THE YEAR IN REVIEW

THE YEAR IN REVIEW 2000: CASES FROM 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

TABLE OF CONTENTS

I. Introduction 72
II. Administrative Law 72
III. Business Law 85
IV. Civil Procedure 88
  A. Costs and Attorney's Fees 88
  B. Damages 88
  C. Miscellaneous 91
V. Constitutional Law 99
  A. Due Process 99
  B. Miscellaneous 100
VI. Criminal Law 102
  A. Constitutional Protections 102
    1. Search and Seizure 102
    2. Miscellaneous 106
  B. General Criminal Law 108
    1. Criminal Procedure 108
    2. Evidence 115
    3. Sentencing 119
    4. Miscellaneous 125
VII. Employment Law 129
  A. Discrimination 129

B. Labor Law 130
C. Workers' Compensation 134
D. Miscellaneous 138
VIII. Family Law 138
A. Child Support 138
B. Child Custody 143
C. Dissolution of Marriage and Distribution of Marital Property 152
IX. Insurance Law 155
X. Property Law 161
XI. Tort Law 166
Appendix (Omitted Cases) 173

I. INTRODUCTION

The Year in Review contains brief summaries of selected decisions handed down in 2000 by the Alaska Supreme Court, the Alaska Court of Appeals, the U.S. Court of Appeals for the Ninth Circuit, and the U.S. District Court for the District of Alaska. 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. Attorneys are advised not to rely upon the information contained in this review without further reference to the cases cited. Please note that memorandum decisions and unpublished opinions are not included in *The Year in Review*.

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

II. ADMINISTRATIVE LAW

In *Akiak Native Community v. United States Postal Service*,[1] the Court of Appeals for the Ninth Circuit affirmed the district court's summary judgment in favor of the U.S. Postal Service.[2] The plaintiffs, several Alaska Native communities, sued the U.S. Postal Service, arguing that the latter's plan to serve the communities by hovercraft rather than by aircraft violated both the Coastal Zone Management Act ("CZMA") and the National Environmental

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1. 213 F.3d 1140 (9th Cir. 2000).
2. *See id*. at 1148.

Policy Act ("NEPA").[3] Under CZMA, any development projects in a coastal zone must be consistent "to the maximum extent practicable" with approved state management programs.[4] The U.S. Postal Service provided a "consistency determination" to the State, which granted its approval.[5] The court found that plaintiffs' reasons to enjoin the hovercraft project were not compelling.[6] The plaintiffs also argued that the U.S. Postal Service's Environmental Assessment, required under NEPA, failed to assess adequately the risks of, or the alternatives to, the hovercraft plan.[7] The court found these claims unwarranted, holding that the Environmental Assessment met all of the criteria required by NEPA, and thus affirmed the district court's summary judgment.[8]

In *State v. Kalve,*[9] the court of appeals held that the Federal Submerged Lands Act works as a concurrent regulation with state regulations and does not grant exclusive federal control.[10] The court reversed the superior court's decision to dismiss claims against the defendant, Kalve, a fisherman charged with illegally fishing in closed state waters.[11] Kalve was provided a federal license that enabled him to fish in certain state waters.[12] By emergency regulation, the State of Alaska prohibited certain types of fishing in state waters and Kalve subsequently was cited for fishing in these waters.[13] The district court granted Kalve's motion to dismiss on the grounds that the "paramountcy doctrine" grants federal supremacy in state waters.[14] The court of appeals reversed, holding that the paramountcy doctrine does not apply since the Federal Submerged Lands Act gives states control over certain territorial waters and "the authority to regulate natural resources within those waters."[15] Additionally, the federal regulations were "not intended to supplant applicable state regulations."[16]

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3. *See id*. at 1143.
4. *Id*. at 1144.
5. *See id.*
6. *See id*.
7. *See id*. at 1145-46.
8. *See id*. at 1148.
9. 9 P.3d 291 (Alaska Ct. App. 2000).
10. *See id.* at 294.
11. *See id.* at 292.
12. *See id.*
13. *See id.*
14. *See id.*
15. *Id.*
16. *Id.* at 294.

In *American International Group v. Uallen Carriere*,[17] the supreme court held that Alaska Statutes section 23.30.155(f) "imposes a continuing duty to satisfy the fourteen-day requirement with tender of a negotiable instrument."[18] Carriere had requested a stop payment on a workers' compensation check underwritten by American International Group ("AIG").[19] When AIG failed to send a replacement check within fourteen days, Carriere filed a claim for a twenty-five percent late payment penalty under Alaska Statutes section 23.30.155(f).[20] The Alaska Workers' Compensation Board denied his claim because the initial check had been mailed on time.[21] The superior court reversed the agency's decision.[22] On appeal, the supreme court upheld the superior court's decision, holding that, by requesting a stop payment on the initial check, Carriere had reinstated the fourteen-day obligation.[23] Further, the statute does not allow discretion for mailing the payment within a "commercially reasonable" time.[24]

In *City of St. Mary's v. St. Mary's Native Corp.*,[25] the supreme court held that a city council could repeal an exemption to a voter-approved sales tax without resubmitting the repeal to public vote.[26] Voters in the City of St. Mary's passed a ballot measure in 1986 to levy a three percent sales tax.[27] St. Mary's city council implemented the voter-approved sales tax, but limited application of the three percent tax to the first $1000 of each sales transaction.[28] In 1994, the council moved to repeal the exemption and held public hearings after posting notice in various local establishments.[29] The repeal ordinance passed over the objections of the defendants, Alaska Commercial Company ("ACC") and St. Mary's Native Corporation ("SMNC"), who later refused to pay the excess tax.[30] The supreme court, overturning summary judgment to ACC and SMNC, held that the repeal did not require submission for public vote because the ordinance neither increased "the rate of levy" of a

17. 2 P.3d 1222 (Alaska 2000).
18. *Id.* at 1223 (citing ALASKA STAT. § 23.30.155(f) (LEXIS 2000)).
19. *See id.*
20. *See id.*
21. *See id.*
22. *See id.*
23. *See id.* at 1225.
24. *Id.*
25. 9 P.3d 1002 (Alaska 2000).
26. *See id*. at 1004.
27. *See id*.
28. *See id*.
29. *See id*. at 1004-05.
30. *See id*. at 1005.

sales tax nor created a "new" sales tax under Alaska Statutes section 29.45.670.[31] The court held that a genuine issue of fact existed as to whether giving notice of the council meeting in the *Tundra Drums* newspaper would have satisfied Alaska Statutes section 29.45.670's mandatory requirement that local governments publish notice in a newspaper of general circulation if such a newspaper exists in a community.[32]

In *Department of Commerce and Economic Development v. Schnell*,[33] the supreme court reversed the superior court's ruling that estopped the Division of Insurance (the "Division") from suspending or conditioning Schnell's insurance agent license, and ordered the Division to reconsider its sanctions decision on remand.[34] In 1992, Schnell was convicted of felony false declaration in connection with his 1987 petition for personal bankruptcy.[35] In an attempt to revoke Schnell's insurance agent license, the Division conducted a hearing in 1993 on the matter, but rejected the hearing officer's proposed sanctions.[36] Schnell's license was renewed until 1995, when a new Division director issued a final decision on the matter and suspended Schnell's license for six months.[37] On appeal, the superior court held that the State was estopped from sanctioning Schnell.[38] The supreme court reversed the superior court, because the Division never asserted, by its conduct or words, that the matter was resolved; therefore, the Division was not estopped from sanctioning Schnell.[39] In addition, the doctrine of laches did not bar the State's action because laches does not bar claims caused by adjudicatory delay.[40] However, because Schnell did not have an opportunity to present evidence of his post-1992 conduct, the court remanded and instructed the Division to consider current evidence in sanctioning Schnell.[41]

In *Department of Public Safety v. Shakespeare*,[42] the supreme court held that the Department of Public Safety could not revoke an arrestee's driver's license for her initial refusal to take a breath

31. *Id.* at 1008 (citing ALASKA STAT. § 29.45.670 (LEXIS 2000)).
32. *See id*. at 1011-12.
33. 8 P.3d 351 (Alaska 2000).
34. *See id*.
35. *See id*. at 354.
36. *See id*.
37. *See id*. at 354-55.
38. *See id*.
39. *See id*. at 358.
40. *See id*. at 359.
41. *See id*. at 360.
42. 4 P.3d 322 (Alaska 2000).

test when she subsequently changed her mind and the test was administered.[43] Shakespeare was arrested for driving while intoxicated ("DWI") and was taken to the local state trooper detachment for a breath test.[44] She refused to take the breath test and was notified that the Department of Public Safety, under Alaska's implied consent statutes,[45] would revoke her license administratively as a consequence.[46] Shortly after surrendering her license, Shakespeare changed her mind.[47] Although the police permitted Shakespeare to take a breath test and obtained potentially probative results, the Department of Public Safety revoked Shakespeare's license administratively based on her initial refusal to take a breath test.[48] The supreme court held that it would be "unfair and inconsistent" to revoke her driver's license when she "cured" her prior refusal by submitting to the test.[49]

In *Department of Revenue v. DynCorp*,[50] the supreme court held that the Office of Tax Appeals erred when it relieved DynCorp from the penalty assessed by the Department of Revenue for failing to file timely amended state tax returns.[51] Under Alaska Statutes section 43.20.030(d), DynCorp was required to notify the Department of Revenue of any tax adjustments made pursuant to an IRS audit and pay the additional taxes within sixty days after the IRS issued its final decision.[52] Citing a large workload and insufficient personnel, DynCorp did not file its notice within the sixty-day deadline.[53] As a result, the Department of Revenue levied a penalty against DynCorp, which DynCorp appealed to the Office of Tax Appeals.[54] The Office of Tax Appeals found that DynCorp's failure to pay the additional taxes within the statutory period was due to a reasonable cause.[55] Although the supreme court held that the Office of Tax Appeals can exercise its independent judgment when reviewing appeals, it held that the Office of Tax Appeals erred when it found that DynCorp's failure to comply with the law was due to a reasonable cause and not willful

43. *See id.* at 326.
44. *See id.* at 323.
45. *See* ALASKA STAT. § 28.35.031(a) (LEXIS 2000).
46. *See Shakespeare*, 4 P.3d at 324.
47. *See id.*
48. *See id*
49. *Id.* at 325-26.
50. 14 P.3d 981 (Alaska 2000).
51. *See id*. at 989.
52. *See id*. at 982.
53. *See id*. at 983.
54. *See id*.
55. *See id*.

neglect.[56] To have reasonable cause for noncompliance, the taxpayer must show that it exercised ordinary business care and prudence.[57] The court held that DynCorp did not exercise ordinary business care and prudence because its failure to file was caused by circumstances under its control, such as the failure to use its resources efficiently.[58] Therefore, the court reversed the decision of the Office of Tax Appeals and reinstated the penalty.[59]

In *Gwich'in Steering Committee v. Office of the Governor*,[60] the supreme court held that documents from the Governor's Office relating to lobbying efforts regarding drilling in the Arctic National Wildlife Refuge ("ANWR") were protected as predecisional and deliberative.[61] The Gwich'in Steering Committee is a nonprofit organization with interests in protecting ANWR from oil exploration and drilling.[62] The Gwich'in Steering Committee requested documents from the Governor's Office relating to ANWR.[63] The Governor's Office provided some, but not all, of the desired materials and claimed that the withheld materials were protected by the predecisional deliberative process privilege.[64] The court noted that public officials may claim the privilege when disclosure would hamper the "open exchange of opinions and recommendations between government officials."[65] A predecisional communication is one that was made before the deliberative process is finished.[66] A document must also be deliberative to qualify as privileged.[67] The court noted that a deliberative document reflects "the 'give-and-take' of the decisionmaking process and contains opinions, recommendations, or advice about agency policies."[68] Once a document meets both of the above prongs, the burden switches to the party desiring disclosure to show that the benefits of disclosure outweigh the government's interest in protecting the document.[69] The supreme court held that the privilege protects "any government decisionmaking function, including the governor's policymaking and

56. *See id*. at 985, 989.
57. *See id*. at 985-86.
58. *See id*. at 987.
59. *See id*. at 989.
60. 10 P.3d 572 (Alaska 2000).
61. *See id*. at 585-86.
62. *See id*. at 576.
63. *See id*. at 576-77.
64. *See id*. at 577.
65. *Id*. at 578.
66. *See id*. at 579.
67. *See id*.
68. *Id*.
69. *See id*.

lobbying of either state or federal government."[70] Finally, the supreme court vacated a portion of the superior court's ruling which ordered Gwich'in to pay attorney's fees to the Governor's Office.[71]

In *In re Johnstone,*[72] the supreme court affirmed the Alaska Commission on Judicial Conduct's recommendation that former Superior Court Judge Karl Johnstone should be publicly reprimanded for creating an appearance of impropriety.[73] Johnstone was responsible for appointing a coroner for Alaska's Third Judicial District.[74] Initially, he asked the court administrator to begin the recruitment process, which has several formal procedural requirements.[75] However, after the recruitment process had been substantially completed, Chief Justice Daniel Moore recommended a personal friend of his, Richard McVeigh, for the job.[76] Even though McVeigh did not submit a formal application and the interviewing committee did not rank him highly compared to other candidates, Johnstone appointed McVeigh on a temporary basis.[77] After a complaint was filed, the Alaska Commission on Judicial Conduct "found the evidence insufficient to establish actual impropriety but sufficient to support the conclusion that Judge Johnstone had created an appearance of impropriety in hiring McVeigh."[78] Applying Alaska Statutes section 22.30.080(2), the court determined that the commission had jurisdiction over Johnstone, even though Johnstone subsequently retired, because he was an active judge both when the alleged impropriety occurred and when the commission began the investigation.[79] The court affirmed the commission's finding that Johnstone created an appearance of impropriety and accepted the recommendation that a public reprimand be issued.[80]

In *Jerrel v. Department of Natural Resources,*[81] the supreme court held that the Department of Natural Resources (the "Department") was not estopped from enforcing a regulation that it had never previously enforced;[82] however, the requirement that

70. *Id*. at 583-84.
71. *See id*. at 585-86.
72. 2 P.3d 1226 (Alaska 2000).
73. *See id.* at 1228.
74. *See id.*
75. *See id.*
76. *See id.* at 1229.
77. *See id.*
78. *Id.* at 1230.
79. *See id.* at 1231-32.
80. *See id.* at 1238.
81. 999 P.2d 138 (Alaska 2000).
82. *See id.* at 142.

livestock markings be visible was not adopted in accordance with the Administrative Procedure Act ("APA") and thus was not a valid regulation.[83] Dan and Viola Jerrel had a lease with the State of Alaska to ranch their horses.[84] The Jerrels' neighbors complained that loose horses were damaging property, yet the belief that the damage was caused by the Jerrels' horses could not be substantiated because the Jerrels' horses were not marked.[85] The Department informed the Jerrels of the requirement under Alaska Administrative Code title 11, section 60.070 that livestock be marked, and the Department also informed them that such markings must be visible from twenty feet away.[86] The court found that the Department could not be estopped from enforcing the Alaska marking requirement even though it had not previously enforced the requirement.[87] However, the court did not allow the Department to enforce the twenty foot visibility requirement of such markings.[88] Although the Department claimed the requirement was "an informal 'policy rule' rather than a regulation,"[89] the court disagreed and held the regulation invalid since it was not adopted through the proper procedural standards set forth in the APA.[90]

In *Kachemak Bay Conservation Society v. Department of Natural Resources*,[91] the supreme court affirmed the Department of Natural Resources' (the "Department") decision to approve a gas and oil lease program.[92] In 1996, the State offered to lease over one million acres of state-owned land for petroleum exploration and development.[93] The Department determined that the sale was in the best interests of the State and that the sale was consistent with the Alaska Coastal Management Plan.[94] Kachemak Bay challenged both of these determinations and further argued that the Department impermissibly "phased" its review (i.e., divided its proposal into discrete parts, such as exploration, construction, and production).[95] Kachemak Bay unsuccessfully moved for an injunction

83. *See id.* at 139.
84. *See id.*
85. *See id.*
86. *See id.* at 140.
87. *See id.* at 142.
88. *See id.* at 146.
89. *Id.* at 143.
90. *See id.* at 144.
91. 6 P.3d 270 (Alaska 2000).
92. *See id*. at 294.
93. *See id*. at 274.
94. *See id*.
95. *See id*.

against the lease sale, which took place in December 1996.[96] In January 1998, the superior court upheld the Department's best interests finding and its conclusive consistency determination.[97] The supreme court held that the Department was expressly permitted to "phase" its review of a proposed disposition of land by Alaska Statutes section 38.05.035.[98] The court further affirmed the Department's best interests finding, concluding that the Department had a reasonable basis for its decision.[99] The supreme court also held that the Department took the requisite "hard look" at the situation and was reasonable in concluding that the proposed lease sale was consistent with the habitats standard.[100]

In *Native Village of Eklutna v. Board of Adjustment for the Municipality of Anchorage,*[101] the supreme court vacated the superior court's affirmation of a permit for a granite mining operation that would destroy a culturally significant hill and remanded for consideration of the cultural impact of the mining.[102] The court found that a five-page report, based primarily upon a walking survey, did not provide substantial evidence to determine that the quarry would not affect cultural resources.[103] Further, other evidence in the record, including testimony that the village of Eklutna is named for two granite hills, one of which was slated for mining, established that some cultural resources would certainly be adversely affected by the quarry.[104] Therefore, the court held that on remand, the extent of such adverse effects should be determined and considered in light of the goals of preserving historic and archaeological resources.[105]

In *Ninilchik Traditional Council v. United States,*[106] the Court of Appeals for the Ninth Circuit affirmed in part and reversed in part the Federal Subsistence Board's (the "Board") decision to impose a spike-fork/fifty-inch antler restriction on subsistence uses of moose in Game Management Unit ("GMU") 15 located on the Kenai Peninsula.[107] The federal government is charged with regu-

