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## YEAR IN REVIEW

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# Alaska Supreme Court, Alaska Court of Appeals, U.S. Court of Appeals for the Ninth Circuit, and U.S. District Court for the District of Alaska Year in Review 1997

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## I. INTRODUCTION

*Year in Review* contains brief summaries of selected decisions handed down in 1997 by the Alaska Supreme Court, the Alaska Court of Appeals, and the Ninth Circuit. The summaries focus on the substantive areas of the law addressed, the statutes or common law principles interpreted, and the essence of each of the holdings. Space does not permit review of all cases decided by the courts this year, but the authors of the *Review* have attempted to highlight decisions signaling a departure from prior law or resolving issues of first impression. The cases that were omitted applied well-settled principles of law or involved narrow holdings of limited import. The appendix lists the omitted cases and includes a brief parenthetical synopsis of each. Attorneys are advised not to rely upon the information contained in this review without further reference to the cases cited.

The opinions have been grouped according to general subject matter rather than by the nature of the underlying claims. The summaries are presented alphabetically in the following eleven areas of the law: administrative, business, civil procedure, constitutional, criminal, employment, family, insurance, property, torts, and trusts and estates.

## II. ADMINISTRATIVE LAW

## A. Public Contracting

In *United Utilities, Inc. v. Alaska Public Utilities Commission*,<sup>1</sup> the Alaska Supreme Court upheld the Alaska Public Utilities Commission's ("APUC's") contract award as being supported by a reasonable basis in the record of decision.<sup>2</sup> United Utilities appealed the award of a telephone contract to Summit Telephone Co. by APUC based on the theory that the APUC did not follow its own adjudicative precedents in making its decision.<sup>3</sup> Under Alaska Statutes section 42.05.241, "[w]here competing applicants seek a certificate that may be issued only to one entity, the [APUC] must select the applicant it considers the most fit, willing[,] and able of those who demonstrate threshold levels of fitness, willingness[,] and ability to serve."<sup>4</sup> Summit proposed a system using underground cable, while United's proposal focused on the use of a microwave system.<sup>5</sup> The supreme court held that "the APUC did consider the strengths and weaknesses of each applicant"<sup>6</sup> and dismissed the claim after finding a reasonable basis in the record for APUC's decision.<sup>7</sup>

In *Mortvedt v. Department of Natural Resources*,<sup>8</sup> the supreme court held that an archaeological report detailing specific archaeological features on a proposed lease site combined with consideration of the likely effects of actual occupancy provided sufficient evidentiary basis for the Department of Natural Resources ("DNR") to reject an application for a negotiated commercial lease on the site.<sup>9</sup> After an extensive review, DNR denied Mortvedt's application for a negotiated commercial lease because, in part, the type of use requested was inconsistent with the mandates of the Alaska Historic Preservation Act.<sup>10</sup> On the basis of reports prepared by professional archaeologists, DNR concluded that archaeological resources were located in the vicinity of the proposed

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1. 935 P.2d 811 (Alaska 1997).

2. *See id.* at 815-16.

3. *See id.* at 813-14.

4. *Id.* at 814 (quoting ALASKA STAT. § 42.05.241 (Michie 1996)).

5. *See id.* at 815-16.

6. *Id.* at 815.

7. *Id.* at 815-16.

8. 941 P.2d 126 (Alaska 1997).

9. *See id.* at 129-30.

10. *See id.*; *see also* ALASKA STAT. § 41.35.010 (Michie 1996). The policy of the Alaska Historic Preservation Act is to "protect the historic, prehistoric, and archeological resources of Alaska from loss, desecration and destruction," and to preserve them for future generations. *See id.*

site and that a negotiated lease in this area would potentially jeopardize the site.<sup>11</sup> The court was persuaded that DNR's decision to deny the commercial lease had a reasonable basis in law and fact and was reflective of a "hard look."<sup>12</sup>

The supreme court also rejected Mortvedt's argument that DNR should have been estopped from denying his application for a personal use cabin permit ("PUCP").<sup>13</sup> The court concluded that Mortvedt's reliance on a tentative approval sent to him by DNR was not reasonable and did not support an estoppel claim because the document explicitly stated that adversely affected third parties had the right to appeal an adverse decision.<sup>14</sup> The court held that DNR's decision that Mortvedt's use of the site would conflict with public interest should be sustained.<sup>15</sup> The court further held that the fact that DNR did not discover the archeological significance of Mortvedt's site until after DNR had tentatively approved his application for a PUCP did not preclude subsequent denial of his application because "it does not make sense, on a policy level, to ignore subsequently discovered information which is relevant to . . . DNR's decision."<sup>16</sup>

In *Eastwind Inc. v. Department of Labor*,<sup>17</sup> the supreme court concluded that the wage determination provisions of the 1993 amendments to Alaska Statutes section 36.05.010<sup>18</sup> regarding public construction contracts were not applicable to "contracts bid on prior to the effective date of the amendments."<sup>19</sup> Prior to the 1993 amendments, all public works construction contractors were required to adjust their wages every time the Department of Labor issued new prevailing wage rates.<sup>20</sup> Under the 1993 amendments, wages in public contracts were frozen for the first twenty-four months of a contract.<sup>21</sup> Rejecting the argument of *Eastwind Inc.*, a public construction contractor, the supreme court concluded that the amended statute should not be interpreted to apply retroactively to *Eastwind's* contract because it was entered into prior to the effective date of the amendments.<sup>22</sup> The court reasoned that "application of the 1993 amendments to pre-existing contracts

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11. *See Mortvedt*, 941 P.2d at 129.

12. *See id.* at 130.

13. *See id.* at 130-31.

14. *See id.* at 130.

15. *See id.* at 131.

16. *Id.*

17. 951 P.2d 844 (Alaska 1997).

18. ALASKA STAT. § 36.05.010 (Michie 1996).

19. *Eastwind*, 951 P.2d. at 844.

20. *See id.* at 845.

21. *See id.*

22. *See id.* at 847.

would give a different legal effect to significant pre-enactment conduct” and such a result would be “inconsistent with the statutory presumption against retroactivity.”<sup>23</sup>

#### B. Land Use and Resource Management

In *Kachemak Bay Watch, Inc. v. Noah*,<sup>24</sup> the Alaska Supreme Court held that the Department of Natural Resources (“DNR”) did not follow statutory requirements in identifying appropriate areas for aquatic farming, and therefore the court invalidated DNR’s decision to accept applications for aquatic farming throughout Southeast and Southcentral Alaska.<sup>25</sup> Alaska Statutes section 38.05.855(a)<sup>26</sup> required DNR to identify districts where sites for aquatic farming could exist.<sup>27</sup> DNR argued that the statute did not require substantive decision-making,<sup>28</sup> but the court held that that statute required DNR’s designation of Southeast and Southcentral as districts to be a “conscious act and determination.”<sup>29</sup> In its action, DNR effectively “collapsed the identification and permit processes.”<sup>30</sup> Accordingly, the court held that “[t]o comply with the statute, DNR must identify districts *and then consider* . . . what sites within those districts can be developed for aquatic farming.”<sup>31</sup>

Conversely, the supreme court held that DNR did not need to comply with the state’s Administrative Procedures Act (“APA”) because “the identification of aquatic farm districts under section 38.05.855(a) does not constitute a regulation under the APA.”<sup>32</sup> The court noted that a regulation may be present when a “practice implements, interprets or makes specific the law enforced or administered by the state agency” or when a “practice affects the public or is used by the agency in dealing with the public.”<sup>33</sup> Although it was a “close question,” the court held that DNR was not required to comply with the APA in identifying districts.<sup>34</sup>

In *Ellis v. Department of Natural Resources*,<sup>35</sup> the supreme

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23. *Id.* at 850.

24. 935 P.2d 816 (Alaska 1997).

25. *See id.* at 828.

26. ALASKA STAT. § 38.05.855(a) (Michie 1996).

27. *See Kachemak Bay Watch*, 935 P.2d at 822.

28. *See id.*

29. *Id.*

30. *Id.* at 823.

31. *Id.* at 824 (emphasis added).

32. *Id.* at 826.

33. *Id.* at 825.

34. *Id.* at 824-25.

35. 944 P.2d 491 (Alaska 1997).

court affirmed the Department of Natural Resources's ("DNR") decision to close state land to new mineral entry, finding that the decision was reasonable and supported by evidence in the record, was preceded by adequate notice, and was within DNR's constitutional and statutory authority.<sup>36</sup> DNR had concluded that the land in question had "significant surface uses" that would be incompatible with mining, such as fishing, boating, and hunting.<sup>37</sup> The court upheld this conclusion as reasonable and held that a miner has no property right to a claim on state land until that claim is discovered, located, and recorded.<sup>38</sup>

In *Payton v. State*,<sup>39</sup> the supreme court held that the Board of Fisheries, in its denial of a subsistence use fishing permit, misconstrued the portion of Alaska Statutes section 16.05.258(a)<sup>40</sup> that refers to "customary and traditional" uses.<sup>41</sup> The court concluded that the Board of Fisheries incorrectly required a familial relationship between current residents of the upper Yetna River and prior generations in determining whether salmon fishing was traditional for that area.<sup>42</sup> The focus should have been "whether the use has occurred consistently for an extended period of time."<sup>43</sup> The supreme court further concluded that the Board of Fisheries erred when it determined that the salmon users in the upper Yetna River did not "handle, prepare, preserve, and store salmon based on traditional practices."<sup>44</sup> Finally, the court concluded that the Board of Fisheries and the Board of Game are "separate entities acting under different statutory authority" and are not required to come to the same conclusion from the same facts.<sup>45</sup>

In *Krohn v. Department of Fish and Game*,<sup>46</sup> the supreme court held that issues regarding the validity of subsistence regulations adopted by the Board of Fisheries, the Board of Game, and the Commissioner of the Department of Fish and Game were rendered moot because the regulations had been repealed.<sup>47</sup> The court found that the issue of the validity of the repealed regulations did not fall within the public interest exception to the moot-

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36. *See id.* at 493.

37. *Id.* at 494.

38. *See id.* at 495-96.

39. 938 P.2d 1036 (Alaska 1997).

40. ALASKA STAT. § 16.05.258 (a) (Michie 1996).

41. *See Payton*, 938 P.2d at 1042.

42. *See id.* at 1042-43.

43. *Id.* at 1043.

44. *Id.* at 1044.

45. *Id.* at 1045.

46. 938 P.2d 1019 (Alaska 1997).

47. *See id.* at 1021; *see also* ALASKA STAT. §§ 16.05.258, .270 (Michie 1992).

ness doctrine.<sup>48</sup> The court accepted the state's argument that the factual and legal issues regarding the regulations were wholly dependent upon the particular circumstances that existed at the time of the adoption of the regulations and therefore were not capable of repetition.<sup>49</sup>

In *Jones v. State*,<sup>50</sup> the court of appeals held that the state could enforce its fish and game laws against the defendant even if the parcel of land on which the defendant shot a deer constituted "Indian Country" under the allotment clause of 18 U.S.C. § 1151.<sup>51</sup> Noting that "it is far from clear whether Congress meant for Alaska Native allotments to be considered 'Indian Country,'"<sup>52</sup> the court concluded that this designation would not inhibit Alaska's authority to enforce its game laws on allotted parcels because "the criminal laws of [Alaska] have the same force and effect within . . . Indian Country as they have elsewhere within the State."<sup>53</sup> The court of appeals based its decision, in part, on *Organized Village of Kake v. Egan*,<sup>54</sup> a U.S. Supreme Court case, which held that Alaska could enforce a law banning the use of fish traps against the villages of Kake and Angoon because "[s]tate authority over Indians is . . . more extensive over activities, such as [the operation of fish traps] . . . not on any reservation."<sup>55</sup> The court of appeals rejected the argument that Alaska's game and fish laws were regulatory and thus not considered criminal for purposes of 18 U.S.C. § 1162(a).<sup>56</sup>

The court also held that Alaska has the authority to enforce its gaming laws against a defendant even if the allegedly illegal deer hunting occurred on federal public land.<sup>57</sup> The court concluded that resolution of the issue of whether the land was federal public land was irrelevant since Alaska had the authority "to regulate the method and means of hunting, even on federal lands within the state, so long as the [s]tate regulations do not conflict with federal law."<sup>58</sup>

In *Alaska Wildlife Alliance v. Jensen*,<sup>59</sup> the Ninth Circuit Court of Appeals held that there was neither a statutory directive nor

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48. See *Krohn*, 938 P.2d at 1022.

49. See *id.*

50. 936 P.2d 1263 (Alaska Ct. App. 1997).

51. See *id.* at 1265; 18 U.S.C. § 1151 (1994).

52. *Jones*, 936 P.2d at 1265.

53. *Id.* at 1266 (quoting 18 U.S.C. § 1162(a) (1994)).

54. 369 U.S. 60 (1962).

55. *Jones*, 936 P.2d at 1265 (quoting *Organized Village of Kake*, 369 U.S. at 75).

56. See *id.* at 1266.

57. See *id.*

58. *Id.* (citing *Totemoff v. State*, 905 P.2d 954 (Alaska 1995)).

59. 108 F.3d 1065 (9th Cir. 1997).

congressional intent that contradicted the National Park Service's allowance of commercial fishing in nonwilderness areas of Glacier Bay National Park.<sup>60</sup> The court held that in the absence of a statutory directive in either the Organic Act,<sup>61</sup> which created the national park system, or the Alaskan National Interest Lands Conservation Act,<sup>62</sup> the court must defer to the Park Service's interpretation of congressional intent so long as such interpretation is reasonable.<sup>63</sup>

### C. Administrative Procedure

In *Kilmer v. Dillingham City School District*,<sup>64</sup> Alaska Supreme Court held that a lawsuit for wrongful termination was an administrative appeal and carried with it no right to a jury trial.<sup>65</sup> The court determined that the superintendent of the Dillingham city schools had requested a bench trial and therefore waived his right to a jury trial.<sup>66</sup> The court also held that, even though the suit was filed more than thirty days after the termination, the superior court properly allowed the suit to proceed.<sup>67</sup> The superintendent was allowed to file the suit nine months after termination on a strict interpretation of Alaska Appellate Rule 602(a)(2),<sup>68</sup> which requires a claimant to appeal within thirty days of an agency's final order.<sup>69</sup> In this case, the superintendent was never informed that the decision was final or that he had thirty days to appeal, therefore relaxation of Rule 602(a)(2) was appropriate.<sup>70</sup>

In *Faulk v. Board of Equalization*,<sup>71</sup> the supreme court held that the Board of Equalization for the Kenai Peninsula Borough made inadequate findings in concluding that property should be valued at more than twice the amount paid for it approximately thirty days before the appraisal.<sup>72</sup> Faulk challenged the assessment as "improper and excessive," but the Board refused the appeal because Faulk had "not presented sufficient evidence."<sup>73</sup> The court

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60. *See id.* at 1074.

61. 16 U.S.C. § 1 (1994).

62. *Id.* §§ 3101-3233.

63. *See Alaska Wildlife Alliance*, 108 F.3d. at 1069-70.

64. 932 P.2d 757 (Alaska 1997).

65. *See id.* at 758-59.

66. *See id.* at 762-63.

67. *See id.*

68. ALASKA R. APP. P. 602(a)(2).

69. *See Kilmer*, 932 P.2d at 763.

70. *See id.*

71. 934 P.2d 750 (Alaska 1997).

72. *See id.*

73. *Id.* at 751.

held that the record did not sufficiently reflect the basis for the Board's decision so as to enable meaningful review and, therefore, remanded the matter to the Board to state the reasons for rejecting the appeal and some basis for evaluating the Board's decision-making process.<sup>74</sup>

In *Bruner v. Peterson*,<sup>75</sup> the supreme court held that a school may condition graduation on completion of a course not listed as required in the course catalog for persons who have fallen below the academic standards, where the catalog does not state that only the listed classes will be necessary for graduation and where the school follows its established procedures for hearing student grievances.<sup>76</sup> Peterson, head of the Admission and Retention Committee of the University of Alaska Anchorage's ("UAA") Nursing Program, required Bruner to pass an English class before re-enrolling in a nursing class Bruner had failed.<sup>77</sup> Although the English class was not listed as a requirement for the nursing program in the course catalog, the catalog did state that certain conditions may be placed on re-enrollment in required classes, subject to review of the faculty.<sup>78</sup> Bruner objected to this requirement, and met with the interim dean of the School of Nursing to discuss his objections.<sup>79</sup> After this meeting, the dean sent Bruner a letter affirming the Committee's decision and stating that this decision was the final decision of UAA.<sup>80</sup> The supreme court held that because the school had followed the procedures for addressing student grievances and because the course catalog indicated that additional work might be required of students who fall below academic standards, Bruner was afforded all the procedural requirements due and no breach of contract occurred.<sup>81</sup>

In *Szejner v. University of Alaska*,<sup>82</sup> the supreme court upheld the University of Alaska Anchorage's ("UAA") decision not to admit a student to the teacher certification program based on his past academic record.<sup>83</sup> Szejner had been expelled from a UAA graduate program and then readmitted on a probationary basis to finish his Master's degree.<sup>84</sup> Szejner then applied to the Teacher

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74. *See id.* at 752.

75. 944 P.2d 43 (Alaska 1997).

76. *See id.*

77. *See id.* at 45.

78. *See id.* at 45-46.

79. *See id.* at 46.

80. *See id.*

81. *See id.* at 48-49.

82. *See* 944 P.2d 481 (Alaska 1997).

83. *See id.* at 485.

84. *See id.* at 483.

Certification Program, to which he was not accepted.<sup>85</sup> The court rejected Szejner's argument that UAA improperly based his rejection on his expulsion from UAA in 1989, holding that subjective factors such as "motivation, maturity, and demonstrated humanitarian qualities are valid considerations in academic admissions decisions."<sup>86</sup> Finally, the court held that denying Szejner admission did not violate his due process rights because there was no "underlying charge of dishonesty or publication of reasons for such denial," and Szejner did not identify any property or liberty interest sufficient to invoke due process.<sup>87</sup>

In *Department of Transportation and Public Facilities v. Fairbanks North Star Borough*,<sup>88</sup> the supreme court held that the Department of Transportation and Public Facilities was not required to exhaust its administrative remedies prior to filing a declaratory action to challenge the validity of a property ordinance adopted by Fairbanks North Star Borough.<sup>89</sup> The supreme court concluded that because the Department's complaint did not allege any error in an administrative action, the doctrine of exhaustion of remedies was inapplicable.<sup>90</sup> The purpose of the doctrine<sup>91</sup> and the fact that the Department sought a judicial, as opposed to an administrative, remedy were reinforcing factors in the court's decision to reverse.<sup>92</sup>

In *Broeckel v. Department of Corrections*,<sup>93</sup> the supreme court held that an action for breach of contract against the Department of Corrections ("DOC") was properly dismissed for failure to exhaust administrative remedies.<sup>94</sup> The issue of whether the exhaustion of remedies doctrine was applicable to prison inmates' grievances was an issue of first impression in Alaska.<sup>95</sup> Although Broeckel attempted to resolve his grievance with the DOC infor-

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85. *See id.*

86. *Id.* at 485.

87. *Id.* (quoting *Phelps v. Washburn Univ. of Topeka*, 632 F. Supp. 455, 459 (D. Kan. 1986)).

88. 936 P.2d 1259 (Alaska 1997).

89. *See id.* at 1260.

90. *See id.* at 1262.

91. "[The] basic purpose of the exhaustion doctrine is to allow an administrative agency to perform functions within its special competence - to make a factual record, to apply its expertise, and to correct its own errors so as to moot judicial controversies." *Id.* at 1262 (quoting *Ben Lomond, Inc. v. Municipality of Anchorage*, 761 P.2d 119, 121-22 (Alaska 1988)).

92. *See id.* at 1262.

93. 941 P.2d 893 (Alaska 1997).

94. *See id.* at 900.

95. *See id.* at 896. The DOC inmate grievance procedure begins with informal procedures, progresses to formal proceedings, and culminates with an appeal to the regional director. *See id.* at 895.

mally before filing his claim, the court determined that Broeckel did not make a “good faith effort” to pursue his grievances internally because he failed to invoke DOC’s formal grievance procedure.<sup>96</sup>

Broeckel alleged that he should be excused from exhausting the administrative remedies because the formal grievance process would be futile.<sup>97</sup> The court rejected that argument because Broeckel failed to produce any facts indicating that the regional director, who would have heard the final appeal of the grievance, would be biased.<sup>98</sup> Furthermore, a general claim by Broeckel that all employees of the DOC are prejudiced and biased against inmate grievances was not sufficient to prove that pursuing every level of the DOC grievance procedure would have been futile.<sup>99</sup>

In *Alaska Wildlife Alliance v. Rue*,<sup>100</sup> the supreme court held that time sheets of hours worked for a public employer are public records subject to disclosure under the Public Records Act,<sup>101</sup> but that the time sheets could be withheld where threats upon the public employees’ lives created an expectation of privacy such as to create a protected right to privacy under the Alaska Constitution.<sup>102</sup> The Alaska Wildlife Alliance (“AWA”) sought, among other things, time sheets maintained by the Alaska Department of Fish and Game of its employees working on the Department’s wolf control program.<sup>103</sup> The Department refused to disclose the documents, and the Commissioner of the Department upheld the decision.<sup>104</sup> AWA appealed to the superior court, which affirmed the Department’s decision.<sup>105</sup> The supreme court ruled, as a matter of first impression, that time sheets of public employers are subject to the Public Records Act, and therefore must be disclosed.<sup>106</sup> Furthermore, it held that these records are not protected from disclosure as confidential personnel records under Alaska Statutes section 39.25.080.<sup>107</sup> However, the court held that there was an expectation of privacy concerning the records where employees working on the wolf control program and their families had re-

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96. *Id.* at 896 (quoting *Casey v. City of Fairbanks*, 670 P.2d 1133, 1136-37 (Alaska 1983)).

97. *See id.* at 897-98.

98. *See id.* at 898.

99. *See id.*

100. 948 P.2d 976 (Alaska 1997).

101. ALASKA STAT. §§ 09.25.100-.220 (Michie 1996).

102. *See Alaska Wildlife Alliance*, 948 P.2d at 980.

103. *See id.*

104. *See id.*

105. *See id.*

106. *See id.*

107. *See id.*; ALASKA STAT. § 39.25.080 (Michie 1996).

ceived death threats, and that this expectation created a constitutionally protected right to privacy under the Alaska Constitution.<sup>108</sup> Finally, the court refused to find a compelling state interest in “verifying accountability of public funds” sufficient to overcome the employees’ constitutionally protected right to privacy at issue in this case.<sup>109</sup>

In *Department of Revenue, Permanent Fund Dividend Division v. Wilder*,<sup>110</sup> the supreme court held that despite active duty military service in Alaska, the failure to return to Alaska or request reassignment to Alaska prevented the establishment of residency and eligibility for permanent fund dividends (“PFDs”).<sup>111</sup> Wilder, an officer in the U.S. Air Force, was stationed in Alaska from 1975 through 1980.<sup>112</sup> While in Alaska, he obtained a driver’s license, registered to vote, opened Alaskan bank accounts, and obtained Alaska motor vehicle registrations.<sup>113</sup> After the Wilder family moved to Alabama in 1980, they only visited Alaska once in June 1989 for less than a week.<sup>114</sup> The Wilder family applied for and received PFDs through 1991, but in 1992 was notified by the Department of Revenue that their PFD applications had been denied for 1989, 1990, and 1991.<sup>115</sup> After a formal hearing, the Department affirmed the denials, finding the Wilders had not demonstrated an intent “to return and remain in Alaska permanently.”<sup>116</sup> The supreme court held that Wilder’s absence from the state for longer than five years established a presumption of ineligibility.<sup>117</sup>

In *Crum v. Stalnaker*,<sup>118</sup> the supreme court held that the Division of Retirement and Benefits was equitably estopped from denying an application for unused sick leave credit that was received two and a half months after the statutory deadline.<sup>119</sup> The court noted that the following four elements are required for the doctrine of equitable estoppel to apply to a governmental agency: “(1) the governmental body asserts a position by conduct or words; (2) the private party acts in reasonable reliance thereon; (3) the private party suffers resulting prejudice; and (4) the estoppel serves

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108. See *Alaska Wildlife Alliance*, 948 P.2d at 980.

109. *Id.* at 981.

110. 929 P.2d 1280 (Alaska 1997).

111. See *id.* at 1282-83.

112. See *id.* at 1281.

113. See *id.*

114. See *id.*

115. See *id.*

116. *Id.*

117. See *id.* at 1282.

118. 936 P.2d 1254 (Alaska 1997).

119. See *id.* at 1258.

the interest of justice so as to limit public injury.”<sup>120</sup> The court concluded that the Division’s failure to provide Crum with notice of the proper procedure for applying for unused sick leave credit and a form for doing so, constituted an “omission” that satisfied the first element of the doctrine of equitable estoppel.<sup>121</sup> Because the Division’s “Retiree Information Form” instructions regarding the unused sick leave credit procedure were poorly written and misleading, Crum’s failure to file a timely claim was reasonable for purposes of the second element.<sup>122</sup> The court concluded that the third and fourth elements were also met because the application of equitable estoppel in Crum’s case would serve “the interest of justice so as to limit public injury.”<sup>123</sup> Thus, the court reversed the superior court’s decision dismissing Crum’s claim and held that the Division should be estopped from rejecting the late application.<sup>124</sup>

In *Board of Marine Pilots v. Renwick*,<sup>125</sup> the supreme court held that deference should be afforded the Alaska Board of Marine Pilots when applying the Alaska Marine Pilotage Act and implementing regulations to suspend a marine pilot.<sup>126</sup> Renwick abandoned his ship as it reached a state of *extremis* because the crew refused to listen to him and because “he couldn’t afford [being aboard the ship when it grounded] with his license problem.”<sup>127</sup> The Board suspended Renwick under Alaska Statutes section 08.01.075(c)<sup>128</sup> because of this action and his intent to leave the ship if it ever moved near danger again.<sup>129</sup> The court held that the interpretation of title 12 of the Alaska Administrative Code sections 56.960(a) and 56.990(14), which require “a pilot to remain on board a vessel and assist in its navigation even if the master of the vessel countermands the pilot’s orders,”<sup>130</sup> was within the Board’s wide range of expertise. Accordingly, the court afforded the Board deference in its finding that Renwick should be suspended

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120. *Id.* at 1256 (citing *Wassink v. Hawkins*, 763 P.2d 971, 975 (Alaska 1988)).

121. *See id.* at 1258.

122. *See id.*

123. *Id.* (quoting *Municipality of Anchorage v. Schneider*, 685 P.2d 94, 97 (Alaska 1984)).

124. *See id.*

125. 936 P.2d 526 (Alaska 1997).

126. *See id.* at 532; *see also* ALASKA STAT. §§ 08.62.010-.190 (Michie 1996); ALASKA ADMIN. CODE tit. 12, §§ 56.960(a), 56.990(14) (1996).

127. *Renwick*, 936 P.2d at 529.

128. ALASKA STAT. § 08.01.075(c) (Michie 1996) (providing in part that “[a] board may summarily suspend a licensee from the practice of the profession before a final hearing is held or during an appeal if the board finds that the licensee poses a clear and immediate danger to the public health and safety”).

129. *See Renwick*, 936 P.2d at 530.

130. ALASKA ADMIN. CODE tit. 12, §§ 56.960(a), 56.990(14) (1996).

under its regulation.<sup>131</sup>

In *Department of Revenue, Child Support Enforcement Division v. Gerke*,<sup>132</sup> the supreme court held that the Alaska Child Support Enforcement Division (“CSED”) was not bound by court rules in administrative collection proceedings,<sup>133</sup> and therefore, the superior court could not condition its collections on a showing of good cause, pursuant to those rules and Alaska Statutes.<sup>134</sup> For over seven years, Gerke had failed to pay child support, accumulating arrearages of more than \$25,000.<sup>135</sup> CSED moved in superior court to reduce Gerke’s arrearages to judgment.<sup>136</sup> The superior court granted CSED’s motions, but, in a handwritten note included in its order, conditioned the collection of any arrearages older than five years to the “the requirements of the *Cross/Dean* decision,”<sup>137</sup> a case that required execution of judgment for purposes of judicial collection to conform to Alaska Statutes section 09.35.020 and Civil Rule 69(d).<sup>138</sup> The supreme court held that the court could not condition CSED’s administrative collections because the legislature has granted CSED independent powers of enforcement not subject to judicial rules.<sup>139</sup>

In *Thoma v. Hickel*,<sup>140</sup> the supreme court held that a public official may be held liable for violating state regulations by using information of criminal convictions from the Alaska Public Safety Information Network (“APSIN”) to discredit a person attempting to have the official recalled.<sup>141</sup> Thoma, an environmental activist, filed an ethics complaint against Governor Hickel and involved himself in an effort to recall the governor, which was endorsed by

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131. See *Renwick*, 936 P.2d at 531-32.

132. 942 P.2d 423 (Alaska 1997).

133. See *id.* at 426.

134. See *id.* at 427.

135. See *id.* at 424.

136. See *id.*

137. *Id.* at 425. The decisions to which the note refers are the consolidated cases heard by the Alaska Supreme Court in *State ex rel. Inman v. Dean*, 902 P.2d 1321 (Alaska 1995). See *Gerke*, 942 P.2d at 425 n.3. According to the party’s interpretation of the superior court’s order, the collection of child support would be conditioned on a showing of good cause why the arrearages more than five years old had not been previously collected. See *id.* at 425, 427.

138. See *id.* at 427; see also ALASKA STAT. § 09.35.020 (Michie 1996); ALASKA R. CIV. P. 69(d).

139. See *Gerke*, 942 P.2d at 426; see also ALASKA STAT. §§ 25.27.230-.260 (Michie 1996) (granting authority to CSED to issue administrative orders to collect child support by means of garnishing wages and attaching property).

140. 947 P.2d 816 (Alaska 1997).

141. See *id.* at 822.

the local chapter of the Sierra Club.<sup>142</sup> Shortly after Thoma filed his complaint, aides of the governor became privy to information about Thoma's prior criminal convictions accessible through APSIN.<sup>143</sup> This information was used in a letter to the Sierra Club, issued by Hickel's press secretary, to discredit Thoma's character.<sup>144</sup> Thoma subsequently filed suit claiming that his rights had been violated by Hickel and asserting state and federal claims.<sup>145</sup> The court held that Hickel was entitled only to qualified immunity in the case, protecting his acts only if they were done "in good faith and are not malicious or corrupt."<sup>146</sup> The court held that Thoma stated a valid claim for violation of state APSIN regulations because the Alaska Administrative Code restricts releasing information to persons other than law enforcement officials.<sup>147</sup> Because Thoma stated a claim for violation of state regulations, the court did not reach Thoma's state constitutional claims, holding that they were superfluous.<sup>148</sup> However, a divided court affirmed the superior court's summary judgment dismissing Thoma's federal claims, finding that no federal constitutional tort claim can be upheld where a party retaliates through protected speech.<sup>149</sup>

In *Rexford v. State*,<sup>150</sup> the court of appeals upheld the Department of Public Safety's authority to revoke administratively a minor's driver's license for possessing or consuming alcohol while under the age of twenty-one, even though a criminal prosecution may still be pending.<sup>151</sup> Rexford was arrested for possessing or consuming alcohol as a minor, in violation of Alaska Statutes section 04.16.050.<sup>152</sup> Based on Rexford's arrest, the Department of Public Safety used administrative procedures to revoke Rexford's driver's license.<sup>153</sup> Because criminal prosecution was still pending at the time his license was revoked, Rexford argued before the superior court that the revocation should be reversed based on the double jeopardy protections under the state and federal constitu-

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142. *See id.* at 818.

143. *See id.*

144. *See id.*

145. *See id.*

146. *Id.* (quoting *Aspen Exploration Corp. v. Sheffield*, 739 P.2d 150, 158 (Alaska 1987)).

147. *See id.* at 823; *see also* ALASKA ADMIN. CODE tit. 13, § 25.280 (1996).

148. *See Thoma*, 947 P.2d at 824, 827.

149. *See id.* at 821. The equally divided court resulted in an affirmance of the decision of the trial court in accord with Alaska precedent. *See id.* at 824; *City of Kenai v. Burnett*, 860 P.2d 1233 (Alaska 1993).

150. 941 P.2d 906 (Alaska Ct. App. 1997).

151. *See id.*

152. *See id.*; ALASKA STAT. § 04.16.050 (Michie 1996).

153. *See Rexford*, 941 P.2d at 906.

tions.<sup>154</sup> A magistrate judge concluded that the Department of Public Safety could only use its regulatory authority to revoke Rexford's license if doing so "had a direct relation to the government's proper regulatory goal of making the highways safe,"<sup>155</sup> and that studies showing the high incidence of highway fatalities among young people established the necessary relation.<sup>156</sup> The court of appeals affirmed the decision of the magistrate on the ground that Rexford had not rebutted the magistrate's finding of a "valid administrative purpose" for revoking the license and therefore the revocation was not "punishment" under double jeopardy analysis, but a valid use of the state's regulatory powers.<sup>157</sup>

### III. BUSINESS LAW

In *Hanson v. Kake Tribal Corp.*,<sup>158</sup> the Alaska Supreme Court held that a Native corporation's "Financial Security Plan" was unauthorized by the Alaska Native Claims Settlement Act ("ANCSA")<sup>159</sup> in that it was not a social welfare program but merely a method of distributing corporate assets to certain shareholders.<sup>160</sup> The Kake Tribal Corporation had adopted a Financial Security Plan, which conferred benefits on the original shareholders who retained the 100 shares they were issued when the corporation was organized.<sup>161</sup> Hanson and other members of the corporation who were not among the original shareholders filed a class action, alleging the Plan unfairly discriminated against them.<sup>162</sup> The supreme court found that the stated purpose of the Plan was to ensure the financial security of the original shareholders, not to be charitable gifts.<sup>163</sup> The court determined that no provision in ANCSA authorized such a plan, thus the payments were illegal.<sup>164</sup>

The court also held that the class action suit was contractual in nature and was therefore governed by the six-year statute of limitations set forth in Alaska Statutes section 09.10.070,<sup>165</sup> and that a separate cause of action accrued with each payment,<sup>166</sup> as estab-

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154. *See id.*

155. *Id.* at 907.

156. *See id.*

157. *See id.*

158. 939 P.2d 1320 (Alaska 1997).

159. 43 U.S.C. §§ 1601-1629 (1994).

160. *See Hanson*, 939 P.2d at 1324.

161. *See id.* at 1322.

162. *See id.* at 1323.

163. *See id.* at 1324.

164. *See id.*

165. ALASKA STAT. § 09.10.070 (Michie 1996).

166. *See Hanson*, 939 P.2d. at 1325.

lished by *Bibo v. Jeffrey's Restaurant*.<sup>167</sup> Following from these holdings, the court stated that all claims payments made before the six-year period were time-barred but the minority tolling statute was properly applied to protect the cause of action for children, even for those who had competent custodians.<sup>168</sup>

The supreme court allowed the plaintiffs to proceed with a direct action, as opposed to a derivative suit, finding it unlikely that a derivative suit would be an adequate remedy.<sup>169</sup> The court remanded two issues for consideration by the superior court: determination of whether a lump sum payment of damages would be consistent with Alaska Statutes section 10.06.358<sup>170</sup> and whether a lump sum payment would impermissibly deplete the defendant's assets.<sup>171</sup> The supreme court affirmed the superior court's decision to restrict expansion of the class unless the plaintiffs agreed to reopen liability issues and payment of costs for wasted time.<sup>172</sup>

In *Alaska Continental v. Trickey*,<sup>173</sup> the supreme court held that a newly-formed corporation could advance claims once held by its dissolved predecessor corporation's shareholders, even though six years had passed between the dissolution of the first corporation and the formation of the second.<sup>174</sup> The court then ruled that this assignment need not be explicit under Alaska Statutes section 10.06.633(g),<sup>175</sup> since the shareholders in the new and the dissolved corporations were the same, and they impliedly had notice of the transfer.<sup>176</sup>

In *Carver v. Quality Inspection and Testing, Inc.*,<sup>177</sup> the supreme court affirmed the findings of the trial court in an action against a closely held corporation brought by one of the shareholders for alleged violations of the corporate dissolution statute.<sup>178</sup> Carver, one of three shareholders in a closely held corporation known as Quality Inspection and Testing, Inc. ("QIT") appealed from a judgment entered in his favor and alleged that the \$20,000 price placed on the corporation at dissolution was so low as to be erroneous.<sup>179</sup> The supreme court concluded that the trial court did

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167. 770 P.2d 290, 295-96 (Alaska 1989).

168. See *Hanson*, 939 P.2d at 1325-26.

169. See *id.*

170. ALASKA STAT. § 10.06.358 (Michie 1996).

171. See *Hanson*, 939 P.2d at 1328.

172. See *id.* at 1330.

173. 933 P.2d 528 (Alaska 1997).

174. See *id.* at 530.

175. ALASKA STAT. § 10.06.633(g) (Michie 1996).

176. See *Alaska Continental*, 933 P.2d at 532.

177. 946 P.2d 450 (Alaska 1997).

178. See *id.* at 452.

179. See *id.* at 453.

not err in relying on the valuation opinion of the defendant's expert.<sup>180</sup> The court also affirmed the trial court's finding that QIT had no significant goodwill and negative cashflow at dissolution.<sup>181</sup> It held that it was harmless error for the trial court "to base QIT's dissolution value on the amount of its initial start-up capital, instead of value at dissolution," since under the latter method Carver would have received nothing.<sup>182</sup> Finally, the court affirmed the trial court's determination that the defendant shareholders committed only harmless error by not notifying QIT's creditors of its dissolution because all of QIT's debts and assets were converted upon dissolution to a new closely held corporation created by the defendant shareholders.<sup>183</sup>

In *Bradford v. First National Bank of Anchorage*,<sup>184</sup> the supreme court held that withdrawing partners become sureties for partnership debts upon their withdrawal, and that, in the absence of evidence that the creditor impliedly discharged them from their obligations, the withdrawing partners are liable as sureties.<sup>185</sup> The Bradfords were members of a partnership that had extended a personal guarantee on a \$3 million debt held by First National Bank of Anchorage.<sup>186</sup> They withdrew from the partnership in 1985, relinquishing their interest in return for real property.<sup>187</sup> In February 1994, the partnership stopped making payments on the loan, and First National brought suit.<sup>188</sup>

Relying on surety law as set forth in the Restatement of Security<sup>189</sup> and *State v. McKinnon*,<sup>190</sup> the court determined that termination agreements in which one partner continues to uphold the obligations of the partnership while the other withdraws create a suretyship in the withdrawing partner.<sup>191</sup> The court determined that continuing partners assumed all obligations in return for adequate consideration, and rejected the argument that an agreement was necessary to establish a suretyship.<sup>192</sup> The court held that a suretyship is discharged only if the creditor consents to material

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180. *See id.* at 454.

181. *See id.*

182. *Id.* at 455.

183. *See id.* at 455-56.

184. 932 P.2d 256 (Alaska 1997).

185. *See id.* at 262.

186. *See id.* at 259.

187. *See id.*

188. *See id.*

189. RESTATEMENT OF SECURITY § 83(d) (1941).

190. 667 P.2d 1239 (Alaska 1983).

191. *See Bradford*, 932 P.2d at 260.

