.*

standing to litigate.[197] The court reasoned that Trask's injuries surpassed the level of trifling, because the Borough had ordered removal of the message, threatened Trask with citations, and filed a complaint against her.[198] Moreover, because of the enforcement actions, Trask alleged that she had chosen not to modify the message.[199] Reversing, the supreme court held that an individual has standing under § 1983 if a municipality files a civil complaint that violates the individual's actual and prospective First Amendment rights.[200]

Taylor v. Moutrie-Pelham

In *Taylor v. Moutrie-Pelham*,[201] the supreme court held that a trial court does not abuse its discretion by refraining from characterizing either party as the prevailing party if both parties prevail on a main issue of the action.[202] Taylor alleged that Moutrie-Pelham had converted $30,000 of Taylor's funds and breached a lease agreement.[203] Moutrie-Pelham counterclaimed that Taylor had breached the lease agreement and owed $7,000 in unpaid rent.[204] Taylor did not contest the unpaid rent portion of the breach claim.[205] The trial court awarded $23,000 to Taylor on the conversion claim but awarded Moutrie-Pelham $10,574 on the breach claim and ruled that neither party had prevailed for the purpose of an attorneys' fees award.[206] The supreme court reasoned that the trial court's prevailing party determination was not arbitrary, capricious, manifestly unreasonable, or improperly motivated because the breach claim had been a main issue in the case.[207] Both parties had alleged breach of contract.[208] Moutrie-Pelham had been awarded nearly half the amount that was awarded to Taylor.[209] That the counterclaim had gone uncontested was irrelevant because Moutrie-Pelham had obtained the relief sought in the counterclaim.[210] The supreme court affirmed, holding that a trial court does not abuse its discretion by refraining from characterizing either party as the prevailing party if both parties prevail on a main issue of the action.[211]

Chilkoot Lumber Co., Inc. v. Rainbow Glacier Seafoods, Inc.

In *Chilkoot Lumber Co., Inc. v. Rainbow Glacier Seafoods, Inc.*,[212] the supreme court held that a settlement agreement made orally in court is enforceable even if the agreement is not later written down.[213] Rainbow leased property and a dock from Chilkoot to use for

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[197] *Id.*
[198] *Id.* at 620.
[199] *Id.*
[200] *Id.*
[201] 246 P.3d 927 (Alaska 2011).
[202] *Id.* at 930.
[203] *Id.* at 928.
[204] *Id.* at 928–29.
[205] *Id.* at 929.
[206] *Id.* at 928.
[207] *Id.* at 929.
[208] *Id.*
[209] *Id.*
[210] *Id.* at 929–30.
[211] *Id.* at 930.
[212] 252 P.3d 1011 (Alaska 2011).
[213] *Id.* at 1015.

Rainbow's fish-processing equipment.[214] Chilkoot later sued Rainbow for unpaid rent.[215] Both parties agreed to a settlement, orally confirmed the agreement in superior court, and agreed to put the agreement in writing.[216] But when the agreement was reduced to writing, Rainbow refused to sign.[217] Rainbow subsequently failed to adhere to the terms of the agreement.[218] Chilkoot moved to enforce the agreement, but the superior court denied its motion because no written agreement had been signed by Rainbow.[219] On appeal, the supreme court reasoned that the original agreement was enforceable, even though it was not written, because an oral agreement made on the record in court is recognized as binding under both the Civil Rules and case law.[220] As long as both parties state on the record that they intend to be bound by an agreement, a settlement agreement is enforceable.[221] Reversing, the supreme court held that a settlement agreement made orally in court is enforceable even if the agreement is not later written down.[222]

Kingery v. Barrett

In *Kingery v. Barrett*,[223] the supreme court held that, if a litigant moves for a new trial by arguing that the jury's verdict went against the weight of the evidence, it is not reversible error for the superior court to deny the motion when conflicting evidence was presented at trial.[224] Kingery and Barrett had a car accident; while Kingery was still in his car, a third car struck his vehicle.[225] A year later, Kingery injured his back while operating a bulldozer.[226] Then, two years after the car accident, Kingery sued Barrett for injuries that he had suffered in the accident.[227] At trial, Kingery testified that he had not felt like he had been injured after the first collision, and his doctors could not say that the collision with Barrett had caused Kingery's pain and back damage.[228] A jury determined that Barrett's negligence had not been a legal cause of Kingery's injuries.[229] On appeal, Kingery argued that he should have been entitled to a new trial because the jury verdict had gone against the weight of the evidence.[230] The supreme court noted that, although Kingery's injury and Barrett's negligence had been undisputed, the evidence had not established that Barrett's negligence caused Kingery's injury.[231] Because the evidence about causation conflicted, the supreme court would not reverse the superior court's denial of a motion for a new trial.[232] The supreme court held that, if a litigant moves for a

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[214] *Id.* at 1013.
[215] *Id.*
[216] *Id.*
[217] *Id.* at 1014.
[218] *Id.*
[219] *Id.*
[220] *Id.* at 1015.
[221] *Id.*
[222] *Id.*
[223] 249 P.3d 275 (Alaska 2011).
[224] *Id.* at 284.
[225] *Id.* at 278.
[226] *Id.* at 279.
[227] *Id.*
[228] *Id.*
[229] *Id.* at 280.
[230] *Id.* at 283.
[231] *Id.* at 284.
[232] *Id.*

new trial by arguing that the jury's verdict went against the weight of the evidence, it is not reversible error for the superior court to deny the motion when conflicting evidence was presented at trial.[233]

3-D & Co. v. Tew's Excavating, Inc.

In *3-D & Co. v. Tew's Excavating, Inc.*,[234] the supreme court held that a court's request for supplemental briefing does not constitute an abuse of discretion when the request is sufficiently related to the substantive issues in dispute.[235] 3-D appealed a superior court's determination that, although it had proven a breach of contract by Tew, 3-D had failed to prove damages to any degree of certainty and had failed to provide Tew with a reasonable opportunity to cure.[236] 3-D argued, in part, that the lower court had abused its discretion by requesting supplemental briefing from the parties on whether 3-D had a duty to give Tew notice and an opportunity to cure.[237] The supreme court explained that Alaska courts have inherent discretionary authority to decide a case on a legal theory not presented by the parties, but advised that they should use this discretion sparingly.[238] Courts may consider new theories when the new theory applies to the transaction at issue, is related to the theories presented by the parties, and is necessary for a proper and just disposition of the case.[239] Because the issues of notice and cure were tied to 3-D's theory of the case, the supreme court affirmed and held that a court's request for supplemental briefing does not constitute an abuse of discretion when the request is sufficiently related to the substantive issues in dispute.[240]

Azimi v. Johns

In *Azimi v. Johns*,[241] the supreme court held that it is an abuse of discretion to dismiss a complaint with prejudice when a pro se litigant fails to fully comply with court orders due to medical concerns and confusion regarding what is required of him.[242] Azimi and Johns were in a car accident, and Azimi filed a pro se complaint claiming that the accident had caused him physical injury and psychological problems.[243] Azimi did not fully comply with the lower court's pretrial order to provide exhibits and jury instructions, expressing confusion over the required materials and concern that complying with the order would affect his health.[244] Johns moved to dismiss, arguing that Azimi's failure to comply with the court's pretrial order warranted involuntary dismissal.[245] The lower court dismissed Azimi's suit, and Azimi appealed.[246] The supreme court reasoned that Azimi's failure to present jury instructions and fully comply

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[233] *Id.*
[234] 258 P.3d 819 (2011).
[235] *Id.* at 831.
[236] *Id.* at 821.
[237] *Id.* at 831.
[238] *Id.* at 830–31.
[239] *Id.* at 831.
[240] *Id.*
[241] 254 P.3d 1054 (Alaska 2011).
[242] *Id.* at 1066–67.
[243] *Id.* at 1056–57.
[244] *Id.* at 1066–67.
[245] *Id.* at 1066.
[246] *Id.* at 1068.

with pre-trial orders had not amounted to willful noncompliance with the court order.[247] The court noted that Azimi had ultimately complied with most requests, and his mere failure to submit jury instructions had not warranted an involuntary dismissal.[248] The supreme court held that it is an abuse of discretion to dismiss a complaint with prejudice when a pro se litigant fails to fully comply with court orders due to medical concerns and confusion regarding what is required of him.[249]

CONSTITUTIONAL LAW

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United States Court of Appeals for the Ninth Circuit

Vandevere v. Lloyd

In *Vandevere v. Lloyd*,[250] the Ninth Circuit held that lessees contractually waive their right to challenge state regulations as unconstitutional takings when their leases contain a waiver provision.[251] Fishermen who held fishery leases sued the Alaska Commissioner of Fisheries when new regulations reduced the value of their leases; the fishermen argued that the regulations amounted to an unconstitutional taking.[252] The district court held that the fishermen had waived any right to compensation by entering lease agreements that contained a provision permitting the State to create new regulations that might affect the value of the leases.[253] On appeal, the Ninth Circuit explained that the fishermen had to show they had a property interest in the leases; if the fishermen did have a property interest, they would have to show that the State's expropriation of that interest amounted to a Fifth Amendment taking.[254] The court then noted that property rights are creatures of state law and that, in the case of "new property" rights like the fishery leases, the state determines what interests an individual possesses.[255] Here, the fishermen's lease agreements explicitly stated that the leases would not limit the power of the State to adopt regulations affecting the value of the interest under the leases.[256] The Ninth Circuit reasoned that the Takings Clause only prohibits uncompensated takings, that compensation can be contractually waived, and that the lease agreements contained such a contractual waiver.[257] The Ninth Circuit affirmed, holding that lessees contractually waive their right to challenge state regulations as unconstitutional takings when their leases contain a waiver provision.[258]

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[247] *Id.* at 1067.
[248] *Id.* at 1066–67.
[249] *Id.*
[250] 644 F.3d 957 (9th Cir. 2011).
[251] *Id.* at 969.
[252] *Id.* at 961.
[253] *Id.* at 963.
[254] *Id.*
[255] *Id.* at 964–65.
[256] *Id.* at 968.
[257] *Id.* at 968–69.
[258] *Id.* at 969.

United States District Court for the District of Alaska

American Booksellers Foundation for Free Expression v. Sullivan

In *American Booksellers Foundation for Free Expression v. Sullivan*,[259] the federal district court held that a statute criminalizing the knowing distribution of indecent materials to minors via the internet is unconstitutional if it is not narrowly tailored to avoid burdening the First Amendment rights of adults.[260] Booksellers, libraries, and publishers alleged that AS 11.61.128, which criminalized the knowing distribution of indecent material to minors via the internet, violated the First Amendment.[261] Applying strict scrutiny because the statute restricted speech based on the speech's content, the court reasoned that "knowing distribution" is not the same as "knowing distribution to a person whom the distributor knows or should know is a minor."[262] The statute thus would have criminalized distribution even if the distributor did not know that the recipient was a minor.[263] This would have a chilling effect on adults' First Amendment rights because there are no reasonable technological means to ascertain the actual age of an individual on the internet.[264] For this reason, the court determined that the statute had not been narrowly tailored to achieve its purpose.[265] The federal district court held that a statute criminalizing the knowing distribution of indecent materials to minors via the internet is unconstitutional if it is not narrowly tailored to avoid burdening the First Amendment rights of adults.[266]

Alaska Supreme Court

Pfeifer v. State, Department of Health & Social Services

In *Pfeifer v. State, Department of Health & Social Services*,[267] the supreme court held that a retroactive statute reducing Medicaid eligibility does not amount to an unconstitutional taking.[268] Pfeifer met with a lawyer to discuss estate planning.[269] She intended to give her son money in February 2007, but wanted to ensure that the gift would not prevent her from receiving Medicaid if she lived long enough to exhaust her assets.[270] At the time of the gift, state Medicaid law provided that the penalty period for such asset transfers would begin immediately after the gift was given.[271] But in 2008, the state legislature changed the penalty period so that it would begin running only after all of the Medicaid recipient's assets were used up.[272] The legislature gave the new law

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[259] 799 F.Supp.2d 1078 (D. Alaska 2011).
[260] *Id*. at 1086–87.
[261] *Id*. at 1078–79.
[262] *Id*. at 1081–82.
[263] *Id*. at 1082.
[264] *Id*.
[265] *Id*. at 1082–83.
[266] *Id*. at 1086–87.
[267] 260 P.3d 1072 (Alaska 2011).
[268] *Id*. at 1081.
[269] *Id*. at 1076.
[270] *Id*.
[271] *Id*.
[272] *Id*. at 1075.

retroactive effect to October 2006, before Pfeifer made her gift.[273] Pfeifer's son appealed the decision, but the administrative agency and the superior court upheld the validity of the penalty provision's retroactive application.[274] In the supreme court, he argued that the statute's retroactive application amounted to an unconstitutional taking under the U.S. and Alaska Constitutions.[275] The court stated that, in any takings analysis, the first consideration is whether the claimant has a protected property interest.[276] The court reasoned that a future Medicaid benefit is not a property interest that has yet vested, and, at the time of her gift, Pfeifer had nothing more than an inchoate expectancy of eventually becoming eligible for the benefits.[277] Thus, the supreme court held that a retroactive statute reducing Medicaid eligibility does not amount to an unconstitutional taking.[278]

In re Tracy C.

In *In re Tracy C.*,[279] the supreme court held that, although a patient may be involuntarily committed only if she is gravely disabled at the time of her commitment hearing, a judge can consider the patient's recent behavior, condition, and symptoms when making that determination.[280] At her involuntary commitment hearing, Tracy's doctor testified that although Tracy had improved since beginning treatment a few days before, she was still in an acute manic state and could relapse at any time without her medication.[281] Based on this testimony, the probate master found her gravely disabled and recommended that the commitment petition be granted.[282] On appeal, Tracy argued that the superior court had improperly based its commitment order on the symptoms she displayed at the time of admission when it should have based its decision on her condition at the time of the commitment hearing.[283] The supreme court agreed that a commitment order must be based on a patient's condition at the time of the hearing, but it concluded that recent behaviors and symptoms are also appropriate for the court to consider in ordering commitment.[284] Thus, the supreme court affirmed the superior court's order for involuntary commitment and held that while a patient may be involuntarily committed only if she is gravely disabled at the time of her commitment hearing, a judge can consider the patient's recent behavior, condition, and symptoms when making that determination.[285]

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[273] *Id.*
[274] *Id.* at 1077–79.
[275] *Id.* at 1080.
[276] *Id.*
[277] *Id.* at 1081.
[278] *Id.*
[279] 249 P.3d 1085 (Alaska 2011).
[280] *Id.* at 1091.
[281] *Id.* at 1088.
[282] *Id.*
[283] *Id.* at 1092.
[284] *Id.* at 1094.
[285] *Id.* at 1091.

CONTRACT LAW

top

Alaska Supreme Court

O'Connell v. Will

In *O'Connell v. Will*,[286] the supreme court held that a contractual provision requiring that a party pay attorneys' fees in any lawsuit concerning the contract also requires the party to pay attorneys' fees for costs incurred to collect on a judgment.[287] A note contract between O'Connell and Will stated that, if a lawsuit was necessary to collect the note, a "reasonable attorney's fee in such suit or action" would likewise be collected.[288] When O'Connell sued Will to collect on the note, the superior court awarded attorneys' fees for the fees incurred to obtain a judgment but held that, based on the contract, O'Connell was not entitled to attorneys' fees for the fees incurred to collect on the judgment.[289] On appeal, the supreme court interpreted the contractual clause, reasoning that "suit" encompasses any proceeding by a party in court and that a proceeding includes any ancillary steps, such as the enforcement of a judgment.[290] Noting that contractual attorneys' fees provisions must be construed broadly to promote efficient litigation, the court determined that O'Connell should have been awarded attorneys' fees for the fees incurred to collect on his judgment.[291] Reversing, the supreme court held that a contractual provision requiring that a party pay attorneys' fees in any lawsuit concerning the contract also requires the party to pay attorneys' fees for costs incurred to collect on a judgment.[292]

Safar v. Wells Fargo Bank, N.A.

In *Safar v. Wells Fargo Bank, N.A.*,[293] the supreme court held that, for a verbal agreement to be enforceable through promissory estoppel, there must be an actual promise of action or forbearance that shows an intent to be bound to a contract with specified terms.[294] Safar contracted to construct six units in a condominium project.[295] Partway through construction, Safar used up all of the money Wells Fargo had loaned to him.[296] Safar put up his personal funds to make ends meet based on an alleged agreement that Wells Fargo would reimburse him.[297] The trial court found that no such agreement existed.[298] The supreme court noted that an actual promise (one of the necessary components of a verbal contract) must use precise language, contain basic terms of the agreement, and show an

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[286] 263 P.3d 41 (Alaska 2011).
[287] *Id*. at 46–47.
[288] *Id*. at 46.
[289] *Id*. at 43.
[290] *Id*. at 46.
[291] *Id*. at 46–47.
[292] *Id*.
[293] 254 P.3d 1112 (Alaska 2011).
[294] *Id*. at 1119–20.
[295] *Id*. at 1113.
[296] *Id*.
[297] *Id*.
[298] *Id*.

intent to be bound by the contract.[299] Safar could not identify any of the basic terms of the alleged agreement, not even the amount of money that Wells Fargo would loan to him.[300] The supreme court affirmed and held that, for a verbal agreement to be enforceable through promissory estoppel, there must be an actual promise of action or forbearance that shows an intent to be bound to a contract with specified terms.[301]

Handle Construction Co., Inc. v. Norcon, Inc.