96. *See id*. at 275.
97. *See id*.
98. *See id*. at 279 (citing ALASKA STAT. § 38.05.035 (LEXIS 2000)).
99. *See id*. at 286.
100. *See id*. at 288.
101. 995 P.2d 641 (Alaska 2000).
102. *See id.* at 645.
103. *See id.* at 644-45.
104. *See id*.
105. *See id.* at 645.
106. 227 F.3d 1186 (9th Cir. 2000).
107. *See id.* at 1189.

lating subsistence hunting use priority, and the Federal Subsistence Board determined subsistence hunting should be permitted in GMU 15, with a spike-fork/fifty-inch antler restriction on moose.[108] Ninilchik argued this restriction violated the provision in 16 U.S.C. § 3114 giving priority to subsistence hunters.[109] The court upheld the Board's decision, which accorded subsistence hunters priority, but not *absolute* priority, over non-subsistence uses.[110] Furthermore, the court found the priority afforded by the Board to subsistence hunters was indeed meaningful as it "was necessary to 'protect the continued viability' of the moose population as required under section 3114."[111] However, the court then determined the Board erred in concluding that a two-day hunting period reserved for subsistence users gave adequate "priority" to subsistence users within the meaning of the statute, as this period was shortened to allow for a non-subsistence bow-and-arrow hunt.[112]

In *O'Callaghan v. Sweat,*[113] the supreme court validated a policy set by the Commissioner of Fish and Game permitting salmon roe stripping for certain overstocked species.[114] Mike O'Callaghan, an officer of the non-profit organization EARTH, contested that roe stripping, or removing eggs from salmon and discarding the flesh, violated Alaska Statutes section 16.05.831, which prohibits the waste of salmon.[115] The court held that the legislature delegated sufficient authority to the Commissioner to promulgate regulations.[116] Furthermore, since there was a surplus of salmon that were subject to roe stripping, the regulation was consistent with the salmon waste law.[117]

In *Office of Public Advocacy v. Superior Court*,[118] the supreme court held that Alaska Criminal Rule 39(e)(2)(B) and Alaska Administrative Rule 12 allowed the trial court discretion to craft a remedy to reimburse the state for the services of the Office of Public Advocacy ("OPA") counsel.[119] A father was appointed counsel from the OPA, and was later found to exceed the maximum in-

108. *See id.* at 1189-90.
109. *See id.* at 1193.
110. *See id.*
111. *Id.* at 1194.
112. *See id.* at 1195-96.
113. 996 P.2d 88 (Alaska 2000).
114. *See id.* at 91.
115. *See id.* at 93.
116. *See id.* at 96.
117. *See id.* at 98.
118. 3 P.3d 932 (Alaska 2000).
119. *See id*. at 934.

come level allowed for the service to be paid for by the State.[120] The trial court ordered the father to reimburse the State for the costs of the representation at a rate of $100 per hour plus the lawyer's airfare and hotel expenses.[121] The supreme court held that Criminal Rule 39(e) applied: the court could either terminate the legal services or continue the services and recapture the costs.[122]

In *Said v. Eddy*,[123] the district court dismissed Said's complaint for declaratory and injunctive relief from removal proceedings by the Immigration and Naturalization Service ("INS").[124] Said was born in Yemen and brought to the United States by her father.[125] Said was convicted of an aggravated felony and, as an alleged alien, the INS began removal proceedings.[126] During those proceedings, Said and the INS entered into a stipulation providing that the INS would stay her removal if she would not appeal the proceeding.[127] The INS then moved to dismiss Said's previous complaint for declaratory and injunctive relief on the grounds that the issue was moot as a result of the stipulation.[128] Said argued that she could maintain her complaint under 8 U.S.C. § 1503(a).[129] However, because no department, agency, or official denied her claim that she was a United States citizen, the court found that she was not entitled to declaratory relief under § 1503.[130] In addition, § 1503 does not apply to persons within the United States where the issue of citizenship arose in connection with any removal proceeding.[131]

In *Schikora v. Department of Revenue,*[132] the supreme court found that, under former Alaska Statutes section 43.23.095(8) and Alaska Administrative Code title 15, section 23.163, when a State resident is absent from the State for more than 180 days in any year, that person does not meet the residency requirement for receiving permanent fund dividends even when, at the time of the application, the resident is present in the State.[133] The supreme court upheld the superior court's decision not to allow Schikora to

120. *See id*. at 933.
121. *See id*.
122. *See id*. at 934-35.
123. 87 F. Supp. 2d. 937 (D. Alaska 2000).
124. *See id*. at 944.
125. *See id*. at 937.
126. *See id*. at 938.
127. *See id*. at 939.
128. *See id*.
129. *See id*. at 940 (citing 8 U.S.C. § 1503(1994)).
130. *See id*.
131. *See id*. at 941.
132. 7 P.3d 938 (Alaska 2000).
133. *See id.* at 939.

receive permanent fund dividends for years in which his absence from Alaska exceeded 180 days.[134] Schikora argued that, because he was a State resident present in Alaska at the time when he had applied for his dividends, he should have received the dividends under former Alaska Statutes section 43.23.095(8).[135] Alaska Statutes section 43.23.095(8) made a person eligible to receive dividends if "on the date of application the individual is a state resident."[136] Schikora claimed that he had been a State resident since 1945 and thus should receive the dividends because he was in Alaska at the time of application.[137] The supreme court held, however, that "[s]ince Schikora was not physically present for the entire qualifying period for any of his permanent fund dividend applications in question . . . he must account for his absences."[138] Because Schikora's absences for business, leisure, and unsubstantiated medical care did not satisfy the statute, he could not receive the dividend.[139] Further, the supreme court found that the permanent fund dividend regulations did not deny Schikora due process of law or equal protection and did not interfere with interstate commerce.[140]

In *Skvorc II v. Personnel Board,*[141] the supreme court remanded to the superior court the issue of whether lack of notice was prejudicial to Skvorc, but affirmed the superior court's finding that the Alaska Personnel Board could recommend Skvorc's termination of employment.[142] Skvorc worked for the Alaska Department of Fish and Game (the "Department") when he was accused of twenty-three violations of the Alaska Executive Branch Ethics Act.[143] Skvorc started his own company in order to develop a fisheries management tool and then used government funds to solicit business for this company without notifying the Department.[144] Skvorc argued that the initial complaint's failure to state three of the twenty-three allegations violated his procedural due process rights for two reasons: inadequate notice and inability to

134. *See id.*
135. *See id.* at 940 (citing ALASKA STAT. § 43.23.095(8) (LEXIS 2000)).
136. *Id.* at 942.
137. *See id.*
138. *Id.* at 943.
139. *See id.* at 942.
140. *See id.* at 944-46.
141. 996 P.2d 1192 (Alaska 2000).
142. *See id.* at 1195.
143. *See id.*
144. *See id.* at 1195-96.

respond.[145] The supreme court stated that "it is not necessary to serve an amended complaint charging all counts later charged in the accusation."[146] However, the court found that one of the twenty-three allegations did not give Skvorc adequate notice because the amended complaint omitted the specific incidences of misuse with which he was eventually charged.[147] The court then remanded for determination whether the omission had been prejudicial to Skvorc.[148]

In *Stosh's Inspection and Maintenance v. Fairbanks North Star Borough,*[149] the supreme court upheld the decision of the Fairbanks North Star Borough Pollution Control Commission ("PCC") to suspend Stoshu Solski's license to perform emissions inspections.[150] Because Solski had five prior violations detected through covert audits, the court held that PCC followed procedure in selecting Solski for an audit under the "as needed" language of the program procedures.[151] In addition, the lack of an auditor training program did not make the audit defective.[152] The goals of a training program, primarily that a tester be familiar with and adhere to PCC procedures and state regulations, had been met.[153]

In *United Parcel Service Co. v. Department of Revenue*,[154] the supreme court held that all jet fuel purchased at the pump in Alaska and used for domestic flights originating from Alaska was taxable under Alaska Statutes section 43.40.010(b).[155] United Parcel Service Co. ("UPS") made bulk purchases of jet fuel in Anchorage between December 1991 and March 1993.[156] Since UPS used some of the jet fuel for direct flights to foreign countries, it was exempt from paying tax directly upon purchase under Alaska Statutes section 43.40.020(b).[157] Accordingly, UPS contended it was subject to tax as "a user" under section 43.40.010(b), not as "a purchaser," and that, "as a user, it should pay only for the actual fuel 'consumed' by its domestic flights within Alaska."[158] Rejecting this

145. *See id.* at 1195, 1197.
146. *Id.* at 1205.
147. *See id.*
148. *See id.* at 1195, 1207.
149. 12 P.3d 1180 (Alaska 2000).
150. *See id.* at 1181.
151. *See id.* at 1184-85.
152. *See id.* at 1185.
153. *See id.* at 1185-86.
154. 1 P.3d 83 (Alaska 2000).
155. *See id.* at 89-90 (citing ALASKA STAT. § 43.40.010(b) (LEXIS 2000)).
156. *See id.* at 84.
157. *See id.* at 87.
158. *Id.*

theory, the supreme court found that the legislative history inferred an intent to "subject purchasers and users to equivalent motor fuel taxes."[159] Furthermore, the supreme court found that "since consumption is commonly . . . measured at the pump," there is no reason to assume "that the legislature intended to adopt a less common and less sensible measure—moment of actual combustion."[160]

In *United States v. Ertsgaard,*[161] the Court of Appeals for the Ninth Circuit held that the Individual Fishing Quota ("IFQ") regulations for halibut do not constitute a fishery management plan under the Magnuson-Stevens Act.[162] In 1998, Ertsgaard was indicted for two violations of the Lacey Act, including the submission of a false IFQ landing report and the harvesting, transmission, and sale of 11,000 pounds of halibut in excess of his quota.[163] Ertsgaard claimed his alleged violations fell within one of the exceptions to the Lacey Act, and that the activity was regulated by a fishery management plan under the Magnuson-Stevens Act.[164] The court held that, although the regulations were created by the Northern Pacific Fishery Management Council, an organization that was itself created by the Magnuson-Stevens Act, the regulations were promulgated under the authority of the Halibut Act and subject to the Lacey Act's provisions.[165]

III. BUSINESS LAW

In *American Computer Institute, Inc. v. State*,[166] the supreme court affirmed the superior court's order that a school which had closed during mid-term must refund tuition to students who could not complete the course of study, but reversed the superior court's reduction in prejudgment interest and remanded the case for entry of an order requiring the school to pay the statutorily set interest rate.[167] American Computer Institute ("ACI"), a postsecondary school providing vocational programs, closed its campuses in Fairbanks and Anchorage without prior notice to students.[168] ACI offered alternative programs which would enable the students to

159. *Id.* at 88.
160. *Id.*
161. 222 F.3d 615 (9th Cir. 2000).
162. *See id.* at 618.
163. *See id.* at 615.
164. *See id.* at 616.
165. *See id.* at 617.
166. 995 P.2d 647 (Alaska 2000).
167. *See id*. at 656-57.
168. *See id*. at 649.

complete the term.[169] Nevertheless, some students at each campus were not able to complete their instruction.[170] On August 19, 1997, the Alaska Commission on Postsecondary Education, acting on behalf of these students, filed a request for an injunction requiring ACI to provide the programs for which the students had paid tuition, or to reimburse the students.[171] The superior court held that ACI had a contractual obligation to its students and that ACI's alternative measures did not limit its liability to its students.[172] The superior court ordered ACI to refund the tuition of the students, but reduced the rate of prejudgment interest to the respective interest rates paid by each student.[173] The supreme court affirmed the order requiring ACI to reimburse the students, but held that the superior court erred in reducing the prejudgment interest. The supreme court reversed and remanded for entry of an order requiring ACI to pay the interest rate specified in Alaska Statutes section 09.30.070(a), which sets the interest rate on judgments.[174]

In *In re Bonham,*[175] the Court of Appeals for the Ninth Circuit held that a bankruptcy court may order substantive consolidation of non-debtor corporations *nunc pro tunc*.[176] Bonham operated a Ponzi scheme through two corporations, of which she was sole shareholder and director.[177] Involuntary Chapter 7 bankruptcy proceedings were ultimately instituted against Bonham.[178] The Chapter 7 trustee filed a motion for substantive consolidation *nunc pro tunc* of the two corporations with Bonham's estate after investors in the Ponzi scheme challenged the trustee's standing to avoid transfers by the corporations.[179] The bankruptcy court granted the motion and the investors appealed.[180] The court first held that the order of the bankruptcy court was final and appealable because substantive consolidation affects substantive rights of involved parties.[181] The court then adopted the substantive consolidation test utilized by the Second Circuit: "(1) whether creditors dealt with the entities as a single economic unit and did not rely on their separate

169. *See id*. at 650.
170. *See id*.
171. *See id*.
172. *See id*. at 651.
173. *See id*.
174. *See id*.
175. 229 F.3d 750 (9th Cir. 2000).
176. *See id.* at 771.
177. *See id.* at 759.
178. *See id.* at 761-62.
179. *See id.* at 766.
180. *See id.*
181. *See id.* at 761-62.

identity in extending credit; or (2) whether the affairs of the debtor are so entangled that consolidation will benefit all creditors."[182] The presence of either factor alone is sufficient, and both factors were present here.[183] Once this test is met, the court leaves the discretion whether consolidation *nunc pro tunc* is appropriate to the bankruptcy court.[184] Such power "should be sparingly used and must be tailored to meet the needs of each particular case."[185]

In *Standifer v. State,*[186] the supreme court held that a district court should have determined whether the petitioner's student loan should have been discharged due to undue hardship.[187] Standifer obtained a student loan from the State of Alaska.[188] Standifer later filed for bankruptcy and was granted a discharge of his listed debts.[189] The state advised Standifer that his student loan was not dischargeable and brought suit.[190] A default judgment was entered against him.[191] The district court denied Standifer's Civil Rule 60(b) motion to vacate the default judgment, and the superior court affirmed the district court's ruling.[192] The supreme court held that under 11 U.S.C. § 524(a)(1), a debtor's defense of bankruptcy discharge cannot be waived for any reason.[193] The bankruptcy discharge relieved the petitioner from defending himself as a debtor in a subsequent action.[194] The court reversed the district and superior courts' judgments and remanded the case to the district court to determine the dischargeability of Standifer's student loan under the federal bankruptcy act's undue hardship provisions.[195]

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182. *Id.* at 766.
183. *See id.*
184. *See id.* at 771.
185. *Id.*
186. 3 P.3d 925 (Alaska 2000).
187. *See id.* at 926.
188. *See id.*
189. *See id.* at 927
190. *See id.*
191. *See id.*
192. *See id.*
193. *See id.* at 929.
194. *See id.*
195. *See id.*

IV. CIVIL PROCEDURE

A. Costs and Attorney's Fees

In *Sanders v. Barth,*[196] the supreme court affirmed the superior court's denial of Civil Rule 82 attorney's fees despite finding error in the superior court's application of the divorce rule exception.[197] Sanders claimed attorney's fees because she had prevailed in a child support proceeding that occurred ten years after the end of the relationship between herself and defendant Barth.[198] The superior court held that in divorce-type proceedings, attorney's fees are awarded based on the economic positions of the parties, but Sanders had not sought such fees.[199] On appeal, the supreme court recognized that this child support proceeding, taking place years after the end of the relationship, did not resemble a divorce proceeding and thus could not fall under the divorce exception.[200] However, because the settlement agreement between the parties did not contemplate the payment of attorney's fees and no evidence proved that Barth knew that attorney's fees were an issue, the superior court's application of the divorce rule exception was harmless error.[201]

B. Damages

In *Alaska General Alarm, Inc. v. Grinnell,*[202] the supreme court held that the statute of limitations for tort actions did not apply to claims for equitable apportionment.[203] In 1993, the plaintiffs sued Grinnell Corporation after suffering injuries from a discharge of halon from a fire protection system while technicians from Grinnell Corporation and Alaska General Alarm were examining the system.[204] In 1996, Grinnell answered the plaintiffs' complaint and filed a third-party complaint against Alaska General Alarm.[205] Grinnell claimed that Alaska General Alarm was responsible in whole or in part for plaintiffs' injuries.[206] Alaska General Alarm answered and filed a motion for partial summary judgment, argu-

196. 12 P.3d 766 (Alaska 2000).
197. *See id*. at 767.
198. *See id.*
199. *See id.* at 767-68.
200. *See id.* at 768.
201. *See id.* at 769.
202. 1 P.3d 98 (Alaska 2000).
203. *See id.* at 99.
204. *See id.*
205. *See id.*
206. *See id.* at 99-100.

ing that the statute of limitations barred the third-party complaint because it was filed more than two years after the initial incident.[207] The superior court denied the motion.[208] The supreme court held that Alaska Statutes section 09.17.080's express language and legislative history did not require that defendants file third-party claims for apportionment within the statute of limitations governing the plaintiffs' underlying claim.[209] Otherwise, the court would undermine the statute's purpose of apportioning liability equitably among at-fault parties.[210] The court also found that third parties must be joined in order to allocate fault and liability.[211]

In *Chilton-Wren v. Olds*,[212] the supreme court held that a forcible entry and detainer ("FED") action deals exclusively with possession and that, in the absence of explicit waiver, raising counterclaims during a FED action does not preclude a party from preserving litigation of claims for damages in a jury trial.[213] After a FED action was decided in favor of Janice Chilton-Wren, she sought a jury trial on her five counterclaims and an additional civil rights claim.[214] The district court granted summary judgment in favor of Wallace Olds, Chilton-Wren's landlord, on the basis of collateral estoppel.[215] The court also held that Chilton-Wren had waived her right to a jury trial.[216] The supreme court reversed, holding that under Civil Rule 38(a), the importance of a jury trial requires an explicit waiver of rights.[217] The court also found that collateral estoppel did not apply to such counterclaims.[218] The court reasoned that "[a] tenant should not be forced to choose between being evicted from her home but preserving her right to seek monetary damages or retaining possession of her home but forfeiting recovery of her damages claims."[219]