192. *See id.* at 261.

alterations in the nature or time of payment,<sup>193</sup> and an implied waiver by the creditor requires “direct, unequivocal conduct indicating purpose to abandon or waive the legal right.”<sup>194</sup> The court concluded that First National’s actions were consistent with an intent to hold the Bradfords liable for the debt.<sup>195</sup>

In *Alaska Marine Pilots v. Hendsch*,<sup>196</sup> the supreme court ruled that a licensed marine pilot may bring a private cause of action against a pilot organization that denies him membership.<sup>197</sup> Hendsch was a licensed marine pilot who contracted with defendant Boyd Enterprises, a dispatch service.<sup>198</sup> After Hendsch was terminated, he brought a breach of contract claim.<sup>199</sup> While Hendsch’s case was still pending, he applied for membership in a regional dispatch service, Alaska Marine Pilots (“AMP”), an organization with some of the same pilots as Boyd Enterprises.<sup>200</sup> AMP refused Hendsch’s application, and he added AMP to his suit, alleging that AMP wrongly denied him membership in the pilot organization in violation of Alaska Statutes section 08.62.175(c)<sup>201</sup> and intentionally interfered with prospective economic advantage.<sup>202</sup> Hendsch was awarded judgment on all of his claims.<sup>203</sup> The supreme court held that section 08.62.175(c) implies a private cause of action because there are “no other apparent remedies” available to Hendsch, “a private right of action will not interfere with governmental enforcement” of the statute, and providing a private right will not “unduly burden the courts.”<sup>204</sup> However, the court also held that Hendsch did not have a claim of intentional interference with prospective economic advantage against AMP because AMP’s actions did not involve any third person with whom Hendsch could have had a relationship with which to gain economic advantage.<sup>205</sup>

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193. *See id.* at 262.

194. *Id.* (quoting *Airoulofski v. State*, 922 P.2d 889, 894-95 (Alaska 1996)).

195. *See id.* at 262.

196. 950 P.2d 98 (Alaska 1997).

197. *See id.* at 105.

198. *See id.* at 101.

199. *See id.* at 102.

200. *See id.*

201. ALASKA STAT. § 08.62.175(c) (Michie 1996). Section 08.62.175(c) states that “a pilot organization . . . shall . . . be open to membership by all persons licensed under this chapter to pilot vessels in the pilotage region in which the organization is recognized.”

202. *See Alaska Marine Pilots*, 950 P.2d at 102-03.

203. *See id.* at 103.

204. *Id.* at 105.

205. *See id.* at 106.

In *Alaska Democratic Party v. Rice*,<sup>206</sup> the supreme court upheld an oral promise under the doctrine of promissory estoppel, in spite of the Statute of Frauds, where there was reasonable reliance on the promise and injustice could be avoided only by enforcement of the promise.<sup>207</sup> In so doing, the court effectively adopted Section 139 of the Restatement (Second) of Contracts.<sup>208</sup> Rice was promised a two-year position with the Alaska Democratic Party as executive director and, based on this promise, she quit her job working for the Maryland Democratic Party and moved to Alaska.<sup>209</sup> However, the job failed to materialize.<sup>210</sup> The court found that the Party could have reasonably expected Rice to act based on its promise and that her reliance also was reasonable.<sup>211</sup> Furthermore, the court stated that “the jury could reasonably find that Rice would be a victim of injustice without an award of damages . . . .”<sup>212</sup> Because Rice met the clear and convincing proof standard within the Restatement, she was awarded damages based on her reliance on the broken promise.<sup>213</sup>

In *Davis v. Dykman*,<sup>214</sup> the supreme court held that an injured party’s letter to an insurer was too indefinite about the calculation of attorney’s fees to constitute a valid settlement offer and, therefore, the insurer’s acceptance did not form a settlement contract.<sup>215</sup> The supreme court rejected Dykman’s argument that a method for calculating attorney’s fees was implicit in Davis’s letter.<sup>216</sup> The court also refused to add terms to the letter according to the reasonable expectations of the parties because the court determined that the parties did not agree to the projected verdict, an essential term.<sup>217</sup> Concluding that a contract to negotiate is unenforceable because it contains no basis for a court to determine the existence of a breach or an appropriate remedy, the supreme court rejected Dykman’s argument that the parties had at least agreed to negotiate.<sup>218</sup>

In *Diksen v. Troxell*,<sup>219</sup> the supreme court held that an issue of

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206. 934 P.2d 1313 (Alaska 1997).

207. *See id.* at 1317.

208. *See id.* at 1316; RESTATEMENT (SECOND) OF CONTRACTS § 139 (1981).

209. *See Alaska Democratic Party*, 934 P.2d at 1315.

210. *See id.*

211. *See id.* at 1317.

212. *Id.*

213. *See id.*

214. 938 P.2d 1002 (Alaska 1997).

215. *See id.* at 1006.

216. *See id.* at 1007.

217. *See id.*

218. *See id.* at 1008.

219. 938 P.2d 1009 (Alaska 1997).

fact existed as to whether a transfer agreement included a promise to reconvey a fishing permit, which would render it illegal pursuant to Alaska Statutes section 16.43.150(g),<sup>220</sup> or whether the transfer was a sale, in which case the transferor might be entitled to collect damages for breach of contract.<sup>221</sup> The court found that both parties had made evidentiary admissions that conflicted with their legal positions, and that these admissions created a genuine issue of fact.<sup>222</sup> The evidence that Diksen's transfer of a limited entry permit to Troxell was a lease included Diksen's characterization of the transaction as such, as well as Diksen's deposition testimony that the permit was to revert to her if Troxell decided to stop using it for the purposes of fishing.<sup>223</sup> However, Troxell testified that it was his understanding that the permit would never revert to Diksen, providing evidence that the transfer was a sale.<sup>224</sup> Because of this conflicting testimony, the court concluded that a genuine issue of fact existed and ordered that the case be remanded to determine whether the parties' transfer agreement contained an illegal term.<sup>225</sup>

In *Nautilus Marine Enterprises Inc. v. Valdez Fisheries Development Ass'n*,<sup>226</sup> the supreme court held that in disputes concerning performance under a contract that limits the parties' expectations as to quantity, extrinsic evidence concerning the historic availability of the product to be supplied is irrelevant, and thus properly excluded by the trial court.<sup>227</sup> Nautilus entered into a contract with Valdez to buy up to 50,000 salmon a day, as available during the 1993 fishing season.<sup>228</sup> Under the terms of the contract, Nautilus would pay Valdez within forty-eight hours of delivery, and failure to pay was grounds for suspending the contract until payment was made.<sup>229</sup> While the contract was in effect, disputes arose involving the payments made to Valdez, and Valdez sued, with Nautilus counterclaiming for breach of contract.<sup>230</sup> The supreme court held that the extrinsic evidence relating to the average availability of salmon in years past was not relevant because the agreement was not an output contract, but rather one that imposed a quantity

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220. ALASKA STAT. § 16.43.150(g) (Michie 1996) (providing that an entry permit may not be transferred).

221. See *Diksen*, 938 P.2d at 1012-13.

222. See *id.* at 1013.

223. See *id.* at 1012.

224. See *id.*

225. See *id.* at 1012-13.

226. 943 P.2d 1201 (Alaska 1997).

227. See *id.*

228. See *id.* at 1202.

229. See *id.*

230. See *id.*

limitation of 50,000 fish.<sup>231</sup>

In *Little Susitna Construction Co. v. Soil Processing, Inc.*,<sup>232</sup> the supreme court held that a trial court may properly allow a jury to interpret a “turn-key” provision of a lease to determine the lease’s factual meaning.<sup>233</sup> Little Susitna Construction Company, Inc. (“LSC”) entered a “turn-key” lease agreement with Soil Processing, Inc. (“SPI”) for the use of soil-remediation equipment in order to complete a government contract.<sup>234</sup> The equipment was leased “at the turn-key price of \$44.00 per ton” of processed soil.<sup>235</sup> LSC experienced several delays causing the project to commence during the winter months, at which time the equipment suffered breakdowns due to the cold weather, which in turn caused costly delays to LSC.<sup>236</sup> LSC refused to pay SPI for the use of the equipment, claiming that SPI was responsible for the costs incurred by the equipments’ failure, repair, and delays.<sup>237</sup> SPI sued for breach of contract.<sup>238</sup> The trial court found that both parties had different interpretations of a “turn-key” provision, and allowed the jury to decide the factual meaning of the term.<sup>239</sup> The supreme court held that even though “turn-key” is accepted as meaning “all risks assumed by the contractor” in some areas of case law, the meaning of the provision in equipment lease agreements is unsettled, and the trial court may properly allow a jury to resolve the contract’s ambiguity.<sup>240</sup> The court found that the evidence presented at trial supported a finding that the contract’s meaning was in fact ambiguous, and therefore refused to disturb the jury’s special verdict.<sup>241</sup>

#### IV. CIVIL PROCEDURE

##### A. Costs and Attorney’s Fees

In *D.L.M. v. M.W.*,<sup>242</sup> the Alaska Supreme Court held that the superior court’s “Findings of Fact and Conclusions of Law” in an adoption matter constituted a final judgment sufficient to begin

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231. *See id.* at 1203-04.

232. 944 P.2d 20 (Alaska 1997).

233. *See id.*

234. *See id.* at 22.

235. *Id.*

236. *See id.*

237. *See id.*

238. *See id.*

239. *See id.*

240. *Id.* at 23-25.

241. *See id.* at 25.

242. 941 P.2d 900 (Alaska 1997).

tolling the time in which motions for costs must be filed.<sup>243</sup> M.W. was involved in custody litigation with the grandparents of his child, who were seeking to adopt the child.<sup>244</sup> In May 1994, at the close of the adoption trial, the superior court denied the adoption petition and entered written "Findings of Fact and Conclusions of Law."<sup>245</sup> The grandparents sought review, and the supreme court vacated the custody order and affirmed the dismissal of the adoption proceedings.<sup>246</sup> On January 3, 1995, the superior court entered final judgment on the dismissal of the adoption petition, and M.W. filed a motion for costs and attorney's fees that same day.<sup>247</sup> The supreme court held that M.W.'s motion for costs was time-barred because it did not come within ten days of the court's final disposition on the merits.<sup>248</sup> The supreme court found that the "Findings of Fact and Conclusions of Law" was a "final judgment" for the purpose of the time limitation because it disposed of the case and made the case ready for appeal, despite the fact that the court's order was not labeled formally as a "final judgment."<sup>249</sup>

In *Alaska Center for the Environment v. State*,<sup>250</sup> the supreme court held that the Alaska Center for the Environment ("ACE") was the "prevailing party" because it achieved the "principal relief" sought by its litigation and therefore was entitled to recovery of attorney's fees.<sup>251</sup> The underlying dispute was a response to a settlement agreement issued by the state legislature to resolve a land dispute regarding federal land granted by the United States Congress to the territory of Alaska in 1956 as a public trust for the benefit of the state's mental health program.<sup>252</sup> Although ACE prevailed on only two of the eleven issues raised in its motion for summary judgment, it succeeded in defeating the settlement agreement, the main relief it desired.<sup>253</sup> However, the superior court denied ACE's request for attorney's fees finding that it was not the "prevailing party" because it prevailed only on two of the eleven issues and the two issues were neither the most important issues in the case nor could they be characterized as the "main issue."<sup>254</sup>

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243. *See id.* at 902-03.

244. *See id.* at 901.

245. *See id.*

246. *See id.*

247. *See id.* at 902.

248. *See id.* at 902-03.

249. *See id.*

250. 940 P.2d 916 (Alaska 1997).

251. *See id.* at 922.

252. *See id.* at 917-18.

253. *See id.* at 921-22.

254. *See id.* at 920.

The supreme court reversed, holding that ACE was the “prevailing party” because it achieved the rejection of the settlement agreement, the “principal relief” sought.<sup>255</sup> Rejecting the state’s argument “that prevailing party status depends on whether a party’s legal arguments ‘directly,’ ‘primarily,’ or necessarily cause the court’s favorable decision,” the supreme court remarked that the superior court “should have asked the simpler and more objective question of whether ACE obtained the relief it sought.”<sup>256</sup>

In *Hughes v. Foster Wheeler Co.*,<sup>257</sup> the supreme court awarded attorney’s fees and costs, under Civil Rule 82,<sup>258</sup> for prevailing in an admiralty case on the basis of *forum non conveniens*.<sup>259</sup> Hughes argued that “admiralty law does not provide for awards of attorney’s fees and costs,”<sup>260</sup> but the court rejected that argument by deciding that the doctrine of *forum non conveniens* “‘has long been a doctrine of general application.’”<sup>261</sup> The court rejected the argument that the award of attorney’s fees and costs would damage the uniformity required under admiralty law.<sup>262</sup> Despite the fact that the case was not adjudicated on its merits, the court held that Foster Wheeler was the prevailing party within the terms of Civil Rule 82.<sup>263</sup>

In *Fairbanks Fire Fighters Ass’n, Local 1324 v. City of Fairbanks*,<sup>264</sup> the supreme court denied the firefighters’ request for reasonable attorney’s fees incurred in acquiring an injunction because the court found that the city did not act in bad faith and that the firefighters were not public interest litigants.<sup>265</sup> During collective bargaining, the city of Fairbanks had unilaterally reduced the number of firefighters from eight to six for each twenty-four hour shift based on budgetary constraints.<sup>266</sup> The firefighters acquired a preliminary injunction to thwart this action based on the serious threat of harm to both the public and the firefighters, and consequently the city rescinded the staffing cuts.<sup>267</sup> Although the court found that this conduct could possibly constitute bad faith on the

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255. *See id.* at 921-22.

256. *Id.*

257. 932 P.2d 784 (Alaska 1997).

258. ALASKA R. CIV. P. 82.

259. *See Hughes*, 932 P.2d at 786.

260. *Id.*

261. *Id.* at 787 (quoting *American Dredging Co. v. Miller*, 510 U.S. 443, 450 (1994)).

262. *See id.* at 789-90.

263. *See id.* at 791.

264. 934 P.2d 759 (Alaska 1997).

265. *See id.* at 762-63.

266. *See id.* at 760-61.

267. *See id.* at 761.

part of the city, the “evidence [did] not compel [the court] to conclude that the superior court’s finding that the [c]ity did not act in bad faith was clearly erroneous.”<sup>268</sup>

The court also did not qualify the firefighters as a public interest litigant.<sup>269</sup> The court stated that a party must satisfy the following four requirements to qualify as a public interest litigant: the case is designed to effectuate strong public policies; numerous people would benefit from a successful lawsuit; only a private party could have been expected to bring the lawsuit; and the party would have sufficient economic incentive to file suit even if the action involved only narrow issues lacking general importance.<sup>270</sup> Because the firefighters had a “direct economic stake in the action,” based on the fact that they would receive more overtime payments, they could not qualify as public interest litigants even if the litigation was motivated in part by safety concerns.<sup>271</sup>

In *Grimes v. Kinney Shoe Corp.*,<sup>272</sup> the supreme court held that the prevailing employer/defendant in an Alaska Wage and Hour Act (“AWHA”)<sup>273</sup> case was not entitled to recover attorney’s fees and costs under former Alaska Statutes section 23.10.110(c) or Civil Rule 82.<sup>274</sup> Prior to the 1995 amendments, section 23.10.110(c) provided that prevailing plaintiffs should be awarded attorney’s fees and costs, but was silent as to whether prevailing defendants may be awarded costs and fees.<sup>275</sup> Because there was no statutory authority to the contrary, Kinney argued that Civil Rule 82, which provides that “the prevailing party in a civil case shall be awarded attorney’s fees,” allows an award of attorney’s fees to prevailing defendants in an AWHA case.<sup>276</sup> Rejecting Kinney’s argument, the court concluded that “analogous case law and the plain language” of section 23.10.110(c) suggest that, prior to the 1995 amendments, a prevailing defendant was not entitled to attorney’s fees and costs in an action under section 23.10.110(c), nor is a defendant entitled to an award under Civil Rule 82.<sup>277</sup> The 1995 amendments to section 23.10.110(c), providing for fees and costs to a prevailing defendant in an action under AWHA, did not

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268. *Id.* at 762.

269. *See id.* at 764.

270. *See id.* at 763.

271. *Id.* at 763-64.

272. 938 P.2d 997 (Alaska 1997).

273. ALASKA STAT. §§ 23.10.050-.150 (Michie 1996).

274. *See Grimes*, 938 P.2d at 1001; ALASKA STAT. § 23.10.110(c) (Michie 1994); ALASKA R. CIV. P. 82.

275. *See Grimes*, 938 P.2d at 998.

276. *Id.* at 999 (quoting ALASKA R. CIV. P. 82).

277. *Id.* at 1001.

support Kinney's argument because the amendment provides an award "only in the event of a frivolous or bad faith claim."<sup>278</sup>

In *Law Offices of Vincent Vitale, P.C. v. Tabbytite*,<sup>279</sup> the supreme court held that an attorney could not collect on an attorney's lien for fees accrued in winning a condemnation case under 25 U.S.C. § 410 for a Native Alaskan condemnee.<sup>280</sup> Tabbytite owned Indian allotment land upon which a road was unlawfully constructed.<sup>281</sup> The road was later annexed by the Municipality of Anchorage.<sup>282</sup> After decades of litigation, Anchorage finally acquired the road through formal condemnation, and Tabbytite was awarded \$165,962 in damages.<sup>283</sup> Vitale acted as Tabbytite's lawyer from 1976 to 1980, after which time he filed an attorney's lien for fees from the litigation proceeds.<sup>284</sup> Under Alaska Bar Rule 39,<sup>285</sup> the matter was heard by a fee arbitration panel, which awarded Vitale \$64,375.<sup>286</sup> The superior court refused to reduce Vitale's award to judgment on the grounds that 25 U.S.C. § 410, the statute governing Indian allotments, precluded funds from the sales of Indian allotment lands to be used for payment of any debt or claim.<sup>287</sup> The supreme court held that although Vitale was entitled to personal judgment based on the arbitration award,<sup>288</sup> the condemnation action was an "enforced sale" and, therefore, 25 U.S.C. § 410 prevented him from collecting his fees from the proceeds of the condemnation action.<sup>289</sup>

In *Department of Natural Resources v. Tongass Conservation Society*,<sup>290</sup> the supreme court held that a conservation society's attempt to recover attorney's fees and costs from an appeal challenging a land exchange agreement was a nonjusticiable political question.<sup>291</sup> The Tongass Conservation Society filed an administrative appeal to prevent a land exchange between the Department of Natural Resources and the Cape Fox Corporation.<sup>292</sup> Because the land value exceeded \$5 million, the exchange required legislative

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278. *Id.* at 1000.

279. 942 P.2d 1141 (Alaska 1997).

280. *See id.* at 1144; *see also* 25 U.S.C. § 410 (1994).

281. *See Law Offices of Vincent Vitale*, 942 P.2d at 1144.

282. *See id.*

283. *See id.* at 1145.

284. *See id.*

285. ALASKA BAR R. 39; *see* ALASKA STAT. §§ 09.43.120-.180 (Michie 1996).

286. *See Law Offices of Vincent Vitale*, 942 P.2d at 1145.

287. *See id.* at 1145-46.

288. *See id.* at 1146.

289. *Id.* at 1148-49.

290. 931 P.2d 1016 (Alaska 1997).

291. *See id.* at 1017-18.

292. *See id.* at 1016.

approval, but the bill died in committee and the parties rescinded the agreement.<sup>293</sup> After the rescission, Tongass moved to recover fees and costs, claiming it was the “prevailing party because the relief it sought had occurred [and] the appeal was a catalyst in bringing about the relief.”<sup>294</sup>

The supreme court agreed that Tongass’s goal in filing the appeal was to prevent the land exchange, and the goal was accomplished because the exchange was not approved, but found that the question of whether the appeal was a catalyst in producing the legislature’s inaction was a political question.<sup>295</sup> Relying on *Malone v. Meekins*,<sup>296</sup> which adopted the political question standards established by the U.S. Supreme Court in *Baker v. Carr*,<sup>297</sup> the court provided three reasons why the issue presented a political question.<sup>298</sup> First, requiring legislative approval for land exchanges of value in excess of \$5 million reflected a “textually demonstrable commitment of the issue to a coordinate political department.”<sup>299</sup> Furthermore, “[i]mputing a motive to the legislature . . . risks expressing a lack of respect for that branch of government.”<sup>300</sup> Finally, there were no “‘judicially discoverable and manageable standards’ which might be used to resolve the question as to why the legislature failed to take a particular action.”<sup>301</sup>

## B. Conflicts

In *McCaffrey v. Green*,<sup>302</sup> the Alaska Supreme Court determined that in child custody cases, a parent subject to personal jurisdiction on visitation and transportation issues was also subject to jurisdiction on child support claims.<sup>303</sup> Kerri McCaffrey and David Green were divorced in Texas in 1987.<sup>304</sup> In 1991, McCaffrey moved to Alaska with the children, and in 1994, Green moved to Oregon.<sup>305</sup> The final terms of the custody agreement, issued under a Texas court’s continuing jurisdiction, raised Green’s child support obligation, provided a detailed visitation schedule, and pro-

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293. *See id.* at 1016-17.

294. *Id.* at 1017.

295. *See id.* at 1017-18.

296. 650 P.2d 351 (Alaska 1982).

297. 369 U.S. 186 (1962).

298. *See Tongass*, 931 P.2d at 1019.

299. *Id.* (quoting *Malone*, 650 P.2d at 357).

300. *Id.* at 1019.

301. *Id.* (quoting *Baker*, 369 U.S. at 217).

302. 931 P.2d 407 (Alaska 1997).

303. *See id.* at 413.

304. *See id.* at 407.

305. *See id.*

vided for the sharing of transportation costs.<sup>306</sup> In May 1994, McCaffrey filed a complaint in the Alaska Superior Court for modification of the child support and transportation cost provisions of the decree, to which Green objected on the ground of a lack of personal jurisdiction.<sup>307</sup> The motion was denied by the superior court.<sup>308</sup>

The supreme court determined that the superior court had misapplied *Puhlman v. Turner*<sup>309</sup> and *Kulko v. Superior Court*<sup>310</sup> in finding no personal jurisdiction over Green.<sup>311</sup> The court found the following: both parents had moved across the continent, Alaska was the only state in which all of McCaffrey's claims could be litigated, and the Uniform Child Custody Jurisdiction Act,<sup>312</sup> which established Alaska jurisdiction to make a child custody determination if Alaska is the home state of the child at the time of the proceeding, had been enacted.<sup>313</sup> Finally, the court decided that assertion of jurisdiction was the most logical method to decide child support issues, because an Alaska court was already deciding custody and visitation issues.<sup>314</sup>

In *State v. Arnariak*,<sup>315</sup> the supreme court held that the federal Marine Mammal Protection Act ("MMPA")<sup>316</sup> did not preempt state law punishing activities associated with hunting walrus on a game sanctuary established by Alaska.<sup>317</sup> The Arnariaks were arrested for entering Round Island, part of the Walrus Islands State Game Sanctuary, without a license and unlawfully discharging a firearm.<sup>318</sup> Before trial, the Arnariaks moved to dismiss the charges on the grounds that the MMPA preempts the state law making their activities a crime.<sup>319</sup> Because the MMPA forbids states from "enforc[ing] . . . or attempt[ing] to enforce . . . any [s]tate law or regulation relating to the taking of any . . . marine mammal within the [s]tate,"<sup>320</sup> and specifically exempts some Alaska Natives from federal regulations when they hunt in certain

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306. *See id.*

307. *See id.*

308. *See id.* at 408.

309. 874 P.2d 291 (Alaska 1994).

310. 436 U.S. 84 (1978).

311. *See McCaffrey*, 931 P.2d at 409-12.

312. ALASKA STAT. §§ 25.30.010-.910 (Michie 1996).

313. *See McCaffrey*, 931 P.2d at 412.

314. *See id.* at 413.

315. 941 P.2d 154 (Alaska 1997).

316. 16 U.S.C. §§ 1361-1407 (1994).

317. *See Arnariak*, 941 P.2d at 158.

318. *See id.* at 156.

319. *See id.*

320. 16 U.S.C. § 1379(a).

circumstances,<sup>321</sup> the district court dismissed the charges against the Arnariaks, and the court of appeals affirmed.<sup>322</sup> The supreme court held that reading the MMPA to preclude states from prohibiting persons from entering state property to hunt would be an unconstitutional taking without condemnation.<sup>323</sup> Under the principle that statutes should be construed so as to avoid unconstitutionality, the court interpreted the MMPA as not precluding “the [s]tate from restricting access to or from prohibiting the discharge of firearms on state land.”<sup>324</sup> The court also cited legislative history of the MMPA, stating that the Act was not intended to prevent the use of game sanctuaries and that the primary purpose was to protect marine animals.<sup>325</sup> Finally, the court employed the “clear statement” doctrine, noting that there is a presumption against federal preemption in areas of traditional state control which, absent a clear and definite statement of Congress’s intent to preempt, will disfavor federal preemption.<sup>326</sup>

In *Hinde v. Provident Life and Accident Insurance Co.*,<sup>327</sup> the Ninth Circuit Court of Appeals held that Rule 38 of the Federal Rules of Appellate Procedure,<sup>328</sup> which permits attorney fee awards only if an appeal is frivolous, preempts Rule 508 of the Alaska Rules of Civil Procedure,<sup>329</sup> which would have permitted a fee award.<sup>330</sup> The court found that because “the Alaska rule was procedural, and not substantive,” it is preempted by Rule 38 in federal diversity cases.<sup>331</sup>

In *In re Durham*,<sup>332</sup> the federal district court decided to abstain from hearing a wrongful death claim based on state law and the federal Jones Act.<sup>333</sup> The estate of Santos had brought a wrongful death claim against Durham for negligently recruiting Santos to work as a commercial diver and failing to provide him with sufficient training.<sup>334</sup> Just before the close of discovery, Durham filed a Chapter 7 petition with the district court, which was

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321. See 16 U.S.C. § 1371(b).

322. See *Arnariak*, 941 P.2d at 156 (citing *State v. Arnariak*, 893 P.2d 1273, 1277 (Alaska Ct. App. 1995)).

323. See *id.* at 156-57.

324. *Id.* at 157.

325. See *id.*

326. See *id.* at 158 (citing *Totemoff v. State*, 905 P.2d 954, 966 (Alaska 1995)).

327. 112 F.3d 412 (9th Cir. 1997).

328. FED. R. APP. P. 38.

329. ALASKA R. CIV. P. 508.

330. See *Hinde*, 112 F.2d at 412.

331. *Id.*

332. 215 B.R. 876 (D. Alaska 1997).

333. See *id.* at 879-80; 46 U.S.C. § 688 (1994).

334. See *In re Durham*, 215 B.R. at 877.

transferred to U.S. Bankruptcy Court in accordance with local rules.<sup>335</sup> Santos's state court litigation was allowed to proceed but Durham removed the action to federal district court.<sup>336</sup> In response, Santos requested that the federal court abstain from hearing the claim.<sup>337</sup>

Durham argued that abstention was improper because the action depended on federal law.<sup>338</sup> He contended that "the gravamen of Santos'[s] action is a wrongful death claim by a seaman arising on the high seas."<sup>339</sup> The court noted that there is a strong policy against removal to federal court of a maritime claim and that Jones Act claims are not removable to federal court.<sup>340</sup> Therefore, if Santos's claims were based on state tort law, the action was properly removed but the district court would abstain.<sup>341</sup> On the other hand, if Santos's claims were in fact Jones Act claims, then removal was improper and the case would be remanded to the state.<sup>342</sup> Regardless, the federal district court declined to retain jurisdiction over the issue.<sup>343</sup>

### C. Timeliness of Prosecution and Appeal

In *Metcalf v. Felec Services*,<sup>344</sup> the Alaska Supreme Court held that the superior court abused its discretion by dismissing an appeal from an administrative agency due to lack of prosecution despite the fact that the brief was filed after the court-ordered deadline.<sup>345</sup> The court found an abuse of discretion because Metcalf's rationale for missing the deadline was "interrelated with the substantive appellate issues he was attempting to raise," and because Felec Services did not show that they would have been prejudiced by the delay.<sup>346</sup> The court concluded that the harsh remedy of dismissal was justified only if the movant showed some "controlling

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335. *See id.*

336. *See id.* at 878. Federal law allows for removal of a civil action brought in a state court if the district courts have original jurisdiction. *See* 28 U.S.C. § 1441(a)-(b) (1994). Section 157 allows wrongful death claims to be tried in the district court in which the bankruptcy case is pending. *See id.* § 157(b)(5).

337. *See In re Durham*, 215 B.R. at 878. Federal law allows for a district court to abstain from hearing a "particular proceeding arising under title 11 or arising in or related to a case under title 11." 28 U.S.C. § 1334(c)(1).

338. *See In re Durham*, 215 B.R. at 879.

339. *Id.*

340. *See id.*

341. *See id.* at 880.

342. *See id.*

343. *See id.*

344. 938 P.2d 1023 (Alaska 1997).

345. *See id.* at 1025.

346. *Id.*

principle, such as need to punish the wrongdoer, deter like conduct, preserve the integrity of the fact finding process, or protect the dignity of the court.<sup>347</sup> The fact that the superior court judge had already received Metcalf's brief when he made his decision to dismiss the case mitigated against the need to impose a strict and harsh result.<sup>348</sup> Because no prejudicial affect was shown and the delay did not work in Metcalf's favor, the court vacated the judgment and remanded.<sup>349</sup>

In *Mundt v. Northwest Explorations, Inc.*,<sup>350</sup> the supreme court held that the superior court erred by refusing to permit a grantee of land to intervene in a post-judgment motion to quiet title to land in which the grantee had a partial interest.<sup>351</sup> Northwest Explorations Inc. filed a motion to quiet title to parcels it had received from Ashbrook in a settlement agreement and to invalidate all deeds conveying those parcels to any parties other than itself.<sup>352</sup> The superior court granted Northwest's motion and issued an order over Ashbrook's objections.<sup>353</sup> Because the order invalidated deeds conveying parcels from Ashbrook to Mundt, Mundt sought to intervene by filing a motion for reconsideration.<sup>354</sup> The supreme court concluded that the superior court's denial of Mundt's motion to intervene was erroneous because her application was timely and Ashbrook did not adequately represent Mundt's interests.<sup>355</sup> Because it was unclear whether Mundt knew that her parcels would be affected prior to the post-judgment order, the fact that she waited to file a motion to intervene until after the order was issued did not make her motion to intervene untimely.<sup>356</sup> The supreme court noted that in order to intervene, Mundt must also show that she had an interest in the subject matter of the post-judgment that would be impaired as a consequence of the action and that her interest had not been adequately represented by any existing party.<sup>357</sup> Because the supreme court concluded that Ashbrook's interests were not coextensive with Mundt's and he had no particular interest in arguing for her interests, it reversed the superior court's denial of Mundt's motion and remanded with instructions to consider

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347. *Id.*

348. *See id.*

349. *See id.*

350. 947 P.2d 827 (Alaska 1997).

351. *See id.* at 829.

352. *See id.*

353. *See id.*

354. *See id.*

355. *See id.* at 830.

356. *See id.*

357. *See id.* at 829.

her claim on its merits.<sup>358</sup>

In *Bauman v. Day*,<sup>359</sup> the supreme court held that courts must liberally grant motions to amend complaints where the complaining party does not act with “undue delay, bad faith, or dilatory motive.”<sup>360</sup> Bauman and his wife sued Day over land they purchased from him that was allegedly covered with permafrost, claiming Day had made a verbal guarantee that the land was free of permafrost.<sup>361</sup> The superior court dismissed their contract claim because the statute of limitations had run, but the supreme court reversed and remanded, holding that the statute of limitations did not commence until discovery of permafrost.<sup>362</sup> In their amended complaint, the Baumans alleged breach of contract, but failed to ask for relief.<sup>363</sup> The supreme court held that the district court erred in not granting the motion to amend the complaint because Alaska Civil Rule 15(a)<sup>364</sup> sets a liberal policy for amending pleadings not made with “undue delay, bad faith, or dilatory motive.”<sup>365</sup>

#### D. Miscellaneous

In *Plumber v. University of Alaska Anchorage*,<sup>366</sup> the Alaska Supreme Court held that a previously settled lawsuit in federal district court bars a subsequent action in state court based on a dispute between the same parties about the same cause of action.<sup>367</sup> Applying the doctrine of res judicata, the court dismissed a grievance against the University of Alaska even though the theories of liability were different.<sup>368</sup> Plumber challenged the denial of a salary increase due to a prior unfavorable evaluation, which she had challenged in federal court as retaliatory and for which she had received a settlement award.<sup>369</sup> Although “[i]t is true that res judicata does not act as a bar when the conduct giving rise to the second suit occurs after the conclusion of the first suit,”<sup>370</sup> the basis for the grievance remained the same in Plumber’s case and her settlement

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358. *See id.* at 831.

359. 942 P.2d 1130 (Alaska 1997).

360. *Id.* at 1132 (quoting *Foman v. Davis*, 371 U.S. 178, 182 (1962)).

361. *See id.* at 1131.

362. *See id.*

363. *See id.*

364. ALASKA R. CIV. P. 15(a).

365. *Bauman*, 942 P.2d at 1132.

366. 936 P.2d 163 (Alaska 1997).

367. *See id.* at 166.

368. *See id.* at 167.

369. *See id.* at 164.

370. *Id.* at 167.

was compensation for her entire injury.<sup>371</sup> Plumber had a fair opportunity to litigate the issue in district court and her ignorance of the effect of her settlement was immaterial in applying *res judicata*.<sup>372</sup>

In *Nome Commercial Co. v. National Bank of Alaska*,<sup>373</sup> the supreme court allowed the National Bank of Alaska (“NBA”) to file an interpleader when there was a dispute over whether the NBA was liable for funds to two independent parties who each claimed ownership of a bank account.<sup>374</sup> The superior court held that for NBA to maintain an interpleader action, “the stakeholder [NBA] must not have incurred independent liability to any claimant.”<sup>375</sup> The supreme court rejected this reasoning, holding that “Civil Rule 22 eliminates the requirement that the stakeholder not be independently liable to a claimant.”<sup>376</sup> The supreme court allowed the interpleader because “Civil Rule 22 permits a stakeholder to interplead funds whenever the stakeholder may be exposed to ‘double or multiple liability’” as long as NBA reasonably and in good faith believed that there were adverse claims to the fund.<sup>377</sup> Because it was not clear which party represented Nome Commercial (and had authority over the funds), the interpleader was allowed to protect the innocent stakeholder, NBA.<sup>378</sup>

In *Exxon Shipping Co. v. Airport Depot Diner, Inc.*,<sup>379</sup> the Ninth Circuit Court of Appeals held that a district court may not issue a declaratory judgment to preempt a state court’s ruling on issues of federal maritime law.<sup>380</sup> The case involved the claims of about 4,000 plaintiffs comprising “[n]umerous commercial fishermen, local business owners, state and local governments, and Native American corporations, among others” who brought claims against Exxon for damages resulting from the 1989 *Exxon Valdez* oil spill.<sup>381</sup> Exxon filed for declaratory judgment that would bind all parties, whether they brought their claim in federal or state court.<sup>382</sup> The district court had granted Exxon summary judgment on certain issues, and Exxon’s declaratory action sought to bind

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371. *See id.* at 168.

372. *See id.* at 167.

373. 948 P.2d 443 (Alaska 1997).

374. *See id.* at 450.

375. *Id.*

376. *Id.*

377. *Id.* at 451.

378. *See id.* at 450-51.

379. 120 F.3d 166 (9th Cir. 1997).

380. *See id.* at 169.

381. *Id.* at 167.

382. *See id.*

the plaintiffs to those judgments.<sup>383</sup> Because most of the plaintiffs had become consolidated in a federal action, however, the court of appeals viewed the declaratory action as directed at specific plaintiffs who had been removed to district court but may still be remanded to state court.<sup>384</sup> The court held that the district court's grant of declaratory judgment was intended to preempt a potential state court ruling, and therefore was an abuse of discretion, since jurisdiction to review state court judgments lies exclusively in the state courts and the U.S. Supreme Court.<sup>385</sup>

In *Buster v. Greisen*,<sup>386</sup> the Ninth Circuit Court of Appeals held that Buster's state claim for misrepresentation by nondisclosure was improperly removed to federal court.<sup>387</sup> Buster had previously been found guilty of breaching a fiduciary duty pursuant to the Employee Retirement Income Security Act ("ERISA"),<sup>388</sup> and now alleged that he did not have notice that he was a fiduciary in that action.<sup>389</sup> The court found that ERISA did not preempt this particular state law claim and the federal court's ancillary jurisdiction could not be applied to prevent a "retaliatory lawsuit."<sup>390</sup> However, the court of appeals did uphold the district court's imposition of Rule 11 sanctions for a "frivolous" filing, despite lack of jurisdiction.<sup>391</sup>

## V. CONSTITUTIONAL LAW

### A. Due Process

In *City of North Pole v. Zabek*,<sup>392</sup> the Alaska Supreme Court held that a city employee did not get pre-termination due process when she was fired without warning, but that her post-termination appeal to the city personnel board cured the city's failure to provide a pre-termination hearing and provided her due process.<sup>393</sup> Zabek initially was informed of her dismissal by letter without a hearing, but she appealed to the city personnel board, which af-

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383. *See id.*

384. *See id.* at 168.

385. *See id.* at 169.

386. 104 F.3d 1186 (9th Cir. 1997).

387. *See id.* at 1187.

388. 29 U.S.C. §§ 1001- 1461(1994).

389. *See Thomas, Head & Greisen Employees Trust v. Buster*, 24 F.3d 1114 (9th Cir. 1994).

390. *Buster*, 104 F.3d at 1189.

391. *See id.* at 1190.

392. 934 P.2d 1292 (Alaska 1997).

393. *See id.* at 1298.

firmed the decision.<sup>394</sup> The court held that public employees who may be terminated only for just cause have a property interest in continued employment that is protected by federal and state due process limitations.<sup>395</sup> The court stated that, “[a]t a minimum, the employee must receive oral or written notice of the proposed discharge, an explanation of the employer’s evidence, and an opportunity to present his position.”<sup>396</sup> The city argued that there was no dispute over the dispositive facts, but the court found that this did not make “a summary termination without the constitutionally-mandated pre-termination hearing acceptable.”<sup>397</sup> However, the court decided that the error was removed when Zabek was given proper due process in her post-termination hearing, and therefore her claim for back pay without mitigation was awarded only for the time between her initial firing and her post-termination hearing.<sup>398</sup>

In *Bartlett v. State Commercial Fisheries Entry Commission*,<sup>399</sup> the supreme court held that an agency does not violate a party’s due process or equal protection rights in denying a permit and a hearing to applicants who submit their applications for the permits after the deadline where no material issue could be addressed in the hearing.<sup>400</sup> The Bartletts applied for fishing permits fourteen years after the deadline for the permits had passed, claiming that they had not filed earlier due to reliance on statements of an employee of the Commercial Fisheries Entry Commission (“CFEC”) who told them they would not be eligible for the permits.<sup>401</sup> The court rejected the Bartletts’ argument and held that a statutorily mandated end to the application process once the maximum number of permits had been issued effectively prevented CFEC from issuing permits to the Bartletts, thus no material issue existed and no hearing could be required in denying the permit.<sup>402</sup>

In *State v. Hazelwood*,<sup>403</sup> the supreme court held that the mens rea requirement for the crime of negligent discharge of oil could be satisfied under a civil negligence standard without a denial of defendant’s due process rights.<sup>404</sup> Both standards require negligence,

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394. *See id.* at 1295.

395. *See id.* at 1297.

396. *Id.* (quoting *Storrs v. Municipality of Anchorage*, 721 P.2d 1146, 1149 (1986)).

397. *Id.* at 1298.

398. *See id.* at 1298-1300.

399. 948 P.2d 987 (Alaska 1997).

400. *See id.* at 990.

401. *See id.* at 989-90.

402. *See id.* at 990.

403. 946 P.2d 875 (Alaska 1997).