In *Handle Construction Co., Inc. v. Norcon, Inc.*,[302] the supreme court held that a duty to inquire whether a mistake has been made in a contract bid does not arise if the bidder bears the risk of its own mistake.[303] Handle Construction Company (Handle) bid on a construction contract for Norcon.[304] As the result of a unilateral mistake, Handle's bid was 35 percent lower than any other bidder.[305] Handle later sued Norcon for the additional costs that Handle had incurred during the construction.[306] The superior court held that Handle bore the risk of its unilateral mistake and granted summary judgment to Norcon.[307] On appeal, Handle argued that a 35 percent difference between Handle's bid and any of the other bids should have alerted Norcon to a potential mistake and that Norcon had thus been obligated to inquire whether a mistake had been made.[308] The supreme court reasoned that Handle's argument, which was based on the Restatement (Second) of Contracts, does not apply to a party (like Handle) that bears the risk of its own mistake.[309] The court further noted that, even if Handle had not borne the risk of its own mistake, a 35 percent difference would have been insufficient to create a duty, on Norcon's part, to inquire.[310] Affirming, the supreme court held that a duty to inquire whether a mistake has been made in a contract bid does not arise if the bidder bears the risk of its own mistake.[311]

Chambers v. Scofield

In *Chambers v. Scofield*,[312] the supreme court held that the term "fair market cost," in a settlement agreement regarding compensation for improvements made to property, does not encompass the time a party spends supervising the improvements.[313] Chambers bought a triplex from Carley.[314] Two years later, Carley's daughter entered into a settlement agreement with Chambers to rescind the sale and compensate Chambers for

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[299] *Id*. at 1120.
[300] *Id*.
[301] *Id*. at 1119–20.
[302] 264 P.3d 367 (Alaska 2011).
[303] *Id*. at 374–75.
[304] *Id*. at 369.
[305] *Id*. at 374.
[306] *Id*. at 370.
[307] *Id*. at 371.
[308] *Id*. at 374.
[309] *Id*.
[310] *Id*.
[311] *Id*. at 374–75.
[312] 247 P.3d 982 (Alaska 2011).
[313] *Id*. at 983.
[314] *Id*.

the "fair market cost" of improvements he had made to the property.[315] Chambers filed a motion to enforce the agreement, claiming that he was owed compensation for supervising the improvements and that such supervision falls under the category of "profit and overhead" typically charged to general contractors.[316] Interpreting the agreement, the supreme court reasoned that it did not include the cost of supervising improvements because supervision was not mentioned in the agreement and because there is no industry standard clearly indicating that "fair market cost" includes the supervision of repairs.[317] The court stated that if Chambers had desired a credit for supervision, he should have included that provision in the agreement.[318] The supreme court held that the term "fair market cost," in a settlement agreement regarding compensation for improvements made to property, does not encompass the time a party spends supervising the improvements.[319]

Erkins v. Alaska Trustee, LLC

In *Erkins v. Alaska Trustee, LLC*,[320] the supreme court held that a disguised settlement provision in a forbearance agreement could constitute constructive fraud.[321] Erkins sued Alaska Trustee, alleging fraud and misrepresentation in relation to a foreclosure proceeding on a delinquent loan.[322] Alaska Trustee proposed a forbearance agreement staying the foreclosure proceeding for five months and Erkins agreed.[323] One paragraph buried in the agreement was titled "RELEASE OF CLAIMS," but the paragraph was not discussed or negotiated.[324] The superior court construed the provision as a full waiver of Erkins' claims and granted summary judgment to Alaska Trustee.[325] On appeal, the supreme court reasoned that the agreement did not contain the terms that would be expected in a settlement agreement, and that a waiver of claims had not been discussed or highlighted as a central part of the agreement; thus, Alaska Trustee had an obligation to bring the waiver-of-claims language to Erkins' attention.[326] Reversing, the supreme court held that a disguised settlement provision in a forbearance agreement could constitute constructive fraud.[327]

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[315] *Id.*
[316] *Id.* at 987.
[317] *Id.* at 983, 988.
[318] *Id.*
[319] *Id.* at 983.
[320] 265 P.3d 292 (Alaska 2011).
[321] *Id.* at 300.
[322] *Id.* at 295.
[323] *Id.*
[324] *Id.* at 295–96.
[325] *Id.* at 296.
[326] *Id.* at 299–300.
[327] *Id.* at 300.

CRIMINAL LAW

top

Alaska Court of Appeals

Lord v. State

In *Lord v. State*,[328] the court of appeals held that the State's "not guilty by reason of insanity" (NGRI) defense statutes are constitutional because the State must still prove the mental state required under any particular criminal statute.[329] After a murder trial, Lord was found guilty but mentally ill.[330] On appeal, she argued that the statutes setting out the NGRI defense were unconstitutional because they permit conviction when the defendant does not have the capacity to appreciate the wrongfulness of her conduct.[331] The court of appeals noted that the U.S. Constitution does not require an inquiry into a defendant's mental state so long as the government proves that she acted with the mens rea required by a criminal statute.[332] The court of appeals also rejected the notion that the Alaska Constitution should be interpreted more broadly than the U.S. Constitution because the determination of the point at which a defendant's mental condition justifies exculpation is a question for the legislature, not the judiciary.[333] Affirming, the court of appeals held that the State's NGRI defense statutes are constitutional because the State must still prove the mental state required under the particular criminal statute.[334]

Liddicoat v. State

In *Liddicoat v. State*,[335] the court of appeals held that a steak knife constitutes a "deadly weapon" for the purposes of the fifth-degree weapons misconduct statute.[336] Liddicoat was convicted of fifth-degree weapons misconduct for carrying a concealed steak knife.[337] The weapons statute defines a "deadly weapon" as a weapon that is "designed for and capable of causing death or serious physical injury."[338] On appeal, Liddicoat argued that, because a steak knife is not designed to cause serious physical injury, the trial court should have granted him a directed verdict.[339] The court of appeals noted that the statute's examples of "deadly weapons" included some (an axe, for example) that are not designed to cause serious physical injury.[340] Further, that the legislature had excluded ordinary pocket knives from previous weapons statutes signaled that the legislature had intended to include other types of knives in the current weapons statute.[341] Accordingly,

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[328] 262 P.3d 855 (Alaska Ct. App. 2011).
[329] *Id*. at 861–62.
[330] *Id*.
[331] *Id*. at 861.
[332] *Id*.
[333] *Id*. at 862.
[334] *Id*. at 861–62.
[335] 268 P.3d 355 (Alaska Ct. App. 2011).
[336] *Id*. at 361.
[337] *Id*. at 356–57.
[338] *Id*. at 359.
[339] *Id*.
[340] *Id*. at 359–60.
[341] *Id*. at 360–61.

the court of appeals held that a steak knife constitutes a "deadly weapon" for the purposes of the fifth-degree weapons misconduct statute.[342]

Strane v. Municipality of Anchorage

In *Strane v. Municipality of Anchorage*,[343] the court of appeals held that, for the Municipality of Anchorage's concealment of merchandise ordinance to be constitutional, the government must prove that the defendant knowingly placed merchandise out of sight and did so with the intent to conceal the merchandise from its rightful owner.[344] Strane placed items from his shopping cart into plastic bags.[345] After bypassing the checkout aisles and nearing the exit door, Strane noticed a uniformed manager standing nearby.[346] He abandoned his cart, attempted to leave the store, and was arrested.[347] At trial, the judge did not instruct the jury that, to find Strane guilty, the Municipality was required to prove that he had acted with the intent to hide the merchandise.[348] On review, the court of appeals reasoned that there are a number of potential innocent circumstances in which individuals might conceal a purchased or unpurchased item that they intend to pay for before leaving a store.[349] Therefore, the ordinance must be interpreted to require proof of something more than a person's act of knowingly concealing merchandise while on commercial premises.[350] Reversing, the court of appeals held that, for the Municipality of Anchorage's concealment of merchandise ordinance to be constitutional, the government must prove that the defendant knowingly placed merchandise out of sight and did so with the intent to conceal the merchandise from its rightful owner.[351]

Dawson v. State

In *Dawson v. State*,[352] the court of appeals held that Alaska's disorderly conduct statute, AS 11.61.110, which prohibits "fighting other than in self-defense," requires fighters to have a mutuality of intent and therefore does not cover all situations where one person strikes another.[353] Dawson was charged with fourth-degree assault for striking her domestic partner with her fists and a baking pan.[354] At trial, her attorney requested a jury instruction on the lesser offense of disorderly conduct.[355] The lower court refused to grant the request, concluding that "fighting," as used in the context of the disorderly conduct statute, required a mutual physical struggle.[356] Dawson was convicted of assault and appealed.[357] The court of appeals extensively reviewed similar common law statutes and

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[342] *Id*. at 361.
[343] 250 P.3d 546 (Alaska Ct. App. 2011).
[344] *Id*. at 547.
[345] *Id*.
[346] *Id*.
[347] *Id*.
[348] *Id*. at 550.
[349] *Id*. at 549.
[350] *Id*. at 550.
[351] *Id*. at 547.
[352] 264 P.3d 851 (Alaska Ct. App. 2011).
[353] *Id*. at 852–53.
[354] *Id*. at 853.
[355] *Id*.
[356] *Id*.
[357] *Id*.

the current disorderly-conduct statute's legislative history.[358] In doing so, the court recognized that it had erred in a previous, unpublished opinion in which it had held that the term "fighting" included fights that are one-sided due to the choice, surprise, or superior ability of one of the fighters.[359] Affirming, the court of appeals held that the disorderly conduct statute requires fighters to have a mutuality of intent and therefore does not cover all situations where one person strikes another.[360]

Olson v. State

In *Olson v. State*,[361] the court of appeals held that a hand cannot be considered a "dangerous instrument" for purposes of first-degree assault when no evidence is presented showing that the assault was likely to inflict serious injury.[362] Olson hit his girlfriend with an open hand.[363] The blow broke her jaw.[364] He was convicted of first- and second-degree assault.[365] The superior court granted Olson's motion for acquittal on the first-degree assault charge because Olson had not used a "dangerous instrument" in the attack.[366] The State argued on appeal that Olson had used his hand as a "dangerous instrument" and that it was therefore error for the lower court to grant a judgment of acquittal for the first-degree assault charge.[367] The court of appeals noted that, when determining whether a "dangerous instrument" was used in an assault, the fact finder must examine the consequences that were reasonably likely to ensue from the defendant's actions (given the type of object used and the circumstances in which the object was used).[368] Applying this test, the court determined that there was no evidence, aside from the injury, that Olson used his hand in a manner that was likely to cause death or inflict serious injury.[369] Affirming, the court of appeals held that a hand cannot be considered a "dangerous instrument" for purposes of first-degree assault when no evidence is presented showing that the assault was likely to inflict serious injury.[370]

Rupeiks v. State

In *Rupeiks v. State*,[371] the court of appeals held that a hand may be deemed a "dangerous instrument" to support a conviction of third-degree assault when the manner of the assault shows the presence of an actual and substantial risk of serious bodily injury or death.[372] Rupeiks drove to Christensen's campsite after they had a disagreement.[373] When Christensen approached Rupeiks' truck and bent down to identify the driver, Rupeiks

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[358] *Id.* at 854–57.
[359] *Id.* at 854.
[360] *Id.* at 852–53.
[361] 264 P.3d 600 (Alaska Ct. App. 2011).
[362] *Id.* at 604–05.
[363] *Id.* at 604.
[364] *Id.* at 602.
[365] *Id.*
[366] *Id.*
[367] *Id.* at 604.
[368] *Id.*
[369] *Id.* at 605.
[370] *Id.* at 604–05.
[371] 263 P.3d 57 (Alaska Ct. App. 2011).
[372] *Id.* at 59–60.
[373] *Id.* at 59.

grabbed Christensen's arm and yanked his torso into the truck.[374] Rupeiks then clubbed Christensen in the face, and drove the vehicle while continuing to hold Christensen's arm.[375] The jury found Rupeiks guilty of third-degree assault and agreed in a special verdict form that Rupeiks' hand or fist had been used as a "dangerous instrument."[376] Rupeiks appealed, arguing that the evidence was insufficient to support the jury's finding.[377] The court of appeals reasoned that the manner and circumstances of the assault showed that Rupeiks had used his hand as a "dangerous instrument."[378] Rupeiks had used his hand to hold Christensen's arm in the truck, which substantially limited Christensen's ability to defend himself.[379] Moreover, the jury heard testimony that Rupeiks had punched Christensen in the face repeatedly, with enough force to fracture his facial bones.[380] Affirming, the court of appeals held that a hand may be deemed a "dangerous instrument" to support a conviction of third-degree assault when the manner of the assault shows the presence of an actual and substantial risk of serious bodily injury or death.[381]

Delay-Wilson v. State

In *Delay-Wilson v. State*,[382] the court of appeals held that criminal liability for issuing a bad check is not established by merely endorsing a check issued by a third party.[383] A company issued a check to Delay-Wilson's daughter, who in turn endorsed it payable to Delay-Wilson; Delay-Wilson then endorsed the bad check and deposited it in her own bank account.[384] Delay-Wilson was convicted of issuing a bad check.[385] On appeal, she argued that simply signing the check was not sufficient to establish liability under the statute governing the offense of issuing a bad check.[386] The court of appeals analyzed the language of the bad-check statute, finding that the offense requires proof that the defendant authorized the check in question.[387] Because the check at issue purported to authorize payment from a third party's account, Delay-Wilson did not actually authorize payment from an account she owned.[388] Reversing, the court of appeals held that criminal liability for issuing a bad check is not established by merely endorsing a check issued by a third party.[389]

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[374] *Id.* at 58.
[375] *Id.*
[376] *Id.*
[377] *Id.* at 59.
[378] *Id.*
[379] *Id.*
[380] *Id.*
[381] *Id.* at 59–60.
[382] 264 P.3d 375 (Alaska Ct. App. 2011).
[383] *Id.* at 376.
[384] *Id.*
[385] *Id.*
[386] *Id.* at 376–77.
[387] *Id.*
[388] *Id.*
[389] *Id.* at 376.

Darroux v. State

In *Darroux v. State*,[390] the court of appeals held that the statutory mitigator in AS 12.55.155(d)(7) cannot be used to reduce the presumptive sentence of a defendant who has already successfully argued that he should be convicted of a lesser included offense based on a claim of provocation.[391] Darroux shot and killed a man; although he was charged with second-degree murder, a jury found him guilty of manslaughter because he had been "serious[ly] provo[ked]."[392] Darroux argued that his presumptive sentence should be mitigated because AS 12.55.155(d)(7) provides that a mitigating factor can be found if "the victim provoked the crime to a significant degree." The superior court rejected Darroux's proposed mitigating factor and Darroux appealed.[393] The court of appeals noted that the degree of provocation necessary to apply the mitigating factor in AS 12.55.155(d)(6), "serious provocation," is the same degree of provocation that is necessary to reduce a murder to manslaughter.[394] But AS 12.55.155(e) forbids the application of a mitigating factor that was raised at trial and reduced the defendant's conviction to a lesser included offense.[395] The court reasoned that it would be illogical to forbid the defendant from mitigating his sentence due to "serious provocation" under AS 12.55.155(d)(6), but then allow the defendant to mitigate his sentence due to lesser, "significant," provocation under AS 12.55.155(d)(7).[396] Affirming, the court of appeals held that the statutory mitigator in AS 12.55.155(d)(7) cannot be used to reduce the presumptive sentence of a defendant who has already successfully argued that he should be convicted of a lesser included offense based on a claim of provocation.[397]

Wiglesworth v. State

In *Wiglesworth v. State*,[398] the court of appeals held that a defendant can only be convicted of one count of second-degree controlled substance misconduct when evidence shows that he possessed several different prohibited substances, on several different occasions, in the course of an ongoing methamphetamine manufacturing scheme.[399] Police investigation revealed that on three dates Wiglesworth possessed several chemicals used to manufacture methamphetamine.[400] He was charged with six counts of second-degree controlled substance misconduct, one for each substance and date, and convicted on each count.[401] He appealed and argued that, because he possessed the chemicals as part of one ongoing manufacturing operation, he should have been convicted of only one count.[402] The court of appeals concluded that the gravamen of the offense is the assembly of materials necessary to manufacture methamphetamine, and

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[390] 265 P.3d 348 (Alaska Ct. App. 2011).
[391] *Id*. at 354.
[392] *Id*. at 349, 352.
[393] *Id*. at 351.
[394] *Id*. at 354.
[395] *Id*.
[396] *Id*.
[397] *Id*.
[398] 249 P.3d 321 (Alaska Ct. App. 2011).
[399] *Id*. at 323.
[400] *Id*. at 324–325.
[401] *Id*.
[402] *Id*. at 325.

there is no societal interest in the accused's possession of each individual chemical.[403] The court reasoned that it would be illogical to convict a defendant of multiple felony counts (one for each ingredient) if he was interrupted partway through the manufacturing process, but of only one count if he completed the same process.[404] Reversing, the court of appeals held that a defendant can only be convicted of one count of second-degree controlled substance misconduct when evidence shows that he possessed several different prohibited substances, on several different occasions, in the course of an ongoing methamphetamine manufacturing scheme.[405]

Scharen v. State

In *Scharen v. State*,[406] the court of appeals held that, in a driving-under-the-influence case, an individual who turned on his car in order to stay warm after leaving a bar is not entitled to a jury instruction on the defense of necessity.[407] Scharen left a bar, planning to sleep in his car, and started the engine for warmth.[408] At trial, Scharen requested a jury instruction on the defense of necessity; the district court refused to give the instruction.[409] The court of appeals reasoned that Scharen was not entitled to a jury instruction on the defense of necessity because he knowingly brought about the dangerous situation (death or serious injury due to freezing) by leaving the bar with the intention of sleeping in his car.[410] Additionally, the court of appeals noted that Scharen had reasonable alternatives to prevent the dangerous situation which would not have required him to operate a motor vehicle.[411] The court of appeals held that, in a driving-under-the-influence case, an individual who turned on his car in order to stay warm after leaving a bar is not entitled to a jury instruction on the defense of necessity.[412]

Leu v. State

In *Leu v. State*,[413] the court of appeals held that Alaska's domestic violence statute, which applies to individuals who "have engaged in a sexual relationship," is not unconstitutionally vague.[414] Leu and his friend had sex on occasion, but had not had sex for five months.[415] Leu and his friend were drinking, began fighting, and Leu punched his friend repeatedly.[416] A jury convicted Leu of fourth-degree domestic violence assault.[417] At sentencing, the district court held that Leu's assault qualified as a domestic violence crime because Leu and the victim had previously engaged in a sexual relationship.[418] On

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[403] *Id*. at 328.
[404] *Id*.
[405] *Id*. at 323.
[406] 249 P.3d 331 (Alaska Ct. App. 2011).
[407] *Id*. at 336.
[408] *Id*. at 332.
[409] *Id*. at 332–33.
[410] *Id*. at 334.
[411] *Id*.
[412] *Id*. at 336.
[413] 251 P.3d 363 (Alaska Ct. App. 2011).
[414] *Id*. at 367–69.
[415] *Id*. at 369.
[416] *Id*. at 364.
[417] *Id*. at 365.
[418] *Id*.

appeal, Leu argued that the domestic violence statute was unconstitutionally vague on its face.[419] The court of appeals reasoned that (1) the term "sexual relationship" is not so ambiguous that it gives inadequate notice of what conduct it proscribes in every instance and (2) Leu had not presented any evidence of selective or arbitrary enforcement.[420] Affirming, the court of appeals held that Alaska's domestic violence statute, which applies to individuals who "have engaged in a sexual relationship," is not unconstitutionally vague.[421]

Bridge v. State

In *Bridge v. State*,[422] the court of appeals held that an escapee cannot be charged with second-degree felony escape from a correctional facility unless the escapee's presence at the facility is forcibly maintained by corrections officers or guards acting as agents of the Department of Corrections (DOC).[423] Bridge was charged with a misdemeanor and, when he was unable to make bail, was placed in a halfway house under contract with DOC.[424] Bridge left the halfway house without permission and was later arrested and charged with second-degree felony escape.[425] At trial, the judge instructed the jury that the halfway house was a "correctional facility" under the statute, without hearing evidence regarding the restraints used on individuals in the halfway house.[426] On appeal following his conviction, Bridge argued that the halfway house was not a "correctional facility" within the meaning of the felony escape statute.[427] The court of appeals agreed, determining that a "correctional facility" did not include any facility used for housing a person under official detention but was instead limited to facilities used for the confinement of detained persons.[428] The court defined a facility for confinement as one which employs physical restraints and guards for the purpose of maintaining security over prisoners required to remain in that facility.[429] Reversing, the court of appeals held that an escapee cannot be charged with second-degree felony escape from a correctional facility unless the escapee's presence at the facility is forcibly maintained by corrections officers or guards acting as agents of DOC.[430]