In *Dobos v. Swartout,*[220] an appeal from a lower court decision in which a taxi driver was found liable for hitting a pedestrian, the supreme court affirmed the trial court's decision to admit the

207. *See id.* at 100.
208. *See id.*
209. *See id.* at 102 (citing ALASKA STAT. § 09.17.080 (LEXIS 2000)).
210. *See id.* at 104.
211. *See id.*
212. 1 P.3d 693 (Alaska 2000).
213. *See id.* at 698.
214. *See id.* at 696.
215. *See id.* at 694.
216. *See id.*
217. *See id.* at 696.
218. *See id.* at 698.
219. *Id.*
220. 9 P.3d 1020 (Alaska 2000).

statement of the taxi passenger under the present sense impression exception to the hearsay rule, and affirmed the lower court's denial of Dobos' motion for a directed verdict.[221] The court held that any error that the trial court may have made in admitting the testimony of the passenger under the hearsay exception was harmless because the statement played a very small role in the trial, and other evidence was strong enough for the jury to have reached the same conclusion without it.[222] The court held that the motion for a directed verdict was properly denied because there was a triable issue of fact as to Dobos' negligence.[223] Because Dobos reasonably could believe that he was not negligent, the supreme court affirmed the lower court decision not to award attorney's fees under Alaska Civil Rule 37(c)(2) for Dobos' failure to admit negligence and causation.[224] However, the court held that fees should have been granted to the plaintiff for Dobos' failure to agree to the admissibility of certain medical records.[225]

In *Griffith v. Taylor,*[226] the supreme court affirmed a jury's finding that legal malpractice was not the legal cause of Ned Griffith's damages.[227] The court held that the lower court did not err in precluding certain expert testimony that was offered six years after the suit was filed, and Griffith did not attempt to modify the pretrial order.[228] In addition, a jury instruction about superseding causation was appropriate because reasonable minds could differ over whether damages were caused by the firm's negligence or subsequent forgery by Griffith's father.[229] Finally, the court held that Griffith waived his right to challenge the jury verdict on jury polling grounds because his attorney told the court he was satisfied with the polling of the jury.[230]

In *Sea Hawk Seafoods, Inc. v. Alyeska Pipeline Service Co.*,[231] the Court of Appeals for the Ninth Circuit affirmed the district court's refusal to set aside punitive damages verdicts in the Exxon Valdez oil spill litigation because of alleged irregularities during

221. *See id.* at 1020-22.
222. *See id.* at 1025.
223. *See id.* at 1025, 1028.
224. *See id.* at 1020, 1026.
225. *See id.* at 1020, 1027.
226. 12 P.3d 1163 (Alaska 2000).
227. *See id.* at 1169.
228. *See id.*
229. *See id.* at 1167-68.
230. *See id.* at 1168-69.
231. 206 F.3d 900 (9th Cir. 2000).

jury deliberations.[232] Defendant Exxon had filed a motion for a new trial on the basis of several incidents: a remark made by the bailiff to another juror about putting emotionally distraught Juror A "out of her misery," an alleged threat to Juror A to put her in jail if she refused to deliberate, and alleged threats to Juror A's daughters.[233] The appeals court ruled that it was not abuse of discretion for the district court to find no actual prejudice from the bailiff's remark, because it was interpreted as a tasteless joke and not heard by Juror A.[234] It was also not clearly erroneous for the district court to doubt Juror A's credibility regarding the threats.[235] Juror A had not reported the threats until years after the trial, explaining that she had forgotten them, and testified for the first time to numerous threats to her own life made during deliberations.[236] This implausible testimony and her extremely distraught condition during and after the trial made it likely, the district court found, that her memory of the events was distorted.[237]

C. Miscellaneous

In *Alaskans for a Common Language, Inc., v. Kritz,*[238] the supreme court affirmed the denial of permissive intervention to U.S. English, Inc., and reversed the denial of intervention for Alaskans for a Common Language, Inc., in an action to determine the constitutionality of a successful ballot initiative requiring the Alaska government to use English as its official language. Alaskans for a Common Language sponsored the initiative.[239] Noting that initiative committee members have a constitutionally based, heightened interest in a lawsuit to determine whether the successful initiative will be enforced and a legal obligation to represent initiative sponsors in all related matters, the court found these interests met the criteria for intervention as of right under Alaska Civil Rule 24(a).[240] To determine whether Alaskans for a Common Language had standing to represent the initiative sponsors, the court adopted the U.S. Supreme Court's test: an association has standing to bring suit on behalf of its members when (1) its members would otherwise have standing to sue in their own right; (2) the interests it seeks to

232. *See id.* at 903.
233. *Id.* at 904-05.
234. *See id.* at 906-07.
235. *See id.* at 913.
236. *See id.* at 908-12.
237. *See id.* at 912-13.
238. 3 P.3d 906 (Alaska 2000).
239. *See id.* at 914.
240. *See id.* at 912-14.

protect are germane to the organization's purpose; and (3) neither the claim asserted nor the relief requested requires the participation of individual members in the lawsuit.[241] The supreme court held that Alaskans for a Common Language, which was formed for the sole purpose of sponsoring the ballot initiative, met this test and thus had associational standing to represent the initiative sponsors.[242] The supreme court further held that U.S. English lacked a direct interest and failed to raise any new issues in the current legislation that would justify an intervention as a matter of right.[243]

In *Barrett v. Era Aviation, Inc.*,[244] the supreme court held that two jury instructions with potentially conflicting definitions of negligence constituted reversible error and remanded the case for a new trial.[245] Mickey Barrett was a passenger on an Era Aviation flight.[246] He later filed suit against Era claiming that damage to his inner ear resulted from negligent maintenance of the plane's pressurization system.[247] Barrett hired an expert, who was not licensed as a mechanic, to testify about the plane's pressurization system.[248] The court ruled that Barrett's expert was competent because the standard for experts is "whether the jury can receive appreciable help from this particular person on this particular subject."[249] The court, however, did not remand on those grounds, but instead found that the failure to correct the jury instructions was a legal error.[250] The judge had included two instructions on negligence: one relating to general negligence and one relating to the negligence standard of a common carrier.[251] The supreme court reasoned that once Era was found within the ambit of a common carrier, the higher standard of care—the utmost duty of care—was applicable.[252]

In *Bauman v. Commissioner*,[253] the district court granted the Internal Revenue Service's ("IRS") motion to dismiss the com-

241. *See id.* at 915 (citing Hunt v. Washington State Apple Adver. Comm'n, 432 U.S. 333, 343 (1977)).

242. *See id.* at 915-16.

243. *See id.* at 916.

244. 996 P.2d 101 (Alaska 2000).

245. *See id*. at 102.

246. *See id*.

247. *See id*.

248. *See id*. at 103.

249. *Id*.

250. *See id*. at 105.

251. *See id*. at 104.

252. *See id*.

253. No. A99-0491-CV(HRH), 2000 U.S. Dist. LEXIS 2424, at *1 (D. Alaska Jan. 31, 2000).

plaint of taxpayers who were audited by the IRS and contested the resulting adjustments to their tax returns.[254] The tax court sent the decisions on the Baumans' cases to their attorney, but the attorney never notified the Baumans.[255] The Baumans filed a cause of action in district court arguing that the tax court decisions were wrong and that they were entitled to a new hearing because they did not receive timely notice of the decisions.[256] In response to the defendant's motion to dismiss, the Baumans argued that res judicata does not apply to the tax court decisions because they were denied due process.[257] However, because plaintiffs' counsel received the tax court's decisions and the plaintiffs could have appealed, the court held that there was no lack of due process and applied the doctrine of res judicata.[258] The court dismissed the Baumans' claim.[259]

In *Copper River School District v. Traw*,[260] the supreme court reversed the trial court's summary judgment and remanded for further proceeding.[261] The Copper Valley School Board passed a motion to offer retirement incentives to teachers with seniority, but administrators later discovered that they had miscalculated the financial effect of the incentives.[262] Before the Board could meet again and rescind the motion, six teachers "accepted" the retirement plan.[263] When the school district refused to pay the teachers the amount specified in the motion, the teachers sued for breach of contract, and the trial court granted the teachers' motion for summary judgment.[264] On appeal, the school district argued that the motion was not an "offer" and, even if it was an offer, the district administrators' communications effectively terminated the teachers' power of acceptance.[265] The supreme court found that it was unclear whether the school board's motion constituted an "offer," and that this is therefore a matter to be determined by a finder of fact.[266] The court further held that the district administrators' communications (telling the teachers that they couldn't accept the

254. *See id*. at *1-2, 10.
255. *See id*. at *2-3.
256. *See id*. at *4-5.
257. *See id*. at *6.
258. *See id*. at *8.
259. *See id*. at *10.
260. 9 P.3d 280 (Alaska 2000).
261. *See id*. at 288.
262. *See id*. at 281.
263. *See id*.
264. *See id*.
265. *See id*. at 282.
266. *See id*. at 286.

motion and not to accept it) did not necessarily revoke any offer, but that this, too, was a matter for the fact finder.[267] Since issues of material fact remained, the supreme court held that summary judgment was improperly granted, and reversed and remanded for further proceedings.[268]

In *Harpole v. United States*,[269] the district court dismissed Harpole's petition seeking to vacate prior tax court orders and sanctions, and to permanently enjoin that judge from exercising any further jurisdiction over this tax case.[270] The judge had declared Harpole's brief to be frivolous and levied $20,000 in sanctions after Harpole continued to advance those arguments.[271] Harpole's petition to the district court sought equitable relief and named as defendants the Tax Court, the judge in his tax case, and the United States.[272] The district court held that Harpole offered no authority that the Tax Court could be sued and dismissed the petition as to that defendant.[273] The United States was also dismissed as a defendant because no executive agency action was involved to trigger a waiver of sovereign immunity.[274] The tax court judge was dismissed as a defendant because as a federal judicial officer, she is immune from suits involving declaratory and injunctive relief.[275] Finally, the court concluded that it lacked subject matter jurisdiction over Harpole's petition because the petition was simply an appeal of his Tax Court case and all issues would be addressed on direct appeal from that court.[276]

In *Hikita v. Nichiro Gyogyo Kaisha, Ltd.,*[277] the supreme court held that the superior court improperly dismissed a suit arising out of tort and contract claims.[278] The superior court dismissed on three grounds: (1) as a sanction for violations of discovery; (2) because of issue preclusion; and (3) on the merits of the case.[279] The litigation entailed a joint venture fish processing facility that had been abandoned in 1974, leading to at least five lawsuits.[280] The

267. *See id*. at 287.
268. *See id*. at 288.
269. 206 F.3d 900 (9th Cir. 2000).
270. *See id.* at 907.
271. *See id.* at 904.
272. *See id.*
273. *See id.* at 905-06.
274. *See id.* at 906.
275. *See id.* at 907.
276. *See id.* at 906-07.
277. 12 P.3d 1169 (Alaska 2000).
278. *See id.* at 1171-72.
279. *See id.*
280. *See id.* at 1172.

court held that before litigation-ending sanctions are imposed for discovery violations, the superior court must examine alternative lesser sanctions.[281] The case should not have been dismissed for issue preclusion because the interests of the plaintiffs were not aligned with those of the party in the earlier litigation.[282] Finally, summary judgment should not have been granted because the defendants failed to meet their burden of establishing that plaintiff's case was without merit.[283] The order of dismissal was therefore vacated.[284]

In *MacDonald v. State*,[285] the court of appeals held that an individual could be prosecuted for violating a domestic violence protective order under Alaska Statutes section 11.56.740(a) without being formally served with a written copy of the order, as long as the defendant had actual knowledge of the protective order.[286] MacDonald was charged with five counts of violating a domestic violence protective order.[287] He filed a motion in district court to dismiss the charges against him, claiming that the court lacked jurisdiction over him because he had not been formally served with a written copy of the order in accordance with Alaska Civil Rule 4.[288] After finding that MacDonald had actual knowledge of the domestic violence protective order at the time the violations occurred, the district court denied MacDonald's motion to dismiss.[289] MacDonald subsequently pled no contest and was found guilty of one count of violating a domestic violence protective order in each of two separate cases.[290] The court of appeals upheld MacDonald's conviction, holding that actual notice is all that is required in a criminal contempt proceeding for a defendant to be bound by a court order.[291]

In *Martinez v. Ha,*[292] the supreme court affirmed a grant of summary judgment to the defendant in a medical malpractice case.[293] Martinez failed to disclose a list of experts and did not respond to an order to show cause or to Dr. Ha's motion for sum-

281. *See id.* at 1176.
282. *See id.* at 1177-78.
283. *See id.* at 1179.
284. *See id.* at 1180.
285. 997 P.2d 1187 (Alaska Ct. App. 2000).
286. *See id*. at 1189.
287. *See id*. at 1188.
288. *See id*.
289. *See id*.
290. *See id*.
291. *See id*. at 1189.
292. 12 P.3d 1159 (Alaska 2000).
293. *See id.*

mary judgment.[294] Without expert testimony or other evidence opposing Dr. Ha's expert report concluding there was no evidence of malpractice, the trial court determined that a prima facie case could not be established.[295] Because no admissible evidence was presented by Martinez until after summary judgment had been granted in favor of Ha, summary judgment for Ha was affirmed.[296]

In *Odom v. Fairbanks Memorial Hospital,*[297] the supreme court held that the superior court erred in dismissing eight out of eleven claims for relief against Fairbanks Memorial Hospital ("FMH") arising out of the termination of Odom's staff privileges.[298] FMH employed Odom as an anesthesiologist from 1988 through 1994.[299] Odom told FMH that he wanted to open an outpatient surgery center in 1992.[300] In 1994, after a Special Investigative Committee's investigation of quality assurance issues involving Odom, the FMH Executive Committee recommended that he lose temporarily his staff privileges at FMH unless he agreed to practice medicine under supervision there or completed further training.[301] While Odom was in a formal retraining program, FMH terminated his staff membership and clinical privileges.[302] Odom argued that his intention to compete with FMH led to the quality assurance investigation, and the information in FMH's report to a national reporting system was false.[303]

Odom alleged eleven claims of relief in his suit against FMH and other health care providers, all of which were dismissed for failure to state a claim.[304] The supreme court reversed the dismissal of eight claims, holding that a complaint should be construed liberally and deemed sufficient if evidence may emerge that supports a grant of relief to the plaintiff.[305] The court held that Odom's complaint alleged facts which, if proven, would be enough to state a claim for unreasonable restraint of trade, group boycott, attempted monopolization, defamation, breach of oral contract, unfair trade

294. *See id.* at 1161.
295. *See id.*
296. *See id.* at 1162-63.
297. 999 P.2d 123 (Alaska 2000).
298. *See id.* at 127.
299. *See id.*
300. *See id.*
301. *See id.*
302. *See id.*
303. *See id.* at 127-28.
304. *See id.*
305. *See id.*

practices, interference with a prospective economic advantage, and intentional infliction of emotional distress.[306]

In *Silvers v. Silvers*,[307] the supreme court held it was error not to allow a son to testify by telephone in a suit brought by his mother to recover loan advances and personal property.[308] Defendant Irene Silvers advanced money to her son, plaintiff Michael Silvers, over several years.[309] Irene and her domestic companion also stored several items of personal property at Michael's residence.[310] After Michael sold his house, Irene discovered that numerous items belonging to her had disappeared.[311] She filed suit for conversion of her missing personal property and repayment of the advanced funds.[312] The superior court awarded damages in a trial in which Michael did not appear.[313]

The supreme court held that the superior court committed reversible error by rejecting Michael's request to appear at trial telephonically since Michael had relocated out-of-state.[314] The court held that Michael's promise to repay the money that Irene advanced him without a specific time of repayment term did not fail for indefiniteness.[315] The pledge to repay the money when Michael became financially able was a conditional promise, which became legally enforceable when Michael satisfied the condition.[316] The court remanded the issue to determine when Michael in fact became financially able to repay the loans and to apply the statute of limitations from that date.[317] The court held that, on remand, Irene could join her domestic companion's estate as a party to the litigation or alternatively could seek recovery for only her share of the allegedly converted property.[318]

In *Stinson v. Russell,*[319] the supreme court held that the lower court abused its discretion by denying appellant Stinson's Alaska Civil Rule 60(b) motion without making a determination with respect to the issue of incompetence on which the motion was

306. *See id.* at 133.
307. 999 P.2d 786 (Alaska 2000).
308. *See id.* at 790, 794.
309. *See id.* at 788.
310. *See id.*
311. *See id.*
312. *See id.*
313. *See id.*
314. *See id.* at 790.
315. *See id.* at 790-791.
316. *See id.* at 791.
317. *See id.*
318. *See id.* at 792.
319. 996 P.2d 1238 (Alaska 2000).

based.[320] The appellant real estate agent was found to have breached his fiduciary duty to buyers of a home and was held liable for damages following a trial that he did not attend due to a serious medical condition.[321] He subsequently moved for relief from the judgment under Rule 60(b) on the grounds that he had been legally incompetent at the time of trial, and thus had been incapable of understanding the consequences of failing to attend the trial or requesting a continuance.[322] Although Stinson made a prima facie showing of incompetence, the lower court denied the motion without conducting an evidentiary hearing.[323] The supreme court held that this was an abuse of discretion because the motion papers revealed a genuine dispute as to Stinson's competence when he chose not to attend the trial, present a defense, or move for a continuance, and "[these] circumstances demonstrated the probable prejudice resulting from any incompetency, and therefore demonstrated the materiality of the dispute."[324]