404. *See id.* at 877.

although “[c]riminal negligence requires a greater risk.”<sup>405</sup> It basically “requires the jury to find negligence so gross as to merit not just damages but also punishment,” but “there is still no requirement that the defendant actually be aware of the risk of harm.”<sup>406</sup> The court relied on precedent to show “that a mental state of simple or ordinary negligence can support a criminal conviction.”<sup>407</sup> The court concluded that for this type of crime “the negligence standard is constitutionally permissible because it approximates the aim of the due process guarantee: an assurance that criminal penalties will be imposed only when the conduct at issue is something society can reasonably expect to deter.”<sup>408</sup>

In *Butler v. Dunlap*,<sup>409</sup> the supreme court held that the highly deferential standard of review of the Uniform Arbitration Act<sup>410</sup> applied to determinations made by the Bar Association Fee Arbitration Panel.<sup>411</sup> *Butler* challenged the standard of review applied by the superior court in upholding the Arbitration Panel’s decision to award an attorney’s fee refund, claiming the appropriate standard was the arbitrary and capricious standard applied to mandatory arbitration.<sup>412</sup> The supreme court held that *Butler*’s arguments of denial of due process were foreclosed by *Miller v. Purvis*,<sup>413</sup> in which the court held that the relevant limitations on the scope of judicial review were not a denial of due process.<sup>414</sup>

In *George v. State*,<sup>415</sup> the court of appeals upheld the constitutionality of a statute requiring prisoners to pay a statutory filing fee.<sup>416</sup> In July 1995, Alaska law was amended to require indigent prisoners to pay a filing fee “‘equal to 20[%] . . . of the average monthly deposits made to the prisoner’s [prison] account . . . or the average balance in that account,’” whichever was greater, so long as it did not exceed the normal filing fee.<sup>417</sup> *George* sought post-conviction relief in the superior court, and appealed the fee, claiming that it posed an unconstitutional burden.<sup>418</sup>

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405. *Id.*

406. *Id.* at 878.

407. *Id.* at 879; see *State v. Rice*, 626 P.2d 104 (Alaska 1981); *State v. Guest*, 583 P.2d 836 (Alaska 1978).

408. *Hazelwood*, 946 P.2d at 884.

409. 931 P.2d 1036 (Alaska 1997).

410. ALASKA STAT. §§ 09.43.010-.180 (Michie 1996).

411. See *Butler*, 931 P.2d at 1040.

412. See *id.* at 1037.

413. 921 P.2d 610 (Alaska 1996).

414. See *Butler*, 931 P.2d at 1039-40.

415. 944 P.2d 1181 (Alaska Ct. App. 1997).

416. See *id.* at 1190-91.

417. *Id.* at 1182 (quoting ALASKA STAT. § 09.10.010(d) (Michie 1996)).

418. See *id.*

George first challenged the statute on procedural due process grounds.<sup>419</sup> The statute authorized courts to waive the filing fee if the prisoner proved “‘exceptional circumstances.’”<sup>420</sup> First, the court found that the statute was not unconstitutionally vague, as it was clear that the phrase “exceptional circumstances” referred to circumstances other than imprisonment and indigency.<sup>421</sup> The court also rejected George’s argument that the statute required prisoners to demonstrate the merit of their claim before they would receive an exemption.<sup>422</sup> Although the law did require the prisoner to describe the nature of the action, it did not authorize denial of an exemption because a prisoner’s claim appeared to lack merit.<sup>423</sup>

George also attacked the validity of the statute on equal protection grounds, claiming an unconstitutional distinction between indigent non-prisoners (eligible for a full fee waiver) and indigent prisoners.<sup>424</sup> The court found that the distinction between prisoners and non-prisoners was constitutional, recognizing the large impact that prisoners’ lawsuits were having on the court system.<sup>425</sup> The court noted that, in fact, the prospect of litigation had actually become a recreational activity for prisoners.<sup>426</sup> For indigent non-prisoners, however, the litigation process represented a “significant intrusion on the person’s life . . . generally requir[ing] the person to spend hours away from their job, from their family, and from chores, errands, and social recreation.”<sup>427</sup> Placing a minimum filing fee requirement on indigent prisoners simply required them to make an economic decision about filing the lawsuit.<sup>428</sup> Finally, the court determined the filing fee did not effectively bar access to the courts, as alternative payment provisions did exist and the required fees were generally very modest.<sup>429</sup>

## B. Double Jeopardy

In *DeMario v. State*,<sup>430</sup> the Alaska Court of Appeals held that a subsequent increase of an imposed sentence due to a previous er-

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419. *See id.* at 1183-89.

420. *Id.* at 1183 (quoting ALASKA STAT. § 09.19.010(c)).

421. *See id.* at 1183.

422. *See id.* at 1185.

423. *See id.*

424. *See id.* at 1185-86.

425. *See id.* at 1187.

426. *See id.* at 1187-88.

427. *Id.* at 1188.

428. *See id.* at 1190.

429. *See id.*

430. 933 P.2d 558 (Alaska Ct. App. 1997).

ror in sentencing did not violate the defendant's right to protection against double jeopardy, but that the defendant was entitled to a new sentence hearing to reevaluate all the currently available information before imposing the increased sentence.<sup>431</sup> DeMario recognized that he had over a year's time left to serve in prison.<sup>432</sup> Due to a sentencing miscalculation during a probation revocation hearing, DeMario was ordered to serve 227 days and was informed by the judge that "as far as I can tell, this is it."<sup>433</sup> Five days later, the error was discovered and the longer sentence was imposed.<sup>434</sup> DeMario argued that the judge "had meaningfully imposed a lawful sentence . . . and that double jeopardy therefore barred any increase."<sup>435</sup> The court disagreed and applied Criminal Rule 36,<sup>436</sup> which can be used to correct errors in sentencing that arise from oversight or omission of the record, to increase DeMario's sentence to the correct amount.<sup>437</sup> However, the court of appeals found that the lower court erred in presuming that DeMario's admitted probation violation automatically warranted the imposition of all previously suspended incarceration.<sup>438</sup> The court ordered a new sentence hearing to consider all of the circumstances surrounding the offense, including the original offense, the offender, and the offender's intervening conduct.<sup>439</sup>

In *Davis v. Municipality of Anchorage*,<sup>440</sup> the court of appeals ruled that a civil *in rem* seizure of an automobile operated by an intoxicated driver did not run afoul of the double jeopardy clauses of the federal and Alaska Constitutions.<sup>441</sup> Davis was arrested for driving while intoxicated and refused to submit to a breath test.<sup>442</sup> Under former Anchorage Municipal Code section 9.28.026, a vehicle operated by an intoxicated driver or any driver who refused to submit to a breath test was subject to forfeiture as a public nuisance.<sup>443</sup> Davis argued that because seizure of the vehicle amounted to punishment for his acts of driving while intoxicated or refusing the breath test, the Municipality was barred from pur-

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431. *See id.* at 562.

432. *See id.* at 560 ("With all due respect, I, you know . . . I've got over a year, I don't want to come back.").

433. *Id.*

434. *See id.*

435. *Id.*

436. ALASKA R. CRIM P. 36.

437. *See DeMario*, 933 P.2d. at 561.

438. *See id.* at 562.

439. *See id.*

440. 945 P.2d 307 (Alaska Ct. App. 1997).

441. *See id.* at 308.

442. *See id.*

443. *See id.*

suings criminal charges against him by the double jeopardy clauses.<sup>444</sup>

Relying on precedent established by the U.S. Supreme Court, the court of appeals held it was clear that forfeiture of property in an *in rem* proceeding did not constitute punishment for double jeopardy purposes.<sup>445</sup> Using the analysis set forth by the U.S. Supreme Court in *United States v. One Assortment of 89 Firearms*,<sup>446</sup> the court determined that the vehicle forfeitures under the statute were *in rem* forfeitures and civil proceedings, "squarely aimed at 'owners who [were] culpable for the criminal misuse of [their vehicle],' and that . . . forfeiture . . . was based on proof that the vehicle was 'hazardous in the hands of this owner because either he use[d] it to commit crimes, or allow[ed] others to do so.'"<sup>447</sup> The court declined to interpret the Alaska double jeopardy clause differently than the federal clause.<sup>448</sup>

In *Erickson v. State*,<sup>449</sup> the court of appeals held that a defendant could lawfully be convicted of separate counts of sexual assault for each separate, distinct form of penetration within a single episode.<sup>450</sup> Erickson was convicted of four counts of sexual assault for actions that arose during a single episode but involved separate forms of sexual penetration.<sup>451</sup> The court upheld Erickson's conviction as being consistent with its decision in *Yearty v. State*<sup>452</sup> and declined to overrule that decision under standards governing when violations of two separate criminal statutes are merged and treated as one crime.<sup>453</sup> The court held that in cases of a single criminal statute being violated multiple times, no double jeopardy concern arises.<sup>454</sup>

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444. *See id.*

445. *See id.*

446. 465 U.S. 354 (1984). The analysis asked first whether the legislature intended proceedings under the forfeiture statute to be civil or criminal, and second whether the forfeiture proceedings were so punitive as to demonstrate that they were not truly civil in nature.

447. *Davis*, 945 P.2d at 308 (quoting *United States v. Ursery*, 116 S. Ct. 2135, 2150 (1996)).

448. *See id.* at 311.

449. 950 P.2d 580 (Alaska Ct. App. 1997).

450. *See id.* at 587.

451. *See id.* at 582.

452. 805 P.2d 987 (Alaska Ct. App. 1991) (holding that when a defendant commits different types of penetration during a single instance of sexual assault, the defendant may be convicted of separate counts of assault for each form of penetration).

453. *See Erickson*, 950 P.2d at 587.

454. *See id.* at 586-87.

### C. Right to Jury Trial

In *Turney v. State*,<sup>455</sup> the Alaska Supreme Court held that the Alaska jury tampering statute, Alaska Statutes section 11.56.590,<sup>456</sup> was not unconstitutionally overbroad or void for vagueness.<sup>457</sup> Turney, a citizen not implicated in a trial, contacted jury members during the trial, informed the jurors about the Fully Informed Jury Association, and encouraged them to call a hotline telling them “what their rights as jurors were.”<sup>458</sup> A grand jury indicted Turney for jury tampering under section 11.56.590.<sup>459</sup> Turney first argued that the statute was overbroad because “it criminaliz[ed] constitutionally protected speech” where Turney was not directly attempting to influence the decision of a jury, but was merely informing them of their “rights.”<sup>460</sup> The court held that the statutory language prohibiting communication intended “to influence a juror in his or her capacity as a juror in reaching a decision in a particular case”<sup>461</sup> was specific and limited to communication affecting the juror’s execution of job responsibilities, and therefore not constitutionally protected speech.<sup>462</sup> The statute sufficiently distinguished between speech directed at jurors in their official capacity and speech aimed at the general public.<sup>463</sup>

Turney then argued that the statute was unconstitutionally vague because it permitted arbitrary enforcement and did not provide adequate notice of prohibited conduct.<sup>464</sup> The court held that it would not invalidate a statute “‘unless there is some history of arbitrary or selective enforcement’” and that there was no evidence of improper prosecutorial discretion regarding section 11.56.590.<sup>465</sup> In dismissing Turney’s claim of inadequate notice, the court stated that “persons of common intelligence would not have to guess at [the statute’s] meaning and differ as to its application.”<sup>466</sup>

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455. 936 P.2d 533 (Alaska 1997).

456. ALASKA STAT. § 11.56.690 (Michie 1996).

457. *See Turney*, 936 P.2d at 536-37.

458. *Id.*

459. *See id.* at 538.

460. *Id.* at 539.

461. *Id.* at 540.

462. *See id.* at 541.

463. *See id.* at 540.

464. *See id.* at 542.

465. *Id.* at 544 (quoting *Holton v. State*, 602 P.2d 1228, 1237 (Alaska 1979)).

466. *Id.* at 543 (citing *Marks v. City of Anchorage*, 500 P.2d 644, 650 (Alaska 1972) (holding that a breach of the peace statute was overbroad)).

## D. Miscellaneous

In *Matanuska-Susitna Borough School District v. State*,<sup>467</sup> the Alaska Supreme Court held that differences in funding laws between regional educational attendance area school districts (“REAA”) and city and borough school districts did not violate the equal protection clause of the Alaska Constitution.<sup>468</sup> The plaintiffs challenged Alaska Statutes sections 14.11.100(a) and 14.17.025(a) and (d).<sup>469</sup> Section 14.11.100(a) provides for state reimbursement of payments made by boroughs and cities to retire debts incurred for school construction.<sup>470</sup> REAAs were not eligible for reimbursement.<sup>471</sup> Section 14.17.025(a) created a scheme to calculate local contributions to schools, the lesser of a four mill levy (a tax of four-tenths of 1%) on the full value of the taxable real and personal property in the district, or 35% of the district’s basic need for the preceding fiscal year, but part (d) stated they were not required in an REAA.<sup>472</sup>

The supreme court declined to undertake any equal protection analysis of the claims based on an adverse effect on educational opportunity or an overall disparity in school construction aid.<sup>473</sup> The plaintiffs failed to present any evidence that arguably showed their children were affected by the different funding schemes or that the students and taxpayers had been disadvantaged by the school construction laws.<sup>474</sup> Although the plaintiffs also failed to show they paid higher taxes as a result of the local contribution requirement, the court did discuss the basis for an equal protection claim because the plaintiffs presented evidence that their borough’s contribution requirement was equivalent to a \$5.69 million tax levy.<sup>475</sup> The court ultimately rejected this claim as well, finding (1) plaintiffs’ interests as taxpayers were not afforded much weight under equal protection analysis,<sup>476</sup> (2) the state’s objectives to “assure an equitable level of education opportunities” were legitimate,<sup>477</sup> and (3) as REAA’s were constitutionally unable to tax, REAA exemption from the local contribution requirement

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467. 931 P.2d 391 (Alaska 1997).

468. *See id.* at 394.

469. *See id.* at 395; ALASKA STAT. §§ 14.11.100(a), 14.17.025(a), (d) (Michie 1996).

470. *See* ALASKA STAT. § 14.11.100(a).

471. *See id.*

472. *See id.* § 14.17.025(a), (d).

473. *See Matanuska-Susitna Borough School District*, 931 P.2d at 396, 397.

474. *See id.*

475. *See id.* at 398.

476. *See id.* at 399.

477. *Id.* (quoting ALASKA STAT. § 14.17.220 (Michie 1996)).

bore a “fair and substantial relationship” to the goal of equitable educational opportunities.<sup>478</sup>

In *Municipality of Anchorage v. Gallion*,<sup>479</sup> the supreme court held that an action to ensure the financial solvency of a retirement plan by diverting surplus assets from other independent retirement plans violated the Alaska Constitution, and that attorney’s fees cannot be based on excess assets available to a retirement fund and not guaranteed to fund members.<sup>480</sup> The Municipality of Anchorage (“MOA”) by ordinance sought to divert surplus money from Plan I and Plan II of the Anchorage Police and Fire Retirement System (“APFRS”) in order to ensure the financial stability of Plan III, which had been determined to be underfunded.<sup>481</sup> MOA had a previous obligation to fund APFRS in order to ensure the programs’ financial soundness.<sup>482</sup> Gallion was a member of a class of Plan I and II members that brought suit against MOA, asking that the ordinance be declared null and void on the theory that funds were diverted so as to impair or diminish the APFRS’s ability to enhance benefits for Plan I and II members.<sup>483</sup>

The superior court held that the proposed ordinance violated section 7 of Alaska Constitution Article XII<sup>484</sup> by impairing the “accrued benefits” of the members of Plan I and Plan II.<sup>485</sup> It also awarded attorney’s fees based on a value of the hours billed by the attorney of the class.<sup>486</sup> The supreme court affirmed that the ordinance did in fact violate the Alaska Constitution by putting the financial integrity of Plan I and Plan II at risk in order to shore up Plan III and lessen MOA’s obligation to APFRS.<sup>487</sup> Because this “accrued benefit” was not in the surplus amount of the funds, but in the financial soundness of the system, the court also held that attorney’s fees should be based on a calculation of actual hours rather than money diverted back to the fund.<sup>488</sup>

In *Mathis v. Sauser*,<sup>489</sup> the supreme court held that where a

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478. *See id.* (quoting *State v. Anthony*, 810 P.2d 155, 159 (Alaska 1991)).

479. 944 P.2d 436 (Alaska 1997).

480. *See id.*

481. *See id.* at 438-39.

482. *See id.* at 439.

483. *See id.*

484. “Article XII, section 7 of the Alaska Constitution states: Membership in employee retirement systems of the [s]tate or its political subdivisions shall constitute a contractual relationship. Accrued benefits of these systems shall not be diminished or impaired.” *Id.* at 440 n.5.

485. *See id.* at 440.

486. *See id.*

487. *See id.* at 444.

488. *See id.* at 446.

489. 942 P.2d 1117 (Alaska 1997).

prison rule forbidding the possession of computer printers by inmates is issued with the intent of curtailing inmates' access to the courts or prejudging the merits of their claims, no reasonable relationship between the rule and its ends may be found to support the rule.<sup>490</sup> Mathis was an inmate in possession of a computer printer at the Spring Creek Correctional Center, where possession of a printer was made improper by a new Standard Operating Procedure ("SOP") adopted by the facility in cooperation with the Department of Corrections ("DOC").<sup>491</sup> Mathis subsequently filed a grievance with the DOC "protesting the impending seizure of his printer."<sup>492</sup> The DOC concluded that the SOP was valid as a restriction on the "amount and nature of property prisoners possess" as well as preventing the "filing of meritless legal cases which result[] in the waste of significant staff time and state resources."<sup>493</sup> The supreme court reversed the summary judgment granted in favor of the DOC because it found a genuine issue of material fact existed regarding whether the SOP was issued to interfere with the inmates' access to the courts.<sup>494</sup> The court adopted the standard espoused by the U.S. Supreme Court in *Ex parte Hull*<sup>495</sup> that "prison officials cannot position themselves as 'gatekeepers' for the courts" in determining which suits are "meritless."<sup>496</sup> On this basis, the court declined to find as a matter of law that the policy was supported by a permissible motive.<sup>497</sup>

In *Valley Hospital Ass'n, Inc. v. Mat-Su Coalition for Choice*,<sup>498</sup> the supreme court held that a "quasi-public" hospital may not have a policy that restricts the availability of legal abortions without violating state constitutional protections of the right to privacy.<sup>499</sup> Valley View Hospital ("VVH"), a nonprofit organization and the only hospital servicing the Matanuska-Susitna Valley, elected a new Operating Board of Directors in 1992, which formulated a policy against providing abortions at the hospital except in cases of rape, incest, or where the life of the mother or fetus was at risk.<sup>500</sup> The Mat-Su Coalition for Choice sued for a permanent injunction against enforcing VVH's policy.<sup>501</sup> The supreme court noted that

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490. *See id.* at 1122-23.

491. *See id.* at 1119.

492. *Id.*

493. *Id.*

494. *See id.* at 1123.

495. 312 U.S. 546 (1941).

496. *Mathis*, 942 P.2d at 1121.

497. *See id.* at 1123.

498. 948 P.2d 963 (Alaska 1997).

499. *See id.* at 971.

500. *See id.* at 965.

501. *See id.* at 965-66.

the Alaska Constitution protects a person's right to an abortion more broadly than the U.S. Constitution.<sup>502</sup> It asserted that a woman's choice of whether or not to have an abortion is a fundamental right protected by Article I, section 22 of the state constitution and may be constrained only when justified by a compelling state interest.<sup>503</sup> The court held that VVH qualified as a "quasi-public" institution such that its conduct is viewed as "state action" and subject to similar constitutional constraints.<sup>504</sup> Because VVH failed to demonstrate a compelling state interest for its restrictive policy concerning abortions, the court determined that the policy was constitutionally invalid.<sup>505</sup> Further, the court ruled that Alaska Statutes section 18.16.010(b)<sup>506</sup> granting hospitals the right to deny abortion services "for the reasons of moral conscience" is unconstitutional as applied to "quasi-public" institutions that are non-sectarian.<sup>507</sup> The court noted that the hospital's statutory right cannot overcome the constitutional right at issue.<sup>508</sup>

In *Brandon v. Department of Corrections*,<sup>509</sup> the supreme court held that the superior court had jurisdiction to hear a claim that a prisoner's constitutional right to rehabilitation had been violated by the Department of Corrections's ("DOC's") determination to transfer the prisoner to an out-of-state prison.<sup>510</sup> Although Alaska Statutes section 22.10.010(d)<sup>511</sup> did not give the superior court jurisdiction to hear Brandon's appeal,<sup>512</sup> the court concluded that an administrative appeal may be appropriate if there is a fundamental constitutional right at stake and the proceeding produced a record capable of review.<sup>513</sup> Recognizing that "visitation privileges are a component of the constitutional right to rehabilitation," the court concluded that the DOC decision to transfer Brandon implicated his fundamental constitutional right to rehabilitation.<sup>514</sup> The court also concluded that the transfer hearing constituted a reviewable record because it was tape recorded in transcribable form and there were written findings indicating the evidence upon which the

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502. *See id.* at 967.

503. *See id.* at 969.

504. *See id.* at 970.

505. *See id.* at 971.

506. ALASKA STAT. § 18.16.010(b) (Michie 1996).

507. *Valley Hospital Ass'n*, 948 P.2d at 971 (quoting ALASKA STAT. § 18.16.010(b)).

508. *See id.* at 972.

509. 938 P.2d 1029 (Alaska 1997).

510. *See id.* at 1030.

511. ALASKA STAT. § 22.10.010(d) (Michie 1996).

512. *See Branon*, 938 P.2d at 1031.

513. *See id.* at 1032.

514. *Id.*

committee relied.<sup>515</sup> Because Brandon's claim implicated a fundamental constitutional right and the DOC's transfer hearing produced a reviewable record, the court held that the superior court had jurisdiction to determine whether Brandon's transfer substantially impaired his constitutional right to rehabilitation.<sup>516</sup>

In *Amin v. State*,<sup>517</sup> the court of appeals held that retrospective application of a sentence appeal statute did not violate the *ex post facto* clause of the U.S. Constitution or the Alaska Constitution.<sup>518</sup> Alaska Statutes section 12.55.120(a)<sup>519</sup> provides, in part, that a defendant cannot appeal a sentence that was imposed in accordance with a plea agreement that provided for a specific sentence or a sentence equal to or less than the specified maximum sentence for the offense.<sup>520</sup> The legislature specifically worded this restriction to apply retroactively.<sup>521</sup> The court of appeals concluded that section 12.55.120(a) is merely a procedural change altering the procedure by which appellate review can be obtained and requiring some defendants to file a petition for review instead of an appeal.<sup>522</sup> Because the new law does not alter the definition of the criminal conduct or increase the penalty of the crime, and because Amin had an available method to petition for review, the court of appeals concluded that retroactive application of section 12.55.120(a) to Amin, whose crime pre-dated the effective date of the statute, did not violate either constitution.<sup>523</sup>

In *Bobby v. State*,<sup>524</sup> the court of appeals held that the *ex post facto* clause does not prohibit the state from enforcing Alaska's sex offender registration law.<sup>525</sup> Bobby argued that "because he committed his crime before the sex offender registration law took effect, the *ex post facto* clauses of the federal and state constitutions prohibit the state from divulging this information to the public."<sup>526</sup> The court rejected this argument because Bobby had never litigated this claim in superior court and had failed to preserve the claim when he pleaded no contest to the charge.<sup>527</sup> The court dis-

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515. *See id.* at 1033.

516. *See id.*

517. 939 P.2d 413 (Alaska Ct. App. 1997).

518. *See id.* at 414.

519. ALASKA STAT. § 12.55.120(a) (Michie 1996).

520. *See id.*

521. *See* 1995 Alaska Sess. Laws ch. 39, § 41.

522. *See Amin*, 939 P.2d at 417.

523. *See id.*

524. 950 P.2d 135 (Alaska Ct. App. 1997).

525. *See id.* at 140; *see also* ALASKA STAT. §§ 12.63.010 (a), .100(2)-(3) (Michie 1996) (codifying sex offender registration law).

526. *Bobby*, 950 P.2d at 139.

527. *See id.*

tinguished his argument from a pure *ex post facto* claim because he was prosecuted for second-degree assault, not for violating the sex offender registration law.<sup>528</sup>

The court also rejected Bobby's claim that he did not get a speedy trial under Criminal Rule 45,<sup>529</sup> after he withdrew his plea of no contest to avoid the sex offender registration law.<sup>530</sup> The court rejected the idea that "Rule 45 should be calculated based on mental states, decisions, or events unknown to the trial court"<sup>531</sup> and held "that it was irrelevant, for Rule 45 purposes, what delayed the filing of Bobby's plea-withdrawal motion."<sup>532</sup>

In *Gibson v. State*,<sup>533</sup> the court of appeals held that a statute prohibiting the possession of firearms by intoxicated persons in their own homes or on their own property did not violate the state constitutional rights to keep and bear arms and to privacy.<sup>534</sup> Gibson pleaded no contest to the charge of possession of a firearm on the person while impaired by intoxicating liquor,<sup>535</sup> but argued on appeal that applying the statute to persons possessing firearms while intoxicated in their own homes or on their residential property was unconstitutional.<sup>536</sup> The court rejected the argument on two grounds. First, it found that based on the legislative history of the article of the constitution in question, the provision was not intended to eliminate government regulation of possession and use of firearms.<sup>537</sup> Instead, the government retained the authority to enforce prohibitions when there is a risk the firearms will be used in a criminal and dangerous fashion.<sup>538</sup> The history indicated the provision was not intended to overturn or invalidate state laws restricting access to or possession of firearms by people under the influence of alcohol.<sup>539</sup> Second, the court found that as the potential for harm resulting from the possession and use of firearms while intoxicated was well documented in the case law, the statute bore a close and substantial relationship to the state's legitimate interest in protecting the health and safety of its citizens.<sup>540</sup>

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528. *See id.* at 140.

529. ALASKA R. CRIM P. 45.

530. *See Bobby*, 950 P.2d at 138.

531. *Id.*

532. *Id.* at 139.

533. 930 P.2d 1300 (Alaska Ct. App. 1997).

534. *See id.* at 1302-03.

535. *See id.* at 1300.

536. *See id.* at 1301.

537. *See id.*

538. *See id.*

539. *See id.* at 1302.

540. *See id.*

In *Morgan v. State*,<sup>541</sup> the court of appeals ruled that a convicted felon who knowingly resides in a house where there is a firearm violates a state criminal statute regardless of whether the convict was aware of the law and despite the state's constitutional guarantee of the right to bear arms.<sup>542</sup> In 1991, Morgan was living with his wife and her two children while on probation from conviction for the felony of third degree assault.<sup>543</sup> Morgan was subsequently convicted of violating Alaska Statutes section 11.61.200(a)(10),<sup>544</sup> which forbids convicted felons from residing in a dwelling with the knowledge that the dwelling contains a concealable firearm.<sup>545</sup> The court of appeals rejected Morgan's arguments that the statute is unconstitutional because it punishes felons who are unaware of the statute and because it infringes upon the right to bear arms.<sup>546</sup> The court held that knowledge of the statute's existence is not an element of the crime, that Morgan's situation did not fall into the narrow area of the "mistake of law" defense because he had not relied on an authoritative interpretation of the law, and that his parole officer did not have a duty to inform him of the statute.<sup>547</sup>

In *Bay View, Inc. v. AHTNA, Inc.*,<sup>548</sup> the Ninth Circuit Court of Appeals held that a Fifth Amendment takings claim challenging the constitutionality of an amendment to the Alaska Native Claims Settlement Act ("ANCSA")<sup>549</sup> was premature given the compensatory procedures available under the Tucker Act.<sup>550</sup> The Ninth Circuit also concluded that even if the enactment was determined to be a Fifth Amendment taking, the Act had been rationally determined to be for public use and so did not require compensation.<sup>551</sup> In 1984, Senator Ted Stevens was responsible for carving out an exception to the Federal Deficit Reduction Act exempting its application to Alaska Native corporations and allowing these corporations to bypass the Act's prohibition on selling Net Operating Losses ("NOLs").<sup>552</sup> The selling of NOLs by Alaska Native corpo-

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541. 943 P.2d 1208 (Alaska Ct. App. 1997).

542. *See id.*

543. *See id.* at 1210.

544. ALASKA STAT. § 11.61.200(a)(10) (Michie 1996).

545. *See id.*

546. *See Morgan*, 943 P.2d. at 1210-11.

547. *See id.* at 1211-12. The court noted, "[E]ven if Morgan's probation officer had affirmatively told him that it was all right to reside in a dwelling where a concealable firearm was kept, this would not be a defense." *Id.*

548. 105 F.3d 1281 (9th Cir. 1997).

549. 43 U.S.C. §§ 1601-1629 (1994).

550. *See Bay View*, 105 F.3d at 1285; 28 U.S.C. § 1491 (1994).

551. *See Bay View*, 105 F.3d at 1286.

552. *See id.* at 1283.

rations generated around \$425 million dollars for the corporations that took advantage of the exemption.<sup>553</sup> Although ANCSA required the sharing of resource-based revenue amongst the Native corporations, ten of the regional corporations agreed not to share in the revenue generated by selling NOLs.<sup>554</sup> Dissatisfied shareholders of these ten corporations filed a class action lawsuit.<sup>555</sup> In 1995, Congress amended ANCSA, retroactively precluding any claim that the dissatisfied shareholders may have had in the NOLs revenue.<sup>556</sup>

These shareholders then filed this suit arguing that the 1995 amendment was an unconstitutional taking in violation of the Fifth Amendment.<sup>557</sup> Because the court had “no jurisdiction to address the merits of takings claims where Congress has provided a means for paying compensation for any taking that might have occurred” and because the shareholders had not availed themselves of the compensation process provided for in the Tucker Act, the Ninth Circuit concluded that the shareholders’ Fifth Amendment claim was premature.<sup>558</sup> Finding that Congress had a rational reason for deciding that the ANSCA amendment was for public use, the Ninth Circuit rejected the shareholders’ argument that there was a Fifth Amendment violation on this ground.<sup>559</sup>

## VI. CRIMINAL LAW

### A. Constitutional Protections

1. *Search and Seizure.* In *Van Sandt v. Brown*,<sup>560</sup> the Alaska Supreme Court held that a police officer is not entitled to qualified immunity for conducting a warrantless search of a person’s house looking for an escaped convict where no specific evidence existed to indicate that the fleeing convict had entered the house.<sup>561</sup> Van Sandt sued in a 42 U.S.C. § 1983 action for a warrantless search of his trailer made by Brown, an Alaska State Trooper, who was looking for two escaped inmates from the nearby Spring Creek Correctional Center.<sup>562</sup> Brown had no specific evidence indicating

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553. *See id.* at 1284.

554. *See id.*

555. *See id.*

556. *See id.*

557. *See id.*

558. *Id.* at 1285.

559. *See id.* at 1286.

560. 944 P.2d 449 (Alaska 1997).

561. *See id.*

562. *See id.*

that the escapees might be in the trailer.<sup>563</sup> The superior court granted Brown's motion for a directed verdict based on a defense of qualified immunity as an officer of the law.<sup>564</sup> The supreme court noted that qualified immunity is available to a law enforcement officer only if "a reasonable officer could have believed the search to be lawful."<sup>565</sup>

In *State v. Landon*,<sup>566</sup> the court of appeals decided that it was reasonable to search all of the defendant's personal items at the time the defendant reported to serve a prison sentence, even though some of those items might have been placed in storage rather than worn into prison.<sup>567</sup> In searching Landon's belongings, prison officials discovered packages of marijuana secreted in hollowed out compartments in the soles of his shoes.<sup>568</sup> Landon argued that the search was illegal, because the prison authorities had no right to search Landon's shoes until he affirmatively wore them into the prison; the search occurred while there remained a possibility that Landon would place the shoes into storage.<sup>569</sup> The court noted that prison officials have a legitimate interest in ensuring that weapons, contraband, and other prohibited items remain unavailable to the prison population.<sup>570</sup> As prisoners have a right to inspect or retrieve their stored personal belongings while incarcerated, it is reasonably necessary for prison officials to search all of the personal belongings of an extended term prisoner in order to prevent the possible matriculation of contraband into the prison community.<sup>571</sup> The court distinguished the supreme court decision in *Reeves v. State*<sup>572</sup> on the ground that prison officials have a limited interest in searching personal belongings where an arrestee is detained only temporarily.<sup>573</sup>

In *Davis v. State*,<sup>574</sup> the court of appeals held that the arctic entry of a residence was part of the "premises" for purposes of a general warrant and that "the time of service" of a search warrant should be interpreted to include the entire time it takes for the police to execute a warrant, as opposed to the particular instant the

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563. *See id.* at 451.

564. *See id.*

565. *Id.* at 452.

566. 936 P.2d 177 (Alaska Ct. App. 1997).

567. *See id.* at 180.

568. *See id.* at 178.

569. *See id.*

570. *See id.* at 179.

571. *See id.*

572. 599 P.2d 727 (Alaska 1979) (holding that arrestee retained privacy interest in personal belongings where sentence involved temporary jail time).

573. *See Landon*, 936 P.2d at 178-79.

574. 938 P.2d 1076 (Alaska Ct. App. 1997).

police serve the warrant.<sup>575</sup> The warrant authorized the police to search “any persons on the premises at the time of service of the search warrant for evidence of possession and/or distribution of controlled substances.”<sup>576</sup> The defendants argued that they were improperly searched because they did not enter the premises and arrived after the search began.<sup>577</sup> The court of appeals concluded that the police were properly authorized to search the defendants because they voluntarily walked into the arctic entry during the execution of the warrant and the “premises” of a dwelling “includes an attached enclosed or screened-in porch.”<sup>578</sup> Additionally, taking what it referred to as a “‘common sense approach,’”<sup>579</sup> the court of appeals concluded that the police were properly authorized to search the defendants even though they arrived after the search had begun.<sup>580</sup> The court held that distinguishing between “the act of ‘serving’ a search warrant (an act that occurs at a particular instant) and the act of ‘executing’ the warrant (that is, the ensuing search of the premises, which might take hours)” was not useful for the purposes of determining the scope of the general warrant.<sup>581</sup>

In *Rynearson v. State*,<sup>582</sup> the court of appeals ruled that a sufficiently corroborated anonymous tip was enough to establish probable cause for a search and seizure.<sup>583</sup> The state troopers received an anonymous tip that Rynearson would be arriving at Anchorage Airport with drugs.<sup>584</sup> The tip specified the date, time, airline, flight number, her appearance, and her luggage.<sup>585</sup> Based on the tip, the troopers confronted Rynearson at the airport, and she admitted to carrying prescription Valium; she was eventually convicted of fourth-degree misconduct involving a controlled substance.<sup>586</sup> The court of appeals applied the test established in *Aguiar v. Texas*<sup>587</sup> and *Spinelli v. United States*,<sup>588</sup> which required the state to prove that the hearsay informant obtained the infor-

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575. *See id.* at 1078.

576. *Id.* at 1077.

577. *See id.* at 1076.

578. *Id.* at 1078.

579. *Id.* at 1079 (quoting *State v. Morris*, 668 P.2d 857, 864 n.2 (Alaska 1983)).

580. *See id.*

581. *Id.* at 1078.

582. 950 P.2d 147 (Alaska Ct. App. 1997).

583. *See id.* at 149.

584. *See id.*

585. *See id.*

586. *See id.*

587. 378 U.S. 108 (1964).

588. 393 U.S. 410 (1969).

mation in a reliable way and was trustworthy.<sup>589</sup> The court determined the first prong of the test was satisfied because the level of detail in the hearsay was sufficient to support the inference that the informant had personal knowledge.<sup>590</sup> As for the second prong, the mere fact that the informant wished to remain anonymous was not enough to qualify her as a citizen informant.<sup>591</sup> However, the fact that material details of the tip were confirmed by the subsequent police investigation, “in a way that len[t] substantial credibility to the report of illegality,” was sufficient to establish reliability.<sup>592</sup>

In *Mackelwich v. State*,<sup>593</sup> the court of appeals held that an Alaska fish and game violation search and seizure statute does not apply to consensual searches.<sup>594</sup> Alaska Statutes section 16.05.180<sup>595</sup> specifies that before an officer conducts a warrantless search, a statement explaining the reason for the search must have been submitted to the person in control of the property.<sup>596</sup> The Alaska State Troopers had received an anonymous tip that Mackelwich had poached a moose and was possibly involved with drugs.<sup>597</sup> The troopers received permission from Mackelwich to search the property and, during the search, found a strange building that smelled of marijuana.<sup>598</sup> The troopers left the property, applied for a search warrant, and on the second search found evidence that Mackelwich was cultivating marijuana.<sup>599</sup> Mackelwich was convicted of fourth-degree misconduct involving a controlled substance.<sup>600</sup> On appeal, Mackelwich argued that the search warrant for his property was invalid because it was based on the trooper’s observation of the building, and even though he had consented to the search, the troopers failed to provide him with a written statement of the reason for the search.<sup>601</sup>

The court of appeals found that section 16.05.180 was intended to expand the authority of law enforcement officers to con-

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589. See *Rynearson*, 950 P.2d at 150.

590. See *id.*

591. See *id.* at 150-51.

592. *Id.* at 152 (quoting *Lloyd v. State*, 914 P.2d 1282, 1286 (Alaska Ct. App. 1946)).

593. 950 P.2d 152 (Alaska Ct. App. 1997).

594. See *id.* at 153.

595. ALASKA STAT. § 16.05.180 (Michie 1996).

596. See *id.*

597. See *Mackelwich*, 950 P.2d at 153.

598. See *id.*

599. See *id.*

600. See *id.*

601. See *id.* at 153-54.

duct warrantless searches.<sup>602</sup> The court reviewed the history of the statute and concluded that, based on several factors, the procedural requirements were meant by the legislature to be applied only to those warrantless searches whose legality rested solely on the statute, and did not fit any other recognized exception to the warrant requirement.<sup>603</sup> As consent searches are lawful without any reference to section 16.05.180, the court concluded that the procedural requirements of section 16.05.180 did not apply to the search of Mackelwich's property.<sup>604</sup>

2. *Miscellaneous.* In *State v. Summerville*,<sup>605</sup> the Alaska Supreme Court held that amendments to Criminal Rule 16 providing for reciprocal discovery violated the state constitutional privilege against self-incrimination.<sup>606</sup> The reciprocal discovery rule was a non-severable provision of Chapter 95 of the 1996 Alaska Session Laws, and, in part, compelled the production of the names and statements of non-alibi witnesses.<sup>607</sup> *Scott v. State*,<sup>608</sup> the controlling decision, held that testimonial, incriminating, and compelled evidence violated the Alaska constitutional protection against self-incrimination.<sup>609</sup> The supreme court found that the reciprocal discovery amendment in Chapter 95 compelled discovery of testimonial and incriminating evidence and, therefore, was unconstitutional.<sup>610</sup> In making its decision, the court explicitly refused to overrule *Scott*.<sup>611</sup>

In *Cockerham v. State*,<sup>612</sup> the supreme court held that a denial of the defendant's motion for an *in camera* review of alleged juvenile records of a prosecution witness was not a denial of his federal or state constitutional right to confront a witness or of his due process rights.<sup>613</sup> Cockerham wanted to examine the alleged records to show that the witness had "committed a crime involving dishonesty" and to damage her credibility during cross-examination.<sup>614</sup> Cockerham argued that the denial of *in camera* review "effectively deprived him of his constitutional right of con-

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602. *See id.* at 158.

603. *See id.*

604. *See id.* at 156.

605. 948 P.2d 469 (Alaska 1997).

606. *See id.*

607. *See id.* at 470; 1996 Alaska Sess. Laws, ch. 95.

608. 519 P.2d 774 (Alaska 1974).

609. *See id.*

610. *See Summerville*, 948 P.2d at 469-70.

611. *See id.*

612. 933 P.2d 537 (Alaska 1997).

613. *See id.* at 541, 544.