Cleveland v. State

In *Cleveland v. State*,[431] the court of appeals held that an individual may be convicted of a separate kidnapping offense when the evidence shows that the restraint used in the kidnapping is more than merely incidental to the commission of another offense.[432] Cleveland and two others took a woman to a trailer, where over the course of at least two

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[419] *Id.* at 366.
[420] *Id.* at 367, 369.
[421] *Id.* at 367–69.
[422] 258 P.3d 923 (Alaska Ct. App. 2011).
[423] *Id.* at 930–31.
[424] *Id.* at 924–25.
[425] *Id.* at 925.
[426] *Id.* at 930.
[427] *Id.*
[428] *Id.* at 926.
[429] *Id.* at 926–27.
[430] *Id.* at 930–31.
[431] 258 P.3d 878 (Alaska Ct. App. 2011).
[432] *Id.* at 882.

days they threatened her, beat her, and sexually abused her.[433] Cleveland was convicted of sexual assault, coercion, kidnapping, assault, misconduct involving a weapon, and harassment.[434] Cleveland appealed, challenging the sufficiency of the evidence used to establish the element of restraint for the kidnapping conviction.[435] The court of appeals recognized that a restraint merely incidental to another offense does not constitute a separate offense.[436] The court upheld the conviction, however, identifying five factors to consider in determining whether a restraint was incidental to the other offense: (1) the duration of the restraint, (2) the movement of the victim during the restraint, (3) whether the restraint exceeded what was necessary for the commission of the other offenses, (4) whether the restraint increased the risk of harm beyond the other offenses, and (5) whether the restraint had some independent purpose.[437] The court reasoned that, although the trial court had not instructed the jury on these factors, the evidence in the case was sufficient to find that the kidnapping was not incidental to Cleveland's separate offenses.[438] The court of appeals held that an individual may be convicted of a separate kidnapping offense when the evidence shows that the restraint used in the kidnapping is more than merely incidental to the commission of another offense.[439]

CRIMINAL PROCEDURE

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Alaska Supreme Court

Kalmakoff v. State

In *Kalmakoff v. State*,[440] the supreme court held that (1) a fifteen-year-old is "in custody" for *Miranda* purposes when he has no previous history of contact with law enforcement and is called out of class by his principal, driven by a police officer to an interview with police, and not told that he is free to leave; and (2) when the police have flagrantly violated a suspect's right to silence during an interview, subsequent interviews are sufficiently tainted to require suppression if the police obtained important incriminating information from the suspect during the first interview and then use that information to convince the suspect to acquiesce to further interviews.[441] Fifteen year-old Kalmakoff was interviewed four times by police in connection with a murder.[442] Kalmakoff was pulled out of a classroom by his principal; a police officer then drove him to the city office for questioning.[443] The police officers did not tell Kalmakoff he was free to leave, nor did they give him *Miranda* warnings.[444] During the course of questioning, he made

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[433] *Id.*
[434] *Id.* at 881.
[435] *Id.* at 881–82.
[436] *Id.* at 882.
[437] *Id.*
[438] *Id.* at 882–83.
[439] *Id.* at 882.
[440] 257 P.3d 108 (Alaska 2011).
[441] *Id.* at 122–24, 127–30.
[442] *Id.* at 111.
[443] *Id.* at 112.
[444] *Id.*

incriminating statements.[445] At another interview at the city office the following day, Kalmakoff told the officers that he wanted to stop the interview and go back to school, but the officers continued questioning him.[446] Three hours later, the officers went to Kalmakoff's home and (again without giving *Miranda* warnings) encouraged him to tell his grandparents what he had already told the officers.[447] Kalmakoff again made incriminating statements.[448] The next day, the officers took Kalmakoff out of class and asked him to show them the murder site.[449] Kalmakoff made several more incriminating statements, at which point the officers administered *Miranda* warnings.[450] The officers then videotaped Kalmakoff's confession while he showed them the crime scene.[451] The superior court held, first, that Kalmakoff had not been in custody when he was taken from the school to his first interview; second, that he had been in custody for his second interview, and the failure to give *Miranda* warnings rendered those statements inadmissible; third, that he had not been in custody for the third interview, and that the taint of the earlier *Miranda* violation was sufficiently attenuated to render those statements admissible; and fourth, that he had validly waived his *Miranda* rights during the fourth interview, rendering his confession admissible.[452] The court of appeals affirmed, holding that the last two interviews were admissible because they were not tainted by the earlier *Miranda* violations.[453] The court of appeals determined that it did not have enough information about the first interview to decide whether Kalmakoff had been in custody when he was taken to the city office but that any error in admitting the statements from the first interview was harmless.[454] The supreme court granted leave to appeal and remanded for fact-finding regarding the first interview.[455] The court determined that, although Kalmakoff had not been formally arrested prior to his first interview, his freedom of movement had been so restrained that a reasonable person in his position would not have felt free to leave or to stop the questioning.[456] The court noted his age, that he had been escorted by a police officer from the school to the city office, that he was not offered the opportunity to speak with his family before the interview, and that the officers questioned Kalmakoff in an accusatory manner.[457] The court then noted that Kalmakoff had been in custody for the second interview but had not received *Miranda* warnings and that, when he had invoked his right to silence, the officers had ignored him and continued the questioning.[458] Finally, the court determined that the officers' flagrant *Miranda* violations in the first and second interviews sufficiently tainted the last two interviews to render statements from those interviews

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[445] *Id*.
[446] *Id*. at 113–14.
[447] *Id*. at 115.
[448] *Id*.
[449] *Id*.
[450] *Id*.
[451] *Id*.
[452] *Id*. at 116–17.
[453] *Id*. at 117–18.
[454] *Id*. at 117.
[455] *Id*. at 118.
[456] *Id*. at 122.
[457] *Id*. at 122–23.
[458] *Id*. at 126.

inadmissible.[459] In particular, the court noted that the officers had asked Kalmakoff to repeat and explain incriminating statements that he had made during the earlier, improper interviews.[460] Reversing, the supreme court held that 1) a fifteen-year-old is "in custody" for *Miranda* purposes when he has no previous history of contact with law enforcement and is called out of a class by his principal, driven by a police officer to an interview with police, and not told that he is free to leave; and 2) when the police have flagrantly violated a suspect's right to silence during an interview, subsequent interviews are sufficiently tainted to require suppression if the police obtained important incriminating information from the suspect during the first interview and then use that information to convince the suspect to acquiesce to further interviews.[461]

Olson v. State

In *Olson v. State*,[462] the supreme court held that when the police voluntarily give information to an arrestee, and that information turns out to be incorrect, the arrestee bears the burden of proving prejudice from the erroneous communication.[463] Olson was arrested for driving while intoxicated and the police asked for a breath sample.[464] Because the police were required to inform him of the consequences of refusal, an officer read to him an implied consent form.[465] The form was out-of-date and stated that, if an arrestee was convicted twice in the previous five years of driving while intoxicated or refusing to take a chemical test, refusing to take the breath test could result in a class C felony.[466] But the law had changed to include a ten year look-back provision.[467] Olson, who had two violations from the previous six years, refused the test and was convicted of a class C felony.[468] Olson appealed, claiming that his due process rights had been violated by the improper notice.[469] The lower court ruled in favor of the State, holding that Olson was required to show that the misinformation actually induced him to refuse the chemical test and that Olson had not shown sufficient evidence of inducement.[470] Although the supreme court agreed with the lower court, holding that Olson must produce evidence that he was actually prejudiced by the improper warning, the court reversed and remanded the case.[471] The court reasoned that Olson had not been aware that he needed to produce evidence that his refusal to take the breath test was induced by the misinformation he received, and a remand was necessary to allow him the opportunity to make that showing.[472] The supreme court held that when the police voluntarily give

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[459] *Id*. at 126–30.
[460] *Id*.
[461] *Id*. at 122–24, 127–30.
[462] 260 P.3d 1056 (Alaska 2011).
[463] *Id*. at 1061–64.
[464] *Id*. at 1058.
[465] *Id*.
[466] *Id*.
[467] *Id*.
[468] *Id*. at 1059.
[469] *Id*.
[470] *Id*. at 1061–62.
[471] *Id*. at 1064.
[472] *Id*.

information to an arrestee, and that information turns out to be incorrect, the arrestee bears the burden of proving prejudice from the erroneous communication.[473]

State v. Carlin

In *State v. Carlin*,[474] the supreme court held that, if a criminal defendant dies while appealing a conviction, the conviction will stand unless the defendant's estate proceeds with an appeal.[475] Carlin died in prison while directly appealing his conviction.[476] The supreme court had previously adopted the doctrine of abatement *ab initio*, under which appellate courts permanently abated a criminal defendant's conviction if the criminal defendant died while his appeal was pending.[477] The court decided to depart from that doctrine for two reasons. First, legal conditions had changed because victims' rights had recently been expanded and other states had recently diversified their positions on abatement.[478] Second, the benefits to crime victims of rejecting the doctrine of full abatement outweighed the benefits of stare decisis.[479] The supreme court held that, if a criminal defendant dies while appealing a conviction, the conviction will stand unless the defendant's estate proceeds with an appeal.[480]

Adams v. State

In *Adams v. State*,[481] the supreme court held that the admission of a prosecutor's comments about a defendant's pre- or post-arrest silence constitutes plain error.[482] During the defendant's trial for sexual assault, the prosecutor asked the defendant on cross-examination to admit that he had refused to speak with the police.[483] The prosecutor also highlighted the defendant's pretrial silence during the closing statement, arguing that the defendant's refusal to speak undermined his credibility and that the defendant had changed his decision to remain silent only after learning that DNA evidence showed that he had had sex with the victim.[484] Although Adams' attorney did not object to either the cross-examination or the closing argument, Adams argued on appeal that the trial court's admission of the prosecutor's comments was plain error.[485] The court of appeals concluded that the admission of the prosecutor's statements had not amounted to plain error.[486] The supreme court disagreed, explaining that the Alaska Constitution protects a criminal defendant's post-arrest silence to a greater degree than the U.S. Constitution.[487] But the supreme court decided that it did not need to determine in this case whether the Alaska Constitution protects pre-arrest statements to the same

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[473] *Id*. at 1061–64.
[474] 249 P.3d 752 (Alaska 2011).
[475] *Id*. at 766.
[476] *Id*. at 754–56.
[477] *Id*. at 756.
[478] *Id*. at 759–61.
[479] *Id*. at 761–63.
[480] *Id*. at 766.
[481] 261 P.3d 758 (Alaska 2011).
[482] *Id*. at 775.
[483] *Id*. at 761–62.
[484] *Id*. at 762–63.
[485] *Id*. at 763.
[486] *Id*.
[487] *Id*. at 765.

extent that it protects post-arrest statements.[488] The court noted that Evidence Rule 403 protects a defendant's pre-arrest silence by rendering it inadmissible in most cases because the high risk of unfair prejudice usually outweighs its inherently low probative value.[489] Reversing, the supreme court held that the admission of a prosecutor's comments about a defendant's pre- or post-arrest silence constitutes plain error.[490]

Stone v. State

In *Stone v. State*,[491] the supreme court held that the U.S. Constitution requires that court-appointed counsel, upon request by a defendant, file a petition for discretionary sentence review after the defendant has been sentenced pursuant to a lawful plea agreement.[492] Stone was charged with manslaughter and submitted to a plea agreement.[493] He received a sentence which, excluding a suspended portion, did not exceed his plea agreement.[494] Stone wanted to appeal his sentence as excessive, but his counsel concluded that Stone had no appealable issues and took no further action.[495] After the lower courts upheld the attorney's refusal to assist Stone with an appeal, Stone petitioned the supreme court, arguing that he had a federal constitutional right to require his counsel to seek appellate review.[496] The supreme court agreed.[497] Although a defendant may not appeal a sentence that is in accordance with a negotiated plea agreement, a defendant may file a petition for discretionary review under the Alaska appellate rules.[498] The court held that a defendant's right to counsel allows the defendant to require his counsel to assist him with this petition.[499] The court further stated that if counsel feels that the defendant's claim is "wholly frivolous," the attorney must get the court's permission to withdraw from the case.[500] Granting Stone leave to file a petition for review of his sentence, the court held that the U.S. Constitution requires that court-appointed counsel, upon request by a defendant, file a petition for discretionary sentence review after the defendant has been sentenced pursuant to a lawful plea agreement.[501]

Alaska Court of Appeals

Weil v. State

In *Weil v. State*,[502] the court of appeals held that an officer is justified in making a community caretaker stop if the officer acts to prevent a potential hazard to the public.[503]

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[488] *Id.* at 766.
[489] *Id.*
[490] *Id.* at 775.
[491] 255 P.3d 979 (Alaska 2011).
[492] *Id.* at 980.
[493] *Id.*
[494] *Id.*
[495] *Id.*
[496] *Id.* at 981–82.
[497] *Id.* at 983.
[498] *Id.*
[499] *Id.*
[500] *Id.*
[501] *Id.* at 980.
[502] 249 P.3d 300 (Alaska Ct. App. 2011).
[503] *Id.* at 303.

Weil was riding his four-wheeler down a gravel road at night, heading toward a busy road.[504] Weil's dog was walking in the middle of the road, tethered to Weil's four-wheeler by a twenty-foot leash.[505] An officer stopped Weil before the four-wheeler or the dog reached the main road, and the officer noticed that Weil was intoxicated.[506] Weil was charged with driving under the influence.[507] Arguing that the stop was not supported by reasonable suspicion, Weil moved to suppress the evidence.[508] The officer testified that he had stopped Weil because he had thought it would have been dangerous for Weil and Weil's dog to cross the highway.[509] The lower court denied the motion to suppress and held that the stop was a valid community caretaker stop.[510] The court of appeals affirmed, reasoning that the stop had not been investigatory, but rather had been made to avoid a potentially dangerous situation.[511] Because Weil's conduct had posed an imminent public danger, the officer had been warranted in stopping Weil before an accident occurred.[512] Affirming, the court of appeals held that an officer is justified in making a community caretaker stop if the officer acts to prevent a potential hazard to the public.[513]

Estes v. State

In *Estes v. State*,[514] the court of appeals held that out-of-court statements, introduced to provide necessary context for understanding admissible evidence, do not violate the Sixth Amendment's Confrontation Clause.[515] Estes and her husband were charged with the murder of Estes' cousin.[516] Estes was convicted of first-degree murder.[517] At Estes' murder trial, the State introduced the contents of a phone conversation between Estes and her husband's cousin and another conversation between Estes and state troopers.[518] On appeal, Estes argued that these out-of-court statements constituted "testimonial hearsay" and were therefore inadmissible under the Confrontation Clause.[519] The court of appeals determined that the evidence had a non-hearsay purpose because it allowed the jury to understand admissible evidence; it had not been offered to prove the truth of the conversations' contents.[520] Affirming, the court of appeals held that out-of-court statements, introduced to provide necessary context for understanding admissible evidence, do not violate the Sixth Amendment's Confrontation Clause.[521]

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[504] *Id*. at 301.
[505] *Id*. at 302.
[506] *Id*. at 300.
[507] *Id*. at 301.
[508] *Id*.
[509] *Id*.
[510] *Id*.
[511] *Id*.
[512] *Id*.
[513] *Id*. at 303.
[514] 249 P.3d 313 (Alaska Ct. App. 2011).
[515] *Id*. at 316–17.
[516] *Id*. at 314.
[517] *Id*. at 319.
[518] *Id*. at 314–15.
[519] *Id*.
[520] *Id*. at 316.
[521] *Id*. at 316–17.

James v. State

In *James v. State*,[522] the court of appeals held that sex offender educational classes can be imposed as parole conditions, without violating the federal and state ex post facto clauses, on prisoners who were convicted before the enactment of a 1985 statute that specifically authorized such educational classes.[523] James was convicted of attempted sexual assault and sexual abuse of a minor in 1979.[524] In 1985 Alaska enacted a statute authorizing courts to impose mandatory attendance of sex offender education classes for sex offenders.[525] James was paroled subject to conditions including the attendance of a sex offender education class; when he refused to cooperate with his treatment, his parole was revoked and the revocation was upheld by the superior court.[526] The court of appeals reasoned that, although the 1985 parole statute specifically authorized sex offender classes, a statute in force when James was convicted had generally authorized courts to impose special parole conditions (including, presumably, sex offender classes).[527] Affirming, the court of appeals held that sex offender educational classes can be imposed as parole conditions, without violating the federal and state ex post facto clauses, on prisoners who were convicted before the enactment of a 1985 statute that specifically authorized such educational classes.[528]

Lindeman v. State

In *Lindeman v. State*,[529] the court of appeals held that, when supplemental jury instructions constructively amend an indictment, an appellate attorney provides ineffective assistance of counsel by failing to raise a constructive amendment argument.[530] Lindeman was charged with first-degree murder in an indictment alleging that Lindeman had assaulted his victim, intending to cause death.[531] The jury convicted Lindeman of second-degree murder following a supplemental jury instruction stating that the jury could convict under a theory of extreme indifference.[532] At a post-conviction relief hearing, the superior court held that Lindeman's lawyer had provided ineffective assistance by failing to raise a constructive amendment argument.[533] The court of appeals reasoned that there were reasonably promising arguments that the supplemental jury instruction constituted a constructive amendment of Lindeman's indictment and that Lindeman had been prejudiced by the constructive amendment because he had lost the opportunity to present any evidence or arguments against the new theory.[534] The court of appeals held that, when supplemental jury instructions constructively amend an

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[522] 244 P.3d 542 (Alaska Ct. App. 2011).
[523] *Id*. at 546.
[524] *Id*. at 544.
[525] *Id*. at 545.
[526] *Id*. at 544.
[527] *Id*. at 546.
[528] *Id*.
[529] 244 P.3d 1151 (Alaska Ct. App. 2011)
[530] *Id*. at 1158–60.
[531] *Id*. at 1159.
[532] *Id*. at 1158.
[533] *Id*. at 1154.
[534] *Id*. at 1159.

indictment, an appellate attorney provides ineffective assistance of counsel by failing to raise a constructive amendment argument.[535]

Korkow v. State

In *Korkow v. State*,[536] the court of appeals held that, when a defendant has received a lengthy prison sentence and is not statutorily eligible for parole until far into the future, it may be excessive for the sentencing judge to restrict the defendant's eligibility for parole beyond the statutory restriction.[537] Korkow killed his wife, stabbing her at least sixty-two times while the couple's children were present.[538] He was convicted of first-degree murder.[539] Although he did not have an extensive prior criminal history, he was sentenced to the maximum term of ninety-nine years in prison.[540] The trial judge then restricted Korkow's eligibility for parole until after he had served fifty years.[541] This restriction was based both on the severity of his attack and on the presence of children during the murder.[542] The court of appeals noted that, by statute, Korkow would have been required to serve at least thirty-three years before becoming eligible for parole.[543] The court stated that, when a defendant will be serving a lengthy sentence, it is preferable to allow questions of discretionary parole release to be decided by the Parole Board.[544] Reversing, the court of appeals held that, when a defendant has received a lengthy prison sentence and is not statutorily eligible for parole until far into the future, it may be excessive for the sentencing judge to restrict the defendant's eligibility for parole beyond the statutory restriction.[545]

Bates v. State

In *Bates v. State*,[546] the court of appeals held that the statutory definition of "household member," which is incorporated into the rules of evidence, is not impermissibly vague.[547] Bates was convicted of assault and attempted murder after he attacked his former girlfriend and two other people in her apartment.[548] The lower court concluded that Bates' former girlfriend was a "household member" as defined by statute because they had dated and had been involved in a sexual relationship.[549] The attack was thus a crime of domestic violence which, under the rules of evidence, allowed the State to present evidence of Bates' two prior assaults.[550] On appeal, Bates argued that the definitions of

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[535] *Id*. at 1158–60.
[536] 258 P.3d 932 (Alaska Ct. App. 2011).
[537] *Id*. at 933.
[538] *Id*.
[539] *Id*.
[540] *Id*.
[541] *Id*. at 933–34.
[542] *Id*. at 934.
[543] *Id*.
[544] *Id*.
[545] *Id*. at 933.
[546] 258 P.3d 851 (Alaska Ct. App. 2011).
[547] *Id*. at 855.
[548] *Id*. at 854.
[549] *Id*.
[550] *Id*.