In *White v. Department of Natural Resources*,[325] the supreme court affirmed the superior court's grant of summary judgment in favor of the Department of Natural Resources (the "Department").[326] White owned two state oil and gas leases that occupied state mental health trust land.[327] White applied to transfer the leases, but before the Department acted on the applications, a court order was issued that barred the state from transferring any interest in mental health trust land without the court's approval.[328] As a result, White's applications were denied, and when he took no further action, his leases expired.[329] He appealed their expiration to the Department and eventually to the supreme court on a force majeure theory, but the court upheld the Department's determination that White was responsible for allowing the leases to expire.[330] In this subsequent action for breach of contract and unlawful taking of property, the supreme court held that res judicata barred his claims because he challenged the same departmental actions that he litigated in his prior case in which a final judgment against him

320. *See id*. at 1239.
321. *See id*. at 1239-40.
322. *See id*. at 1239-41.
323. *See id*. at 1240.
324. *Id*. at 1242.
325. 14 P.3d 956 (Alaska 2000).
326. *See id*. at 963.
327. *See id*. at 958.
328. *See id*.
329. *See id*.
330. *See id*.

was issued.[331] In addition, the court held that because White did not show prejudicial error, the superior court did not err when it converted the Department's motion for judgment on the pleadings to a motion for summary judgment and, as a result, did not give White time to submit additional evidence.[332]

V. CONSTITUTIONAL LAW

A. Due Process

In *Halliburton Energy Services v. Department of Labor*,[333] the supreme court held that process safety management standards were sufficiently clear as applied to the manufacture of perforation guns to avoid a constitutional challenge.[334] After a fatal explosion at the Halliburton plant, the Department of Labor assessed a fine for violating process safety management standards in the manufacture of explosives.[335] The supreme court rejected Halliburton's argument that manufacturing perforation guns falls under a regulatory exemption for "oil well servicing activities," because manufacturing the guns and the act of perforating wells are two different activities, and pose different hazards.[336] The court also rejected Halliburton's constitutional claim, holding that the safety standards were sufficiently clear to provide notice to Halliburton for three reasons: (1) Halliburton presented no clear evidence of inconsistent agency positions, (2) Halliburton did not demonstrate reliance on a particular interpretation, and (3) a company in Halliburton's position bears a "substantial burden of inquiry" concerning applicable safety standards.[337]

In *Raphael v. State*,[338] the supreme court held that the trial court denied the defendant his due process right and his right to be present at trial by incarcerating a witness at an ex parte hearing prior to her testimony.[339] Wilfred Raphael was indicted for the kidnapping and assault of I.W., his live-in companion.[340] I.W. was

331. *See id*. at 960.
332. *See id*. at 962-63.
333. 2 P.3d 41 (Alaska 2000).
334. *See id.* at 51.
335. *See id.* at 42.
336. *Id.* at 43.
337. *Id*. at 55.
338. 994 P.2d 1004 (Alaska 2000).
339. *See id.* at 1016.
340. *See id*. at 1006.

scheduled to testify at Raphael's trial.[341] During a recess, the prosecutor spoke with the trial judge about I.W.'s testimony without Raphael or his attorney present.[342] The prosecutor expressed concern over I.W.'s drinking and the possibility of her recanting her testimony.[343] The trial court decided to place I.W. in jail and her children in protective custody until she gave her testimony.[344] I.W. testified and Raphael was convicted.[345]

On appeal, the supreme court held that the State coerced I.W. to testify favorably on its behalf by implying continued incarceration and loss of custody of her children,[346] and therefore, her testimony violated Raphael's right to due process.[347] The court also held that the trial court's ex parte hearing violated Raphael's right to be present at every stage of his trial under Alaska Criminal Rule 38(a).[348] Even though Raphael's counsel failed to object to the ex parte hearing or I.W.'s testimony at trial, the court held that the trial court committed plain error, and as a result, the court could review these errors on appeal,.[349] The court reversed Raphael's conviction and remanded for a new trial.[350]

B. Miscellaneous

In *Bethel Native Corp. v. Department of the Interior*,[351] the Court of Appeals for the Ninth Circuit held that a third-party claim for equitable apportionment brought by the United States against Alaska was not barred by the Eleventh Amendment.[352] Bethel Native Corporation brought suit against the United States under the Federal Tort Claims Act after diesel fuel leaked onto its property from a storage site operated by the United States Bureau of Indian Affairs.[353] The United States then brought a third-party claim against the State, the city to whom the fuel had been sold, and the city's allegedly negligent contractors, seeking equitable apportion-

341. *See id.*
342. *See id.*
343. *See id.*
344. *See id.*
345. *See id*. at 1007.
346. *See id.* at 1008-10.
347. *See id.* at 1010.
348. *See id.* at 1011-13.
349. *See id.* at 1015.
350. *See id.* at 1016.
351. 208 F.3d 1171 (9th Cir. 2000).
352. *See id.* at 1177.
353. *See id.* at 1172-73.

ment of tort liability.[354] The State's motion to dismiss the claim on the basis of Eleventh Amendment immunity was denied, and the State appealed.[355] Citing *Alden v. Maine*,[356] the court of appeals held that Eleventh Amendment immunity does not extend to actions brought by the United States in federal courts.[357] The court of appeals also concluded that the claim could stand because the primary purpose of the equitable apportionment remedy was to reduce the potential damages the plaintiff could recover against the United States, rather than to create any ongoing legal duty between the adverse tortfeasors.[358]

In *Brown v. Ely*,[359] the supreme court affirmed the dismissal of Brown's federal civil rights claim, reversed the denial of Brown's motion to amend his complaint, and vacated the award of attorney's fees.[360] While investigating a game violation, officers of the Fish and Wildlife Protection department and the Hoonah City Police department visited Brown's house and smelled marijuana.[361] After obtaining a search warrant, the officers returned to Brown's house but did not find any marijuana or drug paraphernalia.[362] Brown was charged with misconduct involving a controlled substance, but the charge was later dropped.[363] Brown subsequently filed a complaint alleging that the search violated his right to privacy and freedom from unreasonable search and seizure.[364] However, because the right to possess marijuana, which Brown alleged was protected under state law, is prohibited by federal law, the court held that the officers had probable cause and therefore the search was not illegal under the Fourth Amendment.[365] In addition, the court construed Alaska Civil Rule 15(c) broadly to allow Brown to amend his complaint to include a malicious prosecution claim against the Hoonah Chief of Police, because the claim arose out of the same conduct and facts alleged in the original complaint.[366] Finally, the court vacated the award of attorney's fees and

354. *See id.* at 1173.
355. *See id.*
356. 527 U.S. 706 (1999).
357. *See Bethel Native Corp.*, 208 F.3d at 1173.
358. *See id.* at 1176-77.
359. 14 P.3d 257 (Alaska 2000).
360. *See id*. at 264.
361. *See id*. at 258.
362. *See id*. at 259.
363. *See id*.
364. *See id*.
365. *See id*. at 260.
366. *See id*. at 262-63.

directed that, on remand, the award should not include any fees incurred in defending the civil rights claim.[367]

In *O'Callaghan v. Divisions of Elections,*[368] the supreme court affirmed the superior court's order denying O'Callaghan's challenge to emergency regulations by the Division of Elections (the "Division") that temporarily adopted a partially closed ballot primary election in place of the blanket primary election prescribed in Alaska Statutes section 15.25.060.[369] The court had previously invalidated such emergency regulations, holding that Alaska Statutes section 15.25.060 was constitutional.[370] However, it had also previously determined that the Division would have authority to "abrogate a statute that is clearly unconstitutional under a United States Supreme Court decision dealing with similar law, without having to wait for another court decision specifically declaring the statute unconstitutional."[371] Because the United States Supreme Court held that a similar blanket primary statute in California violated the First Amendment, and because there were no constitutionally significant differences between the California and Alaska statutes, the court concluded that Alaska Statutes section 15.25.060 was unconstitutional, and that the Division had authority to abrogate the statute and promulgate emergency regulations.[372] The court also held the partially closed primary did not impermissibly infringe upon the Alaska Constitution's voting secrecy clause.[373]

VI. CRIMINAL LAW

A. Constitutional Protections

1. *Search and Seizure*. In *Beavers v. State*,[374] the supreme court held that a confession in a criminal case is involuntary, and hence inadmissible, if partially induced by a police officer's threat of harsher treatment.[375] The court vacated Beavers' indictment for first-degree robbery, reversing a court of appeals ruling that found Beavers' confession voluntary under the "totality of the circum-

367. *See id*. at 263-64.
368. 6 P.3d 728 (Alaska 2000).
369. *See id*. at 730.
370. *See id*.
371. *Id*.
372. *See id*.
373. *See id*. at 731-32.
374. 998 P.2d 1040 (Alaska 2000).
375. *See id.* at 1041.

stances."[376] Beavers confessed to the crime after two Alaska State Troopers asked Beavers to enter the troopers' vehicle and give them information about two Anchorage robberies.[377] The troopers' threat to Beavers that he would be "hammered" if he attempted to hide his conduct from the trooper and that "we're going to have to talk about that" conveyed a strong message that Beavers would be punished, and could not fully exercise his constitutional right to silence.[378] The court held that a law enforcement officer's threat of harsher than normal treatment, in whatever words, sends a message to criminal suspects that they will be punished for their silence.[379] Since there was no evidence affirmatively indicating that the suspect's will was not overcome by the threats, Beavers' confession was involuntary and could not be used against him in his criminal trial.[380]

In *Jones v. State*,[381] the court of appeals overturned a conviction for possession of a controlled substance because the drug evidence was obtained as a result of an unlawful investigative stop.[382] Anchorage police responded to a 911 call concerning an argument between Everett Jones and his landlord.[383] When the officers attempted to ask Jones what happened, Jones began to walk away from the officers.[384] After Jones ignored repeated requests to keep his hands away from his pockets, the officers restrained him, and ultimately handcuffed him when he began to resist.[385] The officers searched Jones and found cocaine.[386] Jones was convicted of possession of cocaine and resisting arrest.[387] The court held that the police could not lawfully restrain Jones at the scene of the dispute.[388] Although the police knew that Jones was involved in a dispute with his landlord, they "had no indication that Jones had assaulted the landlord or had committed any illegal act."[389] Accordingly, there was no basis to require Jones to stay at the scene, and therefore, the cocaine was seized as the result of an ille-

376. *See id.*
377. *See id.*
378. *Id.* at 1047.
379. *See id.* at 1046.
380. *See id.* at 1047.
381. 11 P.3d 998 (Alaska Ct. App. 2000).
382. *See id.* at 999.
383. *See id.*
384. *See id.*
385. *See id.* at 999-1000.
386. *See id.* at 1000.
387. *See id.*
388. *See id.* at 1000-01.
389. *Id.* at 1000.

gal investigative stop.[390] The court held that Jones' conviction for resisting arrest would be upheld if the State proved on remand that "the police were arresting Jones, that Jones knew the officers were arresting him, and that Jones used force with the intent to prevent the officers from making the arrest."[391]

In *Lewis v. State,*[392] the court of appeals affirmed all but one of Lewis' felony drug convictions that resulted from evidence found pursuant to a search warrant that had originally been obtained to search for evidence of a Fish and Game Department violation.[393] The warrant authorized the police to search for evidence of the game violation, including an assault rifle and ammunition.[394] Lewis moved to suppress the obtained evidence, arguing that the affidavit in support of the search warrant did not establish probable cause that he was the person who committed the game violation.[395] The superior court judge agreed that the evidence was insufficient to establish probable cause with respect to the game violation.[396] However, the judge concluded that the warrant should be upheld because there was probable cause to believe that Lewis had violated a condition of his probation by possessing a firearm and that evidence of this offense would be found at his residence.[397] The judge held, and the court of appeals affirmed, that even if the warrant improperly states the crime under investigation, it will still be upheld if it establishes probable cause to search a particular place for the evidence named in the warrant.[398] The court of appeals reversed Lewis' conviction for possession of firearms during the commission of a felony drug offense because the state failed to prove a nexus between his possession of the weapon and his commission of the felony drug offense.[399]

In *Murray v. State*,[400] the court of appeals affirmed the trial court's conviction of Murray for several offenses involving drug possession, but vacated a conviction for second-degree misconduct involving use of a weapon and remanded the case for further con-

390. *See id.*
391. *Id.* at 1001.
392. 9 P.3d 1028 (Alaska Ct. App. 2000).
393. *See id.* at 1028-31.
394. *See id.* at 1032.
395. *See id.* at 1031.
396. *See id.*
397. *See id.*
398. *See id.* at 1033-34.
399. *See id.* at 1038.
400. 12 P.3d 784 (Alaska Ct. App. 2000).

sideration of that count.[401] On August 13, 1997, the police received an anonymous call reporting that there was a dead body in Room 222 of an Anchorage motel.[402] When the police arrived at the room, Murray let them in to search it.[403] Murray was never advised of his *Miranda* rights, and, during questioning, he admitted that he had used drugs and was on probation for a prior drug offense. Murray also mentioned that his girlfriend, Jeannie Joy, was out driving his car in search of cocaine.[404] After finding Joy, the officers obtained Murray's consent to search the car.[405] Joy told the officers that there was marijuana in the car and that Murray owned a firearm.[406] The officers then questioned Murray again, who initially agreed to let them search his home, but then refused to sign a consent-to-search form.[407] The police returned with a search warrant and found, *inter alia*, a bag containing six ounces of marijuana and a loaded handgun.[408]

Murray contested the admissibility of evidence acquired in the motel room, including his own statements; he also filed a motion to quash the search warrant (and the evidence obtained from the search of his residence) on the grounds that, without his motel room statements, the remaining evidence was not sufficient to support a warrant.[409] The superior court held that Murray had consented to the search of the motel room, and thus admitted the physical evidence; however, the court held that Murray's motel room statements could be suppressed since he was not given his *Miranda* warning. Nevertheless, the court did not quash the search warrant.[410] The court of appeals agreed that Murray did consent to the search of the motel room and that Murray further consented to the search of the car; thus, the search warrant was supported by probable cause.[411] Evidence later found in the car and in Murray's residence was not derived from statements made during a possible *Miranda* violation.[412] The court of appeals, therefore, affirmed the drug convictions. As to the count of second-degree weapons mis-

401. *See id*. at 795.
402. *See id*. at 787.
403. *See id*.
404. *See id*.
405. *See id*.
406. *See id*.
407. *See id*. at 787-88.
408. *See id*.
409. *See id*. at 788.
410. *See id*.
411. *See id*. at 789, 792-93.
412. *See id*. at 791.

conduct, the court of appeals held that the State must show a nexus between a defendant's possession of a firearm and the commission of a felony drug offense.[413]

In *Shearer v. Municipality of Anchorage*,[414] the court of appeals held that a motorist suspected of driving while intoxicated ("DWI") continued to pose a potential imminent danger to the driving public, even though he had parked his car in his driveway and exited his vehicle.[415] A police officer testified that he watched Daniel Shearer's Jeep move back and forth between traffic lanes and pass vehicles at a high rate of speed.[416] The police officer testified that, based on his training and experience, his impression was that the driver of the Jeep was intoxicated.[417] Shearer's motion to suppress the evidence obtained after his initial contact with the officer was denied.[418] On the basis of a breath test that exceeded the legal limit, Shearer pled no contest to DWI.[419] Shearer appealed the denial of his motion to suppress the evidence.[420] Shearer claimed that because he parked his Jeep in his driveway, exited the vehicle, and was headed towards his home when the police officer contacted him, the officer had no basis to reasonably suspect that Shearer continued to pose an imminent danger to the motoring public.[421] The court held that the police officer had reasonable suspicion, based on his observations of Shearer's driving, that Shearer posed an imminent danger to public safety.[422] Although Shearer claimed he was home for the night, the court found that there was nothing to prevent Shearer from going inside his house, coming back out, and driving again.[423]

2. *Miscellaneous*. In *Alexander v. Municipality of Anchorage,*[424] the court of appeals upheld Alexander's conviction for driving while intoxicated, finding that the police had not interfered with his right to consult with his attorney.[425] Alexander was taken to the police substation for a breath test after being arrested for

413. *See id*. at 794.
414. 4 P.3d 336 (Alaska Ct. App. 2000).
415. *See id.* at 340.
416. *See id.* at 337.
417. *See id.*
418. *See id*. at 338.
419. *See id.*
420. *See id.*
421. *See id.*
422. *See id.* at 340.
423. *See id.*
424. 15 P.3d 269 (Alaska Ct. App. 2000).
425. *See id.* at 269.

driving while intoxicated ("DWI").[426] Pursuant to policy, the police officer kept Alexander's hands handcuffed behind his back.[427] When Alexander could not hold the telephone between his ear and his shoulder, the police officer held the phone for him.[428] Alexander claimed that the police officer's proximity interfered with his right to speak privately with his attorney.[429] Additionally, although the police officer had turned off the substation's tape recorder, he had not turned off his personal tape recorder.[430] Although the trial court excluded evidence of the tape recorded conversation, it did not suppress the breath test results.[431] The decision of the trial court was affirmed, because Alexander could not show that his conversation with his attorney was harmed by the police officer recording the conversation, and because the police officer had made an effort to allow Alexander to hold the phone between his ear and shoulder.[432]

In *Bushnell v. State*,[433] the court of appeals held that Alaska Statutes section 28.40.060 did not violate due process in a driving while intoxicated ("DWI") case based on test results obtained by an instrument with a working tolerance of .01 percent.[434] Following a jury trial, Albert Bushnell was convicted of felony DWI on the basis of a breath test.[435] The court of appeals upheld the conviction, finding that a working tolerance of .01 percent of a properly calibrated instrument was "tolerably inaccurate" under Alaska Statutes section 28.40.060.[436] The court rejected an interpretation of section 28.40.060 that would require the State to prove the driver's blood actually contained at least .10 percent alcohol by weight or at least .10 grams of alcohol per 210 liters.[437] In light of the history of the chemical test (the "Intoximeter") in Alaska cases and its established working tolerance, the court found that the legislature implicitly decided that a .01 percent working tolerance was "tolerably inaccurate," and, therefore, irrelevant to the driver's guilt under Alaska Statutes section 28.35.030(a)(2).[438] The court also held that