614. *Id.* at 538.

frontation.”<sup>615</sup> The court denied this claim by referring to *Pennsylvania v. Ritchie*,<sup>616</sup> which noted that “[t]he ability to question adverse witnesses . . . does not include the power to require the pre-trial disclosure of any and all information that might be useful in contradicting unfavorable testimony.”<sup>617</sup> The court recognized Cockerham’s “right to a fair trial in accordance with due process” and that “Article I, section 7 of the Alaska Constitution requires that in order for the guarantee of due process to be meaningful, it must at times encompass discovery rights.”<sup>618</sup> However, the court ultimately denied his appeal because Cockerham did not make a sufficient showing that the information he sought would contain relevant impeachment evidence, did not cross-examine the witness about her credibility, and was in effect simply conducting what the court deemed a “fishing expedition.”<sup>619</sup>

In *Beaver v. State*,<sup>620</sup> the court of appeals held that the defendant’s voluntary admission to several sex crimes while institutionalized and undergoing sex offender therapy did not violate his privilege against self-incrimination as guaranteed by the Fifth Amendment.<sup>621</sup> The court noted that “the privilege against self-incrimination is normally lost if a person fails to assert it”<sup>622</sup> and that Beaver in no way was compelled or coerced to give up the protection of the privilege because the sex offender therapy was “completely voluntary.”<sup>623</sup> In fact, “participants were also affirmatively warned that, because of the risk of future prosecution, they should not speak about specific dates, times, location, events, and/or [the] identities of victims in their counseling sessions.”<sup>624</sup> Because Beaver was not forced to give up any incriminatory information regarding past crimes, “the privilege against self-incrimination did not bar the superior court from relying on that information when the court sentenced Beaver for a new crime.”<sup>625</sup> The court also held that the same logic would apply to any statements that Beaver made about committing future crimes.<sup>626</sup>

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615. *Id.* at 540.

616. 480 U.S. 39, 52-53 (1987).

617. *Cockerham*, 933 P.2d at 540-41.

618. *Id.* at 542-43 (citing ALASKA R. CRIM. P. 16(b)(1)(A)(v), 32.1(d)(1)(B)).

619. *Id.* at 543-44.

620. 933 P.2d 1178 (Alaska Ct. App. 1997).

621. *See id.* at 1179.

622. *Id.* at 1181.

623. *Id.*

624. *Id.* at 1183.

625. *Id.*

626. *See id.* at 1184 (“With respect to Beaver’s statement concerning his intended future conduct (his assessment that he would likely reoffend, and his statement that he had already selected his next victim), Beaver has even less of a

In *Bachlet v. State*,<sup>627</sup> the court of appeals held that a statute defining when a public servant commits the crime of receiving a bribe was not constitutionally overbroad or vague.<sup>628</sup> Basing this conclusion on both legislative history and similar bribery statutes in other jurisdictions, the court rejected Bachlet's argument that Alaska Statutes section 11.56.110(a)(2)<sup>629</sup> was overly broad because it did not include an element of "corrupt intent" and concluded that the culpable mental state of the statute is "knowledge."<sup>630</sup> Bachlet, an assistant public defender, had demanded marijuana, expensive meals, and vacations from a client "in exchange" for working on his case.<sup>631</sup> The court rejected Bachlet's argument that the ambiguity of the terms "public servant," "benefit," and "agreement or understanding" render the statute unconstitutionally vague and found that Bachlet's conduct comported with the "core conduct" prohibited by the bribery statute.<sup>632</sup> The court concluded that the statute "clearly provided" Bachlet, an assistant public defender, with adequate notice of the unlawfulness of her conduct.<sup>633</sup>

The court also held that the newly enacted wiretapping statute, Alaska Statute section 12.37<sup>634</sup> did not modify the "longstanding rule" in Alaska that it is lawful for the police to intercept private communications with the consent of one of the participants and judicial authorization (*i.e.*, "Glass Warrant").<sup>635</sup> The court found that section 12.37 is merely an exception to Alaska Statutes section 42.20.300,<sup>636</sup> the general statutory prohibition on eavesdropping, and since the eavesdropping that was authorized by one of the parties fell outside the scope of section 42.20.300, the communication intercepted by the police of Bachlet and her client that was authorized by the client was not controlled by section

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Fifth Amendment claim.").

627. 941 P.2d 200 (Alaska Ct. App. 1997).

628. *See id.* at 204, 206.

629. ALASKA STAT. § 11.56.110(a)(2) (Michie 1996) (providing that the crime of receiving a bribe is committed by a public servant "if the public servant accepts or agrees to accept a benefit upon an agreement or understanding that the public servant's . . . opinion, judgment, [or] action, . . . will be influenced").

630. *See Bachlet*, 941 P.2d at 204.

631. *See id.* at 202.

632. *Id.* at 206.

633. *Id.*

634. ALASKA STAT. §§ 12.37.010-.900 (Michie 1996) (providing that it is lawful for police to intercept judicially authorized private conversations if the interception may provide assistance in a murder, kidnapping, or felony drug offense).

635. *See Bachlet*, 941 P.2d at 208; *see also* *State v. Glass*, 538 P.2d 872 (Alaska 1978).

636. ALASKA STAT. § 42.20.300(b) (Michie 1996) (providing when publication or use of communications is authorized).

12.37.<sup>637</sup>

In *State v. Schwin*,<sup>638</sup> the court of appeals held that a defendant was not entitled to transactional immunity from state prosecution for murder, even if the evidence showed that federal prosecutors granted the defendant use and derivative use immunity in a federal drug conspiracy prosecution at the request of state officials.<sup>639</sup> Federal officials granted Schwin use and derivative use immunity and certain sentencing concessions in return for a plea of guilty to the federal conspiracy charge and testimony against his co-conspirator.<sup>640</sup> Relying on the Alaska Constitution's privilege against self-incrimination and *State v. Gonzalez*,<sup>641</sup> Schwin argued that the federal immunity given to him by the federal officials should be treated as transactional immunity which would protect him from state prosecution for murder.<sup>642</sup> Reversing the trial court, the court of appeals concluded that Alaska's broad constitutional privilege does not apply to Schwin's federal testimony.<sup>643</sup> Distinguishing Schwin's case from *Gonzalez*, the court concluded that the federal officials acted independently of the Alaska state officials and that Alaska's constitutional requirement of transactional immunity does not extend to cases where there is only minimal state action.<sup>644</sup>

In *Covington v. State*,<sup>645</sup> the court of appeals held that procedural due process rights of a parolee were not violated when the final parole revocation hearing was delayed by the parolee himself and the parolee was not prejudiced by it.<sup>646</sup> Because the delay of Covington's final revocation hearing was a result of his efforts to block extradition from Tennessee to Alaska, the court concluded that the delay did not violate due process.<sup>647</sup> The court also held that the substantive due process clause of the Alaska Constitution was not violated where the parole of a sex offender is revoked for non-participation in mandatory treatment even though the reason for the non-participation is the parolee's failure to admit to committing any crimes.<sup>648</sup> The court concluded that Covington's refusal to admit the commission of any crime could be interpreted as will-

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637. See *Bachlet*, 941 P.2d at 208.

638. 938 P.2d 1101 (Alaska Ct. App. 1997).

639. See *id.* at 1106.

640. See *id.* at 1102.

641. 853 P.2d 526 (Alaska 1993).

642. See *Schwin*, 938 P.2d at 1103.

643. See *id.* at 1105.

644. See *id.* at 1106.

645. 938 P.2d 1085 (Alaska Ct. App. 1997).

646. See *id.* at 1088.

647. See *id.*

648. See *id.* at 1090.

ful refusal to participate in treatment.<sup>649</sup>

## B. General Criminal Law

1. *Criminal Procedure.* In *State v. Shewfelt*,<sup>650</sup> the Alaska Supreme Court held that where a jury was allowed to hear again recorded testimony during deliberations, no improper procedures were used to play back the recording, and there was little risk of negative psychological effect of not having the defendant present when the testimony was played, the error in not notifying the defendant of the jury's request to hear the recorded testimony is harmless.<sup>651</sup> *Shewfelt* was convicted of first-degree sexual assault.<sup>652</sup> During deliberations, without *Shewfelt*'s knowledge, the jury requested and was allowed to hear again both *Shewfelt* and the victim's entire testimony.<sup>653</sup> Because *Shewfelt* was not notified of the playback, the superior court granted *Shewfelt*'s motion for a new trial.<sup>654</sup> Relying on an earlier case,<sup>655</sup> the supreme court held that it was harmless error not to notify *Shewfelt* of the playback and reversed.<sup>656</sup> The court found that the parties had stipulated that no improper communications with the jury occurred during the playback.<sup>657</sup> It also found that the absence of *Shewfelt* at the time the playback occurred would have had no negative psychological effect on the jury.<sup>658</sup> The court therefore concluded that not notifying *Shewfelt* of the playback was harmless beyond a reasonable doubt and did not warrant granting a new trial.<sup>659</sup>

In *Saltz v. Department of Public Safety, Driver Improvement Bureau*,<sup>660</sup> the supreme court held that a police officer who provided the Yellow Pages but did not read the "attorneys" section aloud for someone who could not read did not violate the rights of the person arrested for driving while intoxicated to consult with counsel before deciding whether to submit to a breathalyzer test.<sup>661</sup> *Saltz* was arrested for driving under the influence after driving his

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649. *See id.*

650. 948 P.2d 470 (Alaska 1997).

651. *See id.* at 472.

652. *See id.* at 470.

653. *See id.* at 470-71.

654. *See id.* at 471.

655. *See State v. Hannagan*, 559 P.2d 1059 (Alaska 1977).

656. *See Shewfelt*, 948 P.2d at 471-72.

657. *See id.* at 472-73.

658. *See id.* at 473.

659. *See id.*

660. 942 P.2d 1151 (Alaska 1997).

661. *See id.* at 1154.

truck into a ditch and failing field sobriety tests.<sup>662</sup> After being taken to the police station, the arresting officer advised Saltz of his Miranda rights and provided him with a phone and the Yellow Pages, but did not offer to read the telephone listings, even though Saltz indicated that he was unable to read them without his glasses, which he had left in his truck.<sup>663</sup> The court held that a person's statutory right to a "reasonable opportunity" to consult with an attorney before deciding whether or not to submit to a breathalyzer test did not include greater assistance than that given by the arresting officer.<sup>664</sup>

In *Aningayou v. State*,<sup>665</sup> the court of appeals held that a confession was admissible where it was given voluntarily by a potential witness in a criminal investigation, but that failure to inform of Miranda rights in a timely manner can serve as a basis for suppression where a reasonable person in the interviewee's situation would reasonably believe that he or she was not free to leave or break off questioning.<sup>666</sup> Aningayou was questioned in regards to an incidence of sexual assault based on information that he possessed a "Sonics" baseball cap similar to the one identified by the victim.<sup>667</sup> Johnson, the state trooper investigating the crime, questioned Aningayou twice during the course of his investigation.<sup>668</sup> During the second interview, Aningayou was questioned in a room accessible to the public, and was not restrained, but was not specifically informed that he could leave at any time.<sup>669</sup> Johnson warned Aningayou that if he did not cooperate or tell the truth, he could go to jail.<sup>670</sup> Aningayou responded by saying, "It's me."<sup>671</sup> Johnson subsequently informed Aningayou of his Miranda rights, received a detailed, recorded confession from Aningayou, and then arrested him.<sup>672</sup> The court of appeals held that sufficient evidence existed to support the state's burden of proof in showing that Aningayou's confession was voluntary.<sup>673</sup> However, the court also found that a reasonable person in Aningayou's position would not feel free to break off questioning at any time.<sup>674</sup> The court therefore remanded

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662. *See id.* at 1151.

663. *See id.* at 1152.

664. *See id.* at 1154.

665. 949 P.2d 963 (Alaska Ct. App. 1997).

666. *See id.* at 967.

667. *See id.* at 965-66.

668. *See id.* at 965.

669. *See id.*

670. *See id.*

671. *Id.* at 966.

672. *See id.*

673. *See id.* at 967.

674. *See id.* at 968.

the case to determine which of Aningayou's statements were tainted by failing to inform Aningayou of his Miranda rights at the appropriate time.<sup>675</sup>

In *Hoffman v. State*,<sup>676</sup> the court of appeals held that it was harmless error when the trial court communicated to the jury outside the presence of the defendant and his counsel, and the trial court did not err when it admitted evidence of an assault that occurred prior to the crimes for which the defendant was convicted.<sup>677</sup> During the jury deliberations, a request was made to rehear certain testimony.<sup>678</sup> The judge told the jury that they would be allowed to rehear testimony as soon as a courtroom could be arranged and told them the approximate length of the testimony.<sup>679</sup> Before listening to any of the playbacks, the jury issued a guilty verdict on all counts.<sup>680</sup> The court did admit that the trial judge "erred when she communicated with the jury," but ruled that the error was "harmless beyond a reasonable doubt," even though it was a "waiver of an important constitutional right."<sup>681</sup>

Evidence of the prior assault was allowed to "show Hoffman's state of mind at the time of the attack."<sup>682</sup> The court used a two-step analysis to determine whether this "other acts evidence" was admissible.<sup>683</sup> The court determined that it was admissible because it was relevant apart from merely tending to show Hoffman's propensity to engage in similar misconduct and that this relevance outweighed the prejudicial impact the violent assault may have on the jury.<sup>684</sup>

In *Minch v. State*,<sup>685</sup> the court of appeals held that the defendant's right to a speedy trial under Criminal Rule 45<sup>686</sup> was not violated where his attorney requested various continuances resulting in more than a two-year delay between the serving of the summons and the trial.<sup>687</sup> Minch also appealed his conviction based on prejudice he suffered when the judge did not grant a challenge for cause to a prospective juror who admitted he would weigh the

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675. *See id.*

676. 950 P.2d 141 (Alaska Ct. App. 1997).

677. *See id.* at 142.

678. *See id.* at 144.

679. *Id.*

680. *See id.*

681. *Id.* at 145-46; *see* *Dixon v. State*, 605 P.2d 882, 884 (Alaska 1980) (recognizing this constitutional right).

682. *Id.* at 146.

683. *Id.*

684. *See id.* at 146-47.

685. 934 P.2d 764 (Alaska Ct. App. 1997).

686. ALASKA R. CRIM. P. 45.

687. *See Minch*, 934 P.2d at 767.

testimony given by a police officer more heavily than testimony from other people.<sup>688</sup> The court held that it was error for the judge not to have granted Minch's challenge for cause, but found the error to be harmless because Minch used one of his peremptory challenges to remove this juror, and there was "nothing in the record to support the assumption that Minch would have used another peremptory challenge if he had had one."<sup>689</sup>

In *Garcia v. State*,<sup>690</sup> the court of appeals consolidated the appeals and the dismissal of DWI charges in three cases, and held that the reinstatement of charges against the defendants restarted the speedy trial calculation for purposes of Alaska Criminal Rule 45.<sup>691</sup> *Garcia*, *Morange*, and *Rutan* all challenged their DWI charges asserting that the revocation of their licenses constituted a "punishment" and that any additional prosecution based on the charge of DWI would violate the constitutional guarantee against double jeopardy.<sup>692</sup> The district court ruled for the defendants and dismissed their charges; the state appealed the dismissals.<sup>693</sup> Because the court of appeals was considering the same double jeopardy issue in another group of consolidated cases (*State v. Zerkel*<sup>694</sup>), the state's appeal was held in abeyance pending the decision of *Zerkel*.<sup>695</sup> The court of appeals in *Zerkel* held that the suspension and revocation of a driver's license in a DWI case did not constitute a "punishment" for purposes of double jeopardy.<sup>696</sup> When the supreme court denied the petition for rehearing in *Zerkel*, the court of appeals issued an order to adjudicate all of the cases held in abeyance, and therefore, the district court properly reassumed jurisdiction.<sup>697</sup>

The primary issue on appeal was whether Alaska Criminal Rule 45, which guarantees defendants a speedy trial, was violated.<sup>698</sup> Upholding the defendants' convictions, the court of appeals concluded that Rule 45 was not violated because the Rule 45 calculation restarted on the day the district court resumed jurisdiction.<sup>699</sup> The court of appeals rejected the defendants' argument that the Rule 45 calculation should be evaluated under *Sundberg v.*

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688. *See id.* at 764.

689. *Id.* at 769.

690. 947 P.2d 1363 (Alaska Ct. App. 1997).

691. *See id.* at 1363; ALASKA R. CRIM. P. 45.

692. *See Garcia*, 947 P.2d. at 1364.

693. *See id.*

694. 900 P.2d 744 (Alaska Ct. App. 1995).

695. *See Garcia*, 947 P.2d at 1364.

696. *See id.*

697. *See id.* at 1364-65.

698. *See id.* at 1365.

699. *See id.* at 1366.

*State*,<sup>700</sup> concluding that a rule analogous to Rule 45(c)(2), not *Sundberg*, should govern because subsection (c)(2) of the rule was not in existence when *Sundberg* was decided.<sup>701</sup> Applying a rule analogous to Rule 45(c)(2), the court of appeals concluded that the supreme court intended for the Rule 45 calculation to restart “when a prosecution is reinstated after criminal charges have been dismissed on defendant’s motion,” which in this case was the day after the *Zerkel* rehearing was denied.<sup>702</sup>

In *Wells v. State*,<sup>703</sup> the court of appeals held that a defendant may not plead no contest to a criminal charge but at the same time reserve an issue for appeal if that issue is not dispositive of the entire case.<sup>704</sup> Wells was charged with felony driving while intoxicated (“DWI”) and driving while his license was suspended (“DWLS”).<sup>705</sup> Wells pleaded no contest to the DWLS charge and filed a motion to suppress evidence in the DWI case.<sup>706</sup> When the motion to suppress was denied, Wells attempted to reserve his right to appeal the suppression motion by changing his plea in the DWI case from not guilty to no contest.<sup>707</sup> As part of this change, Wells withdrew his no contest plea to the DWLS charge and the prosecutor dismissed it.<sup>708</sup> The court of appeals concluded that this plea agreement was not a proper *Cooksey*<sup>709</sup> plea and, thus, did not reserve for Wells a right to appeal the denial of his motion to suppress.<sup>710</sup> The rule established in *Cooksey* “allows a defendant to plead no contest but at the same time reserve an issue for appeal” provided that the reserved issue is dispositive of the entire case.<sup>711</sup> The subject matter in the motion to suppress evidence applied to the DWI case only and would not have been dispositive of the DWLS case against Wells.<sup>712</sup> Because there was a clear inference that the DWLS charge against Wells was dismissed for the purpose of making the motion to suppress evidence dispositive, the plea

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700. 667 P.2d 1268 (Alaska Ct. App. 1983) (holding that Rule 45 should be tolled, rather than started anew, when a defendant’s case is returned to the trial court after being delayed, during a state’s appeal of an evidentiary hearing).

701. See *Garcia*, 947 P.2d at 1365.

702. *Id.* at 1366.

703. 945 P.2d 1248 (Alaska Ct. App. 1997).

704. See *id.* at 1249.

705. See *id.*

706. See *id.*

707. See *id.*

708. See *id.*

709. See *Cooksey v. State*, 524 P.2d 1251 (Alaska 1974).

710. See *Wells*, 945 P.2d at 1249.

711. *Id.* at 1249.

712. See *id.* at 1249-50.

was not valid.<sup>713</sup>

In *Riney v. State*,<sup>714</sup> the court of appeals held that the police did not violate the defendant's right to receive prompt judicial review of the government's justification for his arrest, despite the fact that he was detained for two hours and questioned before he was taken to the courthouse.<sup>715</sup> Riney's claim that "the police had planted the cocaine on him" during an alleged search and seizure following his arrest was dismissed.<sup>716</sup> The court of appeals relied on the superior court's factual determination that the cocaine was found on Riney prior to his arrival at the police station, even though "the evidence [was] conflicting on this point."<sup>717</sup> The court held that as long as probable cause existed for the arrest, a "post-arrest interrogation of an arrestee [did] not constitute 'unnecessary delay' for purposes of Alaska Criminal Rule 5(a)(1)."<sup>718</sup> The court noted that the outcome would have been different had Riney been detained solely to gather evidence to justify his arrest.<sup>719</sup> The court reasoned that a two-hour interrogation and delay before going to the courthouse was not used to extract an involuntary confession, and that the Fourth Amendment and Rule 5(a)(1) do "not bar routine post-arrest questioning of a suspect."<sup>720</sup>

In *Hillman v. Municipality of Anchorage*,<sup>721</sup> the court of appeals affirmed its jurisdiction to hear an appeal of a DWI conviction.<sup>722</sup> Hillman was ordered to serve sixty days of an unsuspended sentence for his third DWI conviction.<sup>723</sup> The court of appeals rejected the Municipality's argument that the court of appeals lacked jurisdiction under Alaska Statutes section 22.07.020(c),<sup>724</sup> which provides, in part, that "[t]he court of appeals has jurisdiction to review . . . (2) the final decision of the district court on a sentence imposed by it if the sentence exceeds 120 days of unsuspended incarceration for a misdemeanor offense."<sup>725</sup> Because Hillman received only sixty days of unsuspended incarceration, the Municipality argued that section 22.07.020(c) prevented the court of

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713. See *id.* at 1250.

714. 935 P.2d 828 (Alaska Ct. App. 1997).

715. See *id.* at 830.

716. *Id.*

717. *Id.* at 831.

718. *Id.* at 837; see ALASKA R. CRIM. P. 5(a)(1).

719. See *Riney*, 935 P.2d at 834.

720. *Id.* at 836.

721. 941 P.2d 211 (Alaska Ct. App. 1997).

722. See *id.* at 212.

723. See *id.* at 217.

724. See *id.* at 215; ALASKA STAT. § 22.07.020(c) (Michie 1996).

725. ALASKA STAT. § 22.07.020(c).

appeals from hearing Hillman's appeal.<sup>726</sup> The court, however, interpreted section 22.07.020(c) as prohibiting it from reviewing only "sentence appeals" for less than 120 days in which the defendant concedes the legality of his or her sentence but argues that the harshness of the sentence is an abuse of discretion.<sup>727</sup> Concluding that it had jurisdiction over Hillman's appeal because the legality of the sentence was at issue, the court of appeals stated that "[t]his court retains the right to review an illegal sentence, regardless of how much (or how little) imprisonment is imposed on the defendant."<sup>728</sup>

In *Peters v. State*,<sup>729</sup> the court of appeals ruled that it had jurisdiction to hear the appeal of a defendant convicted of two counts of a misdemeanor and sentenced to consecutive 120-day terms of imprisonment, so long as the aggregate unsuspended prison terms exceeded 120 days.<sup>730</sup> Peters pled no contest to two counts of contributing to the delinquency of a minor for sexual acts he committed with a fourteen-year-old and a fifteen-year-old.<sup>731</sup> Subsequently, the trial court sentenced Peters to two consecutive terms of 360 days imprisonment, with 240 days suspended.<sup>732</sup> Peters appealed, and the state argued that the appellate court did not have jurisdiction to hear the case because Peters was not sentenced to more than 120 days imprisonment for any one misdemeanor.<sup>733</sup> The court of appeals resolved the apparent ambiguity in Alaska Statutes section 22.07.020(c),<sup>734</sup> by holding that the sentence in aggregate must exceed 120 days.<sup>735</sup> The court cited the principle that ambiguity in the criminal law should be resolved in favor of a defendant, and interpreted the statute to accord with other sentencing statutes which clearly give defendants sentenced to "aggregate terms exceeding 120 days of unsuspended incarceration" the right to appeal.<sup>736</sup>

In *United States v. Hall*,<sup>737</sup> the Ninth Circuit Court of Appeals held that the testimony of an informant with a criminal record was insufficient to support a search warrant for the defendant's trailer,

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726. See *Hillman*, 941 P.2d at 212.

727. See *id.* at 212.

728. *Id.*

729. 943 P.2d 418 (Alaska Ct. App. 1997).

730. See *id.* at 421.

731. See *id.* at 419.

732. See *id.*

733. See *id.*

734. ALASKA STAT. § 22.07.202(c) (Michie 1996).

735. See *Peters*, 943 P.2d at 421.

736. *Id.* at 420; see also ALASKA STAT. § 12.55.120 (Michie 1996); ALASKA R. APP. P. 215(a).

737. 113 F.3d 157 (9th Cir. 1997).

where the informant's prior convictions bearing on his credibility were not disclosed to the magistrate, and the informant merely testified that the defendant was his cocaine source.<sup>738</sup> After he was arrested for cocaine possession, the informant, Dang, told state troopers that his supplier was Hall.<sup>739</sup> Dang and a trooper appeared before a magistrate where both gave live testimony under oath.<sup>740</sup> In his testimony, the trooper discussed Dang's prior criminal record, but omitted that Dang had a criminal conviction for making a false report five years previously.<sup>741</sup> The magistrate issued a search warrant for the defendant's trailer, the trailer was searched, and Hall was charged after troopers found cocaine, cocaine sales equipment, large quantities of cash, and other evidence of narcotics dealing.<sup>742</sup> Upon holding a hearing pursuant to *Franks v. Delaware*,<sup>743</sup> the magistrate found that the trooper "'either intentionally or recklessly' withheld information bearing on Dang's credibility," including the 1990 conviction for falsely reporting a crime.<sup>744</sup> The district judge considered the magistrate's reports and adopted his recommendations to suppress the evidence found in the search, reasoning that "the magistrate would probably not have issued a search warrant had he known the truth" regarding Dang's prior record.<sup>745</sup>

On appeal, the Ninth Circuit attempted to ascertain "whether a common sense determination would establish probable cause to believe that Hall had the objects of the search in his trailer, if the [informant's prior conviction for making a false report] had been provided."<sup>746</sup> The court found that the information given by Dang to the state trooper was insufficient to amount to probable cause because Dang was not worthy of belief, stating that "[a] known liar is less worthy of belief than an individual about whom nothing is known."<sup>747</sup> The court also rejected the government's argument that

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738. *See id.* at 161.

739. *See id.* at 157.

740. *See id.* at 158.

741. *See id.*

742. *See id.*

743. 438 U.S. 154, 156 (1978) (holding that if a defendant establishes by a preponderance of the evidence the reckless disregard of the concealment of material information, and that if the concealed information were provided the resulting evidence would be insufficient to establish probable cause, the search warrant must be voided and the fruits of the search excluded to the same extent as if probable cause were lacking@).

744. *Hall*, 113 F.3d at 158.

745. *Id.*

746. *Id.* at 159 (*citing* United States v. Mendonsa, 989 F.2d 366, 368 (9th Cir. 1993)).

747. *Id.* (*citing* Mendonsa, 989 F.2d at 369). The court explained that corroboration

Dang's self-inculpatory statement to police lent credibility to the information he provided, reasoning that once a person is caught red-handed by the police, "his statement that another person is more important to his criminal enterprise than he gains little credibility from its inculpatory aspect."<sup>748</sup>

2. *Evidence.* In *McIntyre v. State*,<sup>749</sup> the Alaska Court of Appeals held that the superior court's preclusion of an inquiry into a witness's possible bias based on a claim that the witness and a party had a romantic relationship was an abuse of discretion.<sup>750</sup> McIntyre was convicted of fourth-degree assault on his wife.<sup>751</sup> During the trial, he was unable to cross-examine a female neighbor on a possible romantic relationship between the neighbor and McIntyre's wife, the existence of which may have suggested a bias in the witness's testimony in favor of McIntyre's wife.<sup>752</sup>

Although the court has "broad discretion to exclude relevant evidence of a witness's bias under Alaska Evidence Rule 403 if the probative force of that evidence is outweighed by the danger of unfair prejudice,"<sup>753</sup> the supreme court ruled that the possible bias had significant probative value and that "the bias of a witness toward a party is always relevant to the jury's consideration of the case."<sup>754</sup> Since there was a good-faith factual basis to the inquiry based on personal observation, McIntyre's conviction was reversed, even though the "evidence of same-sex romantic relationships may tend to prejudice or inflame the jury."<sup>755</sup>

In *Russell v. State*,<sup>756</sup> the court of appeals upheld the defendant's conviction of first-degree assault of his wife and rejected his claim that the lower court had improperly admitted evidence that his wife suffered from battered woman syndrome.<sup>757</sup> Russell had asked the superior court to bar evidence of prior physical abuse because "such evidence would do nothing more than paint him as

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ration of innocent facts does not adequately corroborate an anonymous tip, particularly when the informant is known to have previously made a false report to police.

748. *Id.*

749. 934 P.2d 770 (Alaska Ct. App. 1997).

750. *See id.*

751. *See id.* at 771.

752. *See id.* at 772.

753. *Id.* at 772-73 (citing *Beltz v. State*, 895 P.2d 513, 518 (Alaska Ct. App. 1995); *Johnson v. State*, 889 P.2d 1076, 1080-81 (Alaska Ct. App. 1995); *Kameroff v. State*, 926 P.2d 1174, 1179 (Alaska Ct. App. 1992)).

754. *Id.* at 773.

755. *Id.* at 773-74.

756. 934 P.2d 1335 (Alaska Ct. App. 1997).

757. *See id.* at 1342-44.

an abusive husband.”<sup>758</sup> The court held that the evidence was properly admitted to help “explain why one person might fear another person or might submit to another person’s will.”<sup>759</sup> The court also held that the lower court had not erred in allowing the prosecution’s expert, Dr. Ernest Meloche, to testify not only about the characteristics of battered woman syndrome, but also “about his diagnosis of [the wife] as a battered woman.”<sup>760</sup> The court concluded that this “profile” testimony was relevant because the defense had described the victim’s actions as “inconsistent with her allegation of rape,” and the prosecution was therefore “entitled to introduce evidence explaining how [the wife’s] behavior was not necessarily inconsistent with the [s]tate’s allegation of sexual assault.”<sup>761</sup>

In *State v. Titus*,<sup>762</sup> the court of appeals reversed a successful new trial motion based on jurors’ testimony that they discussed matters outside of evidence because this testimony was beyond the scope of a post-verdict examination of the jurors’ deliberations.<sup>763</sup> After Titus was convicted of first-degree sexual assault,<sup>764</sup> three different jurors testified that their personal knowledge of Titus’s drinking may have factored into the deliberations, even though the trial record contained no mention of this drinking.<sup>765</sup> As a result, the superior court granted a new trial.<sup>766</sup>

The court of appeals held that the jury’s verdict could be overturned only if “the jurors’ knowledge of Titus’s reputation and behavior constituted an extraneous influence on their deliberations.”<sup>767</sup> In support of this view, the court quoted the U.S. Senate’s discussion of Federal Rule of Evidence 606(b): “[i]n the interest of protecting the jury system and the citizens who make it work, [R]ule 606 should not permit any inquiry into the internal deliberations of the jurors.”<sup>768</sup> Because “a juror’s pre-existing knowledge is not ‘extraneous’ information,” the court concluded that Alaska Evidence Rule 606(b)<sup>769</sup> barred the superior court from considering the jurors’ testimony and, therefore, a reversal of the

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758. *Id.* at 1340.

759. *Id.* at 1341.

760. *Id.* at 1343.

761. *Id.*

762. 933 P.2d 1165 (Alaska Ct. App. 1997).

763. *See id.* at 1165-66.

764. *See id.* at 1166.

765. *See id.* at 1167-68.

766. *See id.*

767. *Id.* at 1169.

768. *Id.* at 1170 (quoting S. REP. NO. 93-1277, at 13-14 (1974), *reprinted in* 1974 U.S.C.C.A.N. 7060).

769. ALASKA R. EVID. 606(b).

lower court's ruling was warranted.<sup>770</sup>

In *Lamont v. State*,<sup>771</sup> the court of appeals reversed separate convictions of third-degree assault and second-degree sexual assault against the defendant because he was not allowed to instruct the jury on his claim of self-defense, and because prior inadmissible evidence of prior assaultive behavior toward a former girlfriend was used against him.<sup>772</sup> Lamont was convicted of third-degree assault for pointing a gun at a police officer.<sup>773</sup> At the time, he allegedly thought he was going to be robbed by the officer and felt that he was too intoxicated to defend himself.<sup>774</sup> However, the trial court ruled that a self-defense instruction to the jury was unavailable since a robbery was not actually imminent.<sup>775</sup> The court of appeals held that "Lamont was not required to show that a robbery was actually imminent, but merely that he reasonably believed one to be imminent."<sup>776</sup> The court also noted that it is for the jury to determine if the evidence is able to support a claim of self-defense, not the court.<sup>777</sup>

The second-degree sexual assault conviction was overturned because evidence of a defendant's prior misconduct is admissible only "to establish 'opportunity, intent, . . . or absence of mistake or accident.'"<sup>778</sup> The court ruled that Lamont never claimed mistake or accident and that the complete dissimilarity between the past and present acts made the "past acts inadmissible to show intent."<sup>779</sup> The court also rejected the state's claim of curative admissibility, ruling that Lamont's attorney never "'opened the door'" to that line of questioning.<sup>780</sup>

In *Allen v. State*,<sup>781</sup> the court of appeals reversed the defendant's conviction because the evidence of particular instances of the defendant's past violent behavior was not admissible in a criminal case.<sup>782</sup> During an altercation, Allen stabbed another man who eventually died, and Allen was convicted of second-degree murder.<sup>783</sup> At his trial, Allen asserted that he had been acting in

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770. *Titus*, 933 P.2d at 1166.

771. 934 P.2d 774 (Alaska Ct. App. 1997).

772. *See id.* at 776.

773. *See id.*

774. *See id.*

775. *See id.* at 778.

776. *Id.*

777. *See id.* at 777.

778. *Id.* at 780 (quoting ALASKA R. EVID. 404(b)(1)).

779. *Id.*

780. *Id.*

781. 945 P.2d 1233 (Alaska Ct. App. 1997).

782. *See id.* at 1239.

783. *See id.* at 1234-35.

self-defense.<sup>784</sup> To rebut Allen's claim that the other man was the first aggressor, the state introduced evidence to prove Allen's character for violence, specifically, that he had been convicted of assault and that he had previously assaulted a woman with a sword or machete.<sup>785</sup> The court held that, according to Evidence Rule 404(a)(2),<sup>786</sup> evidence of Allen's character was admissible to rebut his claim that he was not the initial aggressor.<sup>787</sup> The court also rejected Allen's argument that he was disadvantaged by the amendment to Rule 404(a)(2) that allowed the evidence to be admitted and that went into effect after he allegedly committed his crime.<sup>788</sup> The court in part relied on the U.S. Supreme Court's elucidation of the argument in *Collins v. Youngblood*<sup>789</sup> that the *ex post facto* clause of the U.S. Constitution prohibits only the retrospective application of laws that "alter the definition of crimes or increases the punishment for criminal acts."<sup>790</sup> The court found that Rule 404(a)(2) did neither of these things.<sup>791</sup> Yet, although the state was authorized to introduce evidence of Allen's character, it was not allowed to introduce evidence of his specific acts of violence.<sup>792</sup> Evidence Rule 405(b)<sup>793</sup> allowed introduction of such specific instances, but since this was a criminal case involving claims of self-defense, Evidence Rules 404(a)(2) and 405 allowed only reputation and opinion evidence to provide evidence of the character of the defendant.<sup>794</sup>

In *Marino v. State*,<sup>795</sup> the court of appeals held that blood and urine specimens solicited for a murder investigation by police could not be used by the state as evidence of two drug charges when the police had specifically promised the defendant immunity from prosecution for any drug offenses.<sup>796</sup> Although Marino consented to the tests and even signed a form that "specifically stated that the samples could be tested for evidence of 'drug abuse,'" the court held that given the verbal assurances Marino had received from police, the "[s]tate exceeded the scope of Marino's con-

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784. See *id.* at 1235.

785. See *id.*

786. ALASKA R. EVID. 404(a)(2).

787. See *Allen*, 945 P.2d at 1236.

788. See *id.*

789. 497 U.S. 37 (1990).

790. *Allen*, 945 P.2d at 1237 (quoting *Collins*, 497 U.S. at 43).

791. See *id.*

792. See *id.* at 1239.

793. ALASKA R. EVID. 405(b).

794. See *Allen*, 945 P.2d at 1239.

795. 934 P.2d 1321 (Alaska Ct. App. 1997).

796. See *id.* at 1332-33.

sent.”<sup>797</sup> The court found that holding Marino to the consent form’s fine print would be “unconscionable.”<sup>798</sup>

In *Brodine v. State*,<sup>799</sup> the court of appeals held that the results of three different DNA tests were properly admitted by the trial court.<sup>800</sup> The court concluded that the admission of the PCR DQ-Alpha DNA testing was supported by the finding in *Harmon v. State*<sup>801</sup> that PCR DNA typing was a generally accepted scientific technique pursuant to the *Frye v. United States* test.<sup>802</sup> As for the new polymarker and the D1S80 tests, the court concluded that the state’s expert testimony and supporting scientific papers justified the trial court’s determination that these techniques were also generally accepted by the relevant scientific community and therefore, correctly admitted.<sup>803</sup> Based on a review of the record, the court concluded that any error the trial court committed by admitting DNA test results without any accompanying population frequency estimates as statistical analysis was harmless error.<sup>804</sup>

In *Shadle v. Municipality of Anchorage*,<sup>805</sup> the court of appeals held that where a defendant’s motion to suppress evidence is denied, but the record upon which the trial court based its decision is lost or destroyed, and cannot be reconstructed, the defendant is denied the opportunity for meaningful appellate review, and the denial of defendant’s motion for suppression must be reversed.<sup>806</sup> Shadle was arrested for driving while intoxicated (“DWI”) and was given a breath test which showed his blood alcohol level to be .227 percent.<sup>807</sup> Shadle signed a waiver to forego independent chemical testing, but during trial he argued that because of a severe hearing impairment, he did not understand what he was signing, and moved to suppress the breath test.<sup>808</sup> The district judge ruled, based mainly on audio recordings of Shadle’s processing for DWI, that Shadle knowingly waived the independent test.<sup>809</sup> Subsequent

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797. *Id.* at 1332.

798. *Id.* at 1333.

799. 936 P.2d 545 (Alaska Ct. App. 1997).

800. *See id.* at 549-52.

801. 908 P.2d 434 (Alaska App. 1995).

802. *See Brodine*, 936 P.2d at 549; *see also Frye v. United States*, 293 F.3d 1013 (D.C. Cir. 1923) (requiring a showing that new scientific methods are generally accepted by the relevant scientific community before they are admitted as evidence).

803. *See Brodine*, 936 P.2d at 550-51.

804. *See id.* at 551.

805. 941 P.2d 904 (Alaska Ct. App. 1997).

806. *See id.* at 905.

807. *See id.* at 904.

808. *See id.* at 905.

809. *See id.*

to the district judge's decision to deny Shadle's motion for suppression, the audio tape was either lost or inadvertently destroyed.<sup>810</sup> The court held that because the record could not be reconstructed in such a way as to afford meaningful appellate review, the district judge's order denying Shadle's motion to suppress must be reversed.<sup>811</sup>

3. *Sentencing.* In *Foxglove v. State*,<sup>812</sup> the Alaska Court of Appeals found a composite sentence imposed for separate incidents of causing injury and death with a snowmobile while intoxicated was not disproportionate to other sentences imposed on defendants convicted of vehicular homicide.<sup>813</sup> Driving his snowmobile while intoxicated, Foxglove struck and seriously injured a twelve-year-old boy, and one half-hour later, drove through a crowd of people gathered around a bonfire killing one child and injuring four other people.<sup>814</sup> Foxglove was convicted of one count of manslaughter and five counts of first-degree assault.<sup>815</sup> He received a composite sentence of twenty-five years imprisonment with six years suspended.<sup>816</sup> Foxglove appealed, contending that his sentence was disproportionate to sentences imposed on other defendants convicted of vehicular homicide.<sup>817</sup>

The court of appeals evaluated Foxglove's assertion, examining "the degree of [his] recklessness, the consequences of his conduct, his age, his record of criminal conduct, and his record of alcohol abuse."<sup>818</sup> The court found Foxglove's conduct was aggravated because he ignored warnings not to drive and purposefully ran over his victims.<sup>819</sup> The court also found that although Foxglove may have killed only one person, he inflicted serious, long-term injuries on the others.<sup>820</sup> The court affirmed the concurrent terms for the four assaults, determining that the nineteen-year sentence adequately addressed the consequences of Foxglove's action.<sup>821</sup> The court also rejected Foxglove's argument that the first assault should merge for sentencing purposes with the punishment

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810. *See id.*

811. *See id.*

812. 929 P.2d 669 (Alaska Ct. App. 1997).