"sexual relationship" and "dating" were impermissibly vague.[551] The court of appeals reasoned that, because Bates challenged a rule of evidence and not a substantive criminal law, the traditional problems with vagueness did not apply; therefore, for the statute to be impermissibly vague, it would have to be impossible for a court to give it meaning.[552] The court determined that both "dating" and "sexual relationship" were definite enough to be given meaning.[553] Thus, the court of appeals held that the statutory definition of "household member," which is incorporated into the rules of evidence, is not impermissibly vague.[554]

Langevin v. State

In *Langevin v. State*,[555] the court of appeals held that (1) whether the state has introduced sufficient corroborating evidence to admit a defendant's confession is an evidentiary question to be determined by a judge and (2) if the judge erroneously admits a confession, the remedy is a new trial rather than an acquittal.[556] Langevin was convicted of driving under the influence, based solely on his confession, despite his objection to the confession's introduction as evidence.[557] Under state law, a defendant cannot be convicted based solely on his or her confession.[558] The court of appeals reasoned that, since the rule against uncorroborated confessions is more like a rule of evidence than an element of any crime, the determination of whether a confession is corroborated should be made by the trial judge.[559] The court further reasoned that, since the remedy for evidentiary errors is a new trial rather than an acquittal, Langevin should be entitled only to a new trial.[560] Reversing, the court of appeals held that (1) whether the state has introduced sufficient corroborating evidence to admit a defendant's confession is an evidentiary question to be determined by a judge and (2) if the judge erroneously admits a confession, the remedy is a new trial rather than an acquittal.[561]

Booth v. State

In *Booth v. State*,[562] the court of appeals held that when a defendant (1) shows that information possibly contained in a police officer's personnel file would be relevant to the defendant's guilt or innocence and (2) presents a factual predicate for the discovery request, the officer's personnel file should be inspected by the trial judge *in camera* to determine whether information in the personnel file should be disclosed.[563] Booth was charged with resisting arrest.[564] He defended himself by arguing that the arresting officers

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[551] *Id.* at 856–57.
[552] *Id.* at 857, 59.
[553] *Id.* at 863.
[554] *Id.* at 855.
[555] 258 P.3d 866 (Alaska Ct. App. 2011).
[556] *Id.* at 868.
[557] *Id.* at 869–72.
[558] *Id.* at 868.
[559] *Id.* at 869–70.
[560] *Id.* at 872–74.
[561] *Id.* at 868.
[562]251 P.3d 369 (Alaska Ct. App. 2011).
[563] *Id.* at 376–77.
[564] *Id.* at 371.

had fabricated a resisting-arrest charge to cover up their use of excessive force.[565] Booth moved the district court to compel the State to produce the officers' personnel files.[566] The trial judge rejected his motion, refused to inspect the files *in camera*, and Booth was convicted.[567] The court of appeals determined that the type of information requested in Booth's discovery motion, if found in the personnel files, would likely have been relevant to the Booth's guilt or innocence.[568] Furthermore, the court determined that Booth had presented a factual predicate for the request.[569] Remanding for further proceedings, the court of appeals held that when a defendant (1) shows that information possibly contained in a police officer's personnel file would be relevant to the defendant's guilt or innocence and (2) presents a factual predicate for the discovery request, the officer's personnel file should be inspected by the trial judge *in camera* to determine whether information in the personnel file should be disclosed.[570]

Pomeroy v. State

In *Pomeroy v. State*,[571] the court of appeals held that, for the purposes of Civil Rule 42(c)(1), a second post-conviction relief application is the same action as the first application, and a prisoner who waives his right to a peremptory challenge in the first application also waives his right to a peremptory challenge in the second application.[572] Pomeroy filed an application for post-conviction relief which the superior court dismissed.[573] Pomeroy filed a second application, which the same superior court judge also dismissed.[574] Pomeroy appealed the dismissal, arguing that the judge should not have adjudicated the second application because Pomeroy had filed a peremptory challenge of the judge under Rule 42(c)(1). The court of appeals noted that, generally, a party has a right under Rule 42(c)(1) to peremptorily challenge a judge.[575] But a party loses that right when new proceedings are collaterally related to previous proceedings in which the party had waived its right to a peremptory challenge.[576] The court determined that the two post-conviction applications were collaterally related to each other, and that, in the first proceeding, Pomeroy had waived his right to peremptorily challenge the superior court judge.[577] Affirming, the court of appeals held that, for the purposes of Rule 42(c)(1), a second post-conviction relief application is the same action as the first application, and a prisoner who waives his right to a peremptory challenge in the first application also waives his right to a peremptory challenge in the second application.[578]

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[565] *Id.*
[566] *Id.* at 372.
[567] *Id.*
[568] *Id.* at 377.
[569] *Id.*
[570] *Id.* at 376–77.
[571] 258 P.3d 125 (Alaska Ct. App. 2011).
[572] *Id.* at 129.
[573] *Id.* at 126.
[574] *Id.*
[575] *Id.* at 128.
[576] *Id.* at 128–29.
[577] *Id.*
[578] *Id.* at 129.

Taylor v. State

In *Taylor v. State*,[579] the court of appeals held that, after a jury's conviction, a presiding judge should only grant a new trial when the evidence is so one-sided that the jury's contrary view is plainly unjust.[580] Taylor was convicted of second-degree theft, which required the State to prove that he had stolen an item worth $500 or more.[581] He argued that the evidence proving the value of the stolen item was so questionable that it warranted a new trial under Criminal Rule 33.[582] The trial judge refused to grant a new trial and stated that, although he himself would have acquitted Taylor, enough evidence had been presented that the jury's verdict could not be called unjust.[583] The court of appeals noted that a simple disagreement with a jury's verdict is not enough to warrant a new trial.[584] The trial judge must instead determine that the jury's view of the evidence is plainly unreasonable and unjust.[585] Affirming, the court of appeals held that, after a jury's conviction, the presiding judge should only grant a new trial when the evidence is so one-sided that the jury's contrary view is plainly unjust.[586]

Reandeau v. State

In *Reandeau v. State*,[587] the court of appeals held that it does not have jurisdiction to adjudicate a defendant's excessive-sentence claim if the defendant's time to serve is within the presumptive range.[588] Reandeau was given a composite sentence of 52½ years with 25 years suspended.[589] The presumptive sentence for his most serious offense was 15–30 years' imprisonment.[590] He appealed the sentence, arguing that it was excessive.[591] The court of appeals noted that, by statute, it only has jurisdiction over sentence appeals when the defendant has been sentenced to more than two years of incarceration and when the sentence is outside the presumptive range.[592] Reandeau argued that the court should take into account his 25-year suspended sentence in determining whether it had jurisdiction.[593] After analyzing the legislative history of its jurisdictional statutes, the court determined that a defendant's right to a sentence appeal is based on the defendant's time to serve without reference to his suspended sentence.[594] Referring Reandeau's excessive-sentence claim to the supreme court for discretionary review, the court of appeals held that it does not have jurisdiction to adjudicate a defendant's excessive-sentence claim if the defendant's time to serve is within the presumptive range.[595]

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[579] 262 P.3d 232 (Alaska Ct. App. 2011).
[580] *Id*. at 234.
[581] *Id*. at 233.
[582] *Id*.
[583] *Id*.
[584] *Id*. at 234.
[585] *Id*.
[586] *Id*.
[587] 265 P.3d 1045 (Alaska Ct. App. 2011).
[588] *Id*. at 1058–60.
[589] *Id*. at 1058.
[590] *Id*. at 1057.
[591] *Id*.
[592] *Id*.
[593] *Id*.
[594] *Id*. at 1058–59.
[595] *Id*. at 1058–60.

Grove v. State

In *Grove v. State*,[596] the court of appeals held that a statute allowing agency employees, including employees of the Public Defender Agency, to practice law for ten months before getting a license did not violate state bar rules.[597] Grove challenged his conviction because the public defender representing him did not have a license and had not been directly supervised as required by state bar rules.[598] The court of appeals reasoned that the statute allowing employees of the Public Defender Agency to practice for ten months before getting a license did not violate state bar rules because the statute clearly served as an alternative to (rather than a contradiction of) current state bar rules.[599] The court of appeals held that a statute allowing agency employees, including employees of the Public Defender Agency, to practice law for ten months before getting a license did not violate state bar rules.[600]

Richards v. State

In *Richards v. State*,[601] the court of appeals held that it lacks subject-matter jurisdiction to review a composite sentence for excessiveness when it lacks jurisdiction to review any of the individual sentences that comprise the composite sentence.[602] Richards was convicted of a felony and a misdemeanor; the superior court imposed a composite sentence of 18 months for both convictions.[603] Richards appealed, arguing that his sentence was excessive.[604] The court of appeals noted that it had subject-matter jurisdiction to decide whether the misdemeanor sentence was excessive because Richards had received more than 120 days of imprisonment for the misdemeanor.[605] But it did not have subject-matter jurisdiction to decide whether the felony sentence was excessive for two reasons: first, a defendant has no right to appeal a felony sentence unless the sentence to be served is more than two years; second, Richards' sentence was within the presumptive sentence range for his offense.[606] The court decided that it should not consider the misdemeanor sentence in isolation because many trial judges select a composite total amount of time for the defendant to serve, then impose individual sentences that add up to that total.[607] The court of appeals referred the excessiveness argument to the supreme court and held that it lacks subject-matter jurisdiction to review a composite sentence for excessiveness when it lacks jurisdiction to review any of the individual sentences that comprise the composite sentence.[608]

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[596] 258 P.3d 843 (Alaska Ct. App. 2011).
[597] *Id.* at 844, 846.
[598] *Id.* at 844.
[599] *Id.* at 845–46.
[600] *Id.* at 844, 846.
[601] 249 P.3d 303 (Alaska Ct. App. 2011).
[602] *Id.* at 306–07.
[603] *Id.* at 306.
[604] *Id.*
[605] *Id.*
[606] *Id.*
[607] *Id.* at 307.
[608] *Id.* at 306–07.

Gray v. State

In *Gray v. State*,[609] the court of appeals held that a statute that automatically waives juvenile jurisdiction for serious offenses does not violate a defendant's right to equal protection under the Alaska Constitution.[610] Gray, a 16 year-old, was sentenced as an adult to 65 years for an execution-style murder.[611] She had been sentenced as an adult as a result of an automatic waiver statute which waives juvenile jurisdiction for certain serious crimes.[612] On appeal, she argued that the automatic waiver statute violated her right to equal protection under the Alaska Constitution.[613] The court of appeals applied a three-step analysis. First, it decided that Gray's interest was the narrow interest of a convicted offender attempting to minimize her punishment.[614] Second, it determined that the State has a strong interest in imposing punishment and in determining how its penalties should be applied to different classes of felons.[615] Third, the waiver statute distinguishes minors by the seriousness of their crimes, a classification which bears a substantial relationship to the purposes of punishment.[616] Affirming, the court of appeals held that a statute that automatically waives juvenile jurisdiction for serious offenses does not violate a defendant's right to equal protection under the Alaska Constitution.[617]

Sawyer v. State

In *Sawyer v. State*,[618] the court of appeals held that a criminal defendant cannot compel the State to produce evidence of unrelated prior incidents unless those incidents have taken place under substantially similar circumstances.[619] Sawyer was convicted of first-degree murder for killing his wife, who was shot while lying in bed.[620] At trial, Sawyer argued that either his wife had committed suicide or his three-year-old son had shot her.[621] Sawyer filed a motion to compel the State to produce the results of state trooper investigations into incidents in which young children had fired weapons resulting in injury or death.[622] The trial court denied the motion, finding it overbroad and wasteful of time and resources.[623] On appeal, Sawyer argued that the trial court had committed reversible error because the reports would have contained relevant evidence favorable to the defense.[624] The court of appeals reasoned that the prosecution should not be compelled to provide evidence that is not reasonably thought to be germane to the case.[625] Affirming, the court of appeals held that a criminal defendant cannot compel the

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[609] 267 P.3d 667 (Alaska Ct. App. 2011).
[610] *Id.* at 674.
[611] *Id.* at 669–70.
[612] *Id.* at 669.
[613] *Id.* at 672.
[614] *Id.* at 673.
[615] *Id.*
[616] *Id.*
[617] *Id.* at 674.
[618] 244 P.3d 1130 (Alaska Ct. App. 2011).
[619] *Id.* at 1133–34.
[620] *Id.* at 1132.
[621] *Id.* at 1133.
[622] *Id.*
[623] *Id.*
[624] *Id.* at 1133–34.
[625] *Id.*

State to produce evidence of unrelated prior incidents unless those incidents have taken place under substantially similar circumstances.[626]

Beattie v. State

In *Beattie v. State*,[627] the court of appeals held that a defendant waives his right against double jeopardy if a question is still pending but he does not object to the jury's dismissal.[628] Beattie was tried for a felony driving under the influence charge, which required the State to prove two prior convictions.[629] Beattie bifurcated his trial, separating the issue of his prior convictions, and failed to object when the jury was dismissed before hearing the evidence of his prior convictions.[630] The court reasoned that, by failing to object, Beattie had waived his right against double jeopardy and authorized the court to call a second jury to hear the evidence of his prior convictions.[631] The court of appeals held that a defendant waives his right against double jeopardy if a question is still pending but he does not object to the jury's dismissal. [632]

Shay v. State

In *Shay v. State*,[633] the court of appeals held that statements made to the police during questioning that occurs on the side of a road, where the individual being questioned is free to leave and has not been handcuffed, are admissible in court regardless of whether a *Miranda* warning has been given.[634] Two police officers found Shay one mile away from an abandoned vehicle that had just sped away from a police stop at an unsafe speed.[635] The police questioned Shay without giving him a *Miranda* warning.[636] Based on his statements, Shay was convicted of several crimes.[637] On appeal, he argued that his statements should not have been admissible because, given the totality of the circumstances, he had reasonably believed that he was under arrest when the officers questioned him.[638] The court of appeals reasoned that this was a routine investigatory stop rather than a custodial interrogation (which would have entitled Shay to a *Miranda* warning) because the questioning took place on the side of a public road, with only two officers present, under circumstances that did not have the coercive atmosphere of a police station.[639] Additionally, the court of appeals noted that the officers had not asked accusatory questions, had not confronted Shay with incriminating evidence, and had not pressured Shay in any way.[640] The court of appeals held that statements made to the police during questioning that occurs on the side of a road, where the individual being

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[626] *Id.*
[627] 258 P.3d 888 (Alaska Ct. App. 2011).
[628] *Id*. at 889.
[629] *Id*.
[630] *Id*. at 889–90.
[631] *Id*. at 890–91.
[632] *Id*. at 889.
[633] 258 P.3d 902 (Alaska Ct. App. 2011).
[634] *Id.* at 905.
[635] *Id.* at 903–04.
[636] *Id.* at 904.
[637] *Id.*
[638] *Id.* at 905.
[639] *Id.* at 906.
[640] *Id.*

questioned is free to leave and has not been handcuffed, are admissible in court regardless of whether a *Miranda* warning has been given.[641]

Burnett v. State

In *Burnett v. State*,[642] the court of appeals held that a driver's act of unnecessarily spinning his vehicle's tires, without more, does not establish reasonable suspicion to believe that the driver is driving negligently.[643] At around midnight, a state trooper observed Burnett's vehicle stopped at an intersection.[644] Burnett then "peeled out" and, although Burnett made no other driving errors, the trooper initiated a traffic stop suspecting that Burnett was driving while intoxicated.[645] Burnett submitted to a breath test and was arrested based on the test results.[646] He moved to suppress the evidence obtained during the traffic stop, arguing that the stop had not been supported by reasonable suspicion to believe he had engaged in wrongdoing.[647] The district court denied the motion, holding that the trooper had probable cause to believe that Burnett had committed the offense of driving negligently, and Burnett was convicted.[648] The court of appeals noted that the State had offered no evidence to suggest that Burnett's driving had created an actual danger to persons or property; therefore, there could have been no reasonable suspicion that Burnett had engaged in negligent driving.[649] Likewise, the facts could not have created more than a hunch that Burnett had been driving while impaired.[650] In addition, the court dismissed the community caretaker theory offered by the State because the trooper had failed to testify that he had believed it necessary to intervene to prevent harm to Burnett or the public.[651] Reversing, the court of appeals held that a driver's act of unnecessarily spinning his vehicle's tires, without more, does not establish reasonable suspicion to believe that the driver is driving negligently.[652]

Ray v. State

In *Ray v. State*,[653] the court of appeals held that a sentencing court does not have the power, in the absence of express statutory authority, to require a defendant to register as a sex offender as a condition of his probation.[654] Ray was convicted of sexual assault in 1994, before the legislature enacted a statute requiring convicted sex offenders to register with the State as sex offenders.[655] Ray was released on probation and contacted a member of the victim's family.[656] The superior court found that Ray had violated his probation

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[641] *Id.* at 905.
[642] 264 P.3d 607 (Alaska Ct. App. 2011).
[643] *Id.* at 613–14.
[644] *Id.* at 608–09.
[645] *Id.* at 609.
[646] *Id*.
[647] *Id.*
[648] *Id*.
[649] *Id*. at 610–11.
[650] *Id.* at 613–14.
[651] *Id*. at 611–12.
[652] *Id.* at 613–14.
[653] 262 P.3d 234 (Alaska Ct. App. 2011).
[654] *Id*. at 236.
[655] *Id*. at 235.
[656] *Id*.