426. *See id.* at 269-70.
427. *See id*. at 270.
428. *See id.*
429. *See id.*
430. *See id.*
431. *See id.*
432. *See id.* at 271-72.
433. 5 P.3d 889 (Alaska Ct. App. 2000).
434. *See id.* at 890.
435. *See id.*
436. *Id.* at 892.
437. *See id.*
438. *Id.*

section 28.40.060's exemption for those aged fourteen to twenty-one who are charged under another statute does not violate Bushnell's state and federal rights to equal protection because minors are in fact subject to a stricter law under the exemption.[439]

B. General Criminal Law

1. *Criminal Procedure*. In *Dodds v. State*,[440] the court of appeals held that the trial court did not err by failing to have the jury decide whether the State had proved the corpus delicti of a robbery charge.[441] Ian Dodds appealed his conviction for first-degree robbery, claiming that the trial judge committed plain error when he neglected to tell the jury that they could not convict Dodds unless the State presented substantial independent evidence tending to establish that Dodds was, in fact, one of the robbers.[442] The court of appeals disagreed.[443] The court held that, when trying to prove a defendant has violated a criminal statute, the corpus delicti rule only requires the State to introduce independent evidence of the occurrence of the injury, loss, or other harm specified in the statute, not independent evidence of the defendant's participation in causing this injury, loss, or harm.[444] The trial raised no issue of corpus delicti, because the occurrence of the robbery was not seriously contested.[445] The court further held that juries do not decide the issue of corpus delicti, therefore no corpus delicti instruction was necessary.[446]

In *Flanigan v. State,*[447] the court of appeals held that a state statutory time limit on a prisoner's petition for post-conviction relief did not violate the state constitution clause barring suspension of the writ of habeas corpus.[448] More than twelve years after his conviction for murder, Flanigan filed an application for post-conviction relief, which was dismissed by the trial court because it was filed after the deadline date mandated by Alaska Statutes section 12.72.020.[449] Although the prisoner argued that the time bar

439. *See id*. at 892-93.
440. 997 P.2d 536 (Alaska Ct. App. 2000).
441. *See id*. at 538.
442. *See id*.
443. *See id*. at 539.
444. *See id*.
445. *See id*.
446. *See id*. at 542-43.
447. 3 P.3d 372 (Alaska Ct. App. 2000).
448. *See id.* at 376.
449. *See id.* at 373.

violated federal and state constitutional prohibitions on suspending the writ of habeas corpus, the court of appeals held that the United States Constitution limited only the federal government's power to suspend the writ.[450] The court of appeals held that the writ protected by the state constitution's suspension clause was the same in scope as the writ at common law, which was limited to testing the jurisdiction of the sentencing court.[451] Dismissal of the petition was proper, because the prisoner's claim for relief did not challenge the sentencing court's jurisdiction.[452] The court of appeals also held that the prisoner's inability to access the Alaska Statutes did not qualify the prisoner for relief, because he was not "physically prevented" from filing a timely petition.[453]

In *Grinols v. State,*[454] the court of appeals held that, because Alaska grants a right to counsel during post-conviction relief proceedings, a defendant may be entitled to relief for incompetent counsel.[455] In challenging the competency of an attorney in such a proceeding, a defendant must prove: (1) "their [sic] own diligence in raising the claim of ineffective representation"; (2) "the incompetence of their [sic] prior post-conviction relief attorney"; (3) "that the omitted legal issue is, in fact, meritorious—that if the underlying issue had been litigated, the defendant would have won"; and (4) "there is a reasonable possibility that the outcome of the defendant's original trial court proceedings would have been different."[456] The court held that a defendant is not entitled to an attorney for a second petition for post-conviction relief.[457] However, the trial court may appoint counsel in individual cases.[458] In addition, the court affirmed the constitutionality of Civil Rule 86(m), which provides that post-conviction relief is the procedural method for collaterally attacking a criminal conviction and upheld the constitutionality, with limited exceptions, of Alaska Statutes section 12.72.020(a)(6), which bars multiple petitions for post-conviction relief.[459]

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450. *See id.* at 374.
451. *See id.* at 375-76.
452. *See id.* at 376.
453. *See id.* at 376-77.
454. 10 P.3d 600 (Alaska Ct. App. 2000).
455. *See id.* at 618.
456. *Id.* at 619-20.
457. *See id.* at 624.
458. *See id.*
459. *See id.*

In *Hertz v. State*,[460] the supreme court affirmed the superior court's order that directed Hertz to refile his complaint for habeas corpus as a request for post-conviction relief.[461] Alaska Civil Rule 86(m) governs habeas corpus procedures and provides that the rule "does not apply to any post-conviction proceeding that could be brought under Criminal Rule 35.1."[462] Hertz argued that his application for habeas corpus could not be brought under Criminal Rule 35.1 because his application was subject to dismissal under Alaska Statutes section 12.72.020(a).[463] Therefore, Civil Rule 86(m) did not apply because his complaint would be dismissed as an application for post-conviction relief.[464] However, because Hertz' application alleged a constitutionally based claim of ineffective assistance of counsel, the complaint could be brought under Alaska Criminal Rule 35.1 and Civil Rule 86(m) applied.[465] Hertz also argued that he should be able to maintain his habeas corpus action and not be subject to the statutory bars in Alaska Statutes section 12.72.020(a).[466] However, because Hertz was not claiming that his original conviction was void, he could not seek redress in habeas corpus and his complaint was subject to the limitations of the statute.[467]

In *Howarth v. State*,[468] the court of appeals held that the superior court abused its discretion in dismissing a petition for post-conviction relief where there were signs of attorney neglect.[469] William Howarth was found guilty of second-degree murder, but filed a petition for post-conviction relief.[470] The superior court appointed an attorney to represent Howarth.[471] The State moved to dismiss, arguing that Howarth's claims were barred and did not establish a case.[472] The superior court dismissed the petition for post-conviction relief because the court-appointed attorney failed to file a response.[473] The court of appeals reversed because the superior court dismissed the petition without demanding a response to the

460. 8 P.3d 1144 (Alaska 2000).
461. *See id*. at 1145.
462. *Id*. at 1146.
463. *See id*.
464. *See id*.
465. *See id*. at 1147.
466. *See id*. at 1148.
467. *See id*. at 1148-49.
468. 13 P.3d 754 (Alaska Ct. App. 2000).
469. *See id*. at 754.
470. *See id.*
471. *See id*.
472. *See id*. at 754-55.
473. *See id*. at 755-56.

motion to dismiss.[474] The court should not have dismissed the petition until the suggestion of ineffective counsel was "dispelled – or, if it is not dispelled, until a new attorney is appointed and has a meaningful opportunity to aid Howarth in reformulating his petition for post-conviction relief."[475]

In *Lonis v. State*,[476] the court of appeals held that the trial court erred by ordering forfeiture of a defendant's bond based on the defendant's failure to abide by his conditions of release, but upheld the trial court's decision to bar defendant from personally addressing the jury and making him pay restitution to the victim's insurance company.[477] The defendant Michael Lonis, along with his son, was driving a pickup truck when Lonis lost control of the truck.[478] The truck crashed into the home of Wes and Helen Allen, causing injuries to Mrs. Allen's neck and stomach.[479] After the crash, Lonis backed out of the Allen's house and drove away.[480] Lonis, who appeared to arm himself with a rifle, threatened to kill police officers when they arrived at his apartment.[481] A grand jury indicted Lonis for two counts of assault in the third-degree for threatening the police officers, two counts of assault in the third-degree for injuring his son and Mrs. Allen in the truck accident, one count of driving while intoxicated, and one count of failing to give immediate notice of an accident to the police.[482] After the trial court found that Lonis had violated the conditions of his bail release, the judge ordered forfeiture of $4500 of Lonis' $5000 bond.[483] The court of appeals overturned the judge's ruling and ordered the money returned to Lonis.[484] The court held that Alaska Statutes section 12.30.060 authorizes a court to seize pledged bail money when the defendant willfully fails to appear, but does not give courts the authority to seize a defendant's bail when the defendant fails to comply with the other conditions of release.[485] However, the trial court did not err in refusing to let Lonis address the jury at the end of the case because, in a case where Lonis chose not to tes-

474. *See id*. at 756.
475. *Id*. at 757.
476. 998 P.2d 441 (Alaska Ct. App. 2000).
477. *See id*. at 443.
478. *See id*.
479. *See id*.
480. *See id*.
481. *See id*.
482. *See id*.
483. *See id*. at 444.
484. *See id*. at 445.
485. *See id*. at 444.

tify, it would be unfair to have Lonis address the jury and give him some of the benefits of testifying without being subject to cross-examination.[486] Finally, the court ruled that Lonis had no standing to complain that the trial court ordered the restitution be paid directly to the insurance company instead of through the Allens.[487]

In *Mullin v. State*,[488] the court of appeals reversed the superior court's decision to dismiss a petition for post-conviction relief on the ground that it was filed too late.[489] Mullin filed a petition for post-conviction relief exactly three days before the deadline imposed by the statute of limitations.[490] However, the superior court clerk's office did not accept the petition because Mullin had not included the $100 filing fee or, in the alternative, an application for exemption from the fee.[491] The clerk's office notified Mullin of the omission, and Mullin filed the exemption application several weeks later, after the deadline had passed.[492] The superior court dismissed the petition, finding that it was not filed in time.[493] The court of appeals determined that Mullin's initial, though technically incomplete, filing of the petition satisfied the statute of limitations.[494] The court of appeals reinstated Mullin's petition and remanded it to the superior court for renewed proceedings.[495]

In *Schumacher v. State*,[496] the court of appeals affirmed Schumacher's conviction for six felony counts of sexual abuse of his three sons and the resulting composite sentence of fifteen years.[497] On appeal, Schumacher argued that the court should have dismissed his indictment because his sons' testimony was unreliable.[498] Because he did not raise the objection before trial, the court held that the objection had been waived.[499] For the same reasons, Schumacher argued that the court should have declared a mistrial or conducted a "taint hearing."[500] However, because judges could differ about the need for a taint hearing, the trial judge did not err

486. *See id*. at 447.
487. *See id*. at 448.
488. 996 P.2d 737 (Alaska Ct. App. 2000).
489. *See id*. at 740.
490. *See id*. at 738.
491. *See id*.
492. *See id*.
493. *See id*.
494. *See id*. at 740.
495. *See id*.
496. 11 P.3d 397 (Alaska Ct. App. 2000).
497. *See id*. at 402.
498. *See id*. at 399.
499. *See id*.
500. *See id*.

when he did not order one.[501] Next, Schumacher argued that the trial court erred when it allowed a detective to demonstrate how Schumacher wiped his groin area in the detective's presence.[502] The court held that permitting the detective to demonstrate his personal observations was not an abuse of discretion because Schumacher's defense raised the issue of whether he had the physical ability to reach his groin area.[503] In addition, Schumacher argued that the trial court erred when it did not allow Schumacher to perform his own demonstration without taking the stand.[504] The court held that the judge did not err by disallowing the demonstration because the demonstration would show a voluntary range of motion that could be manipulated rather than a physical characteristic.[505] Lastly, Schumacher argued that his sentence of fifteen years was excessive.[506] However, because the term was in the upper range of the benchmark sentence and because his crimes were aggravated, the court held that the sentence was not clearly mistaken.[507]

In *State v. Roberts*,[508] the court of appeals held that Alaska Statutes section 12.30.027 forbids a trial court from permitting a person released on a charge or conviction of a crime involving domestic violence to return to the residence of his alleged victim.[509] Lincoln Roberts was convicted of third-degree assault for assaulting M.J., with whom he lived and had a domestic relationship.[510] Following Roberts' initial release on bail during the pendency of his appeal, Roberts was granted a modification on his release conditions so that he could reside in the same residence with the assault victim.[511] After the court of appeals granted the petition for review, Roberts moved to dismiss the petition on the ground that it was moot because Roberts had violated his conditions of release and was in custody.[512] The court of appeals declined to dismiss the case, arguing that the case fell within the public interest exception to the mootness doctrine.[513] On the merits, the court relied on leg-

501. *See id*.
502. *See id*.
503. *See id*. at 400.
504. *See id*.
505. *See id*.
506. *See id*. at 401.
507. *See id*. at 401-02.
508. 999 P.2d 151 (Alaska Ct. App. 2000).
509. *See id*. at 152.
510. *See id*.
511. *See id*. at 152-53.
512. *See id*. at 153.
513. *See id*.

islative intent to hold that the statute prevented courts from releasing to the residence of the alleged victim defendants charged with or convicted of a crime of domestic violence.[514]

In *United States v. Hinojosa-Perez*,[515] the Court of Appeals for the Ninth Circuit affirmed the defendant's conviction for reentering the United States after deportation, because the defendant failed to exhaust the administrative remedies available for attacking the original deportation order.[516] In an order instituting deportation proceedings, the defendant was informed of his obligation to provide any changes in his address to the office of the Immigration Judge in charge of his case.[517] After his deportation hearing, the defendant appealed the denial of his request to depart the country voluntarily.[518] The defendant continued to correspond with the agency handling his appeal but failed to notify the agency when he moved to a new address.[519] Although he prevailed on appeal, the defendant did not appear at his remand hearing and was deported.[520] The defendant was again deported after reentering the United States the following year, and after he reentered the country a second time, he was charged with the corresponding felony.[521] The defendant moved to dismiss, alleging a due process violation because he did not receive notice of his original deportation remand hearing.[522] He appealed from the district court's refusal to dismiss and reasserted the collateral challenge to his deportation order.[523] The court of appeals decided that the defendant had notice of his obligation to inform the State of any address changes, and because he failed to do so, he had constructive notice of the remand hearing and the possibility of appealing the deportation order.[524] The court held that because the defendant did not contest the order, he had not exhausted his administrative remedies and was now barred from contesting the order in his criminal case.[525]

In *Wardlow v. State*,[526] the court of appeals affirmed the conviction of a defendant who alleged that he was denied his right to a

514. *See id*. at 154-55.
515. 206 F.3d 832 (9th Cir. 2000).
516. *See id.* at 833.
517. *See id.*
518. *See id.* at 833-34.
519. *See id.* at 834.
520. *See id.*
521. *See id.*
522. *See id.*
523. *See id.* at 835.
524. *See id.* at 835-37.
525. *See id.*
526. 2 P.3d 1238 (Alaska Ct. App. 2000).

speedy trial and that certain evidence against him had been admitted erroneously.[527] Wardlow was convicted of second-degree assault, two counts of first-degree sexual assault, and kidnapping.[528] Wardlow appealed the conviction, claiming that he had been denied the right to a speedy trial as provided in Alaska Civil Rule 45.[529] Under that rule, Wardlow's trial was to have commenced by September 8, 1997, but scheduling conflicts delayed the beginning of the trial by more than a week.[530] Wardlow's attorney agreed with the prosecutor to reschedule the trial. Wardlow signed a written waiver of Civil Rule 45, but then repudiated the waiver.[531] The court of appeals held that, even if Wardlow had not signed the waiver, Rule 45 was waived when Wardlow's attorney joined the prosecutor's motion to set the trial at a later date.[532] The court of appeals also held that the trial judge's decision to allow evidence of Wardlow's prior assault on another woman was consistent with legislative intent and did not violate the rules of evidence.[533] Evidence of prior assaults is admissible to establish a defendant's propensity to sexually assault women when the defendant raises a defense of consent.[534] The court of appeals also affirmed Wardlow's composite sentence of sixty years, given the aggravating nature of the criminal acts.[535]

2. *Evidence*. In *Ashley v. State,*[536] the court of appeals affirmed a reckless driving conviction, unpersuaded by the appellant's argument that his conviction was supported by insufficient evidence.[537] The court of appeals held that although the conviction was based almost entirely on circumstantial evidence, the evidence was sufficient to convince a reasonable person that Ashley was guilty of reckless driving.[538] The court also gave weight to the fact that Ashley testified in court and failed to convince the jury that his was the correct explanation for how the accident occurred.[539] The court of appeals held that the two charges of reckless driving and

527. *See id*. at 1254.
528. *See id.* at 1241.
529. *See id*. at 1243.
530. *See id*. at 1242-43.
531. *See id.* at 1243.
532. *See id*. at 1244.
533. *See id*. at 1247.
534. *See id*. at 1248.
535. *See id.* at 1254.
536. 6 P.3d 738 (Alaska Ct. App. 2000).
537. *See id*. at 738, 744.
538. *See id*. at 744.
539. *See id*.

failure to report an accident had been properly joined because they arose out of the same accident and because their joinder did not unfairly prejudice Ashley.[540] Furthermore, the court concluded that Ashley had waived his evidentiary objections with respect to the police officer's testimony, because he did not raise them during the trial.[541]

In *Lowe v. State,*[542] the court of appeals affirmed the superior court's conviction of Lowe for tampering with evidence.[543] Robert Meyer was charged with the murder of his wife and daughter and the arson of his boat.[544] After Meyer reported his boat was on fire and his wife and daughter were missing, he went to Ann Lowe's home, where Lowe proceeded to wash his clothing, which smelled heavily of diesel fuel.[545] When the police arrived at Lowe's home, they advised her, in a tape recorded conversation, not to wash Meyer's clothing any further than she already had.[546] Lowe moved to dismiss her indictment due to the State's failure to present exculpatory evidence—the tape recorded conversation.[547] The trial judge concluded that the prosecutor's questioning of the police officer did not substantially deviate from the taped conversation, and therefore affirmed her indictment.[548] Lowe also argued that the evidence of Meyer's guilt was highly prejudicial and allowed the jury to speculate as to her own guilt.[549] The judge, however, ruled that the State could present a "foundational basis for this investigation."[550] The court of appeals found that all of the judge's findings were supported by the record and affirmed the conviction.[551]