813. *See id.* at 670.

814. *See id.*

815. *See id.*

816. *See id.*

817. *See id.* at 671.

818. *Id.*

819. *See id.* at 671-72.

820. *See id.* at 672.

821. *See id.*

received for later killing or injuring someone else.<sup>822</sup>

In *Sorenson v. State*,<sup>823</sup> the court of appeals held that under the *Austin* rule,<sup>824</sup> the superior court erred by sentencing a first time felon to a sentence that exceeded the two-year presumptive term that would have applied had the defendant been a second time offender.<sup>825</sup> The *Austin* rule states that a first-time felony offender should generally receive a sentence that is more favorable than the presumptive term for a second-time felony offender who has been convicted of the same class of crime.<sup>826</sup> The court of appeals concluded that the trial court erred by sentencing Sorenson to a five-year sentence with three years suspended for a first time felony conviction for negligent homicide where the state alleged no aggravating factors or extraordinary circumstances and the presumptive second-time felony term is two years.<sup>827</sup> Remanding the case to the trial court for resentencing, the court noted that if the state decided to propose aggravating factors or extraordinary circumstances that were not previously advanced, they must give Sorenson advance notice and an opportunity to respond.<sup>828</sup>

In *Wilson v. State*,<sup>829</sup> the court of appeals affirmed the Department of Corrections's ("DOC's") ability to aggregate sentences to determine a prisoner's appropriate release date.<sup>830</sup> According to Alaska Statutes section 33.20,<sup>831</sup> inmates with sentences of more than three days are entitled to a "good time" reduction in sentence for following the rules in their correctional facility.<sup>832</sup> Wilson argued that the DOC should not have aggregated his misdemeanor and felony sentences to determine good time.<sup>833</sup> The court rejected this argument, finding that the statutory phrases "term or terms of imprisonment" and "one or more terms of imprisonment" indicated a prisoner's terms of imprisonment were to be aggregated.<sup>834</sup> The court also found that the parole administration statute made no distinction between felony and misdemeanor convictions and instead focused on the total length of the inmate's

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822. *See id.*

823. 938 P.2d 1084 (Alaska Ct. App. 1997).

824. *See Austin v. State*, 627 P.2d 657 (Alaska Ct. App. 1981).

825. *See Sorenson*, 938 P.2d at 1085.

826. *See id.* at 1084 n.1 (citing *Austin*, 627 P.2d at 657-58).

827. *See id.*

828. *See id.* at 1085.

829. 944 P.2d 1191 (Alaska Ct. App. 1997).

830. *See id.*

831. ALASKA STAT. § 33.20 (Michie 1996).

832. *See Wilson*, 944 P.2d at 1192.

833. *See id.*

834. *See id.*; *see also* ALASKA STAT. §§ 33.20.040, .16.900(8) (Michie 1996).

sentence.<sup>835</sup>

In *Landon v. State*,<sup>836</sup> the court of appeals sustained a conviction for running a marijuana growing operation, but remanded the case for resentencing because the defendant was incorrectly labeled as a statutory aggravator.<sup>837</sup> Landon was deemed a statutory aggravator by the superior court for attempting to obtain substantial pecuniary gain while facing only a slight risk of prosecution and punishment, and for committing an offense that was one of a series of criminal activities from which Landon derived a major portion of his income.<sup>838</sup> The court agreed that the pecuniary gain was substantial, but determined that there was a high risk of prosecution and punishment because many marijuana growers are caught and prosecuted each year.<sup>839</sup> The court also determined that the record did not show that a single operation amounted to a continuing series of criminal offenses and that Landon's operation was the major source of his income.<sup>840</sup>

In *State v. McKinney*,<sup>841</sup> the court of appeals held that a defendant's post-offense conduct was properly considered as a non-statutory mitigating factor in a sexual offense case.<sup>842</sup> The court of appeals concluded that McKinney's admission of culpability to his family and to state troopers concerning the sexual abuse of his daughter, his assurances to his daughter that she was blameless, and his willingness to attend therapy and obtain counseling constituted post-offense conduct that was properly considered as a non-statutory mitigating factor in his sentencing.<sup>843</sup> Rejecting the state's argument that McKinney's conduct was "simply a facet of his potential for rehabilitation," the court remarked that the conduct "had significant potential to ameliorate the impact of the sexual abuse" and "to enhance [the victim's] prospects for emotional recovery" and thus should be considered apart from the defendant's potential for rehabilitation.<sup>844</sup>

In *Ting v. Municipality of Anchorage*,<sup>845</sup> the court of appeals affirmed a composite sentence of 330 days previously suspended and a consecutive term of 365 days for a subsequent conviction for

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835. See *Wilson*, 944 P.2d at 1192; see also ALASKA STAT. § 33.16 (Michie 1996).

836. 941 P.2d 186 (Alaska Ct. App. 1997).

837. See *id.* at 188.

838. See *id.* at 193.

839. See *id.*

840. See *id.* at 194.

841. 946 P.2d 456 (Alaska Ct. App. 1997).

842. See *id.* at 458.

843. See *id.* at 457.

844. *Id.* at 458.

845. 929 P.2d 673 (Alaska Ct. App. 1997).

a “worst offender” child abuser.<sup>846</sup> In 1993, Ting had been sentenced to 360 days, 330 suspended, after pleading no contest to a misdemeanor assault for striking his stepdaughter.<sup>847</sup> Over two years later, while still on probation, Ting again assaulted his stepdaughter.<sup>848</sup> The superior court revoked Ting’s probation, ordered him to serve the suspended sentence, and imposed a consecutive term for the second assault.<sup>849</sup> The judge found Ting to be a continuing danger to the stepdaughter and rejected Ting’s argument that he had demonstrated an ability to rehabilitate himself, finding that even assuming Ting’s attendance and participation in rehabilitative programs had been satisfactory, it was clear from the record of repeated assaults that these attempts had been unsuccessful.<sup>850</sup> The court of appeals determined that the sentencing record reflected a “careful consideration of all the necessary sentencing objectives,” and that the court did not err in imposing the composite sentence.<sup>851</sup>

In *Ison v. State*,<sup>852</sup> the court of appeals affirmed the superior court’s refusal to apply two mitigating factors when setting the defendant’s sentence for driving while intoxicated.<sup>853</sup> Ison argued that the mitigating factor construed in section 12.55.125(d)(9)<sup>854</sup> should have been applied because “the conduct constituting [his] offense was among the least serious conduct included in the definition of the offense.”<sup>855</sup> The court of appeals rejected this argument because Ison’s description of his conduct failed to include his past convictions for driving with a suspended license and his physical resistance of arresting officers.<sup>856</sup>

In the alternative, Ison argued that the sentencing judge should have applied section 12.55.125(d)(13),<sup>857</sup> which provides, in part, that a felony offense should be mitigated if the present offense combined with any previous offenses “establish that the harm caused by the defendant’s conduct is consistently minor and inconsistent with the imposition of a substantial period of imprisonment.”<sup>858</sup> Reiterating its interpretation of the statute in *Jordan*

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846. *See id.* at 675.

847. *See id.* at 673.

848. *See id.* at 674.

849. *See id.*

850. *See id.* at 675.

851. *Id.*

852. 941 P.2d 195 (Alaska Ct. App. 1997).

853. *See id.* at 197-98.

854. ALASKA STAT. § 12.55.125(d)(9) (Michie 1996).

855. *Ison*, 941 P.2d at 197 (quoting § 12.55.125(d)(9)).

856. *See id.* at 198-99.

857. ALASKA STAT. § 12.55.125(d)(13).

858. *See Ison*, 941 P.2d at 197 (quoting § 12.55.125(d)(13)).

*v. State*,<sup>859</sup> the court affirmed the superior court's determination that section 12.55.125(d)(13) did not apply to Ison's situation.<sup>860</sup> The court explicitly reserved judgment on the issue of whether it is possible for a defendant to show that the "harm caused by [his or her] conduct is consistently minor," qualifying under mitigator (d)(13), if they have failed to qualify under mitigator (d)(9) by showing that the present offense "was among the least serious conduct included in the definition of the offense."<sup>861</sup>

In *State v. Winters*,<sup>862</sup> the court of appeals held that the plain meaning of a minimum sentencing statute imposing punishment for previous convictions for DWI includes convictions only within the preceding five years.<sup>863</sup> Winters and Goodmanson were both convicted of DWI, an offense that each had been previously convicted of three times.<sup>864</sup> Although each had three prior convictions, only two of the convictions had occurred within the past five years.<sup>865</sup> The sentencing statute provides that "only convictions occurring within five years preceding the date of the present offense may be included" for mandatory sentencing, and sets the punishment at \$5,000 and no less than "120 days if the person has been previously convicted twice" or "240 days if the person has been previously convicted three times."<sup>866</sup> The superior court sentenced the defendants to 210 days of imprisonment, and the state appealed the sentences.<sup>867</sup> The court of appeals held that the statute's plain meaning supported the view that only convictions within the past five years should be included in the sentencing, and that if the statute was ambiguous, the ambiguity should be resolved in favor of the criminal defendant.<sup>868</sup>

In *Ross v. State*,<sup>869</sup> the court of appeals held that the existence of prior DWI convictions is an element of the crime of felony DWI under Alaska Statutes section 28.35.030(n),<sup>870</sup> rather than merely a factor that enhances sentencing.<sup>871</sup> Ross was charged with DWI in October 1995 and previously had been convicted of DWI in 1991

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859. 895 P.2d 994 (Alaska Ct. App. 1995).

860. See *Ison*, 941 P.2d at 198.

861. *Id.*

862. 944 P.2d 54 (Alaska Ct. App. 1997).

863. See *id.*

864. See *id.*

865. See *id.* at 55.

866. ALASKA STAT. § 28.35.030(n) (Michie 1996).

867. See *Winters*, 944 P.2d at 55.

868. See *id.* at 56.

869. 950 P.2d 587 (Alaska Ct. App. 1997).

870. ALASKA STAT. § 28.35.030(n) (Michie 1996).

871. See *Ross*, 950 P.2d at 591.

and again in 1993.<sup>872</sup> Ross argued at trial that his prior convictions were not an element of the offense, but were only relevant to sentencing in the event he was found guilty.<sup>873</sup> In affirming the district court's admission of Ross's two prior DWI convictions as an element of the offense, the court of appeals construed Alaska Statutes section 28.35.030(n) as creating an aggravated felony-level offense for repeat offenders, separate from the traditional misdemeanor offense codified in Alaska Statutes section 28.35.030(a).<sup>874</sup> The court thereby answered the question left open in *State v. Winters*,<sup>875</sup> which held that sections 28.35.030(b) and 28.35.030(n) constitute separate and independent sentencing provisions, by explicitly stating that section 28.35.030(a) and section 28.35.030(n) codify separate offenses.<sup>876</sup> The court held that the state must therefore prove each essential element of the offense to the trier of fact, including proving the existence of the defendant's prior convictions beyond a reasonable doubt.<sup>877</sup>

4. *Miscellaneous.* In *Arnett v. State*,<sup>878</sup> the Alaska Court of Appeals held that the defendant's trial counsel was not ineffective and that the defendant could not knowingly and willfully abscond during trial and then attempt to escape the consequences by blaming his counsel for any wrongdoing.<sup>879</sup> Under *State v. Jones*,<sup>880</sup> the court found that the law presumes that counsel is competent and that any decisions made by counsel are motivated by tactical considerations.<sup>881</sup> Because Arnett failed to show that the decisions of his counsel not to call certain witnesses were motivated by something other than tactical considerations, the court of appeals concluded that Arnett did not rebut the presumption of competence and, thus, failed to show that his counsel was ineffective.<sup>882</sup> The court also rejected Arnett's argument that his counsel acted incompetently when she encouraged and assisted him in absconding from his trial.<sup>883</sup> Without deciding whether Arnett's counsel actually advised or assisted him in absconding, the court concluded that even if Arnett's assertions regarding his

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872. See *id.* at 589.

873. See *id.*

874. See *id.* at 590; see also ALASKA STAT. § 28.35.030(a) (Michie 1996).

875. 944 P.2d 54 (Alaska Ct. App. 1997).

876. See *Ross*, 950 P.2d at 590.

877. See *id.*

878. 938 P.2d 1079 (Alaska Ct. App. 1997).

879. See *id.* at 1080, 1082.

880. 759 P.2d 558 (Alaska Ct. App. 1988).

881. See *Arnett*, 938 P.2d at 1080 (citing *Jones*, 759 P.2d at 569).

882. See *id.* at 1081.

883. See *id.* at 1083.

counsel were true, “Arnett has shown no grounds for claiming prejudice stemming from his attorney’s incompetence” and “[t]o grant relief in this case would permit Arnett ‘to reap a windfall new trial on account of his own [crime].’”<sup>884</sup>

In *Tallent v. State*,<sup>885</sup> the court of appeals upheld the defendant’s second-degree theft conviction and concluded that Alaska Statutes section 11.46.130(a)(6) “defined a separate method of committing the substantive crime of second-degree theft, and that a defendant’s prior convictions [were] an element of that crime.”<sup>886</sup> Section 11.46.130(a)(6)<sup>887</sup> provided that if a defendant had been convicted of theft twice within the past five years, then a theft of between \$50 and \$500 constituted a second-degree theft as opposed to third-degree, the normal degree for that dollar range.<sup>888</sup> Tallent argued that the trial court erred by refusing to withhold evidence of his prior convictions from the jury on the condition that he stipulate to them.<sup>889</sup> Rejecting Tallent’s argument, the court concluded that, despite some contrary legislative history, the newly enacted statutory provisions “were not merely penalty provisions.”<sup>890</sup> Rather, the defendant’s prior convictions were an essential element of the crime and the state was required to prove them beyond a reasonable doubt.<sup>891</sup>

In *State v. Burden*,<sup>892</sup> the court of appeals held that a “go-between” in a cocaine sale could be indicted for delivery of cocaine, because the “procuring agency” defense does not apply to the offense of “delivery,” though the defense might be available for the offense of “sale.”<sup>893</sup> Burden had successfully argued before the trial court that he could not be prosecuted for acting as a go-between in a drug transaction because Alaska Statutes section 11.71.03(a)(1)<sup>894</sup> provides that persons may not be found guilty as an accomplice for offenses in which their actions are an inevitable incidence of the crime (*i.e.*, the “procuring agent” defense).<sup>895</sup> The court held that the state legislature’s modification of the terms of the criminal statute from “sale” to “delivery” evidenced intent to foreclose the “procuring agent” defense, regardless of whether the

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884. *Id.* (quoting *Commonwealth v. McNeil*, 487 A.2d 802, 807 (1985)).

885. 951 P.2d 857 (Alaska Ct. App. 1997).

886. *Id.* at 861.

887. ALASKA STAT. § 11.46.130(a)(6) (Michie 1996).

888. *See Tallent*, 951 P.2d at 860.

889. *See id.* at 859-60.

890. *Id.* at 860.

891. *See id.* at 861.

892. 948 P.2d 991 (Alaska 1997).

893. *See id.* at 994.

894. ALASKA STAT. § 11.71.03(a)(1) (Michie 1996).

895. *See Burden*, 948 P.2d at 994.

defendant acted as an agent for the buyer or the seller.<sup>896</sup>

## VII. EMPLOYMENT LAW

### A. Workers' Compensation

1. *Claims Procedure.* In *Brown v. Alaska Workers' Compensation Board*,<sup>897</sup> the Alaska Supreme Court rejected a workers' compensation claim based on the aggravation of a preexisting condition caused by a work-related injury.<sup>898</sup> Before being employed by the University of Alaska in its power plant, Brown was diagnosed as suffering from a degenerative condition of the cervical spine.<sup>899</sup> During his employment, Brown claimed that he injured his neck when an ash rake fell on his neck, and never returned to work after his injury.<sup>900</sup> The University disputed all of Brown's allegations and ceased paying disability compensation after approximately two months.<sup>901</sup> The Alaska Workers' Compensation Board appointed an independent medical examiner who determined that although Brown did suffer an injury at work, it aggravated his preexisting condition only temporarily and any impairment after the date the University stopped payment was due to his preexisting condition.<sup>902</sup>

The supreme court upheld the Board's decision.<sup>903</sup> It rejected Brown's argument that the Board was compelled to adopt the opinion of the medical examiner, reflecting that no part of Alaska Statutes section 23.30.095(k) required the Board to rely on the examiner's report.<sup>904</sup> The court also held that the Board acted consistently with the statutory definition of medical stability when it determined Brown was suffering no effects attributable to the accident when the University ceased payment, and did not make an error of fact when it relied on two physicians' testimony that Brown was not disabled by the accident.<sup>905</sup> Lastly, because there was substantial evidence to support the Board's conclusion that Brown's continuing degenerative condition was due to the preexisting condition, the supreme court rejected Brown's claim that

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896. *See id.* at 991.

897. 931 P.2d 421 (Alaska 1997).

898. *See id.* at 425.

899. *See id.* at 422.

900. *See id.*

901. *See id.*

902. *See id.* at 422-23.

903. *See id.* at 425.

904. *See id.* at 423-24; *see also* ALASKA STAT. § 23.30.095(k) (Michie 1996).

905. *See Brown*, 931 P.2d at 423-24.

he was still entitled to benefits because of his pre-existing condition.<sup>906</sup>

In *Dafermo v. Municipality of Anchorage*,<sup>907</sup> the supreme court held that a claimant's failure to provide notice of a work-related eye problem to an employer within thirty days of receiving a physician's letter diagnosing the defect was excused because the injury was a latent defect and therefore the notice was timely if filed within two years of diagnosis.<sup>908</sup> The court also found that the delay did not prejudice the employer.<sup>909</sup> Because doctors had initially failed to diagnose Dafermo's injury, the court found that the injury was latent and the two-year statute of limitations was suspended until the nature of the injury was discovered.<sup>910</sup> Also, the court held that no substantial evidence supported a finding that the employer was prejudiced by the failure to give notice within thirty days because Dafermo had talked to his supervisors about his problem, thereby giving his employer knowledge of the injury.<sup>911</sup> Also, the objectives of the notice requirement, such as immediate medical treatment of the injury and early investigation of the relevant facts, were not impeded by Dafermo's failure to give notice because Dafermo's eye problems had started years earlier.<sup>912</sup> Because Dafermo's employer had knowledge of the injury and was not prejudiced, the exception to the notification requirement found in Alaska Statutes section 23.30.100(d)(1) was satisfied.<sup>913</sup>

In *Wells v. Swalling Construction Co.*,<sup>914</sup> the supreme court held that the "last injurious exposure" rule for workers' compensation claims does not apply to successive injuries sustained by the employee in the same job.<sup>915</sup> Wells suffered two injuries, one each to his right and left knee, in 1986 and 1989, respectively, while working for Swalling.<sup>916</sup> In 1986, Wells received surgery on his right knee.<sup>917</sup> In 1989, Wells was examined, but not treated for the injury to the left knee, but needed to have his right knee totally re-

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906. See *id.* at 425.

907. 941 P.2d 114 (Alaska 1997).

908. See *id.* at 119.

909. See *id.* at 118-19.

910. See *id.* at 119; see also ALASKA STAT. § 23.30.105 (Michie 1996) (tolling the two-year limitations period for worker's compensation claims in the case of an employee's latent injury).

911. See *Dafermo*, 941 P.2d at 118-19.

912. See *id.*

913. See *id.* at 119; see also ALASKA STAT. § 23.30.100(d)(1) (Michie 1996).

914. 944 P.2d 34 (Alaska 1997).

915. See *id.* at 37.

916. See *id.* at 36.

917. See *id.*

placed because it had not healed properly from the earlier injury.<sup>918</sup> Swalling paid Wells \$885.20 per week during the period that Wells missed work after his first injury, but paid him only \$562.49 per week after the second injury.<sup>919</sup> Wells filed a claim for adjustment with the Alaska Workers' Compensation Board, and the Board ruled that under the "last injurious exposure rule," Swalling must pay Wells at the same rate of compensation as after the 1986 injury, since his disability was caused by the earlier injury and not the 1989 injury.<sup>920</sup> The supreme court reversed the Board's decision, ruling that the Board had misapplied the "last injurious exposure rule."<sup>921</sup> The supreme court found that the "last injurious exposure" rule was designed as a way to determine liability when successive employers or insurers disputed the claims for different injuries.<sup>922</sup> Since that was not the case for Wells' injuries, the court ruled that the "last injurious exposure" rule did not apply.<sup>923</sup>

In *Lindekugel v. Fluor Alaska, Inc.*,<sup>924</sup> the supreme court held that an oral stipulation dismissing a workers' compensation claim was an agreement in regard to the claim and therefore void when a memorandum of that agreement was not filed with the Workers' Compensation Board as required by Alaska Statutes section 23.30.210(b).<sup>925</sup> Lindekugel waived a compromise and release against Fluor that was to provide all future medical benefits for him, and entered into a new agreement with his current employer that did not provide future medical benefits.<sup>926</sup> The waiver and new agreement were never reduced to writing.<sup>927</sup> The Board disapproved of the new agreement because it "was not in Lindekugel's best interest" and "encouraged Lindekugel to pursue a claim against Fluor for medical expenses."<sup>928</sup> Because section 23.30.210(b) explicitly states that an "agreement is void for any purpose"<sup>929</sup> and the "legislature intended that no legal consequences should flow from an agreement covered by subsection .210(b) which does not meet its requirements," the court rejected Fluor's argument that the oral stipulation was voidable, and not

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918. *See id.*

919. *See id.*

920. *See id.*

921. *See id.*

922. *See id.* at 37.

923. *See id.*

924. 934 P.2d 1307 (Alaska 1997).

925. *See id.* at 1311-12; ALASKA STAT. § 23.30.210(b) (Michie 1996).

926. *See Lindekugel*, 934 P.2d at 1308.

927. *See id.* at 1307-08.

928. *Id.* at 1308-09.

929. ALASKA STAT. § 23.30.210(b).

void on its face.<sup>930</sup>

In *Cogger v. Anchor House*,<sup>931</sup> the supreme court held that the thirty-day period for notifying an employer of a workers' compensation claim began to run when the employee visited the emergency room and incurred medical costs.<sup>932</sup> Although Cogger did not comply with the formal notice requirement, the court remanded the case because Anchor House had actual knowledge of the injury and did not suffer prejudice from the delay.<sup>933</sup> The court held that informing co-workers did not provide actual knowledge to the employer, but the fact that Anchor House did have actual knowledge of Cogger's back condition within days of the expiration of the thirty-day time limit was sufficient to trigger Alaska Statutes section 23.30.100(d)(1).<sup>934</sup>

In *Williams v. Department of Revenue*,<sup>935</sup> the supreme court held that Alaska Statutes section 23.30.100<sup>936</sup> does not time-bar an employee's claim for work-related injuries if the employer had knowledge of the injuries and had not been prejudiced by the employee's failure to give notice.<sup>937</sup> Because the Child Support Enforcement Division ("CSED"), Williams's employer, was informed by a doctor that Williams's injuries were related to work and because there was no indication that CSED's lack of formal notice of the injuries interfered with its ability to investigate Williams's claim, the court held that Williams's claim was not time-barred.<sup>938</sup> Concluding that Williams failed to establish that her work-related mental injuries were "extraordinary and unusual in comparison to pressures and tensions experienced by individuals in a comparable work environment,"<sup>939</sup> the court held that the Workers' Compensation Board did not err when it denied Williams's mental injury claim.<sup>940</sup> However, the court concluded that the trial court erred when it dismissed Williams's physical injury claim.<sup>941</sup> The court noted that in order to rebut the presumption that the injuries were work-related, the employer must either offer affirmative evidence to show that the injury was not work-related or eliminate all possi-

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930. *Lindekugel*, 934 P.2d at 1311.

931. 936 P.2d 157 (Alaska 1997).

932. *See id.* at 160.

933. *See id.* at 160-62.

934. *See id.* at 161-62; ALASKA STAT. § 23.30.100(d)(1) (Michie 1996).

935. 938 P.2d 1065 (Alaska 1997).

936. ALASKA STAT. § 23.30.100 (Michie 1996).

937. *See Williams*, 938 P.2d at 1070.

938. *See id.* at 1071.

939. ALASKA STAT. § 23.30.395(17).

940. *See Williams*, 938 P.2d at 1072.

941. *See id.* at 1072.

bilities that the injury was work-related.<sup>942</sup> Because the doctor's testimony showed that Williams's job was the predominant cause of her physical ailments, the court concluded that CSED failed to successfully rebut the presumption of compensability either affirmatively or negatively.<sup>943</sup> As a result, the court remanded the case to the trial court to calculate damages for Williams's claim that her employment had aggravated a pre-existing physical condition.<sup>944</sup>

In *Blanas v. Brower Co.*,<sup>945</sup> the supreme court concluded that an employee established a genuine fact issue regarding whether a compromise and release ("C&R") was the product of fraud and therefore warranted further proceedings.<sup>946</sup> Blanas entered into the C&R with Brower Co., his employer, to resolve his workers' compensation claim.<sup>947</sup> Subsequently, Blanas petitioned the Workers' Compensation Board to reopen and modify the C&R when he learned that the physical demands of the job required of him by the C&R exceeded his post-injury physical capacity.<sup>948</sup> Blanas's fraud claim was based on an assertion that his employer fraudulently induced him to consent to the C&R despite the knowledge that Blanas was physically incapable of performing the specified job.<sup>949</sup> The Board concluded that it possessed the authority to set aside the fraudulent C&R, but held that the conduct alleged by Blanas did not constitute fraudulent behavior.<sup>950</sup> Although the supreme court agreed with the Board regarding the Board's authority to set aside the C&R,<sup>951</sup> it reversed and remanded on the issue of whether the C&R was obtained fraudulently.<sup>952</sup> The court also ruled that the Board erred in applying the one-year limitation found in Civil Rule 60(b)(3)<sup>953</sup> because it did not apply to a petition to put aside a fraudulently obtained C&R.<sup>954</sup>

In *Twiggs v. Municipality of Anchorage*,<sup>955</sup> the supreme court held that, for purposes of a workers' compensation claim, a substantial increase in a worker's post-injury income was not disposi-

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942. *See id.* at 1073.

943. *See id.*

944. *See id.* at 1076.

945. 938 P.2d 1056 (Alaska 1997).

946. *See id.* at 1064-65.

947. *See id.* at 1058.

948. *See id.*

949. *See id.* at 1059.

950. *See id.* at 1061.

951. *See id.* at 1061-62.

952. *See id.* at 1064-65.

953. ALASKA R. CIV. P. 60(b)(3).

954. *See Blanas*, 938 P.2d at 1063.

955. 938 P.2d 1046 (Alaska 1997).

tive of whether his lost promotion from employment as a volunteer policeman with the Federal Aviation Administration (“FAA”) decreased his earning capacity.<sup>956</sup> The court stated that “incorporating a lost promotion into the lost earning capacity equation is a natural extension of our previous cases.”<sup>957</sup> However, the court concluded that Twiggs’s recovery should be limited by another provision of the Alaska’s Workers’ Compensation Act (“AWCA”),<sup>958</sup> which was in force at the time of the injury.<sup>959</sup> The AWCA provided, in part, that “if the employee is injured while performing duties as a volunteer . . . policeman, . . . the gross weekly earnings for calculating compensation shall be the minimum earnings paid a full-time . . . policeman, . . . employed in the political subdivision where the injury occurred . . . .”<sup>960</sup> Because Twiggs was injured while working as a volunteer policeman, the court concluded that this provision set Twiggs’s gross weekly earnings at the minimum gross weekly earnings paid a full-time Anchorage policeman and rejected Twiggs’s argument that his employment and gross weekly earnings with the FAA should be part of his recovery calculation.<sup>961</sup>

2. *Benefits.* In *Kolkman v. Greens Creek Mining Co.*,<sup>962</sup> the Alaska Supreme Court reversed a decision denying workers’ compensation benefits to an employee based on a failure to give timely notice of injury to his employer when the employer was aware that the employee suffered a heart attack and when the employee did not know that it was a work-related injury until over a year had passed.<sup>963</sup> The employer appealed an adverse decision originally awarding benefits, alleging that Kolkman had failed to serve notice within thirty days of the injury.<sup>964</sup> Based on this

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956. *See id.* at 1048.

957. *Id.* at 1049 (referring to *Fairbanks North Star Borough Sch. Dist. v. Cider*, 736 P.2d 770, 772-773 (Alaska 1987) (holding that lost earning capacity is “not limited to an examination of those losses that appear immediately after claimant’s injury stabilizes”); *Hewing v. Peter Kiewit & Sons*, 586 P.2d 182, 186 (Alaska 1978) (holding that a post-injury increase in earnings does not necessarily preclude a finding of lost earning capacity)).

958. ALASKA STAT. § 23.30.220(a)(4) (Michie 1996).

959. *See Twiggs*, 938 P.2d at 1094.

960. ALASKA STAT. § 23.30.220(a)(4)(9).

961. *See Twiggs*, 938 P.2d at 1049-50.

962. 936 P.2d 150 (Alaska 1997).

963. *See id.* at 154-55.

964. *See id.* at 153; *see also* ALASKA STAT. § 23.30.100(d)(1) (statutory provision stating that “[f]ailure to give notice does not bar a claim under this chapter [] if the employer, an agent of the employer in charge of the business in the place where the injury occurred, or the carrier had knowledge of the injury or death

appeal, the Alaska Workers' Compensation Board found the claim time-barred and the superior court affirmed this decision.<sup>965</sup>

The supreme court determined that Kolkman's failure to give notice of his injury within thirty days should be excused because his employer knew of the heart attack and was not prejudiced by the delay, both of which are necessary to fall within the exception of the notice requirement.<sup>966</sup> The court also partially overruled a previous case that inferred the additional requirement of knowledge of the work-relatedness of the injury by the employer.<sup>967</sup> Since a year passed before Kolkman learned of the work-relatedness of his heart attack and the delay in notification did not prejudice his employer, the case was remanded to the Board to reach the issue of how much Kolkman should be compensated.<sup>968</sup>

In *Morgan v. Lucky Strike Bingo*,<sup>969</sup> the supreme court held that the Workers' Compensation Board did not err in affirming the reemployment benefits administrator's ("RBA's") determination that the claimant was not eligible for reemployment benefits.<sup>970</sup> The court also held that Alaska Statutes section 23.30.041(e)<sup>971</sup> required the RBA to use the Department of Labor's Selected Characteristics of Occupations Defined in the Dictionary of Occupational Titles ("SCODDOT") in determining whether a claimant is eligible for reemployment benefits.<sup>972</sup> Although there was evidence that Morgan could not perform all the duties of her actual job which required prolonged "neck-bending," the court upheld the Board's decision to deny benefits because the physical requirement of "neck-bending" is not expressly listed in the SCODDOT description of a manager/accountant.<sup>973</sup> The court rejected Morgan's argument that "neck-bending" was an implicit lesser-included part of the physical requirements of a sedentary job.<sup>974</sup>

In *Grove v. Alaska Construction and Erectors*,<sup>975</sup> the supreme court held that substantial evidence supported that the claimant

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and the board determines that the employer or carrier has not been prejudiced by the failure to give notice").

965. See *Kolkman*, 936 P.2d at 153.

966. See *id.* at 154-56.

967. See *id.* at 155 (partially overruling *State v. Moore* 706 P.2d 311 (Alaska 1985)).

968. See *id.* at 156.

969. 938 P.2d 1050 (Alaska 1997).

970. See *id.* at 1054.

971. ALASKA STAT. § 23.30.041(e) (Michie 1996).

972. See *Morgan*, 938 P.2d at 1055.

973. See *id.*

974. See *id.*

975. 948 P.2d 454 (Alaska 1997).

was medically stable as of a certain date such that he was not entitled to receive temporary total disability payments.<sup>976</sup> Because Grove's physician failed to submit a treatment plan to the Workers' Compensation Board, Grove's employer, Alaska Construction and Erectors ("ACE"), was not required to compensate Grove for treatment above and beyond the frequency standard as defined by Alaska Administrative Code 45.082(f).<sup>977</sup> The supreme court also concluded that ACE's original decision to controvert Grove's injury claim was not relevant to the issue of whether the frequency standards should apply.<sup>978</sup> Affirming the Board's determination, the court concluded that various reports submitted by Grove's physician regarding treatment did not meet the definition of a treatment plan as required by Alaska Statutes section 23.30.095(c).<sup>979</sup> Grove argued that the Board erred in denying him temporary total disability benefits for a time period in which he claimed that he was unable to work, even though his doctor had released him.<sup>980</sup> Rejecting Grove's argument, the supreme court concluded that the Board's reliance on the testimony and reports of Grove's own doctor regarding whether Grove could work during the relevant time period was proper.<sup>981</sup> The supreme court also upheld the Board's finding that Grove was medically stable as of April 1993 and thus was entitled to no further temporary total disability benefits.<sup>982</sup>

#### B. Grievance Claims

In *Anchorage Police Department Employees Ass'n v. Municipality of Anchorage*,<sup>983</sup> the Alaska Supreme Court held that the Employee Relations Board ("ERB") and the trial court were authorized and required to determine whether a filed grievance was subject to mandatory arbitration.<sup>984</sup> The Anchorage Police Department Employees Association ("APDEA") filed a grievance pursuant to Article V, section 2(N) of the collective bargaining agreement ("CBA") between APDEA and the Municipality of

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976. See *id.* at 459-60.

977. See *id.* at 457; ALASKA ADMIN. CODE tit. 8, § 45.082(g) (1996) (requiring employer to pay for treatments exceeding treatment standards in (f) only if a written treatment plan was submitted to the employer).

978. See *Grove*, 948 P.2d at 457.

979. See *id.* at 458; ALASKA STAT. § 23.30.095(c) (Michie 1996).

980. See *Grove*, 948 P.2d at 458.

981. See *id.* at 458-59.

982. See *id.* at 459.

983. 938 P.2d 1027 (Alaska 1997).

984. See *id.* at 1029.

Anchorage.<sup>985</sup> The grievance challenged the Municipality's implementation of a transfer policy whereby "warrants section personnel were to be transferred to patrol on a rotational basis."<sup>986</sup> Article V, section 2(N) of the CBA provided, in part, that "[i]f the Department implements a change in a current policy or procedure over which the Employer has a mandatory obligation to bargain . . . the designated Association Representative may grieve such change."<sup>987</sup> Thus, the issue of arbitrability, the court concluded, depended on whether officer assignments were a mandatory subject for bargaining.<sup>988</sup> The court found that Article IV, Section 14 of the CBA was the only provision that discussed officer assignments and transfers.<sup>989</sup> This section stated that "'an employee may be involuntarily transferred for non-disciplinary reasons to a different job assignment within a division . . . (1) based upon the needs of the Department'" and "[a]ny involuntary transfer shall be subject to review under the grievance and arbitration provisions of the contract."<sup>990</sup> Because APDEA did not invoke any argument based on Article IV, section 14, the court determined that the transfer policy did not constitute a mandatory subject for bargaining.<sup>991</sup>

In *State v. Beard*,<sup>992</sup> the supreme court held that where an employee alleges an ongoing pattern of harassment resulting in resignation, the employee must first attempt to grieve the involuntary termination, even if the union had previously been unresponsive to the employee's complaints.<sup>993</sup> Beard resigned from the Department of Transportation ("DOT") after having filed five separate grievances through his union representative.<sup>994</sup> After resigning, Beard brought suit against the state and his supervisors alleging constructive discharge and intentional infliction of emotional distress.<sup>995</sup> The supreme court held that Beard was not excused for failing to exhaust his administrative remedies because Beard's claim could never be grieved by the union due to Beard's failure to grieve his departure.<sup>996</sup> The court further held on the same grounds that the unexcused failure to exhaust administrative remedies also

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985. *See id.*

986. *Id.* at 1028.

987. *Id.*

988. *See id.*

989. *See id.* at 1029.

990. *Id.*

991. *See id.*

992. 948 P.2d 1376 (Alaska 1997).

993. *See id.* at 1382.

994. *See id.* at 1377-78.

995. *See id.* at 1377.

996. *See id.* at 1382.

applied to Beard's claims for intentional infliction of emotional distress against the individual named defendants.<sup>997</sup>

In *Brogdon v. City of Klawock*,<sup>998</sup> the supreme court held that a decision of a grievance committee not appealed by either party was dispositive of the grievance.<sup>999</sup> Brogdon filed a grievance in response to being dismissed as Officer-in-Charge with the Klawock Public Safety Department for alleged criminal behavior.<sup>1000</sup> The city grievance committee recommended that an investigation be conducted by the Alaska State Troopers and if Brogdon was found not guilty of criminal behavior, he would be reinstated, but if found guilty, the termination would stand.<sup>1001</sup> Although the trooper investigation found no evidence of criminal misconduct, the city refused to honor Brogdon's request for reinstatement.<sup>1002</sup>

The supreme court held that the decision of the city grievance committee and the findings of the state trooper were "sufficiently clear" and thus "capable of being enforced."<sup>1003</sup> Therefore, under the committee decision, Brogdon should have been reinstated.<sup>1004</sup> The court also held that evidence acquired after the investigation concluded could be admitted to support supplemental justifications for termination but found that after-the-fact evidence should be viewed with skepticism.<sup>1005</sup> The court noted that admission is justified because an employer should not be required to reinstate an employee when the employer later discovers grave misconduct that the employee might have been able to conceal had the employee not been terminated.<sup>1006</sup>

### C. Miscellaneous

In *Ramsey v. City of Sand Point*,<sup>1007</sup> the Alaska Supreme Court affirmed a summary judgment ruling against a former police chief's claim of wrongful termination.<sup>1008</sup> When Ramsey was hired as police chief by the City of Sand Point, he negotiated for an additional clause in his contract that authorized the city to terminate

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997. *See id.* at 1384.

998. 930 P.2d 989 (Alaska 1997).

999. *See id.* at 991.

1000. *See id.* at 989.

1001. *See id.* at 990.

1002. *See id.*

1003. *Id.*

1004. *See id.* at 991

1005. *See id.* at 992.

1006. *See id.*

1007. 936 P.2d 126 (Alaska 1997).

1008. *See id.* at 135.

him without cause, in exchange for six months' severance pay.<sup>1009</sup> The court held that this clause nullified the effect of the municipal ordinance that permitted the removal of the police chief only for "just cause."<sup>1010</sup> The city was still required to give the chief thirty days written notice if he was to be terminated for cause.<sup>1011</sup>

The court held that the addition of the removal clause by Ramsey in exchange for six months' pay effectively waived the protection afforded him by Sand Point Municipal Ordinance 03.70.020 because the statute was not enacted for the protection of the public generally, and therefore was waivable.<sup>1012</sup> The city awarded Ramsey seven months' pay in order to remove the prejudice resulting from the lack of a thirty day notice and to ensure that Ramsey's property and liberty interests were unaffected.<sup>1013</sup> Ramsey's claim of lack of good faith was also dismissed because "[t]he covenant of good faith cannot be interpreted to prohibit what is expressly permitted by Ramsey's contract with the City."<sup>1014</sup>

In *Stalaker v. M.L.D.*,<sup>1015</sup> the supreme court held that the Public Employees' Retirement Board ("PERB") and the trial court erred by focusing on the proposed reasons for a termination, instead of the cause of such termination.<sup>1016</sup> The court concluded that the termination of M.L.D. as police chief by the City of King Cove was "because of a . . . disability" as it is defined in Alaska Statutes sections 39.35.410(a) and 39.35.400(a).<sup>1017</sup> M.L.D. was diagnosed with major depression and suicidal ideation and was hospitalized six days before he was fired.<sup>1018</sup> Because he was terminated as a result of unauthorized absences from work due to his hospitalization, the court concluded that M.L.D. was terminated because of his disability.<sup>1019</sup> The court rejected the City's argument, similar to discrimination cases, that the employer's motive should

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1009. *See id.* at 128.