and ordered that, upon Ray's release, he would have to register as a sex offender under the sex offender statute.[657] Upon review, the court of appeals noted that sentencing courts must have explicit legislative authorization before imposing conditions of probation that fundamentally alter the nature of probation.[658] The court also referred to a supreme court decision stating that sex offender registration imposes significant and intrusive obligations upon a defendant.[659] Thus, the court concluded that sex offender registration was a serious consequence of conviction and could not be imposed without statutory authority.[660] Reversing, the court of appeals held that a sentencing court does not have the power, in the absence of express statutory authority, to require a defendant to register as a sex offender as a condition of his probation.[661]

Sikeo v. State

In *Sikeo v. State*,[662] the court of appeals held that a presumptive 99-year sentence for a defendant who is convicted of first-degree sexual abuse of a minor, and who has two prior convictions for sexual felonies, is not cruel and unusual.[663] Sikeo was convicted of first-degree sexual abuse of a minor.[664] Because of his two prior convictions for second-degree sexual abuse of a minor, Sikeo faced a 99-year presumptive sentence.[665] He received the presumptive sentence and appealed, arguing that the presumptive sentence was cruel and unusual.[666] The court of appeals reasoned that, compared to the mandatory 99-year sentence for defendants convicted of a class A or unclassified felony, who also have two prior, similar convictions, the presumptive term for sexual felons is not cruel and unusual.[667] Affirming, the court of appeals held that a presumptive 99-year sentence for a defendant who is convicted of first-degree sexual abuse of a minor, and who has two prior convictions for sexual felonies, is not cruel and unusual.[668]

Pierce v. State

In *Pierce v. State*,[669] the court of appeals held that, to preserve an issue for appeal, a party must first provide case-specific legal and factual analysis to the trial court, and the trial judge must rule upon the issue.[670] Pierce was charged with robbery, theft, and assault.[671] At a pretrial hearing, Pierce asserted that a witness's identification of him was impermissibly unreliable and should be excluded.[672] However, when it came time to explain why the testimony should be excluded, Pierce's attorney did not provide a factual

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[657] *Id*.
[658] *Id*.
[659] *Id*.
[660] *Id*.
[661] *Id*. at 236.
[662] 258 P.3d 906 (Alaska Ct. App. 2011).
[663] *Id*. at 912.
[664] *Id*. at 907.
[665] *Id*.
[666] *Id*. at 908–09.
[667] *Id*. at 912.
[668] *Id*.
[669] 261 P.3d 428 (Alaska Ct. App. 2011).
[670] *Id*. at 435.
[671] *Id*. at 429.
[672] *Id*.

or legal analysis of the issue.[673] Pierce's attorney filed a motion that told the superior court that she intended to seek suppression of the witness's identification, but the motion contained no discussion of the facts or the legal tests for suppressing witness identification.[674] The trial court never ruled on the motion.[675] For these reasons, the court of appeals determined that the issue had not been properly raised in the superior court.[676] The court of appeals held that, to preserve an issue for appeal, a party must first provide case-specific legal and factual analysis to the trial court, and the trial judge must rule upon the issue.[677]

Fletcher v. State

In *Fletcher v. State*,[678] the court of appeals held that a minor waives her right to contest her juvenile waiver proceeding when she enters a plea of no contest.[679] After concluding that Fletcher, who faced murder charges, would be unamenable to treatment, the superior court waived juvenile jurisdiction over her.[680] Fletcher then pled no contest to her charges.[681] Decades later, she filed an application for post-conviction relief alleging that new developments in juvenile brain research could have convinced the trial court to deny the State's motion to waive juvenile jurisdiction.[682] The court of appeals affirmed the superior court's order dismissing her application, reasoning that jurisdiction over a minor is more akin to personal jurisdiction than to subject-matter jurisdiction because the superior court has jurisdiction over both juvenile and adult felony prosecutions.[683] Entering a plea of guilty or no contest waives certain defects of previous proceedings, including personal jurisdiction.[684] The court of appeals held that a minor waives her right to contest her juvenile waiver proceeding when she enters a plea of no contest.[685]

Carney v. State

In *Carney v. State*,[686] the court of appeals held that a suspect's confession to police officers can be voluntary, even if the officers promise not to arrest the confessor in return for the confession, so long as the confessor does not actually believe the officers.[687] Officers asked Carney, who had substantial experience with the criminal justice system, to come to the police station so they could interview him about a recent murder.[688] Throughout Carney's confession, police officers stated that he would not be arrested that day; but Carney, who seemed to assume that his arrest was imminent, informed one of

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[673] *Id.* at 433.
[674] *Id.* at 432.
[675] *Id.*
[676] *Id.* at 435.
[677] *Id.*
[678] 258 P.3d 875 (Alaska Ct. App. 2011).
[679] *Id.* at 878.
[680] *Id.* at 876.
[681] *Id.*
[682] *Id.*
[683] *Id.* at 878.
[684] *Id.* at 876–77.
[685] *Id.* at 878.
[686] 249 P.3d 308 (Alaska Ct. App. 2011).
[687] *Id.* at 313.
[688] *Id.* at 309.

the officers that, if he should be arrested, he wanted that particular officer to arrest him.[689] Carney stated that prior to his arrest, he could not sleep because he anticipated being arrested, and he did not object when the officers came to arrest him.[690] At trial, Carney moved to suppress his confession, arguing that it had been made involuntarily.[691] The trial court denied his motion and Carney appealed.[692] The court of appeals reasoned that Carney's confession had not been influenced by the officers' promises.[693] The court determined that Carney had not believed that the officers had offered him immunity in exchange for his statement.[694] Affirming, the court of appeals held that a suspect's confession to police can be voluntary, even if the officers promise not to arrest the suspect in return for his confession, so long as the suspect does not actually believe the officers.[695]

State v. Amend

In *State v. Amend*,[696] the court of appeals held that a single validly-obtained *Miranda* waiver is sufficient to make a suspect's statements admissible in court, even if the police change the subject matter of the questioning.[697] Amend was arrested for shoplifting and advised of his *Miranda* rights.[698] During the arrest, Amend agreed to a search of his pockets, in which the police officer found OxyContin tablets.[699] Amend then made several incriminating statements about selling OxyContin.[700] The superior court held that Amend's statements about the OxyContin to the police officer had to be suppressed because the officer had failed to remind Amend of his *Miranda* rights.[701] The court of appeals reasoned that the U.S. Constitution did not require suppression of the statements and that Amend's case presented no compelling reasons to require a stricter waiver process under the Alaska Constitution.[702] Reversing, the court of appeals held that a single validly-obtained *Miranda* waiver is sufficient to make a suspect's statements admissible in court, even if the police change the subject matter of the questioning.[703]

State v. Cook

In *State v. Cook*,[704] the court of appeals held that when, as the result of a mistake, a court in a civil case freezes the assets of a defendant who is also facing a criminal trial, that mistake does not violate the defendant's right to the counsel of his choice.[705] Cook was

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[689] *Id*.
[690] *Id*. at 311.
[691] *Id*. at 309.
[692] *Id*. at 310.
[693] *Id*. at 313.
[694] *Id*. at 312.
[695] *Id*. at 313.
[696] 250 P.3d 541 (Alaska Ct. App. 2011).
[697] *Id*. at 543.
[698] *Id*. at 542.
[699] *Id*.
[700] *Id*. at 543.
[701] *Id*.
[702] *Id*. at 544.
[703] *Id*. at 543.
[704] 265 P.3d 342 (Alaska Ct. App. 2011).
[705] *Id*. at 347–48.

prosecuted for murder and was simultaneously sued for wrongful death.[706] Cook did not respond to the civil suit; as a result, the superior court entered a default judgment against him and froze his assets.[707] When Cook finally responded to the civil suit, the superior court refused to set aside the judgment.[708] Because his assets were frozen at the time of his criminal trial, he was unable to obtain the lawyer of his choice and was instead represented by the Public Defender Agency.[709] He was convicted of murder.[710] Later, the supreme court held that the superior court should have granted Cook's request to set aside the default in his civil case.[711] Cook petitioned for post-conviction relief, arguing that, because the superior court's error had prevented him from obtaining the counsel of his choice, he was entitled to a new trial.[712] The petition was granted, and the State appealed.[713] The court of appeals questioned whether the superior court's mistake should be viewed as a wrongful deprivation of, or interference with, Cook's right to hire the defense counsel of his choice.[714] The court noted that there would not have even been an argument of a Sixth Amendment violation if the supreme court had determined that the superior court had properly refused to reopen the civil case.[715] The court then reasoned that, under Cook's theory, any criminal conviction could be overturned whenever the defendant faced a simultaneous civil suit in which a court committed procedural error.[716] Reversing, the court of appeals held that when, as the result of a mistake, a court in a civil case freezes the assets of a defendant who is also facing a criminal trial, that mistake does not violate the defendant's right to the counsel of his choice.[717]

Olson v. State

In *Olson v. State*,[718] the court of appeals held that a *Miranda* waiver can be valid when the suspect acknowledges that he understands his *Miranda* rights and immediately volunteers information, including information that has not been requested.[719] Olson was arrested for domestic violence.[720] In the squad car, the officer advised Olson of his *Miranda* rights and Olson acknowledged that he understood those rights.[721] He made several incriminating statements—some of which were not in response to questioning—and then invoked his right to silence.[722] The superior court held that he had knowingly waived his right to silence and that the statements were therefore admissible.[723] On

[706] *Id.* at 343.
[707] *Id.* at 343–44.
[708] *Id.* at 344.
[709] *Id.*
[710] *Id.*
[711] *Id.*
[712] *Id.*
[713] *Id.* at 345.
[714] *Id.* at 346.
[715] *Id.*
[716] *Id.*
[717] *Id.* at 347–48.
[718] 262 P.3d 227 (Alaska Ct. App. 2011).
[719] *Id.* at 231.
[720] *Id.* at 229.
[721] *Id.*
[722] *Id.* at 229–30.
[723] *Id.* at 230.

appeal, Olson argued that he had not voluntarily waived his Fifth Amendment rights.[724] The court of appeals acknowledged that, under federal law, a suspect waives his *Miranda* rights if he makes an uncoerced statement to the police.[725] But the court did not have to decide whether Alaska would adopt the federal standard because the totality of the circumstances supported a finding that Olson understood his rights and voluntarily waived them.[726] The court of appeals held that a *Miranda* waiver can be valid when the suspect acknowledges that he understands his *Miranda* rights and immediately volunteers information, including information that has not been requested.[727]

Anderson v. State

In *Anderson v. State*,[728] the court of appeals held that an individual can validly consent to provide blood and urine samples, even when an officer has erroneously told him that he must provide the samples, so long as he has consulted with his attorney.[729] After hitting and killing a pedestrian with his car, police told Anderson that he was required by law to provide blood and urine samples.[730] Anderson discussed the matter with his attorney and eventually provided the samples.[731] Anderson filed a motion to suppress the results of the samples, arguing that he had not had a meaningful conversation with his attorney; his motion was denied and he was convicted of driving under the influence.[732] The court of appeals reasoned that Anderson's consent was voluntary because he had discussed the issue with his lawyer and because he had been given forty minutes to reflect on the decision prior to his consent.[733] The court noted that, although the detaining officer had incorrectly asserted that the samples were required, the misrepresentation was not intentional.[734] And because Anderson refused to provide the samples until he had consulted with his lawyer, the court concluded that Anderson's consent was not tainted by the officer's incorrect assertion of authority.[735] Affirming, the court of appeals held that an individual can validly consent to provide blood and urine samples, even when an officer has erroneously told him that he must provide the samples, so long as he has consulted with his attorney.[736]

Nook v. State

In *Nook v. State*,[737] the court of appeals held that a convicted defendant whose lawyer is retroactively transferred to inactive status must show that he was unfairly prejudiced by his lawyer's representation to prevail on an ineffective-assistance claim.[738] In 1999,

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[724] *Id.*
[725] *Id.* at 231.
[726] *Id.*
[727] *Id.*
[728] 246 P.3d 930 (Alaska Ct. App. 2011).
[729] *Id.* at 933.
[730] *Id.* at 931.
[731] *Id.*
[732] *Id.*
[733] *Id.* at 932.
[734] *Id.* at 931–32.
[735] *Id.*
[736] *Id.* at 933.
[737] 251 P.3d 358 (Alaska Ct. App. 2011).
[738] *Id.* at 362.

Nook was found guilty of second-degree murder.[739] In 2003, the supreme court transferred his counsel to inactive disability status.[740] The inactive status extended retroactively to 1998, prior to Nook's trial.[741] Nook then filed an application for post-conviction relief, arguing that, because Sidell was technically inactive during his representation of Nook, Nook had been denied his right to effective assistance of counsel.[742] The superior court denied the application.[743] The court of appeals reasoned that, absent a situation where an attorney knows at the time of representation that he is barred from representing clients, his client must still prove specific acts of attorney incompetence and resulting prejudice to win an ineffective-assistance claim.[744] To hold otherwise would permit Nook to obtain a new trial when, at the time of his original trial, even the most probing inquiry would not have revealed any defect in his lawyer's ability to practice law.[745] Accordingly, the court of appeals held that a convicted defendant whose lawyer is retroactively transferred to inactive status must show that he was unfairly prejudiced by his lawyer's representation to prevail on an ineffective-assistance claim.[746]

ELECTION LAW

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N/A

EMPLOYMENT LAW

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Alaska Supreme Court

Cameron v. Chang-Craft

In *Cameron v. Chang-Craft*,[747] the supreme court held that a jury can reasonably find that a union breaches its duty of fair representation when a former employee's wrongful-termination grievance has merit but the union withdraws from arbitration without explanation.[748] Chang-Craft asked her union to reconsider her wrongful termination grievance against her employer because she had no previous disciplinary issues with her employer, the allegations against her were exaggerated and taken out of context, and she had been denied a union representative at the investigatory meeting.[749] The union did not respond and offered no reason for its decision not to proceed with the grievance.[750]

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[739] *Id.* at 359.
[740] *Id.* at 361.
[741] *Id.*
[742] *Id.* at 359.
[743] *Id.*
[744] *Id.* at 359-60.
[745] *Id.* at 361.
[746] *Id.* at 362.
[747] 251 P.3d 1008 (Alaska 2011).
[748] *Id.* at 1020–21.
[749] *Id.* at 1014.
[750] *Id.*

Chang-Craft sued and a jury found that the union had violated its duty of fair representation by arbitrary refusing to represent her.[751] On appeal, the supreme court reasoned that, because Chang-Craft had a meritorious argument, and because the union had failed to provide any explanation for its failure to pursue her claim, the evidence was sufficient for a jury to conclude that its decision was arbitrary.[752] Affirming, the supreme court held that a jury can reasonably find that a union breaches its duty of fair representation when a former employee's wrongful-termination grievance has merit but the union withdraws from arbitration without explanation.[753]

State v. Public Safety Employees Ass'n

In *State v. Public Safety Employees Ass'n*,[754] the supreme court announced that it is improper for a court to enforce an arbitration decision that violates an explicit, well-defined, and dominant public policy.[755] The Public Safety Employees Association filed a grievance on behalf of a state trooper who had been dismissed in part for dishonesty during training exercises.[756] The trooper had been told that his dishonesty would result in nothing more than a minor suspension, but his termination letter focused on that dishonesty.[757] Since the other incidents reported in the termination letter did not constitute a pattern of dishonesty, the arbitrator determined that the State lacked just cause for the termination and reinstated the trooper.[758] The superior court upheld the arbitration award and the State appealed.[759] Noting that other jurisdictions have recognized the public-policy exception to the enforcement of arbitration awards, the supreme court adopted such an exception for awards that would violate an explicit, well-defined, and dominant public policy in Alaska.[760] The court nevertheless upheld the arbitrator's reinstatement of the trooper because the State was unable to identify a source that clearly set out a public policy regarding the reinstatement of a trooper who has been dishonest.[761] Thus, the Court upheld the arbitration award but announced that it is improper for a court to enforce an arbitration decision that violates an explicit, well-defined, and dominant public policy.[762]

Hoendermis v. Advanced Physical Therapy

In *Hoendermis v. Advanced Physical Therapy*,[763] the supreme court held that the denial of an unemployment benefits claim does not collaterally estop an employee from suing her former employer for wrongful termination.[764] Hoendermis was an employee of Advanced Physical Therapy (APT) until she was fired for poor interaction with other

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[751] *Id*. at 1015.
[752] *Id*. at 1020.
[753] *Id*. at 1020–21.
[754] 257 P.3d 151 (Alaska 2011).
[755] *Id*. at 165–66.
[756] *Id*. at 152–53.
[757] *Id*. at 153–54.
[758] *Id*. at 154.
[759] *Id*. at 154–55.
[760] *Id*. at 156–58.
[761] *Id*. at 161.
[762] *Id*. at 165–66.
[763] 251 P.3d 346 (Alaska 2011).
[764] *Id*. at 357.

employees.[765] Hoendermis applied for unemployment benefits, but her claim was denied because she had been terminated for misconduct.[766] She then sued APT for wrongful termination.[767] The trial court granted APT's motion for summary judgment, holding that the agency's determination collaterally estopped Hoendermis from suing APT.[768] On appeal, the supreme court reasoned that, although agency decisions can sometimes collaterally estop claims, here the agency's decision was related only to Hoendermis' eligibility for benefits and not to the culpability of her former employer.[769] Reversing, the supreme court held that the denial of an unemployment benefits claim does not collaterally estop an employee from suing her former employer for wrongful termination.[770]

Crowley v. State, Department of Health & Social Services

In *Crowley v. State, Department of Health & Social Services*,[771] the supreme court held that, to prove a breach of the subjective component of the implied covenant of good faith and fair dealing, a terminated employee must show that her employer acted in bad faith.[772] Crowley was discharged from employment after an internal investigation revealed numerous instances of incompetence and poor judgment.[773] Crowley sued, alleging wrongful termination under the theory that her employer had violated the subjective component of the implied covenant of good faith and fair dealing.[774] The superior court dismissed the case, and Crowley appealed.[775] The supreme court noted that the only evidence Crowley had presented to prove that the internal investigation had been conducted in bad faith was her own speculation.[776] And even if Crowley could have proven that her employer had been mistaken as to the underlying facts leading to her termination, such proof would not have shown that her employer had acted in bad faith.[777] Affirming, the supreme court held that, to prove a breach of the subjective component of the implied covenant of good faith and fair dealing, a terminated employee must show that her employer acted in bad faith.[778]

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[765] *Id*. at 350.
[766] *Id*.
[767] *Id*.
[768] *Id*.
[769] *Id*. at 354–355.
[770] *Id*. at 357.
[771] 253 P.3d 1226 (Alaska 2011).
[772] *Id*. at 1231–32.
[773] *Id*. at 1228.
[774] *Id*. at 1229.
[775] *Id*.
[776] *Id*. at 1232.
[777] *Id*. at 1231.
[778] *Id*. at 1231–32.