In *McCormick v. Municipality of Anchorage*,[552] the court of appeals upheld the trial court's decision to admit evidence that the defendant refused to perform two additional field sobriety tests in a Driving While Intoxicated ("DWI") case.[553] John McCormick was asked to perform field sobriety tests by a police officer follow-

540. *See id.* at 740-41.
541. *See id.* at 738.
542. No. A-7387, No. 4318, 2000 Alas. App. LEXIS 197, at *1 (Dec. 13, 2000).
543. *See id.* at *2.
544. *See id.* at *1.
545. *See id.* at *2-3.
546. *See id.*
547. *See id.* at *5.
548. *See id.* at *6.
549. *See id.* at *10.
550. *Id.* at *8.
551. *See id.* at *14.
552. 999 P.2d 155 (Alaska Ct. App. 2000).
553. *See id*. at 158-59.

ing a traffic accident.[554] McCormick submitted to the first sobriety test, and after refusing to perform two additional tests, he was arrested for driving under the influence.[555] McCormick later requested and obtained an independent blood test at a local hospital, which was sent to a laboratory in Colorado without the Municipality's knowledge.[556] When the Municipality sought a blood sample, it obtained a court order directing the hospital to surrender any unused blood to the Municipality for further testing.[557] The Municipality introduced evidence at trial that McCormick had refused to perform the latter two field sobriety tests, and that the blood obtained from the hospital yielded a result of .125 percent alcohol.[558] The court of appeals held that the government can introduce evidence of, and comment on, a motorist's refusal to perform field sobriety tests after the motorist is stopped validly on suspicion of driving while intoxicated.[559] In addition, the court held that the trial court acted lawfully when it ordered McCormick's attorney to surrender the unused portion of the blood sample to the Municipality.[560] Lastly, the court held that the mandatory forfeiture provision of Anchorage Municipal Code section 9.28.020(C)(5) does not violate state law because Alaska Statutes section 28.35.038 authorizes municipalities to enact vehicle impoundment and vehicle forfeiture laws that are harsher than their state-law counterparts.[561] Forfeiture of a $5000 vehicle was not so grossly disproportionate to the repeat offense of driving while intoxicated as to represent an "excessive fine" prohibited by the Eighth Amendment.[562]

In *Napoka v. State*,[563] the court of appeals reversed the conviction of rape and granted a new trial because the court found that the trial court had improperly excluded relevant evidence that the defendant and the alleged victim had repeatedly engaged in consensual sex.[564] The defendant, who was charged with three counts of first-degree sexual assault, sought to introduce evidence of previous consensual sexual encounters with the alleged victim.[565] Un-

554. *See id*. at 157.
555. *See id*.
556. *See id*.
557. *See id*.
558. *See id*.
559. *See id*. at 158-59.
560. *See id*. at 163.
561. *See id*. at 168.
562. *See id*. at 169.
563. 996 P.2d 106 (Alaska Ct. App. 2000).
564. *See id*. at 112.
565. *See id*. at 107.

der the state's rape shield law, Alaska Statutes section 12.45.045, evidence of a rape victim's previous sexual conduct is not admissible at trial, unless the trial judge determines that the probative value of the evidence outweighs the potential for undue prejudice.[566] The court of appeals noted that the wording of the statute, by failing to distinguish between past sexual activity in general and specific sexual acts that may be related to the case at bar, does not describe its purpose.[567] The victim's past sexual behavior in general should not be introduced in a criminal rape proceeding because it is irrelevant, especially where it concerns the victim's sexual contacts with individuals other than the defendant; however, the court maintained that, if the evidence of previous sexual conduct is relevant in a given case, then it should be admitted.[568] Concluding that the trial judge should have admitted the potentially exculpatory evidence, the court of appeals reversed the rape conviction and ordered a new trial.[569]

In *Seaman v. State,*[570] the court of appeals found that the trial court did not err when it denied Seaman's motion to suppress a conversation obtained without a warrant.[571] Seaman was convicted of third-degree misconduct involving a controlled substance for delivering cocaine to an undercover informant.[572] The informant, who was wired to a tape recorder, had a *Glass*[573] warrant to record a conversation between the informant and Michael Bridge, a suspected cocaine dealer, but Seaman was not named in the warrant.[574] Seaman then showed up in lieu of Bridge to deliver the cocaine and the conversation was recorded.[575] The court held that the warrantless recording was justified by exigent circumstances, because there was not sufficient time to secure a new warrant.[576]

In *Worthy v. State,*[577] the supreme court reversed a second-degree sexual assault conviction and remanded the case for retrial, holding that the trial court committed reversible error by excluding evidence of a prior false allegation of sexual assault by the alleged

566. *See id*.
567. *See id*. at 108.
568. *See id*.
569. *See id*. at 112.
570. No. A-7150, No. 4317, 2000 Alas. App. LEXIS 200, at *1 (Dec. 13, 2000).
571. *See id.* at *11.
572. *See id.* at *3.
573. State v. Glass, 583 P.2d 872 (Alaska 1978).
574. *See Seaman*, No. A-7150, No. 4317, 2000 Alas. App. LEXIS 200, at *1.
575. *See id.* at *3.
576. *See id.* at *10.
577. 999 P.2d 771 (Alaska 2000).

victim.[578] The supreme court determined that the usual rules excluding evidence of prior false allegations of sexual assault were inapplicable because the issue of a prior false allegation of sexual assault was made independently relevant by the State.[579] The State made the prior assault a fundamental part of its case against the defendant.[580] Therefore, the court held that the defendant was entitled to litigate the truth or falsity of the prior allegation.[581]

3. *Sentencing*. In *Brown v. State*,[582] the court of appeals reversed Brown's fifty-five-year sentence and ordered the trial judge to sentence Brown to a term within the benchmark range.[583] Brown's sentence upon conviction of second-degree murder was in excess of the twenty to thirty year benchmark range.[584] In a previous decision, the court instructed the trial court to reduce Brown's sentence to no more than thirty years because it had not offered any justification for sentencing Brown to a term above the benchmark range.[585] The supreme court ordered the court of appeals to review its decision in light of *State v. Hodari*,[586] in which the court warned appellate courts not to "articulate sentencing principles and to fine-tune sentences."[587] In reviewing Brown's sentence, the court emphasized that it rejected the trial judge's sentence on factual grounds, not legal grounds.[588] Because the trial judge's justifications for sentencing Brown to a term above the benchmark were not supported by the record, the court again reversed Brown's fifty-five-year sentence and directed the sentencing judge to sentence Brown to a term not more than the thirty year benchmark.[589]

In *Clark v. State*,[590] the court of appeals held that presumptive sentencing applies to defendants convicted of felony driving while intoxicated ("DWI").[591] Johnny Clark drove a motor vehicle while he was intoxicated in violation of Alaska Statutes section

578. *See id*. at 772-73.
579. *See id*. at 774.
580. *See id*.
581. *See id*. at 775.
582. 4 P.3d 961 (Alaska 2000).
583. *See id*. at 964.
584. *See id*. at 962.
585. *See id*.
586. 996 P.2d 1230 (Alaska 2000).
587. *Brown,* 4 P.3d at 963.
588. *See id*. at 964.
589. *See id*.
590. 8 P.3d 1149 (Alaska Ct. App. 2000).
591. *See id*. at 1150.

28.35.030(a).[592] Based on Clark's two prior felonies, the superior court ruled that Clark was subject to presumptive sentencing under Alaska Statutes section 12.55.125 as a third felony offender.[593] Since felony DWI is a class C felony, the trial judge ruled that Clark faced a three-year presumptive term.[594] Clark pleaded no contest to this charge, and was sentenced to three and a half years imprisonment.[595] On appeal, Clark argued that mandatory minimum sentences under section 28.35.030(n) should supplant or supersede the "minimum sentences" contained in the presumptive sentencing statute.[596] The court disagreed and held that the presumptive terms listed in Alaska Statutes section 12.55.125 are different from, and serve a different purpose than, the mandatory minimum sentences for felony DWI listed in Alaska Statutes section 28.35.030(n).[597] The court affirmed both the presumptive sentencing laws and application of the mandatory minimum sentences established in Alaska Statutes section 28.35.030(n).[598]

In *Dollison v. State,*[599] the court of appeals held that the sentencing court's failure to consider as a mitigating factor that the defendant possessed only a small quantity of a controlled substance was harmless error, because the judge had stated that he would not have adjusted the presumptive sentence.[600] The court clarified an earlier ruling setting out the "small quantity" mitigating factor[601] by stating that the typical drug case against which the quantity should be measured "is a drug case where the quantity involved in the case falls in the broad-middle ground penalized by the statute when considering the nature of the substance, its form, its purity, its commercial value, and its relative availability or scarcity," rather than the typically prosecuted case or the typical case on a judge's docket.[602] The court also decided that because an arresting officer's discovery of a crack pipe during a pat-down search gave him probable cause to believe defendant possessed drugs, the officer could

592. *See id*.
593. *See id*.
594. *See id*.
595. *See id*.
596. *See id*.
597. *See id*.
598. *See id*. at 1151.
599. 5 P.3d 244 (Alaska Ct. App. 2000).
600. *See id.* at 248.
601. *See id.* (citing Knight v. State, 855 P.2d 1347, 1349-50 (Alaska Ct. App. 1993)).
602. *Dollison*, 5 P.3d at 247-48.

also legally seize a Tylenol container found in the defendant's pocket that might contain evidence of that crime.[603]

In *Fergerson v. State,*[604] the court of appeals affirmed the superior court's finding that Fergerson's sentence was not excessive or clearly mistaken.[605] Fergerson pleaded no contest to a single count of second-degree theft for fraudulent use of a credit card.[606] He plea bargained for a thirty-month sentence with twenty-seven months suspended, conceding two aggravating factors, and he agreed to pay $55,640.87 in restitution.[607] Less than two weeks after serving this sentence, Fergerson was arrested again for second-degree theft, a scheme to defraud, and contributing to the delinquency of a minor.[608] He again reached a plea agreement with the State receiving a two-year sentence, and the judge imposed his entire prior twenty-seven month suspended term.[609] The court of appeals reiterated that it reviews sentences under the "clearly mistaken" standard rather than a sentencing de novo or the "principal of parsimony."[610] The court also found that a probation violation may indicate a poor prospect for rehabilitation, a finding of which could indicate that the sentence may exceed the *Austin*[611] limit.[612] Therefore, the superior court's sentencing above the *Austin* limit was not excessive or clearly mistaken.[613]

In *Foley v. State,*[614] the supreme court held that the defendant's maximum possible sentence was not excessive in light of his numerous prior offenses and repeated failures at rehabilitation.[615] Foley was observed driving erratically for several minutes before a police officer attempted to pull him over.[616] Before the officer could do so, Foley ran off the road and stopped in the grass.[617] Foley subsequently was determined to have a blood-alcohol level

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603. *See id.* at 247.
604. No. A-7499, No. 4319, 2000 Alas. App. LEXIS 199, at *1 (Dec. 13, 2000).
605. *See id.* at *1.
606. *See id.* at *2.
607. *See id.* at *3.
608. *See id.*
609. *See id.* at *4-5.
610. *See id.* at *6.
611. Austin v. State, 627 P.2d 657 (Alaska Ct. App. 1981) (finding that a first felony offender should normally be sentenced to a lesser sentence than would apply if the defendant were a second felony offender).
612. *See Fergerson*, No. A-7499, No. 4319, 2000 Alas. App. LEXIS 199, at *1.
613. *See id.* at *11.
614. 9 P.3d 1038 (Alaska 2000).
615. *See id.* at 1038.
616. *See id*. at 1038-40.
617. *See id.* at 1040.

of 0.33 percent.[618] The sentencing judge considered as aggravating factors the fact that Foley had thirty criminal convictions in the past twenty-five years,[619] had an extremely high blood-alcohol level, and was driving on a revoked license.[620] The court concluded that the sentencing judge gave the proper weight to Foley's past record in finding that he could neither be rehabilitated nor deterred;[621] thus, the court held that the judge was not clearly mistaken in giving Foley the maximum sentence for his offense.[622]

In *Griffin v. State,*[623] the court of appeals held that a twenty-three-year prison sentence was not excessive when a defendant had a prior history of theft and a demonstrated tendency toward violent crimes.[624] For at least fifteen years prior to the crimes in question, Griffin had been convicted of various burglaries and felonies.[625] On June 19, 1998, he committed another burglary, and the trial court identified aggravating factors for sentencing under Alaska Statutes section 12.55.155(c), focusing on the seriousness of Griffin's crimes and his use of a dangerous weapon.[626] Although the standard *Mutschler* rule would only allow Griffin, as a person convicted of multiple offenses, to receive a sentence equal to the maximum term for the most serious offense, the trial judge imposed a sentence of twenty-two to twenty-three years.[627] The court of appeals upheld this sentence based on "Griffin's long criminal history, the seriousness of Griffin's current offenses, and the apparent failure of all prior attempts to supervise Griffin on probation and parole."[628] Further, the court indicated that, based on the supreme court's holding in *State v. Bumpus*,[629] the excessiveness of a sentence depends on the facts in question and in the present case the facts showed that Griffin deserved his punishment.[630]

In *Harmon v. State,*[631] the court of appeals affirmed separate sentences for appellant's convictions of second-degree sexual assault and incest because the relevant statutes required proof of dif-

618. *See id.*
619. *See id.*
620. *See id.*
621. *See id.* at 1042.
622. *See id.*
623. 9 P.3d 301 (Alaska Ct. App. 2000).
624. *See id.* at 310.
625. *See id.* at 302.
626. *See id.* at 307 (citing ALASKA STAT. § 12.55.155(c) (LEXIS 2000)).
627. *See id.* at 307-08.
628. *Id.* at 308.
629. 820 P.2d 298 (Alaska 1991).
630. *See Griffin*, 9 P.3d. at 310.
631. 11 P.3d 393 (Alaska Ct. App. 2000).

ferent conduct and vindicated different social interests.[632] The court rejected appellant's argument that the sentencing violated the constitutional prohibition against double jeopardy because the sexual assault charge required the State to prove that appellant engaged in sexual penetration with a person he knew to be incapacitated, while incest required proof that appellant engaged in sexual penetration with a blood relative.[633] The court also affirmed that the trial judge's finding of a statutory aggravating factor, which requires proof that appellant's conduct was among the most serious included in the definition of the offense, was not clearly erroneous because the appellant assaulted his sister at night while she slept, and his offense escalated to forcible rape when the sister woke up and appellant choked her into unconsciousness.[634] In addition, the court did not consider the sentence excessive because of previous sexual offense convictions and a lack of any statutory mitigating factors.[635]

In *State v. Delagarza,*[636] the court of appeals reversed a grant of post-conviction relief to petitioner because his prior out-of-state felony convictions were sufficiently similar to Alaska offenses to qualify as felonies for presumptive sentencing purposes.[637] Petitioner had been convicted in Oregon of first-degree burglary, second-degree burglary, and twice of second-degree robbery.[638] Under Alaska Statutes section 12.55.155, an aggravating factor for presumptive sentencing is having three or more felony convictions.[639] Pursuant to Alaska Statutes section 12.55.145(a)(1)(B), the appeals court ruled that first-degree burglary in Oregon was "similar" to second-degree burglary in Alaska, and that second-degree burglary in both states had elements that were substantially identical.[640] The petitioner argued that Alaska's second-degree robbery statute penalized assaultive conduct in the course of taking or attempting to take property, focusing on a crime against the person, while the corresponding Oregon statute emphasized theft, the taking of property.[641] The court rejected this argument by concluding that

632. *See id.* at 395.
633. *See id.*
634. *See id.* at 396.
635. *See id.*
636. 8 P.3d 362 (Alaska Ct. App. 2000).
637. *See id.* at 368.
638. *See id.* at 364.
639. *See id.* (citing ALASKA STAT. § 12.55.155 (LEXIS 2000)).
640. *See id.* at 365-66 (citing ALASKA STAT. § 12.55.145(a)(1)(B) (LEXIS 2000)).
641. *See id.* at 367.

the legislative history of Oregon's robbery statutes indicated that the Oregon legislature also intended to emphasize assault.[642] In comparing the crimes, the court noted that an out-of-state conviction will be treated as a prior felony for presumptive sentencing if its elements are more restrictive than the corresponding Alaska statute, and that even if certain conduct would be penalized under an Oregon statute but not an Alaska statute, that does not prevent a conclusion that the elements of the two statutes are similar.[643]

In *State v. Hodari*,[644] the supreme court upheld the trial court's fifty-five-year composite sentence, finding that the court of appeals improperly relied on sentencing benchmarks as inflexible rules rather than as starting points to reach its decision to overturn the trial court's sentence.[645] Hodari was convicted of two counts of first-degree sexual assault, one count of first-degree robbery, and one count of second-degree assault.[646] The trial judge found that Hodari's long record of prior offenses and the heinousness of the crime were aggravating factors that warranted a greater sentence than forty-four years of "presumptive sentencing" established by Alaska Statutes section 12.55.155.[647] The supreme court found that *State v. Wentz*[648] implicitly rejected *Williams v. State*'s[649] rigid sentencing benchmarks relied on by the court of appeals, and emphasized the importance of the individualized nature of sentencing.[650] Finally, the supreme court found that Hodari's case presented a "truly exceptional confluence of factors" showing in totality "an ingrained compulsive criminal pattern" in his behavior that warranted the trial court's sentencing decision.[651]