1010. *See id.*

1011. *See id.*

1012. *See id.* at 130-31.

1013. *See id.* at 131-32.

1014. *See id.* at 133.

1015. 939 P.2d 407 (Alaska 1997).

1016. *See id.* at 411-12.

1017. *See id.*; ALASKA STAT. § 39.35.410(a) (Michie 1996) (providing, in part, that "[a]n employee is eligible for occupational disability benefit if employment is terminated because of a . . . permanent occupational disability . . . before the employee's normal retirement"); ALASKA STAT. § 39.35.400(a) (providing, in part, that "[a]n employee is eligible for nonoccupational disability benefit if . . . employment is terminated because of a . . . permanent nonoccupational disability . . . before the employee's normal retirement").

1018. *See M.L.D.*, 939 P.2d at 412.

1019. *See id.*

be the focus of the PERB's inquiry, because that would be inconsistent with the goal of the Public Employees' Retirement System ("PERS").<sup>1020</sup> The court concluded that PERS was designed to compensate individuals no longer able to perform their jobs, not to prevent employers from firing individuals because of their disability.<sup>1021</sup> Because motive was not the focus of the inquiry, the fact that the City was not aware of M.L.D.'s hospitalization at the time they terminated him was irrelevant.<sup>1022</sup> Although the court held that the evidence was sufficient to show that M.L.D. was terminated because of his disability, the case was remanded to determine whether the disability was occupational or non-occupational.<sup>1023</sup>

In *Lowery v. McMurdie*,<sup>1024</sup> the supreme court held it was erroneous to offset the amount of money a claim worker owed his employer by wages owed by the employer to a crew member.<sup>1025</sup> McMurdie hired Lowery to work a gold claim, and Lowery, pursuant to that authority, hired DeBerry and others as a crew.<sup>1026</sup> After relations soured, McMurdie secured an injunction to keep Lowery and the others off the claim, and the superior court determined that seventy-six ounces of gold were unaccounted for by Lowery, valued at \$26,000.<sup>1027</sup> The court entered judgment against Lowery for \$12,027, the value of the gold offset by unpaid wages due Lowery and DeBerry, out-of-pocket expenses paid for by Lowery, and equipment rented by Lowery.<sup>1028</sup> Lowery and DeBerry appealed, claiming the superior court erred in failing to award them a statutory penalty for unpaid wages, and DeBerry further claimed the court erred in failing to award him unpaid wages against McMurdie.<sup>1029</sup>

The supreme court reviewed Alaska Statutes section 23.05.140(d),<sup>1030</sup> which provides for statutory penalties for unpaid wages.<sup>1031</sup> The court determined that the statutory penalties were not intended to be mandatory,<sup>1032</sup> but based on the superior court's

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1020. *See id.* at 413.

1021. *See id.*

1022. *See id.* at 412-13.

1023. *See id.* at 413.

1024. 944 P.2d 50 (Alaska 1997).

1025. *See id.* at 53.

1026. *See id.* at 51.

1027. *See id.*

1028. *See id.*

1029. *See id.*

1030. ALASKA STAT. § 23.05.140(d) (Michie 1996).

1031. *See Lowery*, 944 P.2d at 52.

1032. *See id.*; *see also Klondike Indus. Corp. v. Gibson*, 741 P.2d 1161, 1171 (Alaska 1987) (any penalty awarded under Alaska Statutes section 23.05.140(d)

“unarticulated understanding of the ‘facts or circumstances of this case,’” the supreme court did not have any findings to determine if the superior court’s decision not to award penalties was an abuse of discretion, and so remanded for this determination.<sup>1033</sup> The supreme court held that McMurdie was ultimately responsible for DeBerry’s unpaid wages, and that the judgment against Lowery should not have been offset by that amount.<sup>1034</sup>

In *Alaska Housing Finance Corp. v. Salvucci*,<sup>1035</sup> the supreme court held that the Alaska Whistleblower Act<sup>1036</sup> could be applied to the Alaska Housing Finance Corporation (“AHFC”) but AFHC could not be held responsible for punitive damages.<sup>1037</sup> After being fired from AHFC without any explanation, Salvucci was denied both a grievance hearing and an appeal of the decision.<sup>1038</sup> Salvucci filed a complaint alleging, *inter alia*, breach of contract and violation of the Whistleblower Act.<sup>1039</sup> The supreme court upheld the jury’s verdict that AHFC committed a breach of contract, because Salvucci reasonably believed personnel rules, which stated he would be given a reason for termination and would be afforded the protections of progressive disciplinary procedures, applied to him.<sup>1040</sup> The court also held that AHFC was covered under the Whistleblower Act as a “public body.”<sup>1041</sup> AHFC contended that “a written report to an employer and a report protected under the Alaska Whistleblower Act are two distinct reports, with distinct legal consequences.”<sup>1042</sup> However, the court determined that such an interpretation would shield the employer by providing the employee no protection from the separate report.<sup>1043</sup> The court declined to award punitive damages, however, noting that the Act did not expressly authorize punitive damages against the state, and the legislative history reflected an intent that punitive damages would be available only against individual, not government, defendants.<sup>1044</sup>

In *Quinn v. Alaska State Employees Ass’n/American Federa-*

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was within the discretion of the trial court).

1033. *Lowery*, 944 P.2d at 52.

1034. *See id.* at 53.

1035. 950 P.2d 1116 (Alaska 1997).

1036. ALASKA STAT. §§ 39.90.100-.150 (Michie 1996).

1037. *See Salvucci*, 950 P.2d at 1122, 1126.

1038. *See id.* at 1118-19.

1039. *See id.* at 1119.

1040. *See id.* at 1120-21.

1041. *See id.* at 1122.

1042. *Id.*

1043. *See id.*

1044. *See id.* at 1126.

*tion of State, County and Municipal Employees, Local 52*,<sup>1045</sup> the supreme court allowed an employee to seek unpaid overtime from his employer under Alaska Statutes section 23.05.140(b)<sup>1046</sup> or under a breach of contract theory even if the statute of limitations under the Alaska Wage and Hour Act (“AWHA”)<sup>1047</sup> had passed.<sup>1048</sup> Quinn had sued his employer, the Alaska State Employees Association, for unpaid overtime and penalties under Alaska Statutes section 23.05.140(b) and AWWA.<sup>1049</sup> The court initially determined that the three-year statute of limitations in the Fair Labor Standards Act<sup>1050</sup> did not conflict with AWWA’s two-year limitation because the statutes apply to different causes of action and therefore “are not in tension with one another.”<sup>1051</sup> The court then held that Quinn’s section 23.05.140(b) claim offered a form of relief because he filed for unpaid overtime within the requisite two years and three days after his termination.<sup>1052</sup> However, his section 23.05.140(b) claim did not revive that part of his AWWA claim “forever barred” by section 23.10.130.<sup>1053</sup> Finally, the court held that Quinn could use the six-year statute of limitations for contracts under Alaska Statutes section 09.10.050(1) because he alleged a breach of a collective bargaining agreement.<sup>1054</sup> The court noted that unpaid liquidated damages under AWWA were still barred by that Act’s specific statute of limitations.<sup>1055</sup>

In *Ebasco Constructors, Inc. v. Ahtna, Inc.*,<sup>1056</sup> the supreme court held that great deference should be applied in reviewing an arbitrator’s decision and enforcing an arbitration ruling.<sup>1057</sup> Ebasco challenged the award, based, in part, on a denial of its motion to postpone the arbitration hearing.<sup>1058</sup> The court under Alaska Statutes section 09.43.120(a)(3)<sup>1059</sup> applied an extremely deferential review of the arbitrator’s decision and upheld the ruling.<sup>1060</sup> The court was also called upon to enforce a pre-award and post-award

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1045. 944 P.2d 468 (Alaska 1997).

1046. ALASKA STAT. § 23.05.140(b) (Michie 1996).

1047. *Id.* §§ 23.10.050-.150.

1048. *See Quinn*, 944 P.2d at 473.

1049. *See id.* at 470.

1050. 29 U.S.C. §§ 201-219 (1994).

1051. *Quinn*, 944 P.2d at 471.

1052. *See id.* at 472.

1053. *See id.*

1054. *See id.* at 472-73.

1055. *See id.* at 472.

1056. 932 P.2d 1312 (Alaska 1997).

1057. *See id.* at 1313.

1058. *See id.* at 1314.

1059. ALASKA STAT. § 09.43.120(a)(3) (Michie 1996).

1060. *See Ebasco Constructors*, 932 P.2d at 1315-17.

interest judgment against Ebasco.<sup>1061</sup> The court declined to involve itself with the pre-award interest because it “would be inconsistent with the policy of allowing the arbitrator to determine all arbitrable aspects of a dispute,” but affirmed the superior court’s award of interest after the arbitration award because determining interest from the date of the award “will not enmesh the court in the complications which the award of pre-award interest may entail.”<sup>1062</sup>

In *Bouse v. Fireman’s Fund Insurance Co.*,<sup>1063</sup> the supreme court determined that the “final determination” provision of Alaska Statutes section 23.30.155<sup>1064</sup> applies to a determination made by the Alaska Workers’ Compensation Board, but not to decisions made by courts on appeal.<sup>1065</sup> The court construed the statute based on the principle that each part should be “‘construed in connection with every other so as to produce a harmonious whole.’”<sup>1066</sup> Since every other section of the statute referred exclusively to actions before the Board, and nothing in the legislative history regarding final determinations referred to anything other than those made by the Board, the court held that section 23.30.155 does “not control the award of attorney’s fees incurred in proceedings before the superior court or this court.”<sup>1067</sup>

In *Patterson v. International Brotherhood of Teamsters, Local 959*,<sup>1068</sup> a duty of fair representation case, the Ninth Circuit Court of Appeals held that the thirty-day period for removal from state to federal court did not begin to run until the employee had obtained relief from automatic stay in the union’s bankruptcy proceedings.<sup>1069</sup> Patterson, an employee of Matanuska Maid Dairy, filed a suit against his union, Local 959, alleging a breach of its duty of fair representation in state court.<sup>1070</sup> Patterson’s state court action was stayed as a result of the union’s involvement in bankruptcy proceedings.<sup>1071</sup> The circuit court rejected Patterson’s argument that the union’s notice of removal was untimely, reasoning that the no-

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1061. *See id.* at 1317-18.

1062. *Id.* at 1318.

1063. 932 P.2d 222 (Alaska 1997).

1064. ALASKA STAT. § 23.30.155 (Michie 1996). The statute provides, in part, that when a “final determination of liability is made, any reimbursement required . . . and all costs and attorneys’ fees incurred by the prevailing employer, shall be made within 14 days of the determination.” *Id.* § 23.30.155(d).

1065. *See Bouse*, 932 P.2d at 228.

1066. *Id.* at 277 (quoting *Keane v. Local Boundary Comm’n*, 893 P.2d 1239, 1247 (Alaska 1995)).

1067. *Id.* at 228.

1068. 121 F.3d 1345 (9th Cir. 1997).

1069. *See id.* at 1349.

1070. *See id.* at 1348.

1071. *See id.*

tice was filed within thirty days of the date that Patterson obtained relief from the automatic stay.<sup>1072</sup> The court affirmed summary judgment of Patterson's duty of fair representation claim, stating that the court may not second guess a union's reasonable decision not to pursue a potential defense in arbitration proceedings.<sup>1073</sup>

In *Knight v. Kenai Peninsula Borough School District*,<sup>1074</sup> the Ninth Circuit Court of Appeals concluded that letters sent by two unions to nonunion members requesting that they pay a representation or agency fee for collective bargaining benefits were deficient because the letters did not provide a reasonable explanation of the basis for the fee as required by *Chicago Teachers Union v. Hudson*.<sup>1075</sup> The court also concluded that the nonmembers were not provided with sufficient information regarding the union's expenditures to be able to determine whether they should object to the union's charges.<sup>1076</sup> The court held that nonmembers are not required to exhaust union remedies before challenging union charges in federal court.<sup>1077</sup> Reversing the decision of the district court, the Ninth Circuit held that the appropriate time for a union to review the sufficiency of their *Hudson* notice was at the time of mailing and not at the time the union seeks to take action against a nonmember for failure to pay the agency fee.<sup>1078</sup>

## VIII. FAMILY LAW

### A. Child Custody

In *O.R. v. State*,<sup>1079</sup> the Alaska Supreme Court affirmed the termination of parental rights on the basis of abandonment.<sup>1080</sup> The baby had been hospitalized after her birth because she tested positive for cocaine and her parents had visited her only a few times over the next year.<sup>1081</sup> The court applied the two-prong test for physical abandonment, finding "(1) that the parent's conduct implied a conscious disregard for parental obligations and (2) that the parent's conscious disregard led to the destruction of the relationship between the parent and the parent's children."<sup>1082</sup> In this case,

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1072. *See id.* at 1349.

1073. *See id.* at 1349-50.

1074. 131 F.3d 807 (9th Cir. 1997).

1075. *See id.* at 812-15; *Chicago Teachers Union v. Hudson*, 475 U.S. 292 (1986).

1076. *See Knight*, 131 F.3d at 813-15.

1077. *See id.* at 816.

1078. *See id.* at 817.

1079. 932 P.2d 1303 (Alaska 1997).

1080. *See id.* at 1312.

1081. *See id.* at 1306-07.

1082. *Id.* at 1307-08 (quoting *A.M. v. State*, 891 P.2d 815, 820 (Alaska 1995)).

the court found first that the parents' repeated failure to visit the child reflected a "conscious disregard for their parental obligations,"<sup>1083</sup> and second, that the lack of attachment or bond between the child and the parents demonstrated that the parents' conduct had destroyed the parent-child relationship.<sup>1084</sup> The supreme court also found that the harmful conduct of the mother was likely to continue if her parental rights were not terminated because of her repeated substance abuse problems and failure to seek treatment.<sup>1085</sup>

Despite these rulings, the court remanded the issue for the trial court to consider whether the child had a relative willing to care for her.<sup>1086</sup> Although the Department of Health and Social Services argued a finding of physical abandonment was a sufficiently independent basis to apply the Child In Need of Aid statute,<sup>1087</sup> the court interpreted that section to mean that physical abandonment was one example of the failure or lack of willingness to provide care that was the focus of the statute.<sup>1088</sup> The record was insufficient to indicate whether the court adequately considered the possibility that the child had relatives willing to care for her.<sup>1089</sup>

In *A.M. v. State*,<sup>1090</sup> the supreme court upheld the termination of parental rights on the ground of inability to care for the children.<sup>1091</sup> The court revisited a prior decision,<sup>1092</sup> which had been partially overruled, in which the court terminated the parental rights on the ground of abandonment.<sup>1093</sup> The supreme court held that the trial court was not foreclosed from considering alternative grounds from those specified by the supreme court, so long as those alternative grounds were not inconsistent with the supreme court's mandate.<sup>1094</sup> The court affirmed the superior court's finding that the children qualified as children in need of aid on alternative grounds as specified in Alaska Statutes sections 47.10.010(a)(3), (4), and (5).<sup>1095</sup> The supreme court rejected A.M.'s argument that he was denied due process because he did not receive notice that

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1083. *Id.* at 1308.

1084. *See id.* at 1309.

1085. *See id.* at 1311-12.

1086. *See id.* at 1311.

1087. *See id.* at 1309; *see also* ALASKA STAT. § 47.10.010(a)(2) (Michie 1996).

1088. *See O.R.*, 932 P.2d at 1309.

1089. *See id.* at 1311.

1090. 945 P.2d 296 (Alaska 1997).

1091. *See id.* at 299.

1092. *See A.M. v. State*, 891 P.2d 815 (Alaska 1995).

1093. *See id.*

1094. *See A.M.*, 945 P.2d at 301.

1095. *See id.* at 301-02; ALASKA STAT. § 47.10.010(a)(3)-(5) (Michie 1996).

these subsections would be litigated.<sup>1096</sup> Alternatively, the court found that he had ample notice because those grounds were alleged in the state's petition and were addressed in evidence at the original trial.<sup>1097</sup> The supreme court affirmed the lower court's findings of fact, having already explicitly stated in the first *A.M.* opinion that the record supported the findings that A.M. had "consciously disregarded his parental obligations,"<sup>1098</sup> and his history of substance and physical abuse.<sup>1099</sup> Finally, the court determined that A.M.'s failure to complete remedial programs provided under the Indian Child Welfare Act<sup>1100</sup> did not prevent the state from satisfying its duty to make remedial efforts.<sup>1101</sup>

In *R.J.M. v. State*,<sup>1102</sup> the supreme court held that parental rights could not be terminated based upon a showing of emotional neglect because Alaska Statutes section 47.10.010(a)(6)<sup>1103</sup> requires "substantial physical neglect or abuse."<sup>1104</sup> After studying the statute's language and legislative intent, the court decided that the word "or" meant that parental rights could be terminated only upon "physical neglect" or "physical abuse" under the statute.<sup>1105</sup> However, the court did remand the case for consideration under Alaska Statutes section 47.10.010(a)(2)(A) because the court was not bound to accept the parent's stated willingness to care for their children when their actions showed a continual neglect of their children and a resistance to remedial efforts designed to help them.<sup>1106</sup> The court held that a "parent's stated willingness is not dispositive" in determining if parental rights should cease when "both parents had consistently failed to provide for the emotional, mental, and social needs of their children."<sup>1107</sup>

In *Conger v. Conger*,<sup>1108</sup> the supreme court held that it was excusable neglect for a mother to miscalculate the expiration date of an extension of time to file a motion to appeal a custody.<sup>1109</sup> Cherry and Terry Conger had agreed to permit Cherry to have a fifteen-day extension to file her opposition to Terry's motion to modify

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1096. See *A.M.*, 945 P.2d at 302.

1097. See *id.*

1098. *Id.* at 303 (quoting *A.M. v. State*, 891 P.2d 815, 820 (Alaska 1995)).

1099. See *id.*

1100. 25 U.S.C. §§ 1901-1963 (1994).

1101. See *A.M.*, 945 P.2d at 304.

1102. 946 P.2d 855 (Alaska 1997).

1103. ALASKA STAT. § 47.10.010(a)(6) (Michie 1996).

1104. *R.J.M.*, 946 P.2d at 857.

1105. See *id.* at 862-67.

1106. See *id.* at 869.

1107. *Id.* at 868 (citing *O.R. v. State*, 932 P.2d 1303 (Alaska 1997)).

1108. 950 P.2d 119 (Alaska 1997).

1109. See *id.* at 122.

custody.<sup>1110</sup> Because Cherry's counsel wrongly assumed that the fifteen-day extension did not begin until the day the extension order was stamped and filed, Cherry filed her motion nine days late.<sup>1111</sup> The supreme court, however, concluded that the trial court abused its discretion by refusing to grant Cherry's Rule 60(b) motion to set aside the order modifying custody because Cherry was an out-of-state party who promptly retained counsel in Fairbanks and who otherwise participated promptly in the proceedings.<sup>1112</sup> The supreme court noted that "[r]esolution of a custody dispute should not reach its final conclusion in a manner that effectively precludes one party from presenting his or her case."<sup>1113</sup>

In *Hernandez v. Freeman*,<sup>1114</sup> the supreme court held that the trial court abused its discretion by granting a motion to modify a child custody order without first conducting a hearing.<sup>1115</sup> The court concluded that by refusing either to grant Hernandez a continuance when he requested additional time to find an attorney or to inform him of the deadline for filing an opposing motion, the trial court essentially deprived Hernandez of his right to contest fully the motion to modify child custody.<sup>1116</sup>

In *Duffus v. Duffus*,<sup>1117</sup> the supreme court held that the fact that the mother's boyfriend was a past sex offender did not entitle the father to a post-divorce custody modification for his two daughters.<sup>1118</sup> The court considered all the criteria under Alaska Statutes section 25.24.150(c),<sup>1119</sup> and made complete findings holding that the sex offender boyfriend was not a "threat to the children's physical or emotional well-being."<sup>1120</sup>

In *Nelson v. Jones*,<sup>1121</sup> the supreme court determined that the trial court had not constructively terminated parental rights by denying visitation rights when the parent failed to comply with the trial court's conditions for visitation.<sup>1122</sup> During Paul Nelson's divorce from Loretto Jones, the parties stipulated that Nelson had sexually abused their daughter during the marriage.<sup>1123</sup> Conse-

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1110. *See id.* at 120.

1111. *See id.* at 121.

1112. *See id.* at 122; *see also* ALASKA R. CIV. P. 60(b).

1113. *Conger*, 950 P.2d at 122.

1114. 938 P.2d 1017 (Alaska 1997).

1115. *See id.* at 1018.

1116. *See id.*

1117. 932 P.2d 777 (Alaska 1997).

1118. *See id.* at 780.

1119. ALASKA STAT. § 25.24.150(c) (Michie 1996).

1120. *See Duffus*, 932 P.2d at 780.

1121. 944 P.2d 476 (Alaska 1997).

1122. *See id.* at 480.

1123. *See id.* at 478.

quently, the trial court ruled that Nelson could have only supervised visitation conditioned upon his participation in a sex-offender treatment program.<sup>1124</sup> Nelson's doctor terminated his treatment when Nelson failed to admit he had committed abuse, and Nelson violated court orders by "initiating or encouraging physical contact" between himself and his daughter.<sup>1125</sup> The trial court terminated Nelson's visiting rights and Nelson appealed, charging the "cumulative effect of the superior court's orders is a termination of his parental rights."<sup>1126</sup>

The supreme court affirmed the lower court decision, ruling that although conditioning Nelson's visitation on his admitting the abuse was quite severe, the court did not abuse its discretion.<sup>1127</sup> Nelson was not allowed to raise the issue of visitation conditioned on participation in a sex-offender treatment program, as that issue had already been litigated in an earlier appeal.<sup>1128</sup> Additionally, Nelson was not entitled to an evidentiary hearing, as there were no facts in dispute with regard to the child's desire to see Nelson, and no factual issues that could be fully explored in a hearing.<sup>1129</sup> Finally, the court concluded that the superior court specifically considered the child's best interests in deciding the case, and committed no error.<sup>1130</sup>

In *B.J. v. J.D.*,<sup>1131</sup> the supreme court held that a court may award physical custody to a person who is not the child's biological parent out of concern for the welfare of the child.<sup>1132</sup> J.D. sued B.J. for custody of V.J., B.J.'s daughter.<sup>1133</sup> J.D. and B.J. had had an intimate relationship and lived together periodically from 1986 to 1993.<sup>1134</sup> Although V.J. was born in 1989, J.D. was not her biological father.<sup>1135</sup> Prior to the lawsuit, V.J. had been living with her mother in Hawaii, but had recently been sent by her mother to Fairbanks to live indefinitely with J.D.<sup>1136</sup> The court ruled that jurisdiction in this case was proper under the Uniform Child Custody Jurisdiction Act<sup>1137</sup> because neither Alaska nor Hawaii was V.J.'s

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1124. *See id.*

1125. *Id.*

1126. *Id.*

1127. *See id.* at 480.

1128. *See id.* at 479.

1129. *See id.* at 480.

1130. *See id.* at 481.

1131. 950 P.2d 113 (Alaska 1997).

1132. *See id.* at 118.

1133. *See id.* at 114.

1134. *See id.*

1135. *See id.*

1136. *See id.*

1137. ALASKA STAT. § 25.30.020(a) (Michie 1996).

home state at the time of filing, and it was in the best interests of the child for Alaska to resolve the custody dispute.<sup>1138</sup> The court then affirmed the findings of the superior court that J.D. should be awarded custody of V.J., despite not being her natural parent, because V.J.'s "welfare would be in jeopardy if the mother [had] custody," due to evidence that sexual abuse had occurred while in B.J.'s custody and the "awkward, unnatural, and unaffectionate" relationship between V.J. and B.J.<sup>1139</sup> The court of appeals held that its decision was consistent with the holding in *Turner v. Pannick*<sup>1140</sup> that the award of custody to a natural parent should be refused "when the welfare of the child requires that a non-parent receive custody."<sup>1141</sup>

### B. Child Support

In *Department of Revenue, Child Support Enforcement Division v. Campbell*,<sup>1142</sup> the Alaska Supreme Court ruled that voluntary purchases of clothing for children by a non-custodial parent could not be applied as credit for delinquent child support payments.<sup>1143</sup> Relying on *Young v. Williams*,<sup>1144</sup> the court concluded that the general rule states that direct payments by a non-custodial parent to children may not be credited against a child support obligation.<sup>1145</sup> Allowing credit for such a payment would condone unilateral modification of child support orders and interfere with the rights of the custodial parent.<sup>1146</sup> Although Campbell, the non-custodial parent, presented a strong argument that the father was wasting the money she provided and was not buying the children the clothing they needed, the court held that her possible remedy for the father's transgressions consisted of a motion to modify the allowable form of payment or a motion to change custody.<sup>1147</sup> However, the noncustodial parent cannot be allowed to make decisions that are by law entrusted to the custodial parent.<sup>1148</sup>

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1138. See *B.J.*, 950 P.2d at 116.

1139. *Id.* at 117.

1140. 540 P.2d 1051 (Alaska 1975).

1141. *B.J.*, 950 P.2d at 117 (quoting *Turner*, 540 P.2d at 1055). The complete holding of *Turner* stated that custody to a natural parent should be refused only where the biological parent is unfit, the biological parent has abandoned the child, or the welfare of the child requires that a non-parent receive custody.

1142. 931 P.2d 416 (Alaska 1997).

1143. See *id.* at 420.

1144. 583 P.2d 201 (Alaska 1978).

1145. See *Campbell*, 931 P.2d at 419.

1146. See *id.* at 419-20.

1147. See *id.*

1148. See *id.*

In *Vokacek v. Vokacek*,<sup>1149</sup> the supreme court credited \$5,000 toward a husband's delinquent child support because he transferred ownership of a homesite entry permit to his ex-wife.<sup>1150</sup> The court determined that both the inclusion of language regarding "child support arrearages" in the stipulation awarding the property to the ex-wife and the fact that the stipulation was prepared by the ex-wife's attorneys were "highly suggestive" that the property award was meant to reduce the child support due to the ex-wife from the husband.<sup>1151</sup> Although the husband's interest in the land expired before the stipulation,<sup>1152</sup> it was still credited based on "extrinsic evidence regarding the parties' intent and their reasonable expectations at the time the stipulation was entered."<sup>1153</sup>

In *Bunn v. House*,<sup>1154</sup> the supreme court held that only a "material change in circumstances" could warrant a modification of a child support award, and that changing the method of calculating support is not such a change.<sup>1155</sup> House had proposed a new method for collecting child support from Bunn that would increase payments by 151%.<sup>1156</sup> Two judges had previously considered Bunn's child support payments, and had reduced Bunn's monthly obligation to House from \$675.90 to \$154.00 a month.<sup>1157</sup> House's new proposal was thus accepted by the trial court because Bunn's payments had been so dramatically reduced, and "the '15[%] threshold requirement for the court to presume a material change of circumstances' under Civil Rule 90.3(h)(1)" was met.<sup>1158</sup> The supreme court decided, however, that changing the collection formula to calculate a greater than 15% difference did not trigger a presumption of a "material change of circumstance."<sup>1159</sup> A change in legal theory or, as in this case, a change in a child support calculation method is not a material change in circumstances that will warrant a change in child support.<sup>1160</sup>

In *Aga v. Aga*,<sup>1161</sup> the supreme court held that the trial court erred in refusing to modify a husband's child support obligation, even though the husband had agreed to pay more in the settlement

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1149. 933 P.2d 544 (Alaska 1997).

1150. *See id.* at 546-47.

1151. *Id.* at 547.

1152. *See id.* at 545.

1153. *Id.* at 547.

1154. 934 P.2d 753 (Alaska 1997).

1155. *See id.* at 758-59.

1156. *See id.* at 754.

1157. *See id.*

1158. *Id.* (quoting ALASKA R. CIV. P. 90.3(h)(1)).

1159. *Id.* at 757.

1160. *See id.* at 758.

1161. 941 P.2d 1260 (Alaska 1997).

agreement and had received a greater property value in the property division.<sup>1162</sup> In 1990, the superior court entered a divorce decree incorporating a separation agreement in which August Aga, the father, agreed to pay \$945 per month in child support.<sup>1163</sup> August later moved to modify the child support obligation, arguing that it represented from 47% to 104% of his income from 1991 to 1994.<sup>1164</sup> The trial court had calculated August's obligation on the basis of his 1989 salary, which was unusually high.<sup>1165</sup> The trial court denied August's motion, noting that August had received "\$36,300 more in net value as a result of the property division and debt allocation," and that this benefit was sufficient consideration for the unusually high child support obligation in the separation agreement.<sup>1166</sup> The supreme court noted that under Alaska Statutes section 25.24.170<sup>1167</sup> and Civil Rule 90.3(h)(1),<sup>1168</sup> modifications may be made in child support obligations if there is more or less than a 15% change in financial circumstances from the original order, even if the child support obligation is based not on income, but on an agreement signed by the parties.<sup>1169</sup> The court further held that the trial court could not base its decision on an unequal property division, as "property division has no relevancy to child support modification issues."<sup>1170</sup>

In *Acevedo v. Burley*,<sup>1171</sup> the supreme court held that a father was not entitled to modification of his child support obligation when he had stipulated to an appropriate amount given the range of his income and failed to demonstrate a material change from that stipulation.<sup>1172</sup> Acevedo was a self-employed taxi driver, who agreed to a stipulation that his annual net income was between \$10,000 and \$20,000 during his divorce for purposes of determining his child support payments.<sup>1173</sup> After the divorce, he regularly fell behind in payments, and his arrearage exceeded \$7,000.<sup>1174</sup> Acevedo attempted to modify his obligation, asserting that he had experienced a "significant and material change in circumstances"

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1162. *See id.* at 1260.

1163. *See id.*

1164. *See id.*

1165. *See id.*

1166. *Id.* at 1261.

1167. ALASKA STAT. § 25.24.170 (Michie 1996).

1168. ALASKA R. CIV. P. 90.3(h)(1).

1169. *See Aga*, 941 P.2d at 1261-62 (citing *Dewey v. Dewey*, 886 P.2d 623 (Alaska 1994)).

1170. *Id.*

1171. 944 P.2d 473 (Alaska 1997).

1172. *See id.* at 476.

1173. *See id.* at 474.

1174. *See id.* at 475.

in that his income had fallen by at least 15%, and that his income was below the Federal Poverty Level Guidelines.<sup>1175</sup> The court determined that the facts and circumstances which formed the basis of the stipulation had not substantially changed.<sup>1176</sup> Acevedo's reported income did not appear to have changed since he signed the stipulation, and although his income at that time appeared too low to support his current payments, he did not argue that the stipulation was based on an erroneous assessment of his income.<sup>1177</sup> Therefore, he was not entitled to a modification.<sup>1178</sup>

In *Crayton v. Crayton*,<sup>1179</sup> the supreme court established that despite the absence of a child support order, a mother had a statutory and common law duty to provide child support while custody was being transferred to the father.<sup>1180</sup> During divorce proceedings, the court appointed a guardian ad litem ("GAL"), but both parties agreed the children would move to Kansas City, Kansas, with their mother, Shannon Riordan.<sup>1181</sup> Less than a month after moving, the GAL recommended and the court ordered that the children be returned to Anchorage to live with their father, Wayne Crayton.<sup>1182</sup> The children returned to Kansas City about a year later.<sup>1183</sup> Soon after the children left to return to Kansas City, Crayton moved for reimbursement of the expenditures he made while supporting the children, and moved to offset his child support obligations by the amount of reimbursement.<sup>1184</sup>

The supreme court relied on *Mathews v. Mathews*,<sup>1185</sup> holding that "[w]hether a support order exist[ed] or not, '[a] parent is obligated both by statute and at common law to support his or her children.'"<sup>1186</sup> Riordan, as the noncustodial parent, was required to help provide for her children, regardless of any defects in the support order.<sup>1187</sup> The supreme court remanded the issue for calculation of Riordan's obligation in accordance with Civil Rule 90.3.<sup>1188</sup> The court also held that the superior court should take into account a gift received by Riordan from her father when calculating

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1175. *Id.*

1176. *See id.* at 476.

1177. *See id.*

1178. *See id.*

1179. 944 P.2d 487 (Alaska 1997).

1180. *See id.* at 489.

1181. *See id.* at 488.

1182. *See id.* at 489.

1183. *See id.*

1184. *See id.*

1185. 739 P.2d 1298 (Alaska 1987).

1186. *Crayton*, 944 P.2d at 489 (quoting *Mathews*, 739 P.2d at 1299).

1187. *See id.*

1188. *See id.*; ALASKA R. CIV. P. 90.3.

her income,<sup>1189</sup> even though under normal circumstances a one-time gift would not be included in calculating a child support obligation.<sup>1190</sup> However, because no future payments were at issue and the superior court would determine Riordan's income only "in retrospect" for the period when the children lived with Crayton, it was fair to determine reimbursement on the actual resources available to Riordan during that period.<sup>1191</sup>

In *Byars v. Byars*,<sup>1192</sup> the supreme court held that the failure of the mother to use registered mail to notify the father of their child's address was not a material breach of the agreement and therefore did not relieve him of child support obligations.<sup>1193</sup> Despite twice renegotiating the child support agreement, Lonnie Byars again fell behind in his obligations in July 1989, and his former wife, Avril Ogilvie, moved to reduce the child support arrearages to judgment.<sup>1194</sup> Under the terms of the agreement, Ogilvie was required to notify Byars via registered mail of the child's address and phone number by July 15, 1989 and July 15, 1990.<sup>1195</sup> Byars contended that his obligations were excused by Ogilvie's failure to notify him pursuant to the agreement by July 15, 1989.<sup>1196</sup> The supreme court affirmed the lower court's finding that Ogilvie's non-registered letter to Byars's attorney dated July 10, 1989 constituted a good faith effort to satisfy the agreement and demonstrated substantial compliance with the terms of the agreement.<sup>1197</sup> The requirement that Ogilvie use registered mail was not a material element of the agreement, as the primary purpose was to satisfy her claim against Byars for past due child support.<sup>1198</sup> In fact, Byars had actual notice of his child's location, and possessed her phone number at the time the 1989 payment was due.<sup>1199</sup> Therefore, Byars's failure to complete payment in 1989 was a breach of the agreement, relieving Ogilvie of the obligation to send address notification in 1990.<sup>1200</sup>

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1189. See *Crayton*, 944 P.2d at 490.

1190. See *Nass v. Seaton*, 904 P.2d 412, 416 (Alaska 1995) (holding that trial court should not consider gifts when "determining the level of the obligor's adjusted gross income for purposes of calculating a child support obligation").

1191. See *Crayton*, 944 P.2d at 490.

1192. 945 P.2d 792 (Alaska 1997).

1193. See *id.* at 794.

1194. See *id.* at 793.

1195. See *id.*

1196. See *id.*

1197. See *id.* at 794.

1198. See *id.*

1199. See *id.*

1200. See *id.*

In *Gallant v. Gallant*,<sup>1201</sup> the supreme court held that the superior court erred in reducing a child support obligation by 100%.<sup>1202</sup> John Gallant and Shannon Weed were divorced in 1991, with three children.<sup>1203</sup> They agreed John would have custody of two children, with Shannon's sister taking custody of the oldest.<sup>1204</sup> The parties failed to resolve other issues, including child support.<sup>1205</sup> After the initial trial, John appealed, and the supreme court remanded the case for further findings.<sup>1206</sup> On remand, the superior court reduced Weed's child support obligation by 100%.<sup>1207</sup>

The supreme court determined this to be error.<sup>1208</sup> The Alaska Civil Rules provide for up to a 50% reduction in child support payments during extended visits of more than twenty-seven days, and further reductions only for good cause specified by the trial court in writing.<sup>1209</sup> The children visited Weed for longer than twenty-seven days, but the superior court offered no explanation for its reduction of her payment by 100%, and the supreme court determined that those payments should have been reduced by only 50%.<sup>1210</sup> Likewise, Weed's payments made while one child was being treated in a medical facility should not have been reduced by 100%, although her insurance covered the medical expenses.<sup>1211</sup> Because a hospital stay would have less impact on Shannon than actually paying for room and board while the children visited her, she "should not ordinarily be entitled to a reduction of a full 50% of her child support obligation," and the superior court erred in awarding such an amount.<sup>1212</sup>

In *Flannery v. Flannery*,<sup>1213</sup> the supreme court held that it was error for the lower court to use a three-year average to determine income for a child support obligation when the obligor had requested recalculation based on a material change in circumstances.<sup>1214</sup> Michael Flannery sought modification based on a substantial decrease in his monthly income.<sup>1215</sup> The court held that

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1201. 945 P.2d 795 (Alaska 1997).

1202. *See id.* at 800.

1203. *See id.* at 797.

1204. *See id.* at 798.

1205. *See id.*

1206. *See id.*

1207. *See id.*

1208. *See id.* at 798-99.

1209. *See* ALASKA R. CIV. P. 90(a)(3), 90.3(c)(1), & commentary IV.B.

1210. *See Gallant*, 945 P.2d at 798.

1211. *See id.* at 799.

1212. *Id.*

1213. 950 P.2d 126 (Alaska 1997).

1214. *See id.* at 128.

1215. *See id.* at 132.

because the parties used Civil Rule 90.3<sup>1216</sup> in constructing the original child support agreement, Michael could invoke the Rule to seek a change based on a claim of material change of circumstances.<sup>1217</sup> Because Michael “promptly appl[ied] for a modification of child support when [the] material change in circumstances occur[red],” the superior court erred in not considering the date of filing onward as the relevant period of changed circumstances.<sup>1218</sup>

In *Department of Revenue, Child Support Enforcement Division ex rel. P.M. v. Mitchell*,<sup>1219</sup> the supreme court held that although a putative father was entitled to reimbursement for child support paid under a vacated default judgment of paternity, he was not entitled to reimbursement for funds passed along to the mother before judgment was entered and collections ended.<sup>1220</sup> In 1987, Enoch Mitchell was named at birth as the father of Peter Marks.<sup>1221</sup> In November 1989, Mitchell and Peter’s mother signed an Aid to Families with Dependent Children paternity statement declaring Mitchell was not Peter’s father, but the document was not received by the Alaska Child Support Enforcement Division (“CSED”) until 1993.<sup>1222</sup> In March 1990, CSED filed a complaint requiring Mitchell to provide child support; Mitchell did not answer or appear, and a default judgment was filed against him.<sup>1223</sup> In May 1994, the court granted Mitchell’s motion to recover all funds collected from him pursuant to that judgment.<sup>1224</sup> CSED appealed, claiming that although it was not erroneous to set aside the default judgment, the judgment was valid and CSED should not be required to reimburse Mitchell for any funds collected pursuant to a valid court order.<sup>1225</sup>

The supreme court analyzed the case by deciding the question of what should have happened after the default judgment was set aside.<sup>1226</sup> The court refused to address whether Mitchell had waived any claim for reimbursement because this issue was not properly raised in the lower court, was potentially dependent on new and unresolved facts, was not closely related to CSED’s arguments below, and could not have been gleaned from the pro-

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1216. ALASKA R. CIV. P. 90.3.

1217. See *Flannery*, 950 P.2d at 131.

1218. *Id.*

1219. 930 P.2d 1284 (Alaska 1997).