United States Court of Appeals for the Ninth Circuit

Southeast Alaska Conservation Council v. Federal Highway Administration

In *Southeast Alaska Conservation Council v. Federal Highway Administration*,[779] the Ninth Circuit held that an agency violates the National Environmental Policy Act (NEPA) when its environmental impact statement fails to adequately address a reasonable alternative to a proposed project.[780] The Alaska Department of Transportation, in connection with the Federal Highway Administration, initiated a project to improve the surface access from Juneau to Haines and Skagway.[781] The Highway Administration released for public comment a draft environmental impact statement in which it announced that its preferred method of improving surface access was to build a new highway and a new ferry terminal.[782] In a comment letter, the Southeast Alaska Conservation Council (Council) asserted that the draft impact statement violated NEPA because it did not consider that surface access could be improved by improving the ferry systems already in place in the Lynn Canal corridor.[783] The Highway Administration issued a final impact statement in which it rejected the Council's suggestion, stating simply that it could not increase ferry service there without reducing service elsewhere and without increasing costs.[784] The Council sought an injunction in the district court.[785] The district court held that the Highway Administration violated NEPA when, in its impact statement, it arbitrarily refused to consider a reasonable alternative to its project.[786] In so holding, the district court enjoined any construction on the project.[787] On appeal, the Ninth Circuit noted that, under NEPA, an agency must objectively evaluate any reasonable alternatives to a proposed action.[788] The Highway Administration had failed to adequately consider the Council's alternative under NEPA.[789] Further, the Highway Administration's reason for dismissing the Council's argument—that the Council's plan would take ferry service away from other areas and that it would increase costs—was arbitrary, because the Highway Administration's adopted plan would create the same problems.[790] Affirming, the Ninth Circuit held that an agency violates NEPA when its environmental impact statement fails to adequately address a reasonable alternative to a proposed project.[791]

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[779] 649 F.3d 1050 (9th Cir. 2011).
[780] *Id*. at 1058.
[781] *Id*. at 1052.
[782] *Id*. at 1053–54.
[783] *Id*. at 1053.
[784] *Id*. at 1054.
[785] *Id*. at 1056.
[786] *Id*.
[787] *Id*.
[788] *Id*.
[789] *Id*. at 1057–58.
[790] *Id*. at 1057.
[791] *Id*. at 1058.

United States District Court for the District of Alaska

Organized Village of Kake v. U.S. Department of Agriculture

In *Organized Village of Kake v. U.S. Department of Agriculture*,[792] the federal district court held that the promulgation of the Forest Service rule exempting the Tongass National Forest from the Roadless Area Conservation Rule was arbitrary and capricious.[793] The Forest Service gave three reasons for its promulgation of a rule temporarily exempting the Tongass from the Roadless Rule: (1) the long-term socioeconomic costs to local communities of applying the Roadless Rule to the Tongass would be too great; (2) the Tongass Forest Plan sufficiently protected the roadless values on the Tongass; and (3) the temporary exemption would provide legal certainty in light of numerous lawsuits regarding the Roadless Rule.[794] Individuals who used and relied on the Tongass roadless area challenged the rule.[795] The court analyzed whether the reasons offered by the Forest Service for the exemption provided a rational basis for the temporary exemption.[796] First, the court reasoned that it was implausible to use long-term socioeconomic projections to justify a short-term exemption; moreover, the Forest Service had not offered any evidence showing actual job losses resulting from the application of the Roadless Rule.[797] Second, the court noted that the Forest Service had flipped positions—without explanation—by first maintaining that the Forest Plan did not provide enough protection to the Tongass, then maintaining that it did.[798] Furthermore, the Ninth Circuit had already stated that the Roadless Rule provided greater protection to roadless areas than did the forest plans.[799] Finally, the court reasoned that it was implausible that a temporary exemption, during which the Forest Service would engage in further rulemaking, could provide any legal certainty.[800] Reinstating the Roadless Rule, the federal district court held that the promulgation of the Forest Service rule exempting the Tongass National Forest from the Roadless Area Conservation Rule was arbitrary and capricious.[801]

ETHICS AND PROFESSIONAL RESPONSIBILITY

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Alaska Court of Appeals

State v. Dussault

In *State v. Dussault*,[802] the court of appeals held that a judge who has significant ex parte communications about a case, without express legal authorization and without

[792] 776 F.Supp.2d 960 (D. Alaska 2011).
[793] *Id.* at 976.
[794] *Id.* at 965, 970, 973, 975.
[795] *Id.* at 966–67.
[796] *Id.* at 970.
[797] *Id.* at 971.
[798] *Id.* at 974.
[799] *Id.*
[800] *Id.* at 975.
[801] *Id.* at 976.
[802] 245 P.3d 436 (Alaska Ct. App. 2011).

immediately notifying the missing parties, must be disqualified from the case.[803] Dussault was civilly committed after being acquitted of first-degree murder by reason of insanity.[804] During conditional-release hearings, the superior court judge had numerous ex parte conversations with Department of Health and Social Services officials in an attempt to gain conditional release for Dussault.[805] The State moved to disqualify the judge; when the judge denied the State's motion, the State appealed.[806] The court of appeals noted that the ex parte conversations had not been expressly authorized by law, nor had they been required for administrative purposes.[807] Furthermore, the court noted that the superior court judge failed to immediately notify the missing parties of his ex parte communications.[808] Under these circumstances, the court determined that the ex parte communications created an appearance of partiality and that the superior court judge had to be disqualified from the case.[809] Reversing, the court of appeals held that a judge who has significant ex parte communications about a case, without express legal authorization and without immediately notifying the missing parties, must be disqualified from the case.[810]

FAMILY LAW

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Alaska Supreme Court

Heustess v. Kelley-Heustess

In *Heustess v. Kelley-Heustess,*[811] the supreme court held that, during a child's minority, the statute of limitations for child support is tolled.[812] The parents had a son in 1991.[813] The father failed to financially support the child until 1997.[814] During divorce proceedings, the superior court held that the statute of limitations did not bar the mother's claim for pre-1997 child support.[815] The supreme court affirmed because (1) the statute of limitations in Alaska expires ten years after the cause of action; (2) when a claim belongs to a child, the time that the child is under the age of majority does not count against the statute of limitations; and (3) in Alaska, the right to child support is the child's right.[816] Affirming, the supreme court held that, during a child's minority, the statute of limitations for child support is tolled.[817]

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[803] *Id*. at 443.
[804] *Id*. at 437.
[805] *Id*. at 438–39.
[806] *Id*. at 439.
[807] *Id*. at 440–41.
[808] *Id*. at 441–42.
[809] *Id*. at 442–43.
[810] *Id*. at 443.
[811] 259 P.3d 462 (Alaska 2011).
[812] *Id*. at 469.
[813] *Id*. at 466.
[814] *Id*.
[815] *Id*. at 467.
[816] *Id*. at 468.
[817] *Id*. at 469.

Darcy F. v. State, Department of Health & Social Services

In *Darcy F. v. State, Department of Health & Social Services*,[818] the supreme court held that not every possible active effort must be provided by the Office of Children's Services (OCS) to a parent before parental rights can be terminated.[819] Darcy had a history of severe chronic pain and other medical problems that led to substance abuse.[820] The superior court terminated Darcy's parental rights to her daughter because she was not capable of meeting the child's needs.[821] On appeal, Darcy argued that the State had made insufficient efforts to address the medical conditions underlying her substance abuse.[822] The supreme court reasoned that OCS had done enough, even if there was more that OCS could have done.[823] The court noted that active efforts made by OCS included: (1) developing a case plan for Darcy that identified specific concerns, and offering services to address those concerns; (2) repeatedly following up on Darcy's case plan; (3) numerous efforts to arrange for substance abuse assessments, drug tests, and treatments; and (4) continued monitoring of Darcy's progress up to the beginning of the hearings.[824] Affirming, the supreme court held that not every possible active effort must be provided by OCS to a parent before parental rights can be terminated.[825]

Christina J. v. State, Department of Health & Social Services

In *Christina J. v. State, Department of Health & Social Services*,[826] the supreme court held that when a child is taken by the Office of Children's Services (OCS) soon after birth, termination of parental rights may occur earlier than usual due to the importance of bonding and permanence for young children.[827] Christina appealed from the termination of her parental rights to her son.[828] Her son had been exposed to substance abuse, domestic violence, and his parents' mental health instability.[829] OCS took custody of him four months after his birth and petitioned for the termination of parental rights nine months after his birth.[830] The lower court upheld the termination of parental rights, finding that Christina had done virtually nothing to remedy her behavior.[831] The supreme court affirmed, holding that the child's young age and the slow pace of Christina's attempted recovery were significant factors when determining whether to terminate parental rights.[832] The court noted that, because of the child's young age, it was important for OCS to find a permanent, stable family for him so that he could appropriately bond with a parental figure.[833] Affirming, the supreme court held that when a child is taken by

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[818] 252 P.3d 992 (Alaska 2011).
[819] *Id*. at 993–94.
[820] *Id*. at 992.
[821] *Id*. at 994.
[822] *Id*. at 992.
[823] *Id*. at 994.
[824] *Id*. at 993–94 & n.7.
[825] *Id*. at 993–94.
[826] 254 P.3d 1095 (Alaska 2011).
[827] *Id*. at 1107–08.
[828] *Id*. at 1097.
[829] *Id*.
[830] *Id*.
[831] *Id*. at 1107.
[832] *Id*. at 1108.
[833] *Id*. at 1107–08.

OCS soon after birth, termination of parental rights may occur earlier than usual due to the importance of bonding and permanence for young children.[834]

William P. v. Taunya P.

In *William P. v. Taunya P.*,[835] the supreme court held that a trial court does not abuse its discretion by limiting a father's visitation rights due to the father's denigrating the mother in front of their children.[836] William and Taunya were a divorced couple with two sons.[837] Taunya moved out of state, requiring modification of the couple's child custody arrangement.[838] The trial court granted sole custody to Taunya and shortened William's visitation rights to one week at Christmas and six weeks during the summer.[839] William appealed the order, arguing that the reduction was unwarranted given that the experts in the case recommended no reduction in visitation.[840] The supreme court reasoned that William had harmed the boys' relationship with their mother by repeatedly denigrating Taunya in front of them. The court also noted that the superior court would revisit the issue if William later ceased such denigration.[841] The court emphasized that one factor—the willingness and ability of each parent to facilitate and encourage a close and continuing relationship between the other parent and the children—is the most important factor when parents reside at a great distance apart.[842] Affirming, the supreme court held that a trial court does not abuse its discretion by limiting a father's visitation rights due to the father's denigrating the mother in front of their children.[843]

Bagby v. Bagby

In *Bagby v. Bagby*,[844] the supreme court held that a father's relocation with his child out of state constitutes a substantial change in circumstances warranting a determination of whether modification of the child custody agreement would better serve the child's best interests, even if the parents had previously lived far apart within Alaska.[845] The superior court denied the mother's motion to modify custody after the father, who had primary custody, moved with their daughter to Arizona.[846] The superior court found that the father's move to Arizona did not constitute a substantial change in circumstances because the original custody order had included long-distance travel between Sitka and Anchorage.[847] After examining state precedent and evaluating the considerable obstacles involved in interstate traveling, the supreme court reversed and held that a father's relocation with his child out of state constitutes a substantial change in circumstances warranting a determination of whether modification of the child custody agreement

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[834] *Id.*
[835] 258 P.3d 812 (Alaska 2011).
[836] *Id.* at 819.
[837] *Id.* at 813.
[838] *Id.* at 814.
[839] *Id.* at 818.
[840] *Id.*
[841] *Id.*
[842] *Id.* at 817.
[843] *Id.* at 819.
[844] 250 P.3d 1127 (Alaska 2011).
[845] *Id*. at 1129–30.
[846] *Id*. at 1127–28.
[847] *Id*. at 1128.

would better serve the child's best interests, even if the parents had previously lived far apart within Alaska.[848]

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

In *Ralph H. v. State, Department of Health & Social Services*,[849] the supreme court held that a parent's compliance with a treatment program does not guarantee that parental rights will not be terminated.[850] Ralph attended a family violence intervention program but later threatened to kill a social worker if his son, Rex, was not returned to him.[851] The superior court found that Ralph had not remedied the conduct or condition that made Rex a child in need of aid.[852] On appeal, Ralph argued that he had substantially complied with his treatment plan and, thus, Rex was not a child in need of aid.[853] The supreme court noted that a treatment program does not guarantee that adequate parenting skills will be acquired by completing the program.[854] Further, sufficient evidence existed in the record to support the superior court's finding that Ralph had not remedied the conduct and conditions that had placed Rex at a substantial risk of harm.[855] Affirming, the supreme court held that a parent's compliance with a treatment program does not guarantee that parental rights will not be terminated.[856]

Yvonne S. v. Wesley H.

In *Yvonne S. v. Wesley H.*,[857] the supreme court held that a marked drop in a child's academic performance does not necessarily demonstrate a change of circumstances warranting modification of a custody arrangement.[858] Yvonne and Wesley divorced and Wesley was given primary physical custody of their daughter.[859] Two years later, Yvonne moved for a hearing for shared physical custody because their daughter's grades had deteriorated during the time that she lived primarily with Wesley.[860] The lower court denied the motion, stating that Yvonne had not demonstrated a substantial change in circumstances.[861] On appeal, the supreme court reasoned that although the daughter's grades had dropped markedly, the drop could be attributed to numerous causes (such as harder classes).[862] The court also noted that the daughter strongly preferred to live with Wesley.[863] The supreme court affirmed and held that a marked drop in a child's academic

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[848] *Id*. at 1129–30.
[849] 246 P.3d 916 (Alaska 2011).
[850] *Id*. at 925.
[851] *Id*.
[852] *Id*. at 926.
[853] *Id*. at 925.
[854] *Id*.
[855] *Id*.
[856] *Id*.
[857] 245 P.3d 430 (Alaska 2011).
[858] *Id*. at 436.
[859] *Id*. at 431.
[860] *Id*.
[861] *Id*. at 431–32.
[862] *Id*. at 434.
[863] *Id*.

performance does not necessarily demonstrate a change of circumstances warranting modification of a custody arrangement.[864]

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

In *Ralph H. v. State, Department of Health & Social Services*,[865] the supreme court held that, when parental rights have been terminated, post-termination visitation rights should not be granted if visitation is not in the best interest of the child.[866] The superior court terminated Ralph's parental rights after a Child in Need of Aid (CINA) proceeding.[867] Ralph then moved for post-termination visitation privileges with his child and, at a hearing, a doctor testified that it would be in the child's best interest to continue a relationship with Ralph.[868] The superior court denied Ralph's motion without prejudice, finding that Ralph had not shown by a preponderance of the evidence that granting him visitation rights would be in his child's best interest.[869] On appeal, the supreme court first noted that a termination of parental rights results in automatic cessation of visitation and that no CINA statute expressly grants a superior court the authority to order post-termination visitation rights.[870] But, the supreme court noted, the possibility of post-termination visitation is not completely foreclosed; extraordinary circumstances might permit a superior court to order such visitation, if visitation would be in the best interest of the child.[871] After reviewing the record, the supreme court determined that the superior court had not clearly erred in its denial of post-termination visitation rights.[872] First, the supreme court reasoned that the child would benefit from a sense of permanency that could only be achieved through adoption.[873] Second, it noted that conflicting evidence had been presented to the superior court as to whether visitation would be beneficial or harmful to the child.[874] The supreme court thus held that, when parental rights have been terminated, post-termination visitation rights should not be granted if visitation is not in the best interest of the child.[875]

McAlpine v. Pacarro

In *McAlpine v. Pacarro*,[876] the supreme court held that, although res judicata does not apply to custody disputes, collateral estoppel may bar a litigant from twice arguing that prior domestic violence should influence a custody decision.[877] McAlpine and Pacarro divorced and McAlpine moved for a long-term domestic violence protective order against Pacarro.[878] The superior court found that there was no evidence of domestic violence.[879]

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[864] *Id*. at 436.
[865] 255 P.3d 1003 (Alaska 2011).
[866] *Id*. at 1014–15.
[867] *Id*. at 1007.
[868] *Id*.
[869] *Id*. at 1014.
[870] *Id*.
[871] *Id*.
[872] *Id*. at 1015.
[873] *Id*. at 1014.
[874] *Id*. at 1015.
[875] *Id*. at 1014–15.
[876] 262 P.3d 622 (Alaska 2011).
[877] *Id*. at 625–27.
[878] *Id*. at 623.