In *United States v. Scheele*,[652] the Court of Appeals for the Ninth Circuit held that the district court's failure to consider margin of error when it arrived at a quantity of drugs upon which to base a sentence constituted error, but that the district court did not err when it applied an obstruction of justice adjustment to the sentence based on the testimony of an officer, who had heard a tape of

642. *See id*.
643. *See id.* at 366-67.
644. 996 P.2d 1230 (Alaska 2000).
645. *See id.* at 1237.
646. *See id.* at 1232.
647. *See id.* at 1233-34 (citing ALASKA STAT. § 12.55.155 (LEXIS 2000)).
648. 805 P.2d 962 (Alaska 1991).
649. 800 P.2d 955 (Alaska Ct. App. 1990).
650. *See Hodari*, 996 P.2d at 1234.
651. *Id.* at 1237.
652. 231 F.3d 492 (9th Cir. 2000).

the defendant threatening a witness.[653] Scheele was indicted for manufacturing, distributing, and attempting to manufacture methamphetamine.[654] The testimony varied as to the amount of drugs attributable to Scheele.[655] Weighing the various statements made by Scheele as to the amount of drugs he produced, the judge arrived at a sum of 3040.98 kg.[656] Pursuant to the sentencing guidelines, the amount was just 40.98 kg above the threshold for a base offense level of thirty-four.[657] The court of appeals held that, although the district court made every attempt to be fair in its estimation, it "failed to err on the side of caution."[658] Since taking the margin of error into account could have reduced Scheele's base offense level to the next lowest level, the court of appeals held that the district court's failure to do so constituted error.[659] Finally, the court held that the adjustment to the sentence for obstruction of justice was not erroneous because nothing in the record suggested that the testimony of the officer was unreliable, and because the statements made by Scheele were sufficiently threatening to support such a finding.[660]

4. *Miscellaneous*. In *Fuzzard v. State*,[661] the court of appeals held that evidence of prior acts of domestic violence were admissible under Alaska Rules of Evidence 404(b)(1) and (b)(4).[662] James Fuzzard threatened to kill Bobbi Jo Murphy.[663] He was arrested and indicted for third-degree assault.[664] Fuzzard asked for a protective order that would prohibit the State from admitting evidence of previous episodes of domestic violence against Murphy.[665] The court held that the admission of the prior episodes did not "place him at unreasonable risk of conviction" because Fuzzard had other opportunities to impeach Murphy's testimony about these events.[666] Additionally, the admission of the prior acts comported with the

653. *See id.* at 499-500.
654. *See id.* at 495.
655. *See id.*
656. *See id.* at 496-97.
657. *See id.*
658. *Id.* at 498.
659. *See id.* at 499-500.
660. *See id.* at 500.
661. 13 P.3d 1163 (Alaska Ct. App. 2000).
662. *See id*. at 1163.
663. *See id.* at 1164.
664. *See id.*
665. *See id.*
666. *Id.* at 1167.

legislative purpose of the rules.[667] Fuzzard also argued that the evidence rules violated the equal protection clause.[668] The court rejected this argument because Fuzzard failed to show that the rules infringed on a fundamental right.[669]

In *Hosier v. State*,[670] the court of appeals held that the trial court did not err by allowing the State to amend an indictment to conform to the evidence, failing to inform the defendant of a note received from the jury during trial, and allowing the State to play a tape recording of an interview between the defendant and police that contained references to the defendant's prior criminal acts.[671] The defendant Donald Hosier was convicted on several counts of second-degree forgery and one count of second-degree theft for forging another person's name on several checks drawn from an account at Key Bank.[672] Although Hosier's indictment mistakenly identified the bank as "First Bank," the trial judge allowed the State to amend the indictment to name the correct bank.[673] The court of appeals upheld the amendment because the identity of the bank was not a material element of the forgery charge.[674] In addition, the court held that Hosier was not prejudiced by the trial judge's failure to inform him of a jury note requesting the prosecutor to speak more slowly and the defense attorney to speak more loudly.[675] The court concluded that it was clear from the record that the judge conveyed the jury's requests to the attorneys, and that the jury note did not directly involve the merits of the litigation or the jury's duties in deciding the case.[676] The court also held it was not error to admit the tape recording containing Hosier's prior criminal acts because the trial judge adequately cautioned the jury against the potentially objectionable portions of the recording, and Hosier failed to preserve his objection to playing the tape.[677]

In *Plyler v. State*,[678] the court of appeals held that a defendant who files for post-conviction relief challenging a criminal conviction does not have the right to a peremptory challenge of the judge

667. *See id*.
668. *See id.*
669. *See id.* at 1167-68.
670. 1 P.3d 107 (Alaska Ct. App. 2000).
671. *See id.* at 108.
672. *See id.*
673. *See id.*
674. *See id.* at 109.
675. *See id*. at 110.
676. *See id*.
677. *See id*. at 111-12.
678. 10 P.3d 1173 (Alaska Ct. App. 2000).

who presided over the trial.[679] Plyler was found guilty of first-degree murder.[680] He later filed an application for post-conviction relief, claiming he had received ineffective assistance of counsel, and tried to change judges using a peremptory challenge.[681] The court of appeals, relying on other jurisdictions that had considered similar cases, held that Plyler did not have a right to the peremptory challenge, because the change in judge would foster an unnecessary delay.[682] The court held that a new judge would have to become familiar with all the intricacies of the case, and that it would be difficult for a new judge to determine the credibility and demeanor of the witnesses simply by examining the record of the case.[683]

In *Semaken v. State*,[684] the court of appeals affirmed a conviction of a misdemeanor: failing to make an annual report to the Department of Public Safety, pursuant to Alaska Statutes section 12.63.010.[685] Having been convicted in 1990 of sexual assault, Semaken was required to register as a sex offender and annually report his current address and other information.[686] At the time this case arose, the Department of Public Safety's regulation required sex offenders to submit an annual report thirty days prior to their birthday.[687] Semaken was stopped for a traffic violation three days after his birthday and charged with the misdemeanor of failing to report.[688] Semaken argued that Alaska Statutes section 12.63.010 requires the Department of Public Safety to establish an individualized annual reporting schedule rather than impose a general rule.[689] The court of appeals disagreed, and, noting that Semaken had been well aware of the regulation prior to the traffic stop, affirmed his conviction.[690]

In *Thompson v. State*,[691] the court of appeals affirmed the ruling of the superior court, which dismissed Thompson's Rule 33 motion, his appeal for a reduction in sentence, and his motion to ap-

679. *See id.* at 1176.
680. *See id.* at 1173.
681. *See id.* at 1173-74.
682. *See id.* at 1174-75.
683. *See id.* at 1175.
684. 8 P.3d 368 (Alaska Ct. App. 2000).
685. *See id*. at 370 (citing ALASKA STAT. § 12.63.010 (LEXIS 2000)).
686. *See id*. at 369.
687. *See id*.
688. *See id*.
689. *See id*. (citing ALASKA STAT. § 12.63.010 (LEXIS 2000)).
690. *See id*. at 369-70.
691. 13 P.3d 276 (Alaska Ct. App. 2000).

point counsel.[692] Thompson was convicted of first-degree murder for killing his ex-wife.[693] In 1996, he sought post-conviction relief.[694] The court of appeals remanded to the superior court to determine whether Thompson was denied the right to testify.[695] Thompson then filed a motion for a new trial under Alaska Criminal Rule 33.[696] Thompson's motion was not timely, and the court dismissed his motion, along with his motions for reduction of sentence and appointment of new counsel.[697] On appeal, the court concluded that Alaska Statutes section 12.72.020 did not apply to Thompson's motion for a new trial.[698] Further, the court concluded that Thompson did not fall under an exception to the 120-day time limit for filing a motion to reduce the sentence.[699] Finally, the court held that Thompson's motion to appoint counsel was untimely.[700]

In *Ward v. State*,[701] the court of appeals upheld the trial court's decision to select a jury in Fairbanks rather than renewing its unsuccessful efforts to select a jury in Fort Yukon.[702] The defendant Thomas Ward and his father got into a fight, and the defendant's ex-girlfriend tried to stop them.[703] During the struggle, Ward hit his ex-girlfriend in the head with an axe, causing his arrest for assault.[704] Before trial in Fort Yukon, the trial judge made several unsuccessful efforts to empanel a sufficient number of jurors to hear the case.[705] The trial judge decided not to attempt to contact the potential jurors that did not respond to the summons or the radio messages, and instead elected to return the case to Fairbanks for jury selection.[706] After a trial in Fairbanks with a new judge and jury, Ward was convicted of third-degree assault.[707] The court of appeals affirmed Ward's conviction, finding that the trial judge undertook reasonable efforts to obtain a jury in Fort Yukon.[708] The

692. *See id*. at 278.
693. *See id*. at 276.
694. *See id*. at 277.
695. *See id*. at 277-78.
696. *See id*. at 278.
697. *See id.*
698. *See id*. (citing ALASKA STAT. § 12.72.020 (LEXIS 2000)).
699. *See id*.
700. *See id*.
701. 997 P.2d 528 (Alaska Ct. App. 2000).
702. *See id.*
703. *See id*. at 528-29.
704. *See id*.
705. *See id*. at 529.
706. *See id*.
707. *See id*.
708. *See id*. at 531-32.

court found that although it might have been possible to locate additional prospective jurors to complete jury selection, the process undertaken revealed widespread familial and personal relationships between the prospective jurors and the participants in the alleged assault, and that the jury pool had extensive knowledge of the incident itself.[709] The court upheld the trial court's ruling to reject Ward's proposed jury instructions on transferred intent and self-defense because they were superfluous.[710]

VII. EMPLOYMENT LAW

A. Discrimination

In *Era Aviation, Inc. v. Lindfors,*[711] the supreme court affirmed a jury verdict against Era Aviation ("Era") for discrimination and retaliation in a case where a female pilot alleged sex discrimination and retaliation after she filed a human rights violation complaint.[712] The court held that although the jury instruction was erroneously worded for this type of discrimination case, the jury instruction was equally favorable to Era as the one Era had requested.[713] Additionally, because the jury instruction did not prejudice Era, it did not constitute reversible error.[714] The court held that separate submission of discrimination, retaliation, and constructive discharge claims was appropriate, and the fact that the jury rejected the constructive discharge claim did not impact the other claims.[715] The court also held that testimony offered by another employee about the conduct of an officer was appropriately admitted because there was "sufficient circumstantial evidence for the jury to infer that Birmingham was one of the decisionmakers in Era's retaliation against Lindfors."[716] The court further found that the punitive damages award of $750,000 was excessive and remanded the case for remittitur to $500,000.[717] The court held it was appropriate for the jury to determine whether Lindfors qualified as a professional under the Alaska Wage and Hour Act for purposes of determining whether overtime pay was due.[718] The court concluded that a risk

709. *See id*. at 531.
710. *See id*. at 532.
711. 17 P.3d 40 (Alaska 2000).
712. *See id.* at 52.
713. *See id.* at 46.
714. *See id.*
715. *See id.* at 47.
716. *Id.* at 48.
717. *See id.* at 49.
718. *See id.* at 50.

enhancement or lodestar multiplier was not required, because Lindfors had neither shown she was a public interest plaintiff nor that her attorneys would not be compensated beyond the fees awarded by the court.[719]

B. Labor Law

In *Alaska Contracting & Consulting, Inc. v. Department of Labor*,[720] the supreme court held that the Department of Labor (the "Department") had authority to determine that a contracting company was a "liable employer" under the Alaska Employment Security Act, notwithstanding a prior determination, and that the Department's liability determination was supported by substantial evidence.[721] The Alaska Employment Security Act requires employers to pay contributions to the Department for an unemployment compensation fund each year that the employers are subject to the Act.[722] Alaska Contracting engages in "lease-back" operations whereby "lease-drivers" operate the company's equipment to perform certain duties in construction projects.[723] In 1996, Department Hearing Officer Jenkins ruled that Alaska Contracting was liable under the Act for contributions after April 1, 1993, despite a 1990 notice of "non-liability."[724] The supreme court held that the 1996 ruling was not barred by collateral estoppel because the issue was not actually litigated, which is a prerequisite for preclusion.[725] The supreme court also held that Alaska Statutes section 23.20.315(a) authorizes the Department to "determine coverage for a new period, even if its new coverage determination differs from a previous coverage determination."[726] Further, no new evidence was required under Alaska Statutes section 23.20.315(b) to redetermine a Department ruling, because the "1996 liability ruling decided Alaska Contracting's coverage status and liability for new tax periods not covered by the 1990 non-liability determination."[727] Finally, the supreme court held that the Department did not err in finding Alaska Contracting liable as a employer, because the lease-drivers provided a "service" to Alaska Contracting, and because Alaska Contracting was not exempt under the three-part "ABC

719. *See id.* at 50-51.
720. 8 P.3d 340 (Alaska 2000).
721. *See id.* at 351.
722. *See id.* at 342.
723. *See id.* at 343.
724. *See id.* at 344.
725. *See id.* at 345.
726. *Id.* at 346 (citing ALASKA STAT. § 23.20.315(a) (LEXIS 2000)).
727. *Id.* at 347 (citing ALASKA STAT. § 23.20.315(b) (LEXIS 2000)).

test."[728] The court affirmed the Department's ruling that part B of the test was not met because the lease-drivers dirt hauling was within the usual course of business for Alaska Contracting.[729] The court also affirmed that part C of the test was not met, because each lease-driver was not "customarily engaged in an independently established trade," since Alaska Contracting provided many of the lease-drivers with insurance on the trucks.[730]

In *Cassel v. Department of Administration*,[731] the supreme court affirmed a superior court ruling that the termination of a probationary employee was proper, because the termination conformed to the objective standards required by the collective bargaining agreement.[732] The court further affirmed the denial of back pay, finding that the employee was not deprived of his due process rights in the post-termination procedures.[733] James Cassel was dismissed from his position as the Department of Public Safety's Identification Bureau Chief after receiving an unacceptable performance rating from his supervisor during his twelve-month probationary period.[734] Applying the standard set forth in *University of Alaska v. Tovsen*,[735] the court concluded that the collective bargaining agreement permitted termination "only when a probationary employee has failed to satisfy objective standards of performance."[736] The court then held that the Hearing Officer properly concluded that unsatisfactory performance of duties constituted just cause for termination by applying an objective standard, despite relying on the evaluation of Cassel's supervisor.[737] Finally, the court held that the post-termination procedures did not violate Cassel's due process rights because they were fair, reasonable, efficacious, and in accordance with the collective bargaining agreement.[738] Thus, the court found that he was properly denied back pay.[739]

In *Cavin v. Department of Public Safety,*[740] the supreme court reversed the superior court holding that Cavin was not a "seaman"

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728. *See id.* at 351.
729. *See id.* at 350.
730. *Id.*
731. 14 P.3d 278 (Alaska 2000).
732. *See id.* at 285.
733. *See id.* at 287.
734. *See id.* at 281.
735. 835 P.2d 445 (Alaska 1992).
736. *Cassel*, 14 P.3d at 283-84.
737. *See id.* at 284-85.
738. *See id.* at 287.
739. *See id.*
740. 3 P.3d 323 (Alaska 2000).

under the Jones Act and remanded the case for further proceedings.[741] Cavin, an employee of the Alaska Department of Public Safety, Fish and Wildlife Protection Division, brought suit under the Jones Act to recover federal maritime remedies for injuries he suffered while working on state vessels.[742] Cavin alleged "claims of Jones Act negligence, general maritime negligence, unseaworthiness, and maintenance and cure."[743] Because Cavin did not spend at least thirty percent of his time working solely on boat duty, the superior court found that he did not meet the temporal requirement for time spent working on vessels, and thus did not qualify as a "seaman" under the Jones Act.[744] The supreme court remanded because the superior court failed to consider Cavin's employment between 1983-87.[745] The supreme court also remanded for consideration of whether Cavin qualified as a "seasonal seaman" under the Jones Act.[746] Finally, the supreme court noted that, if on remand the superior court could not find recovery under the Jones Act, Cavin's unseaworthiness claim should still proceed to trial, unless barred by the statue of limitations.[747]

In *Sever v. NLRB* and *Alaska Pulp Corporation v. NLRB*,[748] the Court of Appeals for the Ninth Circuit held that the Alaska Pulp Corporation had the right to reinstate strikers in any nondiscriminatory order, including merit.[749] Further, the court held that Alaska Pulp must be given an opportunity to prove that the employees who voluntarily resigned for pension benefits had severed the employment relationship unequivocally and were not due back pay or reinstatement.[750] Following an economic strike, the National Labor Relations Board ("NLRB") found that Alaska Pulp had committed various unfair labor practices because of the methods it employed when rehiring the striking workers.[751] Additionally, several of the strikers were not offered reinstatement because they accepted an offer by Alaska Pulp of a lump sum payment of pension benefits in exchange for voluntary resignation.[752] In the first mat-

741. *See id.* at 324.
742. *See id.* at 324-25.
743. *Id.* at 325.
744. *See id.* at 325-26.
745. *See id.* at 328.
746. *See id.* at 329-30.
747. *See id.* at 332.
748. 231 F.3d 1156 (9th Cir. 2000).
749. *See id.* at 1167.
750. *See id.* at 1169-70.
751. *See id.* at 1159-64.
752. *See id.* at 1161.

ter, the court of appeals found that the NLRB had erred when it forced Alaska Pulp to use seniority in determining the amount of back pay it owed the workers.[753] The court held that, under the controlling *Lone Star* case,[754] an employer could recall workers using any nondiscriminatory method it wanted, thus permitting its use of merit.[755] The court also found that accepting pension benefits did not express an employee's intention to quit.[756] Instead, the court held that, on remand, the NLRB needed to consider whether Alaska Pulp met its burden under the *Augusta Bakery* case[757] test "to prove that each employee who resigned expressed an unequivocal intent to sever his or her relationship with the company."[758]

In *Wescott v. State,*[759] the supreme court held that the Department of Labor (the "Department") failed to consider adequately the risk an individual's work posed to his health as a factor in determining whether he could receive "waiting week" unemployment benefits.[760] Wescott was a drilling roustabout at Alaska Petroleum Contractors when he had surgery on his club foot.[761] Although Wescott's physician eventually gave him a full medical release, he recommended Wescott get a job that did not require prolonged standing and walking.[762] Wescott later quit his job and applied for unemployment benefits under the Alaska Employment Security Act.[763] The Department's Division of Employment Security informed Wescott that he would not receive benefits for his first six weeks of unemployment (waiting week benefits), because he voluntarily left suitable work without good cause.[764] The supreme court held that the Department failed to consider the degree of risk to Wescott's health and safety that his work presented.[765] The court held that a job which a worker is physically capable of performing may be unsuitable if it is detrimental to the worker's health.[766]

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753. *See id.* at 1165.
754. 279 N.L.R.B. 550 (1986).
755. *See Sever*, 231 F.3d. at. 1167.
756. *See id.* at 1168.
757. 298 N.L.R.B. 58 (1990), *enforced sub nom.* N.L.R.B. v. Augusta Bakery, Corp., 957 F.2d 1467 (7th Cir. 1992).
758. *Sever*, 231 F.3d at 1170.
759. 996 P.2d 723 (Alaska 2000).
760. *See id.* at 723-24.
761. *See id.* at 724.
762. *See id.*
763. *See id.* at 725.
764. *See id.*
765. *See id.* at 727.
766. *See id.* at 727-28.