1220. See *id.* at 1285.

1221. See *id.* at 1286.

1222. See *id.*

1223. See *id.*

1224. See *id.* at 1286-87.

1225. See *id.* at 1287.

1226. See *id.*

ceedings.<sup>1227</sup> The court also held it was not plain error for the superior court to fail to raise the waiver issue *sua sponte* or to condition vacation of the default judgment on relinquishment of the reimbursement claim.<sup>1228</sup> The court required the state to return proceeds collected from the judgment because to retain them would constitute unjust enrichment.<sup>1229</sup> However, Mitchell was not entitled to the return of funds that were passed along to Peter's mother because he could have raised the paternity issue when he was first sued by CSED and prevented the state from disbursing those amounts to Peter's mother.<sup>1230</sup>

In *Department of Revenue, Child Support Enforcement Division v. Wetherelt*,<sup>1231</sup> the supreme court refused to refund the child support paid by a father before he conclusively established his non-paternity.<sup>1232</sup> Wetherelt was married to Victoria Lake at the time of Roberta Wetherelt's birth, which, in Alaska, established a presumption of paternity.<sup>1233</sup> The marriage was dissolved in 1983, and both parties indicated on the application for dissolution that there were no minor children born of the marriage or adopted.<sup>1234</sup> The supreme court held that this dissolution decree was not a showing of clear and convincing evidence required to disestablish paternity.<sup>1235</sup> Wetherelt did not conclusively disestablish his paternity until 1994.<sup>1236</sup> The supreme court reversed the lower court's ruling that the Child Support Enforcement Division ("CSED") abused its discretion by enforcing Wetherelt's support obligations, finding CSED did not have the statutory authority to disestablish paternity.<sup>1237</sup> CSED informed Wetherelt that only he could take the steps to disestablish his paternity.<sup>1238</sup> Finally, the court found CSED was not unjustly enriched by retaining the child support payments.<sup>1239</sup> Wetherelt failed to establish two elements of the unjust enrichment test, namely that the payments were "a benefit conferred upon the defendant by the plaintiff . . . and acceptance and retention by the defendant of such benefit under such circumstances that it would be inequitable for him to retain it without

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1227. *See id.* at 1288.

1228. *See id.* at 1288-89.

1229. *See id.* at 1289.

1230. *See id.* at 1290.

1231. 931 P.2d 383 (Alaska 1997).

1232. *See id.* at 391.

1233. *See id.* at 385.

1234. *See id.*

1235. *See id.* at 388.

1236. *See id.* at 383.

1237. *See id.* at 389.

1238. *See id.*

1239. *See id.* at 390.

paying the value thereof.”<sup>1240</sup> The money collected by CSED was reimbursement for payments already made to support a child for which Wetherelt was legally responsible.<sup>1241</sup>

In *Department of Revenue, Child Support Enforcement Division ex rel. Valdez v. Valdez*,<sup>1242</sup> the supreme court held that the Uniform Reciprocal Enforcement of Support Act (“URES A”)<sup>1243</sup> does not provide that court orders entered in another state will supersede child support orders entered as part of an original divorce decree.<sup>1244</sup> The Child Support Enforcement Division’s (“CSED”) URES A petition in California for payment of child support in arrears from Alfonso Valdez resulted in an order from the California court requiring \$250 per month for support and \$25 toward arrears.<sup>1245</sup> An Alaska superior court subsequently held that the U.S. Constitution’s full faith and credit clause required that Alfonso Valdez not pay more than \$250 in child support for the period after the California court’s order made pursuant to URES A.<sup>1246</sup> The supreme court reversed, using California law to conclude that URES A allows for multiple support orders while leaving original orders fully enforceable.<sup>1247</sup> The supreme court also remanded on the question of whether CSED could collect on arrears prior to June 1, 1984.<sup>1248</sup> It held that a ten-year statute of limitations and the doctrine of laches do not apply to child support, but do allow Alfonso to argue that estoppel and waiver preclude CSED from collecting more than \$250 per month, an amount which CSED accepted as Alfonso’s legal monthly obligation.<sup>1249</sup>

In *Pacana v. Department of Revenue, Child Support Enforcement Division*,<sup>1250</sup> the supreme court held that it was reversible error for the superior court to deny credit against child support obligations for Social Security benefits paid on a father’s behalf to his children.<sup>1251</sup> Pacana was ordered to pay a total of \$750 in child support for his three children, effective May 4, 1987.<sup>1252</sup> In 1990, Pacana became disabled and was subsequently awarded Social Se-

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1240. *Id.* (quoting *Darling v. Standard Alaska Prod.*, 818 P.2d 677, 680 (Alaska 1991)).

1241. *See id.* at 390-91.

1242. 941 P.2d 144 (Alaska 1997).

1243. ALASKA STAT. §§ 25.25.010-.270 (1996 & Supp. 1997).

1244. *See Valdez*, 941 P.2d at 149-50.

1245. *See id.* at 147-48.

1246. *See id.* at 147.

1247. *See id.* at 149.

1248. *See id.* at 153-54.

1249. *See id.* at 152-53.

1250. 941 P.2d 1263 (Alaska 1997).

1251. *See id.* at 1267.

1252. *See id.* at 1264.

curity benefits which became his primary income.<sup>1253</sup> Pacana did not meet his child support obligations, and the Alaska Child Support Enforcement Division (“CSED”) garnished his disability benefits.<sup>1254</sup> Because of Pacana’s disability, his children became eligible for and received Social Security children’s insurance benefits (“CIB”) payments from 1991 to 1995.<sup>1255</sup> In October 1995, CSED sent Pacana notice that he was \$57,374.39 in arrears for child support, but they did not credit the \$26,544 his children had received in CIB payments.<sup>1256</sup> Pacana motioned in superior court to modify the child support order and credit the CIB payments.<sup>1257</sup> The superior court reduced Pacana’s ongoing child support by the amount of the CIB benefits, but refused to credit the CIB payments toward the amount that Pacana owed in arrears.<sup>1258</sup> Deciding this as a case of first impression,<sup>1259</sup> the supreme court elected to follow the “majority rule” that CIB payments could be credited against child support arrearage.<sup>1260</sup> The court acknowledged that Alaska Civil Rule 90.3(h)(2)<sup>1261</sup> prohibits the retroactive modification of a child support arrearage, but interpreted this rule as only restricting modification in the amount of the child support awarded, and not in the correction of mistaken arrearage.<sup>1262</sup> The court also noted policy reasons for not insisting on additional support from a disabled Social Security beneficiary who is less likely to be able to meet child support obligations due to health and financial difficulties.<sup>1263</sup>

In *Flanigin v. Department of Revenue, Child Support Enforcement Division*,<sup>1264</sup> the supreme court held that the Child Support Enforcement Division (“CSED”) has the general authority to order the payment of support arrearages that have accrued prior to the service of a “Notice and Finding of Financial Responsibility” (“NFFR”), despite a contrary CSED policy interpretation.<sup>1265</sup> Flanigin, who signed an “acknowledgment of paternity” in Norway regarding Benjamin Egdetveit, argued that the CSED of Alaska

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1253. *See id.*

1254. *See id.*

1255. *See id.*

1256. *See id.*

1257. *See id.*

1258. *See id.*

1259. *See id.*

1260. *See id.* at 1265-66.

1261. ALASKA R. CIV. P. 90.3(h)(2).

1262. *See Pacana*, 941 P.2d at 1266.

1263. *See id.* at 1266-67 (citing *Weaks v. Weaks*, 821 S.W.2d 503, 506-507 (Mo. 1991)).

1264. 946 P.2d 446 (Alaska 1997).

1265. *See id.* at 446.

lacked authority to require him to pay child support arrearages for the time period prior to the service of an NFFR when no support order was in existence.<sup>1266</sup> The supreme court concluded that Alaska Statutes section 25.27.140(a),<sup>1267</sup> which authorizes the administrative establishment of child support orders, Alaska Statutes section 25.27.160(a),<sup>1268</sup> which describes how an administrative case is initiated, Alaska Statutes section 25.27.900(3),<sup>1269</sup> which defines the term “duty of support,” and Alaska Statutes section 25.27.170(d),<sup>1270</sup> which defines the issues that the hearing officer shall decide in a formal hearing, all “plainly authorize[d] CSED to enter orders establishing child support arrearages that . . . accrued prior to service of an NFFR even though no prior support order ha[d] been entered.”<sup>1271</sup> The supreme court rejected Flanigin’s argument regarding a contradictory CSED policy because the policy was not validly adopted and was not a reasonable interpretation of the aforementioned statutes.<sup>1272</sup>

In *Agen v. Department of Revenue, Child Support Enforcement Division*,<sup>1273</sup> the supreme court held that a parent’s consent to adoption did not abrogate responsibility for child support obligations.<sup>1274</sup> Agen signed a consent releasing his rights as a parent, but the state continued to provide child support assistance paid to the child’s mother.<sup>1275</sup> The court found that had it ruled otherwise, “irresponsible non-custodial parents readily would sign such consent forms, leaving custodial parents or the [s]tate with the burden of supporting the children.”<sup>1276</sup> The court noted that the parental duty of support terminates only when the child is adopted and, as a consequence of the adoption, another person assumes support obligations.<sup>1277</sup>

In *Yerrington v. Yerrington*,<sup>1278</sup> the supreme court held that Civil Rule 90.3(h)(1)<sup>1279</sup> required modification of a divorced mother’s child support payments after her income had dropped

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1266. *See id.* at 448.

1267. ALASKA STAT. § 25.27.140(a) (Michie 1996).

1268. *Id.* § 25.27.160(a).

1269. *Id.* § 25.27.900(3).

1270. *Id.* § 25.27.170(d).

1271. *Flanigin*, 946 P.2d at 448.

1272. *See id.* at 450.

1273. 945 P.2d 1215 (Alaska 1997).

1274. *See id.* at 1218.

1275. *See id.* at 1216-17.

1276. *Id.* at 1218.

1277. *See id.*

1278. 933 P.2d 555 (Alaska 1997).

1279. ALASKA R. CIV. P. 90.3(h)(1).

more than \$36,000 in one year.<sup>1280</sup> Civil Rule 90.3(h)(1) allows a modification of a child support award if there has been a material change in circumstances, and a material change is presumed when support as calculated under the Rule varies “more than 15[%] greater or less than the outstanding support order.”<sup>1281</sup> The court recommended that the mother’s child support order be based on an “income-averaging approach” because her income fluctuated based on the dividends she received from her Native corporation stock.<sup>1282</sup>

### C. Marital Property

In *Cox v. Cox*,<sup>1283</sup> the Alaska Supreme Court held that the value of a marital checking account should be determined at the time of divorce and not separation.<sup>1284</sup> The superior court had awarded Vicki Cox the checking account, worth \$2,555 at the time of separation.<sup>1285</sup> At the time of the divorce, however, the checking account was empty, so the superior court instructed C.B. Cox to pay \$2,555 to Vicki.<sup>1286</sup> The supreme court held that the appropriate time to value the account was at the time of the divorce, not the separation, and that the superior court should order reimbursement.<sup>1287</sup> The supreme court then determined that the refinancing proceeds of a house held separately by C.B. but transferred to the marital estate at the time of refinancing were not marital property, and both the proceeds and anything purchased with the proceeds should be considered as C.B.’s separate assets.<sup>1288</sup> Third, the supreme court rejected C.B.’s argument that the trial court failed to take into consideration the expenditure of marital funds for nonmarital purposes.<sup>1289</sup> The court recognized that the division of assets did recognize such equitable factors as this but did not find the need to deviate from a fifty-fifty distribution of marital assets which the trial court had found fair.<sup>1290</sup> Fourth, the supreme court found that treating a \$14,000 deduction from fair value of a house as marital but \$6,000 recovered from insurance as C.B.’s separate property was inconsistent and ordered the \$6,000

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1280. See *Yerrington*, 933 P.2d at 556-57.

1281. *Id.* at 557.

1282. See *id.*

1283. 931 P.2d 1041 (Alaska 1997).

1284. See *id.* at 1043.

1285. See *id.* at 1042.

1286. See *id.*

1287. See *id.* at 1043.

1288. See *id.*

1289. See *id.* at 1044.

1290. See *id.*

to be included among C.B.'s assets.<sup>1291</sup> Finally, the supreme court upheld the validity of requiring a cash settlement as opposed to transference of title, but instructed the lower court on remand to address the issues of whether equality could be achieved through transfer of title and whether the payment could be made without incurring hardship.<sup>1292</sup>

In *Harrelson v. Harrelson*,<sup>1293</sup> the supreme court held that it is permissible to consider marriage-like relationships when dividing marital assets and before setting spousal support.<sup>1294</sup> Barbara and Kenneth (a.k.a. Larry) Harrelson were legally married for the last thirty-four months of a twelve-year relationship.<sup>1295</sup> They had been presenting themselves as husband and wife for eight years, including owning property together and filing joint tax returns.<sup>1296</sup> Larry's annual income during much of that time was approximately nine times that of Barbara's.<sup>1297</sup> The superior court determined that, due to the unequal earning power of the two parties, Barbara was entitled to a greater portion of the marital assets and an award of spousal support.<sup>1298</sup> The supreme court remanded this finding because the lower court made the division based on its clearly erroneous finding that the parties had been married for eight years.<sup>1299</sup> Although Alaska law does not recognize common law marriage,<sup>1300</sup> the superior court could consider the eight-year marriage-like relationship when making its division of assets.<sup>1301</sup> The supreme court also held Larry was entitled to a reduction in the spousal award since Barbara was incurring no housing costs and the trial court had partially justified its award with the calculation of such costs.<sup>1302</sup>

In *Jones v. Jones*,<sup>1303</sup> the supreme court held that a trial court may not punish a party to a divorce for illegal behavior such as gambling by awarding that party a smaller share of marital assets in a property division.<sup>1304</sup> Johnie and Marian Jones were divorced on June 30, 1995, after 32 years of marriage.<sup>1305</sup> At trial, the only

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1291. *See id.*

1292. *See id.* at 1045.

1293. 932 P.2d 247 (Alaska 1997).

1294. *See id.* at 251.

1295. *See id.* at 249.

1296. *See id.*

1297. *See id.*

1298. *See id.*

1299. *See id.* at 250-01.

1300. *See id.* at 250.

1301. *See id.* at 251.

1302. *See id.* at 255.

1303. 942 P.2d 1133 (Alaska 1997).

1304. *See id.* at 1135.

1305. *See id.*

issue was the division of property.<sup>1306</sup> While finding several reversible errors regarding the identification and valuation of marital property,<sup>1307</sup> the supreme court also held that the trial court had made an unequal division of property based on erroneous grounds, and thus remanded for a proper division of the marital property.<sup>1308</sup> The supreme court held that there was insufficient evidence to show that Johnie's gambling losses significantly wasted marital assets to the extent of causing the disparate property division.<sup>1309</sup> Furthermore, it found that the issue of misconduct, based solely on Johnie's gambling, did not apply to this case because the gambling did not evince serious economic misconduct, and the trial court apparently had unduly sanctioned Johnie for this behavior.<sup>1310</sup>

In *Johns v. Johns*,<sup>1311</sup> the supreme court affirmed an equitable division of property on a fifty-fifty basis, even though it required a lump sum payment of \$60,000 by the husband to his wife to offset assets received by the husband.<sup>1312</sup> Against the husband's argument, the court held that a fishing boat, acquired through using substantial assets of the husband, was marital property because it was acquired during the marriage.<sup>1313</sup> The court also held that an Individual Fishing Quota acquired during the marriage was marital property and subject to division, as were permanent limited entry fishing permits, although they presently had no resale value.<sup>1314</sup> The husband's final claim of economic hardship caused by the \$60,000 cash judgment was also rejected by the court which noted that he could "sell some of the assets or . . . take out a significant loan."<sup>1315</sup>

In *Wahl v. Wahl*,<sup>1316</sup> the supreme court held that a divorce agreement, which entitled the wife to one-third of the husband's retirement benefits, applied to the entire value of the retirement plan at the date of retirement.<sup>1317</sup> The court rejected the husband's argument that the divorce agreement gave his wife one-third of the retirement benefits that were earned during the marriage, and followed the "plain language of the contract."<sup>1318</sup> Concluding that

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1306. *See id.*

1307. *See id.* at 1136-37.

1308. *See id.* at 1137-39.

1309. *See id.* at 1138.

1310. *See id.* at 1140.

1311. 945 P.2d 1222 (Alaska 1997).

1312. *See id.* at 1224.

1313. *See id.* at 1225.

1314. *See id.* at 1226-27.

1315. *Id.* at 1228.

1316. 945 P.2d 1229 (Alaska 1997).

1317. *See id.* at 1231.

1318. *Id.* (concluding that the husband had completed 2/3 of his working career

the decree enforcement was within the superior court's inherent power, the court upheld the superior court's decision to award a survivor annuity to the wife and to provide that the parties' children would receive the wife's share of retirement benefits if she predeceased the husband.<sup>1319</sup>

In *Brown v. Brown*,<sup>1320</sup> the supreme court held that a post-trial agreement regarding the characterization of property in a property division proceeding was binding.<sup>1321</sup> Kevin Brown argued that Trade Construction, a corporation of which Wendy Brown was the sole shareholder, should be characterized as a marital asset and that an agreement he had entered into with Wendy regarding the corporation did not contradict his characterization of the property.<sup>1322</sup> The supreme court rejected Kevin's argument, concluding that the binding agreement he made with Wendy relinquished any rights he may have had to the corporation.<sup>1323</sup> However, the supreme court vacated and remanded the trial court's property division because (1) the trial court "clearly failed to begin with the presumption that an equal division of marital property is the most equitable," (2) the court failed to adequately consider all appropriate factors when determining Kevin's earning capacity, and (3) the court's use of Kevin's salaried position with health benefits as a justification for property division was overly broad.<sup>1324</sup>

In *Beard v. Beard*,<sup>1325</sup> the supreme court held that the trial court did not abuse its discretion in awarding the wife substantial attorney's fees because of the husband's greater earning power and secure financial situation in comparison to the wife's.<sup>1326</sup> Earl Beard argued that the trial court's award of partial attorney's fees to Annette Beard was improper because of Annette's "vexatious litigation conduct,"<sup>1327</sup> including failing to respond timely to pleadings, violating court orders, and refusing to vacate the family residence.<sup>1328</sup> Although the supreme court concurred with Earl's claim of vexatious conduct, the supreme court concluded that the trial court did not abuse its discretion by reducing Annette's award of

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and that the wife was entitled to 1/2 of that amount, leaving her with 1/3 of the entire retirement package).

1319. *See id.* at 1232.

1320. 947 P.2d 307 (Alaska 1997).

1321. *See id.* at 310.

1322. *See id.* at 309.

1323. *See id.* at 310.

1324. *Id.* at 313-14.

1325. 947 P.2d 831 (Alaska 1997).

1326. *See id.* at 834.

1327. *Id.*

1328. *See id.* at 835.

attorney's fees instead of denying them altogether.<sup>1329</sup>

#### D. Miscellaneous

In *Batey v. Batey*,<sup>1330</sup> the Alaska Supreme Court held that there was no putative marriage between two parties even though the couple "held themselves out as husband and wife for over twenty years" because there was no good faith belief by either party in the validity of the marriage.<sup>1331</sup> The couple, Michael and Earline, were "married" in Nevada in 1971, although at the time Earline knew the ceremony was invalid because Michael's divorce from his first wife was not finalized.<sup>1332</sup> Michael's divorce from his first wife was finalized seven months later.<sup>1333</sup>

Michael filed for divorce from Earline in 1993,<sup>1334</sup> and later alleged that the "marriage was void."<sup>1335</sup> Earline did not dispute Michael's claim, but argued that this was a putative marriage under Alaska Statutes section 25.05.051.<sup>1336</sup> The court disagreed because "[t]he essential basis of a putative marriage is a good faith belief by at least one of the parties in the validity of the marriage."<sup>1337</sup> Since both parties knew that Michael was married "at the inception of the putative marriage[,] . . . Earline lacked a good faith belief in the validity of the marriage at its inception, [and] she cannot [now] take advantage of the protections afforded a putative spouse in [Alaska Statutes section] 25.05.051."<sup>1338</sup>

In *Lowe v. Lowe*,<sup>1339</sup> the supreme court held that a party to a divorce settlement may make a timely motion for relief from judgment of the settlement based on certain unfulfilled oral agreements made earlier by the parties.<sup>1340</sup> In July of 1984, Linda and Tommy Lowe filed for dissolution of their marriage.<sup>1341</sup> At the same time, Linda quitclaimed her interest in the marital home.<sup>1342</sup> In the couple's motion for dissolution, there was no mention of the home or of Tommy's military retirement benefits.<sup>1343</sup> In May 1989,

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1329. *See id.*

1330. 933 P.2d 551 (Alaska 1997).

1331. *Id.* at 552.

1332. *See id.*

1333. *See id.*

1334. *See id.*

1335. *Id.*

1336. *See id.*; ALASKA STAT. § 25.05.051 (Michie 1996).

1337. *Batey*, 933 P.2d at 553.

1338. *Id.* at 553-54.

1339. 944 P.2d 29 (Alaska 1997).

1340. *See id.* at 29-30.

1341. *See id.*

1342. *See id.*

1343. *See id.*

Linda moved for relief from judgment of the property settlement, asking for a share of Tommy's retirement benefits.<sup>1344</sup> The superior court found that the original property settlement had been implicitly based on an oral agreement between the parties that Tommy would sell the home and give half the proceeds to Linda, a promise which was never carried out.<sup>1345</sup> On this basis, the superior court ruled that Linda did not unreasonably delay in filing for relief from judgment, pursuant to Alaska Civil Rule 60(b).<sup>1346</sup> The supreme court affirmed the superior court's ruling, finding that Linda had reasonably relied on Tommy's assurances that he would sell the marital home and give her the proceeds.<sup>1347</sup>

In *Pierce v. Pierce*,<sup>1348</sup> the supreme court held that a term inserted into a divorce settlement by one party during the drafting of the agreement and not specifically agreed upon by the other party, may be deleted even after the agreement has been signed.<sup>1349</sup> While drafting the settlement agreement, Donald Pierce inserted a 50% child support credit for extended visits of his children lasting over twenty-seven days, even though this had not been agreed upon by the parties.<sup>1350</sup> The drafted agreement was then forwarded to Roxanne Pierce, Donald's wife, without calling attention to the change in the agreement.<sup>1351</sup> Even though the child support credit included in the agreement is permitted under Civil Rule 90.3(a)(3),<sup>1352</sup> the court held that the rule is discretionary and must be negotiated as a part of the settlement.<sup>1353</sup> The court further held that the trial court could set aside the judgment entered on the agreement sua sponte based on Civil Rule 60(b)(3).<sup>1354</sup>

#### IX. INSURANCE LAW

In *Department of Public Safety, Division of Motor Vehicles v. Fernandes*,<sup>1355</sup> the Alaska Supreme Court affirmed the suspension

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1344. *See id.*

1345. *See id.* at 30-31.

1346. *See id.* at 30; ALASKA R. CIV. P. 60(b).

1347. *See Lowe*, 944 P.2d at 32.

1348. 949 P.2d 498 (Alaska 1997).

1349. *See id.* at 500.

1350. *See id.* at 499.

1351. *See id.*

1352. ALASKA R. CIV. P. 60(b)(3).

1353. *See Pierce*, 949 P.2d at 500.

1354. *See id.* Civil Rule 60(b)(3) provides that relief from judgment may be granted in cases of "fraud . . . , misrepresentation, or other misconduct of an adverse party." *Id.* Roxanne Pierce had argued that relief should be granted based on Rule 60(a) involving clerical errors.

1355. 946 P.2d 1259 (Alaska 1997).

of a driver's license and held that the driver's post-accident conduct, including personal indemnification of all parties who suffered damage in the accident and purchasing automobile liability insurance soon after the accident, did not excuse his pre-accident failure to comply with the Alaska Mandatory Motor Vehicle Insurance Act ("mandatory insurance laws").<sup>1356</sup> The court found that Fernandes did not meet two of the three required conditions for exemption from the mandatory insurance laws.<sup>1357</sup> Fernandes failed to satisfy the condition that the property damage be less than \$1000 and the condition that his failure to maintain insurance was due to circumstances beyond his control.<sup>1358</sup> The supreme court also rejected Fernandes's argument that he substantially complied with the mandatory insurance laws by determining that Fernandes did not provide the level of protection required by the laws and he demonstrated no justification for his failure to hold insurance at the time of the accident.<sup>1359</sup> Because Fernandes could not show that he had continuously maintained the ability to pay a judgment of \$125,000, the supreme court determined that he did not comply with the self-insurance provisions of the mandatory insurance laws.<sup>1360</sup>

In *University of Alaska v. Tumeo*,<sup>1361</sup> the supreme court held that unmarried employees did not have to pay back any health insurance benefits received by their domestic partners because Alaska Statutes section 18.80.220(a)(1),<sup>1362</sup> part of the Alaska Human Rights Act, "bar[red] discrimination in employment on the basis of marital status" at the time it was initially passed.<sup>1363</sup> This statute, however, had been recently amended to allow employers to provide different benefits to employees who had spouses or children than what it provided to other employees.<sup>1364</sup> The court initially held that the recent amendments did not render the controversy moot because the issues of whether the University could seek refunds for previous payments and whether the superior court's award of attorney's fees to the parties discriminated against required an interpretation of the pre-amended statute.<sup>1365</sup> The University admitted that it discriminated against employees who

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1356. See *id.* at 1262; ALASKA STAT. § 28.22 (Michie 1996).

1357. See *Fernandes*, 946 P.2d at 1261.

1358. See *id.*

1359. See *id.*

1360. See *id.*

1361. 933 P.2d 1147 (Alaska 1997).

1362. ALASKA STAT. § 18.80.220(a)(1) (Michie 1996).

1363. *Tumeo*, 933 P.2d at 1148.

1364. See *id.* at 1151.

1365. See *id.* at 1151-52.

wished coverage for their unmarried partners, but it “argue[d] that such discrimination does not violate the [Alaska] Human Rights Act.”<sup>1366</sup> After a careful examination of the plain language of the Human Rights Act as it was initially passed, the court held that the Act did not intend to allow this type of discrimination, and therefore the University was not entitled to any refunds based on a misinterpretation of the original statute.<sup>1367</sup>

In *Jones v. Horace Mann Insurance Co.*,<sup>1368</sup> the supreme court held that the liability coverage of a homeowner’s insurance policy did not cover a snow machine accident because it occurred away from the insured’s premises.<sup>1369</sup> The snow machine accident occurred approximately four-tenths of a mile from the insured’s home on a public road that served as the access road to a drive that abuts the insured’s property.<sup>1370</sup> Given the wording of the policy,<sup>1371</sup> the court concluded that an interpretation that the public road was covered under the insurance policy “would be contrary to the intent and reasonable expectations of both the insurer and the insured.”<sup>1372</sup> Jones also argued that the snow machine accident was covered under the insured’s policy because it was a motorized vehicle used mainly to service the insured’s premises and the geographic limitation in the policy did not apply to such vehicles.<sup>1373</sup> In rejecting Jones’s argument, the court concluded that the snow machine did not constitute a service vehicle for purposes of the policy because the insured used the snow machine to service their premises only on a few isolated instances and primarily used the machine for recreation.<sup>1374</sup> The court also rejected Jones’s argument that Horace Mann waived its right to defend coverage under the service vehicle provision.<sup>1375</sup> Even though Horace Mann failed to inform Jones of all the bases for its denial of coverage, a general denial letter sent by Horace Mann to Jones twenty-seven days after the accident was sufficient notice to enable Jones to challenge the denial of coverage.<sup>1376</sup> Because it was determined that the acci-

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1366. *Id.* at 1150.

1367. *See id.* at 1156.

1368. 937 P.2d 1360 (Alaska 1997).

1369. *See id.* at 1362.

1370. *See id.* at 1361.

1371. According to the policy between the homeowner and Horace Mann, the insured premises included “‘premises used by [homeowner] in connection with the described location’” and “‘all access ways immediately adjoining the insured premises.’” *Id.* at 1362 (quoting insurance policy).

1372. *Id.* at 1364.

1373. *See id.*

1374. *See id.* at 1365.

1375. *See id.*

1376. *See id.*

dent did not occur on the insured's premises for the purposes of liability insurance coverage, the court concluded that the insurer also was not liable for Jones's medical expenses.<sup>1377</sup>

In *Department of Transportation and Public Facilities v. State Farm Fire and Casualty Co.*,<sup>1378</sup> the supreme court held that a liability insurer had a duty to defend the State of Alaska pursuant to a liability insurance policy entered into by the defendant insurer and the lessees of the state-owned land on which the state was named as an insured.<sup>1379</sup> An automobile accident occurred on a public road at Anchorage International Airport.<sup>1380</sup> Because a literal interpretation of the insurance policy would have led to unreasonably broad coverage, the court limited State Farm's coverage to claims that have a "fair relationship to the use of the leased premises."<sup>1381</sup> The court concluded that the collision, which involved a motorcycle and a baggage train traveling toward the airport on a public road within the boundaries of the leased premises, constituted a claim arising out of or incidental to the appropriate use of the premises, and thus, the accident fell within the limits of the scope of the policy.<sup>1382</sup> Although the premises were subleased, the court concluded that this fact did not relieve the insurer of the duty to defend the claim.<sup>1383</sup> The court also rejected State Farm's argument that the professional services exclusion in the policy relieved them of any duty to defend the claim against the state for negligent design of the roadway.<sup>1384</sup> Finally, the court noted that even if State Farm was relieved of defending the negligent design claim, they would still have a duty to defend the state, because "the fact that one claim may be excluded by a policy provision does not relieve an insurer from its obligation to defend where there are other claims which are not excluded."<sup>1385</sup>

In *Grace v. Insurance Co. of North America*,<sup>1386</sup> the supreme court held that an excess liability insurer has no obligation to "drop down" to cover a policy holder where the primary insurer became insolvent, and that a breach of the policy holder's duty to obtain consent for a settlement absolved the insurer of its duty to

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1377. *See id.* at 1366.

1378. 939 P.2d 788 (Alaska 1997).

1379. *See id.* at 789.

1380. *See id.*

1381. *Id.* at 793.

1382. *See id.*

1383. *See id.* at 794.

1384. *See id.*

1385. *Id.*

1386. 944 P.2d 460 (Alaska 1997).

indemnify unless the insurer's behavior justified the breach.<sup>1387</sup> Grace sued Bell Helmets and Ocelot Engineering for product liability when a motorcycle helmet he was wearing cracked during an accident.<sup>1388</sup> Bell Helmets had several layers of insurance, with Insurance Company of North America ("INA") providing coverage for liability in excess of \$5,100,000.<sup>1389</sup> Ocelot confessed judgment for \$15,000,000 and assigned its rights to seek indemnification from Bell Helmets to Grace in exchange for an agreement not to execute on the judgment for at least three years.<sup>1390</sup> Grace then sought settlement from Bell Helmets, who agreed, without consent from INA, to a final judgment amount in excess of \$17,000,000.<sup>1391</sup> The supreme court held that INA did not have a duty to "drop down" to cover the liability previously covered by the primary insurer.<sup>1392</sup> However, it did hold that Bell Helmet's breach of its duty to seek pre-settlement consent was excused by INA's refusal to indemnify until the underlying liability coverage was spent.<sup>1393</sup> The court found that "INA is liable only for amounts in excess of the liability limits of the [primary insurers], not for amounts in excess of the sums actually paid by those policies."<sup>1394</sup> The court then reversed summary judgment on the grounds that a question of fact existed regarding whether INA had improperly refused to pay its obligation until the underlying coverage was actually paid.<sup>1395</sup>

In *Wichman v. Benner*,<sup>1396</sup> the supreme court held that an assignee of rights to be reimbursed for workers' compensation benefits may recover for the full amount of the benefits paid to an employee regardless of the amount for which the rights were purchased.<sup>1397</sup> Wichman was injured while working for Benner, and subsequently recovered \$65,000 when a jury found that he was not comparatively negligent in the accident resulting in his injury.<sup>1398</sup> The jury's finding of no comparative negligence was appealed and reversed by the supreme court in a prior case.<sup>1399</sup> Benner's liability insurer, Northland Insurance Company (Northland), purchased the right to be reimbursed for the \$33,837.53 already paid to

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1387. *See id.*

1388. *See id.* at 462.

1389. *See id.*

1390. *See id.* at 463.

1391. *See id.*

1392. *See id.* at 465.

1393. *See id.* at 464-65.

1394. *Id.* at 465.

1395. *See id.* at 467.

1396. 948 P.2d 484 (Alaska 1997).

1397. *See id.* at 487-88.

1398. *See id.* at 485.

1399. *See id.* at 486 (citing *Benner v. Wichman*, 874 P.2d 949 (Alaska 1994)).

Wichman in workers' compensation benefits should a jury determine that Wichman was comparatively negligent on remand.<sup>1400</sup> The jury found that Wichman was 6% negligent, and the court ordered Benner to pay \$61,000 plus interest, costs and attorney's fees, totaling \$111,000.<sup>1401</sup> Benner agreed to pay \$76,591.57 and deposited the remaining \$35,211.43 with the court to be held until its motion for attorney's fees and costs and a reduction of the verdict could be ruled upon.<sup>1402</sup> Northland intervened and motioned for a release of the funds, submitting evidence that it was entitled to \$34,654.95 because the amount of reimbursement should have been reduced one-third for attorney's fees.<sup>1403</sup> The superior court granted Northland's motion, and Wichman appealed.<sup>1404</sup> The supreme court held that the right to reimbursement of workers' compensation benefits was properly assignable.<sup>1405</sup> The court determined that public policy preventing the assigning of personal injury claims as "trafficking in lawsuits for pain and suffering" did not apply in this case, but rather that this case involved only the right to be reimbursed for overpayment of benefits.<sup>1406</sup> Finally, the court held that the fact that Northland had purchased the rights for only \$10,000 did not prevent it from recovering in excess of that amount, as the assignment of the right included the potential risk of no recovery and therefore did not amount to a windfall to Northland.<sup>1407</sup>

In *St. Paul Fire & Marine Insurance Co. v. F.H.*<sup>1408</sup> the Ninth Circuit Court of Appeals held that the district court did not abuse its discretion in exercising jurisdiction in a declaratory judgment action of a professional liability policy.<sup>1409</sup> St. Paul Fire & Marine Insurance Company ("St. Paul") had sought a declaration in district court that its professional liability policy for Big Brothers/Big Sisters did not cover sexual abuse by an employee.<sup>1410</sup> The victim of the abuse countersued for damages and declaratory judgment but the district court granted St. Paul's motion for summary judgment.<sup>1411</sup> The circuit court reversed and remanded the case back to

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1400. *See id.*

1401. *See id.*

1402. *See id.*

1403. *See id.*

1404. *See id.*

1405. *See id.* at 487.

1406. *Id.*

1407. *See id.* at 488.

1408. 117 F.3d 435 (9th Cir. 1997).

1409. *See id.* at 438.

1410. *See id.* at 436.

1411. *See id.*

the district court, which then ruled against St. Paul.<sup>1412</sup> St. Paul then claimed that the district should have declined jurisdiction under the Declaratory Judgment Act.<sup>1413</sup> The court concluded that the district court did not abuse its discretion in exercising jurisdiction over the matter because there was no pending state action and there was a potential for undue cost and delay had jurisdiction not been exercised.<sup>1414</sup> Upholding jurisdiction, the circuit court concluded that “[b]ecause the defendants K.W. and F.H. filed a counterclaim for monetary damages with jurisdiction supported by diversity of citizenship, a dismissal of St. Paul’s declaratory judgment action would not have saved the district court from having to adjudicate the controversy and deal with state law issues.”<sup>1415</sup>

In *Allstate Insurance v. Shelton*,<sup>1416</sup> the Ninth Circuit Court of Appeals held that uninsured/underinsured motorist coverage does not cover a child who resided in the same household but was not related by blood or affinity to the policy holder.<sup>1417</sup> While Karen Kohlbeck and Michael Shelton were cohabitating, Karen’s daughter, Brittany, was struck and killed by a motorist.<sup>1418</sup> Brittany’s biological parents asserted a claim for coverage under the uninsured/underinsured motorist provision of Michael Shelton’s insurance policy.<sup>1419</sup> The circuit court affirmed the district court’s ruling that Brittany’s estate could not recover, as Brittany did not fit under the term “relative” in Michael’s policy.<sup>1420</sup> According to the plain language standard used for statutory construction of Alaska law, the plain meaning of the term “relative” means “a person connected by blood or affinity.”<sup>1421</sup> Extrinsic evidence also demonstrated that Michael Shelton did not reasonably expect his automobile coverage would include Brittany, as he and Karen kept different policies and Brittany’s estate recovered under her mother’s policy.<sup>1422</sup> Finally, case law supported the district court’s determination, showing that courts have previously determined that a relative was a person connected by blood or marriage.<sup>1423</sup>

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1412. *See id.* at 436-37.

1413. *See id.* at 437; 28 U.S.C. § 2201 (1994).

1414. *See St. Paul Fire & Marine Insurance*, 117 F.3d at 437.

1415. *Id.* at 438.

1416. 105 F.3d 514 (9th Cir. 1997).

1417. *See id.* at 517.

1418. *See id.* at 515.

1419. *See id.*

1420. *See id.* at 517.

1421. *Id.* at 516.

1422. *See id.*

1423. *See id.* at 516-17; *see also* *Groves v. State Farm Life and Casualty Co.*, 829 P.2d 1237 (Ariz. Ct. App. 1992); *Young v. State Farm Mut. Auto. Ins. Co.*, 697 P.2d 40 (Haw. 1985).

## X. PROPERTY

## A. Restrictions on Use

In *Kohl v. Legoullon*,<sup>1424</sup> the Alaska Supreme Court upheld a homeowner's action to enforce common subdivision restrictions against another homeowner.<sup>1425</sup> The Kohls built on the lot directly across the street from the Legoullons and repeatedly assured the Legoullons that they were in compliance with the height and setback requirements or that they had obtained a waiver from these restrictions.<sup>1426</sup> The Legoullons sued when they noticed the walls of a fifth story being added to the Kohl's home.<sup>1427</sup> The supreme court upheld the Legoullon's standing to enforce the covenants, as the covenants were established as part of a common plan of development.<sup>1428</sup> The Kohls claimed that the homeowners had waived the setback and height restrictions through a majority vote and approval of an architectural review committee, but the court found the waiver was invalid on two grounds.<sup>1429</sup> First, the setback requirements which stated that "[n]o fence or wall shall be erected . . . nearer to any street than the minimum . . . set-back line unless [approved by the Architectural Control Committee]," applied only to barriers, not houses.<sup>1430</sup> Second, the covenants state they "are to run with the land and shall be binding . . . for a period of twenty-five . . . years from the date these covenants are recorded," then automatically extended for successive ten-year periods unless the homeowners vote otherwise.<sup>1431</sup> Because the covenants were recorded in 1986, they were not subject to modification before 2011.<sup>1432</sup> The court also held that the action was not barred by laches, because the Kohls continued to build at their own risk once their neighbors had complained.<sup>1433</sup> The Kohls led the Legoullons to believe that their construction plans would not obstruct the Legoullons' view, so the Legoullons should not be faulted for waiting to bring an action.<sup>1434</sup> However, the supreme court permitted the height to remain and reversed the lower court's order that the top story be removed from the structure, as the Legoullons failed to

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1424. 936 P.2d 514 (Alaska 1997).

1425. *See id.* at 519.

1426. *See id.* at 516.

1427. *See id.*

1428. *See id.*

1429. *See id.* at 517.