Two years later, McAlpine sought to obtain custody of their children and again asserted that Pacarro's prior domestic violence should influence the custody decision.[880] The superior court denied her motion without a hearing, holding that the motion was barred by res judicata and collateral estoppel.[881] On appeal, the supreme court noted that res judicata does not apply to custody modifications.[882] A change in circumstances must normally be demonstrated to obtain a custody modification, but that rule is relaxed when domestic violence is an issue—especially if the custody agreement was made by pro se parties with a history of domestic violence.[883] The court reasoned, however, that the superior court judge had discretion to apply collateral estoppel to bar McAlpine's claim because: (1) she was a party to the first action, (2) the issue that she raised was identical to the issue already decided, (3) a final judgment on the merits had been issued, and (4) the determination of the issue was essential to the final judgment.[884] Because the superior court did not discuss whether it would be fair to apply collateral estoppel to McAlpine's claim, the supreme court remanded and held that, although res judicata does not apply to custody disputes, collateral estoppel may bar a litigant from twice arguing that prior domestic violence should influence a custody decision.[885]

Nelson v. Nelson

In *Nelson v. Nelson*,[886] the supreme court held that a move out of state constitutes a change of circumstances sufficient to modify a custody agreement, even when the parties had agreed upon a custody arrangement if one of the parents moved out of the state.[887] When Justin and Erica divorced, they agreed that, if one of them moved out of their community, their children would remain with the non-moving parent until both parents created a parenting agreement for the different communities.[888] Both parents later contemplated moving out of state and both parents moved for primary custody, arguing that moving out of state would constitute a change of circumstances.[889] The superior court held that there had been no unanticipated change of circumstances because both parents had contemplated moving out of state at the time of their original custody agreement.[890] Justin appealed, arguing that his anticipated move constituted a change of circumstances.[891] The supreme court reasoned that an anticipated move satisfies the change-of-circumstances requirement and that to hold otherwise could result in a custody award to an unfit parent solely because that parent had not moved away.[892] The existing custody agreement could be taken into account by the superior court, but the superior court could not enforce the agreement unless the court agreed that the terms of the

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[879] *Id.* at 624.
[880] *Id.*
[881] *Id.*
[882] *Id.* at 626.
[883] *Id.*
[884] *Id.* at 627.
[885] *Id.* at 625–27.
[886] 263 P.3d 49 (Alaska 2011).
[887] *Id.* at 52–54.
[888] *Id.* at 51.
[889] *Id.*
[890] *Id.* at 51–52.
[891] *Id.* at 52.
[892] *Id.* at 53.

agreement were also in the best interest of the child.[893] The supreme court held that a move out of state constitutes a change of circumstances sufficient to modify a custody agreement, even when the parties had agreed upon a custody arrangement if one of the parents moved out of the state.[894]

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

In *Sarah G. v. State, Department of Health & Social Services*,[895] the supreme court held that a parent's tendency to expose her children to an environment filled with domestic violence can be used to support a judgment that her child is in need of aid.[896] The Office of Children's Services (OCS) removed Sarah's children after receiving reports that Sarah's boyfriend had assaulted her in the home and that her children did not feel safe there.[897] The superior court determined that the children were in need of aid due to their mental injury and substance abuse, as well as their mother's mental illness and her failure to provide them with treatment and supervision.[898] In so holding, the superior court found that Sarah had a "continued tendency" to enter physically abusive relationships, thus creating a substantial risk of mental injury to her children.[899] On appeal, Sarah argued that the court's finding would compel the conclusion that any woman who fails to sever contact with an abusive partner would show a "continued tendency" to enter abusive relationships.[900] The supreme court noted that no evidence at trial supported a finding that Sarah had ever had a nonviolent relationship.[901] The court reasoned that, because the children had lived their lives in the shadow of domestic violence, Sarah had exposed them to a substantial risk of mental injury.[902] Affirming, the supreme court held that a parent's tendency to expose her children to an environment filled with domestic violence can be used to support a judgment that her child is in need of aid.[903]

INSURANCE LAW

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United States Court of Appeals for the Ninth Circuit

Allstate Insurance Co. v. Herron

In *Allstate Insurance Co. v. Herron*,[904] the Ninth Circuit held that the failure of an insurer to determine by a date certain whether the insured's liability exceeds his policy limit does not necessarily result in a violation of the Alaska covenant of good faith and fair dealing, even when the insurer has the ability to do so.[905] Herron was involved in a car accident in

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[893] *Id.* at 53–54.
[894] *Id.* at 52–54.
[895] 264 P.3d 831 (Alaska 2011).
[896] *Id.* at 833–34.
[897] *Id.* at 832.
[898] *Id.* at 833.
[899] *Id.*
[900] *Id.*
[901] *Id.* at 834.
[902] *Id.*
[903] *Id.* at 833–34.
[904] 634 F.3d 1101 (9th Cir. 2011).
[905] *Id.* at 1109–10.

which his passenger was injured.[906] The passenger's lawyer contacted Allstate and stated that it would revoke an offer to settle at policy limits by May 16, 2003.[907] On that day, Allstate stated that it was still investigating the accident and would respond to the settlement offer by the end of May.[908] On May 30, Allstate offered to settle for the policy limit, but the offer was rejected because Allstate had not met the May 16 deadline.[909] Allstate sought a declaratory judgment that its attempt to settle satisfied its obligation to Herron and that it would not be obligated to pay any amount exceeding the policy limit.[910] The parties stipulated that Allstate could have determined that Herron's liability exceeded his policy limits by May 16, but a jury found that Allstate had acted reasonably.[911] Herron appealed, arguing that the Alaska covenant of good faith and fair dealing required Allstate to settle by May 16.[912] Viewing the evidence in the light most favorable to Allstate, the Ninth Circuit concluded that it was not clear that Allstate had unreasonably failed to settle by May 16.[913] The court noted that, although the parties had stipulated that Allstate could have determined Herron's liability by May 16, the question before the jury was whether Allstate should have settled by then.[914] Affirming, the Ninth Circuit held that the failure of an insurer to determine by a date certain whether the insured's liability exceeds his policy limit does not necessarily result in a violation of the Alaska covenant of good faith and fair dealing, even when the insurer has the ability to do so.[915]

Alaska Supreme Court

State, Department of Commerce v. Alyeska Pipeline Service Co.

In *State, Department of Commerce v. Alyeska Pipeline Service Co.*,[916] the supreme court held that a non-construction, owner-controlled insurance program is not barred by AS 21.36.065.[917] Alyeska Pipeline Service Company contracted with Liberty Mutual to write an owner-controlled insurance program.[918] The contractors enrolled in that program engaged in maintenance and support, not construction.[919] The State issued a cease-and-desist order, claiming that the owner-controlled insurance program violated AS 21.36.065.[920] The superior court held that the company had not violated the statute.[921] On appeal, the supreme court reasoned that the definitions provided in AS 21.36.065(c) clearly restrict AS 21.36.065 to insurance programs that are procured on behalf of a

[906] *Id.* at 1105.
[907] *Id.*
[908] *Id.*
[909] *Id.* at 1106.
[910] *Id.*
[911] *Id.* at 1107.
[912] *Id.* at 1109.
[913] *Id.* at 1110.
[914] *Id.* at 1109.
[915] *Id.* at 1109–10.
[916] 262 P.3d 593 (Alaska 2011).
[917] *Id.* at 597.
[918] *Id.* at 594.
[919] *Id.*
[920] *Id.* at 595.
[921] *Id.* at 596.

person who, in the course of the person's business, engages the service of a contractor for the purpose of working on a construction project.[922] The court noted that the statute's language is so clear that it is unsusceptible to any other interpretation, even though the legislature arguably intended the statute to apply more broadly.[923] Affirming, the supreme court held that a non-construction, owner-controlled insurance program is not barred by AS 21.36.065.[924]

Whitney v. State Farm Automobile Insurance Co.

In *Whitney v. State Farm Automobile Insurance Co.*,[925] the supreme court held that an insurance company does not breach its duty of care toward a policy holder by declining to settle a lawsuit against him for more than the upper limit covered by his policy.[926] Whitney injured Giannechini in a traffic accident.[927] Giannechini offered to settle all claims; Whitney's insurer, State Farm, responded that it would be willing to settle for the maximum amount covered by Whitney's policy.[928] Giannechini refused and sued.[929] Whitney later sued State Farm, alleging that it had acted in bad faith and violated the duty of care owed to him by failing to settle.[930] The trial court entered summary judgment in favor of State Farm.[931] On appeal, the supreme court noted that all insurance contracts contain an implied covenant of good faith and fair dealing, including a duty to accept reasonable offers of settlement promptly.[932] Here, that duty was not triggered because Giannechini's settlement offer was higher than the policy limit.[933] Affirming, the supreme court held that an insurance company does not breach its duty of care toward a policy holder by declining to settle a lawsuit against him for more than the upper limit covered by his policy.[934]

NATIVE LAW

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United States Court of Appeals for the Ninth Circuit

Blatchford v. Alaska Native Tribal Health Consortium

In *Blatchford v. Alaska Native Tribal Health Consortium*,[935] the Ninth Circuit held that the Indian Health Care Improvement Act (IHCIA) provides a tribal organization with a right of recovery for health care services only against third parties and not against the

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[922] *Id*. at 597.
[923] *Id*.
[924] *Id*.
[925] 258 P.3d 113 (Alaska 2011).
[926] *Id*. at 118.
[927] *Id*. at 114–115.
[928] *Id*. at 115.
[929] *Id*.
[930] *Id*.
[931] *Id*. at 116.
[932] *Id*. at 116–117.
[933] *Id*. at 117–118.
[934] *Id*. at 118.
[935] 645 F.3d 1089 (9th Cir. 2011).

health care recipient.[936] Blatchford was injured in a car accident and received free health care services from the Alaska Native Tribal Health Consortium (ANTHC).[937] ANTHC filed a lien against Blatchford for any money that she might receive from third parties related to the injuries for which ANTHC had treated her.[938] Blatchford then received a settlement from her insurer and sought a declaratory judgment that the ANTHC's liens were not valid under IHCIA; ANTHC filed a counterclaim for payment of the money Blatchford had received.[939] The district court granted summary judgment to ANTHC.[940] On appeal, the Ninth Circuit noted that the title of the Act's applicable section reads: "[r]eimbursement from certain third parties of costs and health services."[941] That section also contained another phrase implying that the statute only permits the health care provider to stand in the shoes of the health care recipient.[942] The court reasoned that Congress enacted the statute to permit recovery from third parties because health care recipients would not be strongly inclined to seek remuneration for health care costs that were obtained for free.[943] Reversing, the Ninth Circuit held that IHCIA provides a tribal organization with a right of recovery for health care services only against third parties and not against the health care recipient.[944]

Alaska Supreme Court

McCrary v. Ivanof Bay Village

In *McCrary v. Ivanof Bay Village*,[945] the supreme court reaffirmed its previous decision that Alaska Native Tribes on the Department of the Interior's list of federally recognized tribes are sovereign entities.[946] Ivanof Bay Village contracted with McCrary to oversee its economic planning and development.[947] When Ivanof Bay refused to pay expenses McCrary had incurred as part of the contract, McCrary sued.[948] The superior court dismissed the suit for lack of subject-matter jurisdiction, reasoning that the tribe was federally recognized and thus protected by sovereign immunity.[949] On appeal, McCrary argued that, although *John v. Baker*[950] held that Alaska Native Tribes on the Department of the Interior's list of federally recognized tribes are sovereign entities, the supreme court's holding in that case should have no precedential value because no party in *John v. Baker* had argued against the position taken by the court.[951] The court noted that its previous decision had been well-reasoned and, further, that it had never been called into

[936] *Id*. at 1092–93.
[937] *Id*. at 1090.
[938] *Id*.
[939] *Id*.
[940] *Id*.
[941] *Id*. at 1092.
[942] *Id*.
[943] *Id*.
[944] *Id*. at 1092–93.
[945] 265 P.3d 337 (Alaska 2011).
[946] *Id*. at 342.
[947] *Id*. at 338.
[948] *Id*.
[949] *Id*.
[950] 982 P.2d 738 (Alaska 1999).
[951] 265 P.3d at 340.

question by commentators, by Congress, or by other courts.[952] The supreme court reaffirmed its previous decision that Alaska Native Tribes on the Department of the Interior's list of federally recognized tribes are sovereign entities.[953]

State v. Native Village of Tanana

In *State v. Native Village of Tanana*,[954] the supreme court held that federally recognized Alaska Native tribes that have not reassumed exclusive jurisdiction over child custody proceedings under the Indian Child Welfare Act (ICWA) still have concurrent jurisdiction to initiate child custody proceedings both inside and outside of Indian country.[955] The State Attorney General issued an opinion stating that Alaska state courts had exclusive jurisdiction over child custody proceedings involving Alaska Native children unless the child's tribe successfully petitioned the Department of Interior for jurisdiction under ICWA or a state superior court transferred the case to a tribal court.[956] The Office of Children's Services (OCS) then created guidelines severely limiting the amount of information it would give to a tribe about any investigations conducted by OCS, and the Bureau of Vital Statistics began refusing to accept tribal court adoption paperwork.[957] Several tribes sought a declaratory judgment that they had inherent and concurrent jurisdiction to adjudicate children's proceedings.[958] The superior court granted the tribes' requested relief; the State appealed, arguing that ICWA provided a complete jurisdictional scheme limiting the ability of the tribes to initiate child custody proceedings.[959] Four considerations led the court to believe that the tribes have concurrent jurisdiction to adjudicate child custody matters: (1) a federally recognized tribe has inherent authority to regulate internal domestic relations unless Congress has divested it of that authority; (2) the elimination of nearly all Indian country under the Alaska Native Claims Settlement Act did not divest the tribes of their authority to regulate internal domestic relations; (3) ambiguities in statutes affecting the rights of Native Americans must be resolved in favor of the Native Americans; (4) in enacting ICWA, Congress intended to allow tribes to adjudicate child custody matters.[960] Affirming, the supreme court held that federally recognized Alaska Native tribes that have not reassumed exclusive jurisdiction over child custody proceedings under ICWA still have concurrent jurisdiction to initiate child custody proceedings both inside and outside of Indian country.[961]

Bruce L. v. W.E.

In *Bruce L. v. W.E.*,[962] the supreme court held that a father can sufficiently acknowledge paternity of his son to qualify as a parent under the Indian Child Welfare Act (ICWA)

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[952] *Id.* at 340–41.
[953] *Id.* at 342.
[954] 249 P.3d 734 (Alaska 2011).
[955] *Id.* at 751.
[956] *Id.* at 746.
[957] *Id.* at 747.
[958] *Id.* at 736.
[959] *Id.* at 737.
[960] *Id.* at 750.
[961] *Id.* at 751.
[962] 247 P.3d 966 (Alaska 2011).

even if the father does not comply with the Alaska legitimation statute.[963] The superior court upheld an adoption decree and termination of Bruce's parental rights after he failed to establish paternity within one year of his child's birth in accordance with state law.[964] On appeal, Bruce argued that since his son is an Indian child, termination of parental rights was subject to the higher ICWA evidentiary standard rather than the state law standard.[965] The prospective adoptive parents argued that Bruce's unwed status, in conjunction with his delay in establishing paternity, precluded ICWA's application.[966] The court noted that Bruce had filed an acknowledgment of paternity with the superior court in the first adoption proceeding, that he had moved for custody and paternity testing, and that he had filed a separate suit for custody of his son.[967] The supreme court vacated the trial court's termination of Bruce's parental rights and held that a father can sufficiently acknowledge paternity of his son to qualify as a parent under ICWA even if he does not comply with the Alaska legitimation statute.[968]

Pravat P. v. State, Department of Health & Social Services

In *Pravat P. v. State, Department of Health & Social Services*,[969] the supreme court held that, to satisfy the "active efforts" requirement of the Indian Child Welfare Act (ICWA), the efforts of the Office of Children's Services (OCS) must cross the threshold from passive to active, and a parent's lack of cooperation can excuse minor faults on the part of OCS.[970] While Pravat was incarcerated for assaulting the mother of one of his children, OCS contacted him but did not start a case plan because Pravat, who was Laotian, spoke limited English and had bilateral hearing loss.[971] OCS supervised meetings between Pravat and his children but delayed reunification efforts until Pravat could obtain a psychological assessment (which took over a year due to Pravat's language and hearing issues).[972] OCS obtained an interpreter for family therapy meetings, obtained a hearing aid for Pravat, and reached out to Laotian and Thai temples for assistance in teaching parenting skills to Pravat.[973] Pravat was uncooperative with treatment and OCS moved to terminate his parental rights.[974] In terminating Pravat's parental rights, the superior court held that OCS had made "active efforts," as required by ICWA, to prevent the breakup of Pravat's family.[975] On appeal, Pravat argued that OCS undermined his chances of reunification by failing to provide cultural continuity, failing to provide parenting modeling, and inappropriately delaying its efforts, thus violating its duty to make active efforts to prevent the breakup of his family.[976] The supreme court noted that OCS is not required to be perfect to satisfy the "active efforts" requirement of ICWA; OCS's efforts

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[963] *Id*. at 979.
[964] *Id*. at 969.
[965] *Id*. at 978.
[966] *Id*.
[967] *Id*. at 979.
[968] *Id*.
[969] 249 P.3d 264 (Alaska 2011).
[970] *Id*. at 272.
[971] *Id*. at 265, 267.
[972] *Id*. at 267.
[973] *Id*. at 268.
[974] *Id*. at 269.
[975] *Id*. at 269, 271.
[976] *Id*. at 272.

merely need to cross the threshold from passive to active.[977] Further, the court noted, a parent's lack of cooperation can excuse minor faults on OCS's part.[978] Affirming, the supreme court held that, to satisfy the "active efforts" requirement of ICWA, OCS's efforts must cross the threshold from passive to active, and a parent's lack of cooperation can excuse minor faults on the part of OCS.[979]

PROPERTY LAW

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Alaska Supreme Court

Horan v. Kenai Peninsula Borough Board of Equalization

In *Horan v. Kenai Peninsula Borough Board of Equalization*,[980] the supreme court held that a Board of Equalization could consider rental restrictions when valuing low-income housing complexes for the purpose of assessing property taxes.[981] Park Place owned an apartment complex built in 2004 that participated in the Low Income Housing Tax Credit (LIHTC) program; the complex was valued by an independent appraiser at $652,000 using an income approach.[982] The Borough Assessor valued the complex at $2,930,700 using a cost approach.[983] Pacific Park appealed the Assessor's valuation; the Board determined that although the Assessor had discretion to use the cost approach, rental restrictions should have been considered.[984] In the supreme court, the Assessor argued that after AS 29.45.110(d) (which mandated an income-approach valuation for complexes qualifying for the LIHTC program before January 2001) became effective, rental restrictions could not be considered in the valuation of properties that qualified for the LIHTC program after January 2001.[985] The supreme court disagreed, stating that a taxing authority is not prohibited from considering rental restrictions just because it is not required to use an income approach to property valuation.[986] Thus, the supreme court determined, it was reasonable for the Board to consider the rental restrictions on Pacific Park's apartment complex in its valuation.[987] Affirming, the supreme court held that a Board of Equalization could consider rental restrictions when valuing low-income housing complexes for the purpose of assessing property taxes.[988]

Varilek v. Burke

In *Varilek v. Burke*,[989] the supreme court held that a Board of Equalization is not required to use a previous valuation of property as the starting point for determining the property's

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[977] *Id.*
[978] *Id.*
[979] *Id.*
[980] 247 P.3d 990 (Alaska 2011).
[981] *Id.* at 998.
[982] *Id.* at 996.
[983] *Id.*
[984] *Id.* at 997.
[985] *Id.* at 998.
[986] *Id.*
[987] *Id.*
[988] *Id.*
[989] 254 P.3d 1068 (Alaska 2011).

current valuation.[990] In 2006, the Board of Equalization assessed the value of Varilek's property at $85,000.[991] Two years later, its value was reassessed at $146,200.[992] Varilek appealed the reassessment; the lower court held that Varilek had not shown that the property had been improperly valued. [993] On appeal, Varilek argued that the Board should have considered the 2006 tax assessment as the base rate when it valued the property in 2008 and that the Board should have been required to explain the difference between the assessments.[994] The supreme court reasoned that property assessments are based on current market values, not previously assessed values; Varilek thus had the burden of proving that the 2008 assessment was incorrect.[995] The supreme court held that a Board of Equalization is not required to use a previous valuation of property as the starting point for determining the property's current valuation.[996]

Stevens v. Stevens

In *Stevens v. Stevens*,[997] the supreme court held that it is an abuse of discretion to divide marital property according to its value at a time before the final property division if the property's value has changed significantly in the interim.[998] Mr. and Mrs. Stevens separated in 2006 and their divorce proceedings went to trial in June 2007.[999] After the first day of trial, the two parties believed they had reached a settlement agreement.[1000] But the two were unable to memorialize the terms of the agreement and their case went back to trial in August 2008.[1001] After the new trial, the superior court divided the marital assets based on their value as of the first trial date in 2007.[1002] The supreme court noted that, with a few exceptions, property should be divided according to its value close to the time that the court actually divides the property.[1003] Moreover, the court reasoned that it would be inequitable to divide their property according to its value at the earlier date because the value of their assets had changed by more than 15 percent during the year that separated the two trials.[1004] Reversing, the supreme court held that it is an abuse of discretion to divide marital property by its value at a time before the final property division if the property's value has changed significantly in the interim.[1005]

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[990] *Id*. at 1073.
[991] *Id*. at 1072.
[992] *Id*. at 1070.
[993] *Id*.
[994] *Id*. at 1072.
[995] *Id*. at 1073.
[996] *Id*.
[997] 265 P.3d 279 (Alaska 2011).
[998] *Id*. at 287.
[999] *Id*. at 281.
[1000] *Id*.
[1001] *Id*.
[1002] *Id*. at 283.
[1003] *Id*. at 285–86.
[1004] *Id*. at 286–87.
[1005] *Id*. at 287.