1430. *Id.*

1431. *Id.*

1432. *Id.*

1433. *See id.*

1434. *See id.* at 518.

prove that burying the first two floors of the structure elevated the land around the house above its natural level.<sup>1435</sup> The supreme court ordered the Kohls to cure the breach of the setback restriction by converting the garage into an open deck or porch, which would also alleviate the impact that the Kohls' house had on the Legoullons' view.<sup>1436</sup>

In *Methonen v. Stone*,<sup>1437</sup> the supreme court held that summary judgment was improperly granted in enjoining a purchaser of land with a well on it to continue to provide water to adjoining land.<sup>1438</sup> Even though the purchaser did not have actual or constructive notice of the unrecorded agreement that allegedly created an easement on the land, there were genuine issues of fact as to whether Methonen was on inquiry notice and whether an implied easement had been created.<sup>1439</sup> In 1974, when the original owner of the land conveyed the parcel to a subsequent owner, a "Water Agreement" was executed, but not recorded until 1985, stating that the owner of the land would furnish water to the other lots of the subdivision.<sup>1440</sup> Methonen purchased the land in 1976, "subject to easements, restrictions, reservations and exceptions of record."<sup>1441</sup> In July 1994, Methonen discontinued water service to the other lots, and Stone brought suit for an injunction and damages.<sup>1442</sup> The parties filed cross motions for summary judgment, and the superior court granted Stone's motion.<sup>1443</sup> On appeal, the supreme court held that because Stone had failed to demonstrate that Methonen had either actual or constructive notice, and because "the intention to create a servitude must be clear on the face of an instrument," summary judgment was improperly granted.<sup>1444</sup> Because the water agreement was not recorded until 1985, after Methonen had purchased the land, it did not bind Methonen.<sup>1445</sup>

However, the court denied that Methonen was entitled to summary judgment, because there remained issues of material fact concerning whether an easement was established on the ground of implied easement or whether Methonen was on inquiry notice.<sup>1446</sup> If Methonen was "aware of facts which would lead a reasonably

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1435. *See id.* at 519.

1436. *See id.* at 520.

1437. 941 P.2d 1248 (Alaska 1997).

1438. *See id.* at 1251.

1439. *See id.*

1440. *See id.*

1441. *Id.* at 1250.

1442. *See id.*

1443. *See id.*

1444. *Id.* at 1251.

1445. *See id.*

1446. *See id.*

prudent person to a course of investigation which, properly executed, would lead to knowledge of the servitude," then an easement might exist under a theory of "inquiry notice."<sup>1447</sup> The court also noted that, under a theory of implied easement, an easement might exist if the water lines leading off of Methonen's property to the adjoining lots indicated use that was "manifest, continuous, and reasonably necessary to the enjoyment of" the other parcels.<sup>1448</sup>

In *Persson-Mokvist v. Anderson*,<sup>1449</sup> the supreme court held that a plat note for residential property restricting use of the land to "residential/recreational use" is not violated by raising and training sled dogs or by operating a bed and breakfast.<sup>1450</sup> In 1982, Persson-Mokvist purchased land in a subdivision formally owned by the state.<sup>1451</sup> In 1992, he filed claim against neighboring land owners, alleging that their activities violated a plat note created when the land was subdivided in 1981 limiting the land use to "residential/recreational" uses.<sup>1452</sup> The court affirmed the decision of the trial court that raising and training sled dogs, as a hobby and not for profit, qualifies as "recreational" under the note, as interpreted using definitions found in state land-use regulations.<sup>1453</sup> Furthermore, the court ruled that operating a bed and breakfast establishment is "incidental" to residential use, and appropriate under the statute.<sup>1454</sup>

#### B. Transfers and Conveyances

In *Amyot v. Luchini*,<sup>1455</sup> the Alaska Supreme Court established that the statute requiring good faith disclosure of defects of residential real property transfers precluded any claims of innocent misrepresentation of property conditions included in the mandatory disclosure form.<sup>1456</sup> After purchasing a house from the Luchinis, Amyot discovered the foundation had completely failed and began replacing it at a cost of approximately \$100,000.<sup>1457</sup> Amyot sued the Luchinis under theories of innocent, negligent, and intentional misrepresentation.<sup>1458</sup> The superior court concluded Alaska

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1447. *Id.* at 1252.

1448. *Id.* at 1253.

1449. 942 P.2d 1154 (Alaska 1997).

1450. *See id.* at 1157.

1451. *See id.* at 1155.

1452. *See id.*

1453. *See id.* at 1157.

1454. *See id.*

1455. 932 P.2d 244 (Alaska 1997).

1456. *See id.* at 247.

1457. *See id.* at 245.

1458. *See id.*

law precluded the innocent misrepresentation theory,<sup>1459</sup> from which Amyot appealed.<sup>1460</sup> The supreme court reviewed the relevant statutes and concluded that by explicitly adopting a negligence standard of liability, the legislature implicitly rejected liability based on a lesser degree of fault.<sup>1461</sup> Additionally, consistent with the “good faith” requirement of real estate disclosures, it was clear that innocent misrepresentations did not violate that standard.<sup>1462</sup>

In *James v. McCombs*,<sup>1463</sup> the supreme court held that absent an actual defect in title, there was no breach of the covenants contained in a warranty deed.<sup>1464</sup> McCombs acquired land from the state, which originally held it as part of the Alaska Mental Health Trust.<sup>1465</sup> Two years later, McCombs sold the land to James and executed a warranty deed for the property in exchange for a promissory note secured by a deed of trust on the property.<sup>1466</sup> James began a dairy farm, but after it became apparent the farm would fail, James informed McCombs he would make no further payments on the note.<sup>1467</sup> James filed suit for breach of warranty based on litigation which invalidated the statute establishing lands held under the Mental Health Trust as general grant lands.<sup>1468</sup> McCombs counterclaimed for the principal and interest owed on the note.<sup>1469</sup>

The supreme court affirmed the lower court’s finding that there was no breach of warranty in the conveyance.<sup>1470</sup> The court found that the concepts of “cloud of title” and “marketable title” were not applicable because they applied to a breach of sale contract, and that once the deed was delivered, the relevant covenants are only those contained in the deed itself.<sup>1471</sup> James did not assert which particular covenant was breached, and the court noted that each covenant required title to actually be defective before holding the grantor liable.<sup>1472</sup> James was required to show the actual existence of paramount title to establish a breach; since

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1459. See ALASKA STAT. §§ 34.70.010-.090 (Michie 1996).

1460. See *Amyot*, 932 P.2d at 246.

1461. See *id.* at 246-47.

1462. See *id.* at 247.

1463. 936 P.2d 520 (Alaska 1997).

1464. See *id.* at 526.

1465. See *id.* at 522.

1466. See *id.*

1467. See *id.*

1468. See *id.* at 525.

1469. See *id.* at 522-23.

1470. See *id.*

1471. See *id.* at 524.

1472. See *id.*

McCombs was a bona fide purchaser of the land from the state, McCombs' title could not be stripped by the invalidation of the statute, and James was not entitled to rescission.<sup>1473</sup> James's defense to the counterclaim was based on a failure of consideration because of defective title, but since the claim of defective title failed, the court found his defense failed as a matter of law.<sup>1474</sup>

In *Melendrez v. Bode*,<sup>1475</sup> the supreme court ruled that the superior court abused its discretion by unconditionally granting quiet title in the successors to original purchasers of land because the landowner had not fully collected payment for the property.<sup>1476</sup> The Bodes received the property that had originally been owned by Melendrez through a quitclaim deed.<sup>1477</sup> The prior owners of the property had agreed to pay the remaining amount left on the sale of the land to Melendrez, but after Melendrez did not respond to the offer, they quitclaimed the interest in the property to the Bodes.<sup>1478</sup> The Bodes filed claim to quiet title on the property in superior court and Melendrez failed to appear in court until over a week after default was entered.<sup>1479</sup> The Bodes then motioned for entry of default judgment, requesting the court to order quiet title in the Bodes in exchange for payment of the balance owed to Melendrez.<sup>1480</sup> The court struck the proposed payment from the motion for default judgment and granted Bode's motion.<sup>1481</sup> Melendrez moved for the default judgment to be set aside.<sup>1482</sup> The court ruled that it was an abuse of discretion to enter default judgment greater than that prayed for by the Bodes, and reversed and remanded for the court to settle the issue of how much money was owed to Melendrez.<sup>1483</sup> Because the supreme court found Melendrez culpable for the default, however, it did not reverse the superior court's refusal to set aside default judgment.<sup>1484</sup>

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1473. *See id.* at 525-26.

1474. *See id.* at 526.

1475. 941 P.2d 1254 (Alaska 1997).

1476. *See id.* at 1256.

1477. *See id.* at 1255.

1478. *See id.*

1479. *See id.* at 1256

1480. *See id.*

1481. *See id.*

1482. *See id.*

1483. *See id.* at 1257-58.

1484. *See id.* at 1258.

### C. Takings

In *Four Separate Parcels of Land v. City of Kodiak*,<sup>1485</sup> the Alaska Supreme Court held that “lost profits” did not constitute a taking when there was no proof that the condemnation terminated the landowner’s contract with a tenant.<sup>1486</sup> The City of Kodiak made public plans to condemn four parcels of land, two of which belonged to Gerald Markham.<sup>1487</sup> Markham contested the compensation offered for his parcels and brought suit.<sup>1488</sup> He had entered into an agreement with the City to relocate houses situated on the land that the City was taking.<sup>1489</sup> Markham moved the houses per the agreement so that a tenant could continue occupancy of one of the houses, and claimed “lost profits” he would have collected while the house was being moved.<sup>1490</sup> He had a deal with the tenant under which he received certain benefits from a management contract, and he claimed moving the house terminated the deal with his tenant and cost him the profits of that deal.<sup>1491</sup> The court rejected Markham’s expert’s testimony on “lost profits” as irrelevant, since Markham failed to demonstrate that his benefit from the contract with the tenant was terminated by the taking.<sup>1492</sup> Nor was Markham entitled to compensation for the “cost of cure” (moving the house) as the agreement specifically stated he would have the right to remove the houses “at his sole expense.”<sup>1493</sup>

In *Toney v. City of Anchorage Police Department*,<sup>1494</sup> the supreme court held that a six-year statute of limitations was proper for a claim of conversion relating to the taking of property by the police department.<sup>1495</sup> Toney was charged with drug trafficking and some of his property was seized and turned over to the federal DEA without a forfeiture hearing.<sup>1496</sup> Toney’s complaint for conversion was dismissed by the superior court based upon a statute of limitations.<sup>1497</sup> The supreme court reviewed three different statutes

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1485. 938 P.2d 448 (Alaska 1997).

1486. *See id.*

1487. *See id.* at 449.

1488. *See id.*

1489. *See id.* at 450.

1490. *See id.* at 452.

1491. *See id.* at 450.

1492. *See id.*

1493. *Id.* at 453.

1494. 950 P.2d 123 (Alaska 1997).

1495. *See id.* at 125.

1496. *See id.* at 124.

1497. *See id.*

which set forth six, two, and three year periods of limitation for Toney's claim before determining that the six-year statute was appropriate for conversion.<sup>1498</sup> The supreme court did not allow Toney's conversion claim against the officers of the police department as individuals because the incident occurred while they were "acting in their official capacity."<sup>1499</sup>

#### D. Landlord-Tenant

In *Brigdon v. Lamb*,<sup>1500</sup> the Alaska Supreme Court held that the Alaska Uniform Residential Landlord and Tenant Act ("URLTA")<sup>1501</sup> did not apply to potential purchasers of property who occupied the property under a contract of sale.<sup>1502</sup> The Lambs occupied the Brigdons' property under two agreements, a "Receipt and Agreement to Purchase" and an "Occupancy Agreement."<sup>1503</sup> The Lambs were notified after several months of occupancy that their application to assume the loan on the property had been denied, but declined to sign an addendum to extend the purchase agreement.<sup>1504</sup> After vacating the property, the Lambs sued under URLTA for injuries suffered from being exposed to carbon monoxide from a defective furnace, alleging a breach of the duty "to maintain heating facilities in safe working order and to keep premises in a fit and habitable condition."<sup>1505</sup> The supreme court held that the URLTA did not apply because the Lambs occupied the premises under a contract for sale until they were notified that their loan application had been denied.<sup>1506</sup> Additionally, the court rejected the Lambs' argument that the occupancy agreement was created to avoid the application of the URLTA.<sup>1507</sup> The supreme court remanded for reconsideration the question of whether or not URLTA applied after the Lambs were notified that their application had been rejected.<sup>1508</sup>

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1498. *See id.* at 125 (citing ALASKA STAT. §§ 09.10.050(3), .070(a)(2), and .060(b) (Michie 1996)).

1499. *Id.* at 126.

1500. 929 P.2d 1274 (Alaska 1997).

1501. ALASKA STAT. § 34.03.330(b)(2) (Michie 1996).

1502. *See Brigdon*, 929 P.2d. at 1277.

1503. *See id.* at 1276.

1504. *See id.*

1505. *Id.* at 1275-76.

1506. *See id.*

1507. *See id.* at 1277.

1508. *See id.* at 1277-78.

## E. Miscellaneous

In *Osborne v. Hurst*,<sup>1509</sup> the Alaska Supreme Court held that the owners of damaged property may be allowed to pursue damages equal to the cost of restoring their property to its original condition instead of diminished market value.<sup>1510</sup> The superior court had granted summary judgment to defendant Hurst on the issue of restoration costs, but the supreme court reversed, holding that “restoration costs are an inappropriate measure of damages when those costs are disproportionately larger than the diminution in the value of land and there is no ‘reason personal to the owner for restoring’ the land to its original condition.”<sup>1511</sup> The court remanded for a determination of the appropriate measure of damages according to the “reason personal” test, to determine whether Osborne was entitled to an award of damages exceeding diminished market value.<sup>1512</sup>

In *Rush v. Alaska Mortgage Group*,<sup>1513</sup> the supreme court reversed summary judgment and held that a senior lienholder stated a claim of equitable subrogation because there was no evidence that the senior lienholder intended to subordinate the new deed of trust and because “paramount equities” did not favor the junior creditor.<sup>1514</sup> Because Rush, the senior lienholder, affirmed that she had no knowledge of any subsequent deeds of trust, the supreme court concluded that it could not be definitively inferred that she intended to subordinate her security position to subsequent deeds of trust.<sup>1515</sup> Because there was no evidence that the Alaska Mortgage Group had relied on Rush’s release of the deed of trust to their detriment, the supreme court rejected the Alaska Mortgage Group’s paramount equities theory.<sup>1516</sup>

In *Weiss v. State*,<sup>1517</sup> the supreme court held that a settlement agreement deciding a class action suit concerning lands granted in public trust to Alaska under the Alaska Mental Health Enabling Act (“AMHEA”)<sup>1518</sup> represented a “fair, adequate and reasonable settlement of the litigation.”<sup>1519</sup> The approved settlement agree-

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1509. 947 P.2d 1356 (Alaska 1997).

1510. *See id.* at 1360.

1511. *Id.* at 1359 (quoting RESTATEMENT (SECOND) OF TORTS § 929(1)(a) (1977)).

1512. *See id.* at 1360.

1513. 937 P.2d 647 (Alaska 1997).

1514. *See id.* at 651.

1515. *See id.* at 651.

1516. *See id.* at 652.

1517. 939 P.2d 380 (Alaska 1997).

1518. Pub. L. No. 84-830, 70 Stat. 709 (1956).

1519. *Weiss*, 939 P.2d at 382.

ment reconstituted the trust with land and cash, provided for improved mental health programs and established institutional mechanisms to protect the trust.<sup>1520</sup> Not all of the plaintiffs named in the underlying suit were proponents of the settlement agreement.<sup>1521</sup> Weiss, the named plaintiff in the original suit against the state, appealed the trial court's approval of the settlement agreement alleging that the settlement was a "bad deal."<sup>1522</sup> Weiss argued that the trial court erred by undervaluing the probable outcome of litigation and by overestimating the value of the remedy to the plaintiffs.<sup>1523</sup> Rejecting all of Weiss's arguments and upholding the settlement approval as fair and adequate, the supreme court held that the superior court did not err in evaluating the potential outcome of litigation, nor did it err in valuing the settlement lands.<sup>1524</sup> Weiss also argued that the trial court erred in its evaluation of the settlement's provisions regarding the Trust Authority, the budgeting procedures and land management.<sup>1525</sup> The supreme court also rejected this argument, stating that "the program benefits [including the Trust Authority, the budgeting procedures and land management] at best offer a considerable advantage over continued litigation" and "[a]t worst, . . . are as favorable as the likely product of continued litigation."<sup>1526</sup> The supreme court concluded that Civil Rule 60(b)<sup>1527</sup> was an appropriate enforcement mechanism, rejecting Weiss' claim that the settlement was not legally enforceable.<sup>1528</sup> Although the court concluded that there was evidence that some of the plaintiff's attorneys had legitimate disagreements, the supreme court found no evidence of improper collusion.<sup>1529</sup> Finally, the court rejected Weiss' due process claim, concluding that he "clearly had ample opportunity to present his case."<sup>1530</sup>

## XI. TORT LAW

In *Griffith v. Taylor*,<sup>1531</sup> the Alaska Supreme Court held that a plaintiff must show a duty to use such skill, prudence, and diligence

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1520. *See id.* at 382-86.

1521. *See id.* at 386.

1522. *Id.* at 387.

1523. *See id.* at 387-88.

1524. *See id.* at 387-92.

1525. *See id.* at 393-96.

1526. *Id.* at 396.

1527. ALASKA R. CIV. P. 60(b).

1528. *See Weiss*, 939 P.2d at 396-97.

1529. *See id.* at 399-400.

1530. *Id.* at 402.

1531. 937 P.2d 297 (Alaska 1997).

as other attorneys commonly possess and exercise; breach of that duty; proximate cause between the negligent conduct and the resulting injury; and actual loss or damage from the breach to establish a claim of professional legal malpractice.<sup>1532</sup> The court reversed a summary judgment decision against Griffith, a client of defendant law firm that represented him in preparing a quitclaim deed to settle a debt between him and his father, and that later represented his father in an attempt to divest Griffith of that same property.<sup>1533</sup>

The court further held that the substantial relationship test would be used to determine if an attorney-client relationship had been formed in the absence of a showing that confidential knowledge was actually gained from a previous professional relationship with a former client.<sup>1534</sup> The client therefore did not need to show that confidential information was actually disclosed in past dealings.<sup>1535</sup> The court qualified its holding by requiring a showing of confidential information if the attorney did not take a position adverse to its former client.<sup>1536</sup>

In *West v. City of St. Paul*,<sup>1537</sup> the supreme court held that a harbormaster has no duty to warn a vessel of the danger posed by an ice floe outside the harbor entrance because the ice was an open and obvious condition.<sup>1538</sup> The court held that the duties of a harbormaster extend to "warn[ing] the ship captain about such hidden dangers as underwater obstacles in the approach and latent structural defects in the wharf," but not to open and obvious conditions that could be reasonably ascertained by a vessel.<sup>1539</sup> The court found that the vessel's captain did not use "reasonable diligence" in attempting to enter the ice-filled harbor where the "ice was not a hidden hazard."<sup>1540</sup>

In *Manes v. Coats*,<sup>1541</sup> the supreme court held that a travel reservation service is not liable for an injury sustained at an inn because the reservation service is not the agent of the traveler.<sup>1542</sup> Manes used a reservation service, One Call Does It All ("One Call"), to arrange bed-and-breakfast accommodations for a trip to

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1532. *See id.*

1533. *See id.*

1534. *See id.* at 301.

1535. *See id.*

1536. *See id.* at 303.

1537. 936 P.2d 136 (Alaska 1997).

1538. *See id.* at 138-39.

1539. *Id.*

1540. *Id.* at 139.

1541. 941 P.2d 120 (Alaska 1997).

1542. *See id.* at 123.

Valdez.<sup>1543</sup> One Call made a reservation for Manes at the Always Inn.<sup>1544</sup> Manes sustained an injury from falling down a stairway in the Always Inn that was without handrails and adequate landing area.<sup>1545</sup> Manes sued both the reservation service and the owner of the inn.<sup>1546</sup> The superior court granted summary judgment in favor of One Call on the grounds that One Call was not an agent of Manes with the responsibility to inspect for hidden defects.<sup>1547</sup> The supreme court affirmed, noting that One Call did not act with the power to alter the legal relations of Manes, and that Manes did not exercise control over One Call, thus, no principal and agent relationship existed.<sup>1548</sup>

In *Department of Transportation and Public Facilities v. Sanders*,<sup>1549</sup> the supreme court held that the state has sovereign immunity for its decision to allow aircraft support vehicles to use a public road adjacent to an airport, but that it could be held liable if it negligently ignored risks associated with allowing the vehicles to use the roads.<sup>1550</sup> Sanders was injured when he ran his motorcycle into the rear of a baggage tug operating on Old International Airport ("OIA") Road.<sup>1551</sup> He subsequently sued the State of Alaska, United Airlines, and Dynair, the owner of the tug.<sup>1552</sup> The superior court granted Sanders' summary judgment motion against the state, holding that it was not entitled to sovereign immunity regarding its decision to allow airport-related traffic on OIA Road because it had breached its obligation to operate the airport safely.<sup>1553</sup> The supreme court held that the state is entitled to discretionary function immunity for its decision to allow airport-related business traffic on OIA Road because "the [a]irport officials did not have a mandatory duty to enforce traffic regulations on OIA Road."<sup>1554</sup> However, the court also held that once the state has exercised its discretion, it may still be held liable if it acts negligently in failing to take reasonable measures to minimize the risks associated with allowing unsafe vehicles to use the OIA road.<sup>1555</sup>

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1543. *See id.* at 122.

1544. *See id.*

1545. *See id.*

1546. *See id.*

1547. *See id.*

1548. *See id.* at 123-24.

1549. 944 P.2d 453 (Alaska 1997)

1550. *See id.*

1551. *See id.* at 455.

1552. *See id.*

1553. *See id.* at 456.

1554. *Id.* at 458.

1555. *See id.* at 459.

In *Rice v. Denley*,<sup>1556</sup> the supreme court remanded an alleged settlement agreement made orally in open court to determine whether the victim and the tort-feasor had reached a meeting of the minds regarding whether the settlement included the victim's insurer's subrogated claim.<sup>1557</sup> The settlement was for \$20,000, and tort-feasor Rice made it clear in court that it "would include any and all liens and costs and fees incurred."<sup>1558</sup> Rice felt that Denley, who included a subrogation claim with her insurer, was to have the responsibility of dealing with her insurer for the difference in the settlement and what Rice owed directly to Denley.<sup>1559</sup> Rice argued that the settlement agreement was unclear whether it excluded medical payment interest, and therefore asked the court to hold that there was no contract, to grant him relief based on a unilateral mistake as to a material term, or to void the contract based on mutual mistake.<sup>1560</sup> The court considered this argument because of the interchangeable terms "lien" and "subrogation lien," but remanded because the intent of the parties was unclear.<sup>1561</sup>

In *Pluid v. B.K.*,<sup>1562</sup> the supreme court held that damages in a bench trial that are based on reasonable estimates will not be reversed and also that evidence of a defendant's wealth is not necessary for awarding punitive damages, but may be offered at defendant's option.<sup>1563</sup> Pluid was found liable by clear and convincing evidence in a bench trial of sexually battering the minor daughter of a woman who was living with him.<sup>1564</sup> In awarding compensatory damages, the judge calculated the amount of counseling that would be needed by the victim as 100 sessions with a therapist at \$120 per session, and therefore awarded \$12,000 for future medical expenses.<sup>1565</sup> The judge also awarded \$25,000 for past and future pain and suffering.<sup>1566</sup> Finally, the judge awarded punitive damages at five times the amount of compensatory damages (\$185,000).<sup>1567</sup> The supreme court found that the compensatory damages were reasonably based and that the trial court did not commit clear error.<sup>1568</sup> The court ruled that it was not error for the court to ac-

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1556. 944 P.2d 497 (Alaska 1997).

1557. *See id.* at 501.

1558. *Id.* at 498.

1559. *See id.* at 499.

1560. *See id.* at 500.

1561. *See id.* at 500-01.

1562. 948 P.2d 981 (Alaska 1997).

1563. *See id.* at 985.

1564. *See id.* at 982.

1565. *See id.* at 983.

1566. *See id.*

1567. *See id.*

1568. *See id.* at 984.

knowledge the criminal penalty in assessing punitive damages.<sup>1569</sup> Recognizing a split in other jurisdictions, the court held that evidence of the defendant's wealth is not necessary for awarding punitive damages, but that defendant may offer such evidence if he so chooses.<sup>1570</sup>

In *Harris v. Keys*,<sup>1571</sup> the supreme court upheld the jury's discretion to decide issues of fact as its conclusions were clearly reasonable and refused to overturn the decision because any error in jury instructions was harmless.<sup>1572</sup> Defendant Keys asked Satterwhite to stay in his motorhome to discourage theft of property Keys was leasing.<sup>1573</sup> Satterwhite left the site for a month in November, so Keys assumed Satterwhite had abandoned the site and terminated the agreement.<sup>1574</sup> When Satterwhite returned, Elizabeth and Seth Harris accompanied him.<sup>1575</sup> Keys visited the site several times, once allegedly asking Satterwhite to leave, yet Satterwhite and his friends remained at the mobile home, frequently drinking heavily.<sup>1576</sup> On December 25, Keys, paramedics and police found Elizabeth dead from an infection and Seth frost-bitten and incoherent.<sup>1577</sup> Seth lost both feet to frostbite and suffered neural damage from shock.<sup>1578</sup> He then brought suit against Keys for his injuries.<sup>1579</sup> The jury found Satterwhite negligent and a cause of the injuries to Seth, but found that Keys was not negligent and Satterwhite was not his agent.<sup>1580</sup>

The supreme court rejected Seth's appeal on several grounds. First, the court affirmed the superior court's refusal to disturb the jury's finding of no agency relationship between Keys and Satterwhite.<sup>1581</sup> Recognizing that Alaska law did not clearly delineate between an agency relationship and a landlord-tenant relationship or a bailor-bailee relationship, the court could still find no authority that indicated every tenancy or bailment which serves the owner's purposes creates an agency relationship.<sup>1582</sup> Mere occupancy of the motorhome was not enough to create an agency relationship, and

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1569. *See id.* at 985.

1570. *See id.* at 986.

1571. 948 P.2d 460 (Alaska 1997).

1572. *See id.* at 465-66.

1573. *See id.* at 463.

1574. *See id.*

1575. *See id.*

1576. *See id.*

1577. *See id.*

1578. *See id.*

1579. *See id.* at 462.

1580. *See id.* at 464.

1581. *See id.* at 465.

1582. *See id.* at 464.

from the facts, the jury could reasonably conclude that Keys did not exercise control of Satterwhite's conduct; thus, Keys and Satterwhite were not principal and agent.<sup>1583</sup> Seth claimed the jury instructions were flawed, as the jury was not instructed that a servant or employee was a subspecies of agent; however, the court concluded this was not reversible error as it was unlikely that it affected the jury's judgment.<sup>1584</sup> The supreme court further found no error in excluding Elizabeth's diaries, as the business records exception<sup>1585</sup> did not apply due to the questionable veracity of the diaries, and the entries did not concern a matter about which a witness used to have knowledge but now had "insufficient recollection to discuss accurately."<sup>1586</sup> Finally, the court held that Seth had waived any objection to lack of judgment against Satterwhite, as he did not object until after the trial court began to prepare the final judgment form, and thus his post-verdict objection was untimely.<sup>1587</sup>

In *Schumacher v. City and Borough of Yakutat*,<sup>1588</sup> the supreme court held that a city was not liable for injuries sustained by the plaintiff's son in a sledding accident because the city did not owe a duty to protect children from the obvious dangers associated with sledding in the streets.<sup>1589</sup> Although the supreme court determined that several factors militated in favor of finding the existence of a duty in a case where a minor was injured when sledding into an intersection, the court concluded that these factors were outweighed by the burden that would result for the City of Yakutat and the community if such a duty were imposed.<sup>1590</sup> The supreme court noted that other jurisdictions have held that municipalities owe a specific duty to protect children playing in the streets against dangers caused by harmful road conditions.<sup>1591</sup> However, this duty does not extend to dangers created by a child's own conduct.<sup>1592</sup> Because the accident resulted from the dangerous conduct of the plaintiff's son and not a dangerous condition in the road, the su-

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1583. *See id.* at 465.

1584. *See id.* at 466.

1585. The business records exception to the hearsay rule allows admission of a record made "from information transmitted by [] a person with knowledge acquired of a regularly conducted business activity . . . if it was the regular practice of that business activity to make and keep the memorandum . . . unless the source of information or the method or circumstances of preparation indicate lack of trustworthiness." ALASKA R. EVID. 803(6).

1586. *Harris*, 948 P.2d at 466.

1587. *See id.* at 468.

1588. 946 P.2d 1255 (Alaska 1997).

1589. *See id.* at 1257.

1590. *See id.*

1591. *See id.* at 1257.

1592. *See id.*

preme court refused to find a duty in this case.<sup>1593</sup> The supreme court also rejected the plaintiff's claim that the city had a duty to protect her son from an inherently dangerous property condition, remarking that "[t]he dangers inherent in sledding down a road do not qualify as dangers caused by a 'condition' of land."<sup>1594</sup>

In *State v. Greenfield*,<sup>1595</sup> the supreme court held that the Alaska Whistleblower Act<sup>1596</sup> does not waive the state's right to immunity from punitive damages.<sup>1597</sup> The relevant section of the Act provides that "[a] person who alleges a violation of [Alaska Statutes section] 39.90.100 may bring a civil action and the court may grant appropriate relief, including punitive damages."<sup>1598</sup> The supreme court, based on its ruling in *Alaska Housing Finance Corp. v. Salvucci*,<sup>1599</sup> decided that "the amendment was added not to make governmental entities liable for punitive damages, but to ensure that individual defendants would not be immunized from punitive damages" in upholding the traditional presumption against punitive damage awards towards government entities.<sup>1600</sup>

In *Bowen v. Oistead*,<sup>1601</sup> the Ninth Circuit Court of Appeals held that an allegedly improper termination of a national guardsman fell under the Feres doctrine<sup>1602</sup> of intramilitary immunity which bars all tort and constitutional claims against the government.<sup>1603</sup> Although Bowen was a state employee and the use of the Feres doctrine was being applied to Alaska by the federal government, his claim failed because "the military apparatus of the United States cannot be divided into strictly state and federal components."<sup>1604</sup>

## XII. TRUSTS AND ESTATES

In *Johnson v. Doris*,<sup>1605</sup> the Alaska Supreme Court reversed a probate order approving final accounting and distribution of an es-

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1593. *See id.*

1594. *Id.* at 1258.

1595. 950 P.2d 1128 (Alaska 1997).

1596. ALASKA STAT. §§ 39.90.100-.150 (Michie 1996).

1597. *See Greegfield*, 950 P.2d at 1128.

1598. *Id.* at 1129 (quoting ALASKA STAT. § 39.90.120(a)).

1599. 950 P.2d 1116 (Alaska 1997).

1600. *Greenfield*, 950 P.2d at 1129 (quoting *Salvucci*, 950 P.2d at 1126).

1601. 125 F.3d 800 (9th Cir. 1997).

1602. *See* *Freres v. United States*, 340 U.S. 135, 146 (1950) (holding that members of the armed services can not sue the government for injuries that "arise out of or are in the course of activity incident to service").

1603. *See Bowen*, 125 F.2d at 803.

1604. *Id.* at 805.

1605. 933 P.2d 1139 (Alaska 1997).

tate, holding that the initial failure to object to alleged excessive fees and costs incurred during the estate's administration pursuant to Civil Rule 60(b)(2)<sup>1606</sup> did not necessarily preclude a later hearing to resolve these issues.<sup>1607</sup> Johnson was denied the use of rule 60(b) by the trial court because of his involvement with the administration of the estate, his discussions with the attorney working on the estate, and his later personal representation by counsel.<sup>1608</sup> While the trial court ruled that Johnson's "'claim of excusable neglect and inadvertence [was] incredible,'" the supreme court held that Johnson should get a hearing to establish his "lack of knowledge and comprehension of the probate system."<sup>1609</sup> The court ruled that Johnson's meeting with the attorney who went over the final figures was also insufficient because "[i]f Johnson did not understand that the fees were objectionably high, it is not determinative that [the estate attorney] told him what the numbers were."<sup>1610</sup> Neither did Johnson's representation by an attorney affect his right to a hearing, because his attorney examined the final figures of the estate with the belief that the final accounting issue had already been resolved prior to his involvement.<sup>1611</sup>

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1606. ALASKA R. CIV. P. 60(b)(2).

1607. *See Johnson*, 933 P.2d at 1139-40. Civil Rule 60(b)(2) provides that a court may set aside a probate order on the basis of a party's ignorance or mistake concerning fees and costs.

1608. *See id.* at 1144.

1609. *Id.*

1610. *Id.* at 1145.

1611. *See id.* at 1146.

## APPENDIX

## ADMINISTRATIVE LAW

**Human Resources Co. v. Alaska Commission on Post-Secondary Education, 946 P.2d 441 (Alaska 1997)**

(ruling that the Human Resources Company's youth programs and adult GED program do not fall within the statutory definition of post-secondary education and thus are not within the Alaska Commission on Post-Secondary Education's jurisdiction).

**Southwest Marine, Inc. v. Department of Transportation and Public Facilities, 941 P.2d 166 (Alaska 1997)**

(holding that the state correctly rejected toilet and shower units installed by Southwest pursuant to its contract with the state to refurbish a ferry when the units did not conform to the federal "Buy America Provision" requirements as specified in the contract).

**Williams v. Babbitt, 115 F.3d 657 (9th Cir. 1997)**

(holding that the Reindeer Industry Act of 1937 does not prevent nonnatives in Alaska from owning and importing reindeer).

**Anowlic v. City of Nome, 948 P.2d 489 (Alaska Ct. App. 1997)**

(finding that title 13, section 02.200(b)(1) of the Alaska Administrative Code does not require a driver to make a left turn from the extreme left edge of the lane, in contrast to section 02.200(a) which requires a driver to make right turns "as close as practicable to the right-hand curb or edge of the roadway").

## BUSINESS LAW

**Anchorage Nissan, Inc. v. State, 941 P.2d 1229 (Alaska 1997)**

(affirming a superior court ruling that a car dealer who fails to disclose certain facts about a vehicle, including that the car has been involved in a serious accident, thereby commits unfair or deceptive business acts).

**Distributel, Inc. v. State, 933 P.2d 1137 (Alaska 1997)**

(holding that the mail order exemption of the Telephonic Solicitation Act did not apply to sales initiated by telephone call from the seller following the seller's delivery of a catalog to consumers).

**Howell v. Ketchkikan Pulp Co., 943 P.2d 1205 (Alaska 1997)**

(holding that an injured worker cannot sue as a third-party beneficiary to a contract in which a company agrees to indemnify a contractor for lawsuits brought by an employee and where the contract was not intended to benefit the employee).

## CIVIL PROCEDURE

Ghete v. Anchorage, 948 P.2d 973 (Alaska 1997)

(holding that a pro se litigant in a condemnation hearing may not raise on appeal the validity of a settlement agreement when she failed to raise the issue in the superior court).

## CONSTITUTIONAL LAW

Hertz v. Storer, 943 P.2d 725 (Alaska 1997)

(holding that a denial of a Permanent Fund Dividend ("PFD") to an incarcerated felon did not constitute double jeopardy because denial of a PFD is not a criminal punishment).

Wallace v. State, 933 P.2d 1157 (Alaska Ct. App. 1997)

(holding that the use of Alaska National Guard soldiers who were not in service to execute a search warrant of defendant's home was properly authorized under Alaska law and did not violate the defendant's constitutional rights).

## CRIMINAL LAW

State v. Page, 932 P.2d 1297 (Alaska 1997)

(dismissing petition for hearing as improvidently granted).

United States v. Check No. 25128, 122 F.3d 1263 (9th Cir. 1997)

(holding that a check which was both proceeds of a suit against the City of Fairbanks and of drug trafficking was sufficiently traceable to drug transactions and therefore subject to federal forfeiture laws).

Smith v. State, 948 P.2d 473 (Alaska 1997)

(remanding for a determination if the "inevitable discovery" rule can be used to admit evidence found in the defendant's home after the defendant was required to provide his address to the police as a condition of bail).

DeNardo v. Municipality of Anchorage, 938 P.2d 1099 (Alaska Ct. App. 1997)

(holding that the litigation of a challenge for cause is not a "subsequent pretrial proceeding" within the meaning of Alaska Criminal Rule 25(d)(5), so that a party who argues a challenge for cause before the judge being challenged does not forfeit the right to exercise a subsequent preemptory challenge against the same judge).

Rozkydal v. State, 938 P.2d 1091 (Alaska Ct. App. 1997)

(holding that Alaska Statutes section 12.55.120(a) governs only appeals in which the defendant contends that the sentencing judge abused his or her discretion and does not prohibit a defendant from filing a petition for review pursuant to Alaska Appellate Rule 215(a)(2)).

State v. Simpson, 946 P.2d 890 (Alaska Ct. App. 1997)

(finding that both prongs of the *Risher v. State* test for ineffective

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assistance of counsel were met where the attorney was given access to documents which could have been used to impeach the credibility of adverse witnesses and failed to realize the value of this evidence).

*Municipality of Anchorage v. Baxley*, 946 P.2d 894 (Alaska Ct. App. 1997)

(finding that photo-radar evidence was insufficient to sustain convictions for speeding absent independent corroboration).

*Smithart v. State*, 946 P.2d 1264 (Alaska Ct. App. 1997)

(holding that evidence of another person's guilt was not admissible in the absence of showing a direct connection between the other person and the actual crime charged).

## EMPLOYMENT LAW

*Schorr v. Frontier Transportation Co.*, 942 P.2d 418 (Alaska 1997)

(holding that a shipping company sued for basing its overtime compensation on inaccurate driving times was not entitled to summary judgment because an issue of material fact existed as to the accuracy and legitimacy of the relied-upon driving times).

## FAMILY LAW

*Department of Revenue, Child Support Enforcement Divison ex rel. Hawthorne v. Rios*, 938 P.2d 1013 (Alaska 1997)

(holding that the superior court erred in calculating child support obligations from the time when paternity was established instead of from the time of birth because the duty to support a child begins at birth).

*Borchgrevink v. Borchgrevink*, 941 P.2d 132 (Alaska 1997)

(holding that the superior court's decision to award legal and primary custody to the mother was supported by substantial evidence that this custody award was in the children's best interest).

*Brotherton v. Brotherton*, 941 P.2d 1241 (Alaska 1997)

(holding that the superior court abused its discretion in not valuing and allocating real property acquired during the marriage as part of a divorce order).

*Bellanich v. Bellanich*, 936 P.2d 141 (Alaska 1997)

(holding that property inherited by a husband from his parents should be separate from marital property because there was no finding of intent or any evidence of acts by the husband signaling a transmutation into marital property).

## INSURANCE LAW

*State v. Arbuckle*, 941 P.2d 181 (Alaska 1997)

(holding that worker's beneficiary may not recover under an accidental death insurance policy that does not cover death for illness or disease where the deceased died from a heart attack resulting from a pre-existing severe heart condition).

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*Bollerud v. Department of Public Safety*, 929 P.2d 1283 (Alaska 1997)

(affirming the revocation of a driver's license pursuant to the Alaska Motor Vehicle Safety Responsibility Act for driving without insurance and causing damage in excess of \$500).

PROPERTY

*Stadnicky v. Southpark Terrace Homeowner's Ass'n, Inc.*, 939 P.2d 403 (Alaska 1997)

(holding that the petitioners failed to preserve for appellate review their claim as landowners that an attempt to enforce a covenant not to construct a building with a metal roof was unreasonable).

TORT LAW

*Alaska Native Class v. Exxon Corp.*, 104 F.3d 1196 (9th Cir. 1997)

(holding that, in regard to the Exxon Valdez oil spill, Alaska Natives failed to prove any "special injury" to their "subsistence way of life" which would warrant recovery of noneconomic damages for the public nuisance).