Burts v. Burts

In *Burts v. Burts*,[1006] the supreme court held that federal law does not preempt the states from treating military health insurance benefits as marital assets to be divided in a divorce.[1007] Leon received TRICARE health insurance as a military retiree.[1008] When he and his wife divorced, the superior court treated his health insurance as a marital asset and divided its value between the two.[1009] Leon appealed, arguing that state courts are preempted from considering TRICARE in marital property divisions.[1010] The supreme court first noted that field preemption did not apply, because the Former Spouses' Protection Act permits state courts to treat disposable retired pay as either belonging solely to the military retiree or to the married couple.[1011] The court next reasoned that conflict preemption did not apply because TRICARE benefits more closely resemble pension benefits that can be characterized as marital property (such as disposable retired pay) than those benefits that cannot (such as military disability retired pay). Affirming, the supreme court held that federal law does not preempt the states from treating military health insurance benefits as marital assets to be divided in a divorce.[1012]

Price v. Eastham

In *Price v. Eastham*,[1013] the supreme court held that prescriptive easements are limited to those users who have satisfied the elements of the prescriptive easement statute and does not extend to other types of users.[1014] Price owned land that was used by snowmachiners, for whom a public prescriptive easement over the land was established.[1015] In defining the scope of the easement, the superior court held that other uses, such as hiking, dog-sledding, and hunting, should be included in the easement.[1016] The supreme court reasoned that a prescriptive easement is limited to only those users and those uses that satisfy the elements of the prescriptive easement.[1017] Because the superior court had not explicitly found that non-snowmachine users had satisfied the elements of a prescriptive easement, they could not be included in the easement.[1018] Reversing, the supreme court held that prescriptive easements are limited to those users who have satisfied the elements of the prescriptive easement statute and does not extend to other types of users.[1019]

[1006] 266 P.3d 337 (Alaska 2011).
[1007] *Id.* at 346.
[1008] *Id.* at 339.
[1009] *Id.* at 340.
[1010] *Id.* at 343.
[1011] *Id.* at 343–44.
[1012] *Id.* at 346.
[1013] 254 P.3d 1121 (Alaska 2011).
[1014] *Id.* at 1127.
[1015] *Id.* at 1123–24.
[1016] *Id.* at 1125.
[1017] *Id.* at 1127.
[1018] *Id.*
[1019] *Id.*

Gillis v. Aleutians East Borough

In *Gillis v. Aleutians East Borough*,[1020] the supreme court held that, to qualify for a purchase preference under the Alaska Land Act, a lessee must enter the land while it is under federal control.[1021] In 1989, Gillis leased five acres of state land from the Alaska Department of Natural Resources (DNR).[1022] DNR then conveyed the land and lease interest to Aleutians East Borough.[1023] Gillis offered to buy the land from the Borough; when the Borough refused, he asserted a right to purchase the land under the Alaska Land Act.[1024] The superior court granted summary judgment to the Borough.[1025] On appeal, the supreme court reasoned that the Alaska Land Act's plain language requires an individual to enter the land while it is still under federal ownership to qualify for a purchase preference.[1026] Although the statute gives some government land users a right to purchase leased land without competitive bidding, to qualify the user must begin use of the land while it is under federal ownership.[1027] Affirming, the supreme court held that, to qualify for a purchase preference under the Alaska Land Act, a lessee must enter the land while it is under federal control.[1028]

Shaffer v. Bellows

In *Shaffer v. Bellows*,[1029] the supreme court held that a fixed price repurchase option of unlimited duration may be an unreasonable restraint on transfers of real property.[1030] Shaffer and Bellows purchased an island near Sitka.[1031] Shaffer later quitclaimed his interest in the property in exchange for money and an option agreement that stated he would have an option to buy the island at a fixed price should Bellows ever sell.[1032] When Bellows later gifted the property, Shaffer sued under the agreement.[1033] The lower court held that the option agreement ran with the land and was still viable.[1034] On appeal, the supreme court remanded the case for a determination of whether the option agreement was unenforceable.[1035] The supreme court noted that a fixed price repurchase option of unlimited duration is an unreasonable restraint on alienation.[1036] The court reasoned that such a restraint would leave owners with an incentive not to sell, even if a potential buyer would pay more and be willing to put the property to more beneficial use.[1037] Remanding,

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[1020] 258 P.3d 118 (Alaska 2011).
[1021] *Id*. at 124.
[1022] *Id*. at 120.
[1023] *Id*.
[1024] *Id*.
[1025] *Id*.
[1026] *Id*. at 122, 123.
[1027] *Id*. at 120, 122–124.
[1028] *Id*. at 124.
[1029] 260 P.3d 1064 (Alaska 2011).
[1030] *Id*. at 1072.
[1031] *Id*. at 1066.
[1032] *Id*.
[1033] *Id*. at 1067.
[1034] *Id*. at 1068.
[1035] *Id*. at 1072.
[1036] *Id*.
[1037] *Id*.

the supreme court held that a fixed price repurchase option of unlimited duration may be an unreasonable restraint on transfers of real property.[1038]

Sengul v. CMS Franklin, Inc.

In *Sengul v. CMS Franklin, Inc.*,[1039] the supreme court held that a commercial tenant does not necessarily waive its right to rent abatement, if the tenant has signed a contract with a strict non-waiver provision and if the landlord does not suffer prejudice, even if the tenant fails to pay rent for six weeks and does not discuss rent abatement with its landlord.[1040] CMS entered into a long-term lease for a commercial storefront with Sengul.[1041] The lease included a provision that abated the rent by three to four days for every day the property was delivered late to lessee.[1042] The lease also included a non-waiver provision, which stated that a failure by either party to insist upon a contractual right would not constitute waiver of that right.[1043] Sengul delivered the property to CMS a week late because defects in the storefront had to be remedied first.[1044] After moving in, CMS did not pay rent to Sengul and failed to mention rent abatement until six weeks had passed.[1045] The superior court held that CMS had waived its right to abatement because it had declined to timely invoke the lease's rent abatement provision.[1046] The supreme court disagreed, first noting the strict non-waiver provision in the contract.[1047] The court then noted that CMS could have explicitly or implicitly waived its right to abatement but that CMS had done neither.[1048] CMS could not have impliedly waived its right to abatement because its failure to raise the issue had not prejudiced Sengul at all—even if the issue had been raised before CMS moved into the storefront, Sengul could not have more quickly remedied the defects that pushed back the move-in date.[1049] Reversing, the supreme court held that a commercial tenant does not necessarily waive its right to rent abatement, if the tenant has signed a contract with a strict non-waiver provision and if the owner does not suffer prejudice, even if the tenant fails to pay rent for six weeks without discussing rent abatement with its landlord.[1050]

Henash v. Fairbanks North Star Borough

In *Henash v. Fairbanks North Star Borough*,[1051] the supreme court held that, when a charitable organization leases property to a charitable organization that uses the property exclusively for charitable purposes, the revenue remains tax-exempt regardless of the amount of money earned from the lease.[1052] Henash sought tax-exempt status for two

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[1038] *Id.*
[1039] 265 P.3d 320 (Alaska 2011).
[1040] *Id.* at 327–28.
[1041] *Id.* at 322.
[1042] *Id.*
[1043] *Id.*
[1044] *Id.* at 329–30.
[1045] *Id.* at 322–23.
[1046] *Id.* at 327.
[1047] *Id.* at 328–29.
[1048] *Id.* at 329.
[1049] *Id.* at 329–30.
[1050] *Id.* at 327–28.
[1051] 265 P.3d 302 (Alaska 2011).
[1052] *Id.* at 306–07.

parcels of land that it had leased to charitable organizations; the borough's tax assessor denied the request because Henash had leased the property at market rates.[1053] The superior court affirmed.[1054] On appeal, the supreme court determined that, under AS 29.45.030 (which governs the tax-exempt status of charitable organizations), the amount of money received by the lessor is immaterial to determining the tax-exempt status of the leased property.[1055] Because Henash, a charitable organization, had leased its property to a charitable organization that used the property exclusively for charitable purposes, the property was tax-exempt under the statute.[1056] Reversing, the supreme court held that, when a charitable organization leases property to a charitable organization that uses the property exclusively for charitable purposes, the revenue remains tax-exempt regardless of the amount of money earned from the lease.[1057]

Cowan v. Yeisley

In *Cowan v. Yeisley*,[1058] the supreme court held that (1) a deeded right of way grants an easement, not full title, to the recipient[1059] and (2) AS 09.10.030, Alaska's most recent adverse-possession statute, does not apply retroactively.[1060] In 1956, Cowan was deeded land and a "perpetual right of way running with the land" over a 30-foot strip alongside the tract.[1061] In the years that followed, plots of land around Cowan were conveyed and subdivided.[1062] The subdivision's plat showed Cowan's right of way and dedicated it to the local borough.[1063] Cowan sued to determine who controlled the right of way.[1064] The superior court ruled that the original deed had not conveyed the disputed land and, using the most recent adverse-possession statute, denied Cowan's adverse-possession claim.[1065] The supreme court reasoned that the original deed had not conveyed the disputed strip of land because the "right of way" language unambiguously granted an easement, not full title.[1066] With respect to the adverse-possession claim, the supreme court noted that no statute applies retroactively unless the legislature explicitly makes it retroactive.[1067] Because Cowan's potential adverse possession occurred and would have been completed before the most recent statute was enacted, the most recent statute did not apply.[1068] The supreme court held that (1) a deeded right of way grants an easement, not full title, to the

[1053] *Id*. at 306.
[1054] *Id*.
[1055] *Id*. at 305.
[1056] *Id*. at 307.
[1057] *Id*. at 306–07.
[1058] 255 P.3d 966 (Alaska 2011).
[1059] *Id*. at 971.
[1060] *Id*. at 973–74.
[1061] *Id*. at 968.
[1062] *Id*.
[1063] *Id*.
[1064] *Id*.
[1065] *Id*.
[1066] *Id*. at 971–72.
[1067] *Id*. at 973.
[1068] *Id*.

recipient[1069] and (2) AS 09.10.030, Alaska's most recent adverse-possession statute, does not apply retroactively.[1070]

TORT LAW

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United States Court of Appeals for the Ninth Circuit

Jachetta v. United States, Bureau of Land Management

In *Jachetta v. United States, Bureau of Land Management*,[1071] the Ninth Circuit held that the Federal Tort Claims Act (FTCA) may provide a waiver of federal sovereign immunity when the alleged torts are also actionable under state law.[1072] Jachetta, an Alaska Native, applied in 1971 to the Bureau of Indian Affairs (BIA) for a Native allotment comprised of two land parcels.[1073] Due to an error by BIA, in 1986 the Bureau of Land Management (BLM) issued only the first parcel.[1074] Meanwhile, BLM granted permits to third parties to use the second parcel for the extraction of over 700,000 cubic yards of gravel, leaving a giant crater on the property.[1075] After years of administrative proceedings, Jachetta finally received the second parcel in 2004.[1076] Jachetta sued BLM and the State for damages and injunctive relief.[1077] The district court dimissed Jachetta's claims, holding that BLM and the State had sovereign immunity and had not waived it.[1078] On appeal, the Ninth Circuit affirmed that the Eleventh Amendment barred the entirety of Jachetta's claims against the State.[1079] The court reasoned, however, that the FTCA provided a waiver of the federal government's sovereign immunity for Jachetta's nuisance and breach-of-fiduciary-duties claims against BLM because they are actionable torts under Alaska state law.[1080] Reversing, the Ninth Circuit held that the FTCA may provide a waiver of federal sovereign immunity when the alleged torts are actionable under state law.[1081]

Alaska Supreme Court

Nelson v. Municipality of Anchorage

In *Nelson v. Municipality of Anchorage*,[1082] the supreme court held that the Workers' Compensation Act shields a municipality from lawsuits regarding work-related

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[1069] *Id*. at 971.
[1070] *Id*. at 973–74.
[1071] 653 F.3d 898 (9th Cir. 2011).
[1072] *Id*. at 904–06.
[1073] *Id*. at 902.
[1074] *Id*.
[1075] *Id*.
[1076] *Id*.
[1077] *Id*. at 902–03.
[1078] *Id*. at 903.
[1079] *Id*. at 912.
[1080] *Id*. at 904–06, 912.
[1081] *Id*. at 904–06.
[1082] 267 P.3d 636 (Alaska 2011).

injuries.[1083] Nelson was injured in a workplace accident and sued the municipality for damages.[1084] The superior court granted summary judgment to the municipality because it qualified as a "project owner" under AS 23.30.045(a) and, therefore, the Workers' Compensation Act shielded the municipality from torts arising from work-related injuries.[1085] On appeal, Nelson argued that, under AS 23.30.045, the municipality should be classified as a "contract-awarding entity" and not as a "project owner."[1086] If the court accepted his argument, the Workers' Compensation Act would not shield the municipality from liability.[1087] The supreme court first noted that the statute's definition of "project owner" did not preclude the municipality from being characterized as a project owner.[1088] Further, the legislative history strongly suggested that the legislature had intended to include the State and its political subdivisions in its definition of "project owner."[1089] Accordingly, the supreme court held that the Workers' Compensation Act shields a municipality from lawsuits regarding work-related injuries.[1090]

Olson v. City of Hooper Bay

In *Olson v. City of Hooper Bay*,[1091] the supreme court held that: (1) internal police department regulations regarding taser usage can serve as notice that excessive tasing represents excessive force and (2) the very nature of an officer's actions may provide enough notice that his amount of force is excessive.[1092] Olson was physically and verbally combative with officers when they entered his home.[1093] The officers tased him at least 15 times within one minute; some of the tasings occurred while Olson was handcuffed and lying face-down.[1094] The superior court held that the officers were immune to Olson's civil lawsuit because Fourth Amendment taser jurisprudence was not clear enough to provide adequate notice to the officers that multiple tasings constituted excessive force.[1095] On appeal, the supreme court reasoned that internal police department regulations could have provided notice because they established an unconstested standard for taser usage and because they were not in conflict with federal guidelines for taser usage.[1096] Additionally, the supreme court reasoned that the very nature of the officers' actions could have provided notice that they were using excessive force.[1097] The supreme court reversed and held that: (1) internal police department regulations regarding taser usage can serve as notice that excessive tasing represents

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[1083] *Id*. at 642.
[1084] *Id*. at 639.
[1085] *Id*.
[1086] *Id*. at 640.
[1087] *Id*.
[1088] *Id*.
[1089] *Id*. at 641.
[1090] *Id*. at 642.
[1091] 251 P.3d 1024 (Alaska 2011).
[1092] *Id*. at 1039–41.
[1093] *Id*. at 1027–28.
[1094] *Id*. at 1041.
[1095] *Id*. at 1029–30.
[1096] *Id*. at 1040.
[1097] *Id*. at 1041.

excessive force and (2) the very nature of an officer's actions may provide enough notice that his amount of force is excessive.[1098]

Russell ex rel. J.N. v. Virg-In

In *Russell ex rel. J.N. v. Virg-In*,[1099] the supreme court held that any reasonable officer would believe that it is excessive to tase an 11 year-old girl twice after she has committed a misdemeanor traffic violation and has been compliant in her arrest.[1100] J.N. ran several stop signs while driving her ATV at 35 m.p.h.[1101] Virg-In, a police officer, turned on his lights and siren and followed J.N.[1102] J.N. nearly ran into Virg-In's car; when she tried to get away, her ATV stalled.[1103] Virg-In approached her, tased her twice, then arrested her.[1104] J.N.'s mother sued Virg-In for excessive use of force.[1105] The superior court granted summary judgment, determining that Virg-In was entitled to qualified immunity because no clearly-established law would have put him on notice that his conduct was unlawful and because his conduct was not so extreme that any reasonable officer would have known it was excessive.[1106] On appeal, the supreme court noted that some conduct can be so egregious that any reasonable officer would know that it is unlawful.[1107] The court reasoned that the use of force is least justified against nonviolent misdemeanants who are not fleeing, resisting arrest, or posing an immediate threat to an officer's safety.[1108] Because the superior court had not made any factual findings on these issues, a remand was necessary.[1109] The supreme court held that any reasonable officer would believe that it is excessive to tase an 11 year-old girl twice after she has committed a misdemeanor traffic violation and has been compliant in her arrest.[1110]

TRUSTS & ESTATES LAW

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Alaska Supreme Court

Foster v. Professional Guardian Services Corp.

In *Foster v. Professional Guardian Services Corp.*,[1111] the supreme court held that, under the "reasonable compensation" standard of AS 13.26.230, a conservator may not obtain reimbursement from an estate for attorneys' fees spent in the unsuccessful defense of conservator actions that caused significant harm to the estate.[1112] The superior court

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[1098] *Id*. at 1039–41.
[1099] 258 P.3d 795 (Alaska 2011).
[1100] *Id*. at 809.
[1101] *Id*. at 798–99.
[1102] *Id*. at 799.
[1103] *Id*.
[1104] *Id*.
[1105] *Id*. at 800.
[1106] *Id*. at 801.
[1107] *Id*. at 804.
[1108] *Id*. at 808.
[1109] *Id*. at 809.
[1110] *Id*.
[1111] 258 P.3d 102 (Alaska 2011).
[1112] *Id*. at 112.

appointed a professional conservator for a woman suffering from dementia.[1113] Her daughter sued the conservator and it was found that the conservator had breached its fiduciary duty to the estate.[1114] The conservator incurred large legal fees, paid by the estate, in defending its actions.[1115] The superior court approved reimbursement from the mother's property for the full attorneys' fees the conservator incurred because AS 13.26.230 permits reasonable compensation from an estate to its lawyers or conservators.[1116] On appeal, the supreme court noted that the paramount interest of AS 13.26.230 is the protection of the incapacitated person's estate.[1117] The court reasoned that it would be unreasonable and impermissible under AS 13.26.230 to require a protected person to fund a conservator's legal defense of actions that had significantly damaged the protected person's estate, even if the defense was undertaken in good faith.[1118] The supreme court held that under the "reasonable compensation" standard of AS 13.26.230, a conservator may not obtain reimbursement from an estate for attorneys' fees spent in the unsuccessful defense of conservator actions that caused significant harm to the estate.[1119]

[1113] *Id*. at 104.
[1114] *Id*.
[1115] *Id*.
[1116] *Id*. at 104, 111.
[1117] *Id*. at 112.
[1118] *Id*.
[1119] *Id*.