C. Workers' Compensation

In *Berger v. Wein Air Alaska,*[767] the supreme court reversed the Workers' Compensation Board's decision not to allow amounts payable by an employer to offset an employer's portion of a third-party tort award.[768] The supreme court remanded for reconsideration the reduction amount of the employer's credit.[769] Berger, a flight attendant for Wein Air Alaska, suffered injuries from a plane crash and settled a workers' compensation claim against Wein Air, leaving Wein Air liable for any future medical expenses.[770] In a previous suit against the State of Alaska, Wein Air claimed a credit from the recovery.[771] When Berger eventually sought further benefits from Wein Air for additional medical expenses, Wein Air claimed it still had credit from the tort suit that had not been offset by medical expenses paid by collateral sources.[772] The supreme court held that, although collateral sources paid the expenses, Wein Air's credit was still offset by the amount of the expenses, because Alaska Statutes section 23.30.015(g) allows a reduction of credit by all amounts payable by the employer.[773] If the collateral sources had not paid the expenses, Wein Air would have been liable for payment under Alaska Statutes section 23.30.015(g).[774]

In *Bloom v. State Farm Fire and Casualty Co.,*[775] the supreme court reversed the Alaska Workers' Compensation Board's decision to deny Bloom's request to change attending physicians without the permission of his employer.[776] Bloom injured his back while working for his employer, Tekton, Inc.[777] Bloom had two surgeries but continued experiencing back pain.[778] Bloom visited another doctor, but was dissatisfied with the assessment.[779] He then requested permission from Tekton's insurance adjuster to seek a second opinion, but his request was denied.[780] Bloom tried to schedule another appointment with the original physician, but the doctor

767. 995 P.2d 240 (Alaska 2000).
768. *See id.* at 241.
769. *See id.*
770. *See id.*
771. *See id.*
772. *See id.*
773. *See id.* at 242.
774. *See id.*
775. 5 P.3d 235 (Alaska 2000).
776. *See id.* at 236.
777. *See id.*
778. *See id.*
779. *See id.* at 237.
780. *See id.*

was unavailable to see Bloom.[781] Tekton later permitted Bloom to seek a second opinion, but refused to allow him to see the doctor of his choice.[782] The court held that, since the physician referred by Tekton was either unavailable or unwilling to treat him, Bloom had a right to name a new attending physician pursuant to Alaska Statutes section 23.30.095(a) without obtaining his employer's permission.[783]

In *Carlson v. Doyon Universal-Ogden Services,*[784] the supreme court held that the Alaska Workers' Compensation Board did not err in finding that an employee was not entitled to Permanent Total Disability ("PTD") benefits, because the employer adequately showed that regular and continuous employment was available to the employee.[785] Carlson injured her back while working as a housekeeper for the appellees.[786] Carlson became ineligible for the Temporary Total Disability benefits she had been receiving, because her condition eventually stabilized.[787] Therefore, she applied for PTD benefits.[788] The Alaska Workers' Compensation Act presumes that the employee's claim is compensable, so the employer must rebut the presumption for PTD with substantial evidence to the contrary.[789] Although Carlson presented testimony supporting her claim that she could not work,[790] the court held that she did not prove her claim by a preponderance of the evidence, and that the employer presented substantial evidence that Carlson did not qualify.[791] Therefore, the court affirmed the Board's decision to deny PTD benefits.[792]

In *DeYonge v. NANA/Marriott*,[793] the supreme court rejected a distinction between aggravation of symptoms and aggravation of the underlying impairment to reverse the denial of benefits to a worker with a pre-existing arthritic condition exacerbated by her job.[794] Judy DeYonge's job as a housekeeper for NANA/Marriott

781. *See id.*
782. *See id.*
783. *See id.* at 239.
784. 995 P.2d 224 (Alaska 2000).
785. *See id.* at 226.
786. *See id.*
787. *See id.*
788. *See id.*
789. *See id.* at 227.
790. *See id.* at 228.
791. *See id.* at 228-229.
792. *See id.* at 231.
793. 1 P.3d 90 (Alaska 2000).
794. *See id*. at 92.

required that she kneel, bend, and stoop when cleaning.[795] Pain in DeYonge's knees became so intense from this work that she left her job.[796] The Workers' Compensation Board denied her claim on the premise that job must worsen the underlying condition, not just the symptoms, to be compensable.[797] The supreme court held that under Alaska law, once DeYonge showed "some evidence" that the injury was related to her job, a presumption of compensability applies.[798] In order for NANA/Marriott to rebut this presumption, it would have to provide substantial evidence of an alternative explanation that excluded work factors as the cause of the impairment or eliminate any reasonable possibility that the job caused the disability.[799] The court held that NANA/Marriott did not provide sufficient evidence to rebut the presumption of compensability, and the Board's decision was reversed and remanded.[800]

In *Doyon Universal Services v. Allen*,[801] the supreme court affirmed the Alaska Workers' Compensation Board's finding that an employee's injury arose in the scope of his employment and his work-related injury was a substantial factor in causing his disability.[802] Lawrence Allen was employed by Doyon at a remote site on the Trans-Alaska Pipeline.[803] On August 21, 1997, Allen ate a dinner that included Brussels sprouts at the company cafeteria, which was the only eating establishment available at his workplace.[804] Later that evening, Allen suffered acute abdominal pain, accompanied by vomiting and severe diarrhea.[805] On August 23, 1997, Allen was flown to the Alaska Native Medical Center, where it was determined that he had a bowel obstruction caused by two bezoars containing traces of undigested Brussels sprouts.[806] Allen filed an injury report with Doyon on September 5, 1997, and Doyon responded by filing notice that it would not pay Allen benefits, since his injuries did not arise in the course and scope of his employment.[807] Allen then filed an Application of Adjustment of Claim

795. *See id*.
796. *See id*.
797. *See id*. at 93.
798. *See id*. at 95.
799. *See id*. at 96.
800. *See id*. at 98.
801. 999 P.2d 764 (Alaska 2000).
802. *See id*. at 771.
803. *See id*. at 766.
804. *See id*.
805. *See id*.
806. *See id*. at 767.
807. *See id*.

with the Department of Labor.[808] The Alaska Workers' Compensation Board held a hearing on May 12, 1998, and the Board determined that Allen's intestinal obstruction was a compensable injury.[809] The supreme court agreed with the Board's determination that the Brussels sprouts were a substantial factor in causing Allen's injury because Allen's eating options were strictly limited to his employer's facilities at a remote site.[810] Allen was entitled to compensation, because the disability would not have happened but for an injury sustained in the course and scope of employment, and because reasonable persons would regard the injury as the cause of disability.[811]

In *Steffey v. Municipality of Anchorage,*[812] the supreme court held that, where a defendant employer presents substantial evidence that work was not a substantial factor in causing the aggravation of an injury, and plaintiff fails to prove his claim by a preponderance of the evidence, the employer does not have to pay workers' compensation benefits under Alaska Statutes section 23.30.095.[813] Instead, the supreme court applied Alaska Administrative Code title 8, section 45.082(f) to limit the payment requirement.[814] In 1992, Robert Steffey suffered two work-related injuries, and the Municipality of Anchorage paid for his chiropractic care until April 1995.[815] Steffey claimed that he should continue receiving care for eight work-related injuries that aggravated the original injury.[816] The Alaska Workers' Compensation Board (the "Board") rejected his claim because it found that Steffey had not sustained a compensable injury on any of the eight occasions.[817] On appeal, the superior court and the supreme court affirmed the Board's decision, holding that the Board had overcome a presumption that the injury was compensable by presenting evidence that "either 1) provides an alternative explanation which, if accepted, would exclude work related factors as a substantial cause of the [aggravation or acceleration]; or 2) directly eliminates any reason-

808. *See id*.
809. *See id*.
810. *See id*. at 770.
811. *See id*.
812. 1 P.3d 685 (Alaska 2000).
813. *See id.* at 691-92.
814. *See id.* at 692.
815. *See id.* at 687.
816. *See id.* at 688.
817. *See id.* at 689.

able possibility that employment was a factor in causing the [aggravation or acceleration]."[818]

D. Miscellaneous

In *Egemo v. Egemo Construction Co.*,[819] the supreme court held that the two-year statute of limitations to file a claim for time-loss benefits does not begin to run until the injured employee both experiences actual disablement from the injury and knows of the disability's full effect on the employee's earning capacity.[820] Because Egemo's doctor told him he would someday need surgery to correct a leg deformity sustained in a work-related accident, the insurer claimed that Egemo knew of his impending disability more than ten years before filing his claim.[821] The supreme court rejected the insurer's arguments, holding that disablement occurred only when Egemo sustained wage losses because of his inability to work following corrective surgery.[822] The court also decided that previous disablement from the same injury did not disqualify Egemo's claim.[823]

VIII. FAMILY LAW

A. Child Support

In *Atcherian v. Child Support Enforcement Division*,[824] the supreme court affirmed the superior court's order that entitled Atcherian to a refund of child support collected after his motion to vacate a paternity judgment.[825] Pursuant to a default judgment of paternity filed against Atcherian, the Child Support Enforcement Division ("CSED") ordered Atcherian to pay child support.[826] However, a paternity test disproved Atcherian's paternity and the superior court vacated the paternity judgment.[827] The court did not grant Atcherian full restitution, but required CSED to reimburse him for any child support collected after the date he moved to vacate his paternity judgment.[828] On appeal, the supreme court held

818. *Id.* at 690-91.
819. 998 P.2d 434 (Alaska 2000).
820. *See id.* at 440.
821. *See id.* at 439.
822. *See id.*
823. *See id.* at 439-40.
824. 14 P.3d 970 (Alaska 2000).
825. *See id*. at 977.
826. *See id*. at 972.
827. *See id*. at 973.
828. *See id*.

that, without any impropriety on the part of CSED in establishing or collecting child support, a father whose paternity has been disproved cannot require the CSED to repay funds that it has already disbursed for the benefit of the child.[829] Because there was no misconduct on the part of CSED, the order of the superior court was affirmed.[830]

In *Bennett v. Bennett*,[831] the supreme court held that, under *Turinsky v. Long*,[832] child support awards "should follow custody orders."[833] When Rita and Albert Bennett divorced, Rita was granted primary custody.[834] However, a motion to modify custody was made when one of the children went to live with Albert.[835] This arrangement did not work, and the child then lived with Rita while Albert had de jure custody.[836] Rita then moved to modify the custody order again, and requested custody and child support for the time the child lived with her while Albert had legal custody.[837] The court affirmed the decision of the superior court to deny Rita this child support reimbursement because *Turinsky* requires child support to follow court-ordered custody rather than de facto custody.[838] However, the court found that the trial court abused its discretion in retroactively awarding child support to Albert while the child lived with Rita.[839] Such an award was violative of the purpose of child support payments, which is to benefit the child.[840]

In *Child Support Enforcement Division v. Button*,[841] the supreme court affirmed the superior court's decision that the Child Support Enforcement Division ("CSED") could not collect child support payments that were in arrears because Button adequately rebutted the presumption of paternity at the first formal opportunity.[842] In 1986, Button acknowledged his paternity of Vickie Hansen and paid child support.[843] However, he subsequently discovered that he was not Vickie's biological father and discontinued the

829. *See id*. at 975-76.
830. *See id*. at 976, 977.
831. 6 P.3d 724 (Alaska 2000).
832. 910 P.2d 590 (Alaska 1996).
833. *Bennett*, 6 P.3d at 725.
834. *See id.* at 725.
835. *See id.*
836. *See id.*
837. *See id.* at 725-26.
838. *See id.* at 727.
839. *See id.* at 728.
840. *See id.* at 727-28.
841. 7 P.3d 74 (Alaska 2000).
842. *See id.* at 75.
843. *See id.*

support payments.[844] In 1995, the CSED notified Button that he was in arrears for $40,684 of public assistance that had been paid on Vickie's behalf.[845] The superior court disestablished Button's paternity after tests confirmed he was not the biological father, which relieved him of any ongoing support obligations and the amount in arrears.[846] The court affirmed the superior court's holding that the CSED had never issued a valid support order because Button requested a formal hearing to contest the order within the statutorily allotted time period.[847] Because a valid support order was not issued before Button disestablished paternity, he did not owe the amount in arrears.[848]

In *Child Support Enforcement Division v. Leitch*,[849] the supreme court held that the Child Support Enforcement Division ("CSED") had the authority to request modification of a child support order against the obligee of the order when a change in physical custody had occurred, but the order had not been changed.[850] McKinnon and Leitch are the parents of a minor child.[851] After the court granted physical custody to Leitch and ordered McKinnon to pay child support, McKinnon took physical custody of the minor at various times, receiving public assistance for the child during those periods.[852] The CSED moved to modify the child support order to obtain payments from Leitch for the public assistance received by McKinnon when the child was in his custody.[853] Alaska Statutes section 25.27.045 allows CSED to seek modification of a support order "upon application of an obligee or at the agency's own discretion if the obligor is liable to the state under Alaska Statutes section 25.27.120(a) or (b)."[854] The court defined the term "obligor" as a person owing a duty of support that is imposed or imposable by law or by court order.[855] Although Leitch was not the obligor under the child support order, she was an obli-

844. *See id.*
845. *See id.*
846. *See id.* at 75-76.
847. *See id.* at 76-77.
848. *See id.* at 77.
849. 999 P.2d 782 (Alaska 2000).
850. *See id.* at 784.
851. *See id.* at 782.
852. *See id.*
853. *See id.*
854. *Id.* at 783 (quoting ALASKA STAT. § 25.27.045 (LEXIS 2000)). Alaska Statutes section 25.27.120 allows CSED to seek reimbursement for public assistance received by a parent who is required to pay child support. *See* ALASKA STAT. § 25.27.045 (LEXIS 2000).
855. *See Leitch*, 999 P.2d at 783.

gor under Alaska Statutes section 25.27.045 because liability for support could potentially be imposed on her.[856] The court held that given the broad power and authority granted to CSED, the legislature did not intend to prevent CSED from seeking modification of child support orders where physical custody of the child has changed but the actual order has not.[857] Therefore, CSED had the authority to initiate a modification proceeding against Leitch.[858]

In *Child Support Enforcement Division v. McCormick*,[859] the supreme court held that a custodial parent's motion to extend the duration of child support beyond the child's eighteenth birthday does not require a showing of changed circumstances under Alaska Statutes section 25.24.170(a) and its 1992 amendment.[860] Larry McCormick and his ex-wife Colleen divorced in 1992, after a statutory amendment had been passed allowing a court to extend support to eighteen-year-old children upon a motion by either party.[861] Although the original child support order did not provide for post-majority support, the Child Support Enforcement Division moved in 1999 to increase Larry's support payments and also to extend the duration of the payments past the children's eighteenth birthdays.[862] The court held that if the original order did not expressly exclude such support and the child meets the statute's requirements of being unmarried, pursuing a high school diploma, and living dependently with a parent or guardian, then post-majority support of an eighteen-year-old child will be extended in all but the most exceptional cases.[863]

In *Child Support Enforcement Division v. Pealatere*,[864] the supreme court held that the Child Support Enforcement Division ("CSED") was not entitled to reimbursement of public assistance under Alaska Statutes section 25.27.120(a) because the child support offset agreement approved by the superior court served the child's best interests.[865] In the Pealatere's divorce decree, custody of their minor son was granted to Ralph Pealatere, and Kathy Pealatere's child support obligations were waived in exchange for her relinquishment of her marital property claims in her husband's

856. *See id.*
857. *See id.* at 784.
858. *See id.*
859. 3 P.3d 930 (Alaska 2000).
860. *See id.* at 930-31.
861. *See id.* at 930 (citing ALASKA STAT. § 25.24.170 (LEXIS 2000)).
862. *See id.*
863. *See id.* at 931.
864. 996 P.2d 84 (Alaska 2000).
865. *See id.* at 85-86.

tools.[866] After the Pealatere's son received aid from the state, CSED sought reimbursement from Kathy Pealatere for the public assistance.[867] Although *CSED v. Green* held that CSED had an independent statutory right to recoup such costs,[868] the supreme court found an exception to this rule when CSED's right to reimbursement should yield to equitable considerations.[869] The court affirmed the superior court's decision to allow the defendant Kathy Pealatere to offset her child support obligation by relinquishing her interest in a portion of the marital property because the offset preserved the custodial parent's means of support and was therefore in the child's best interests.[870] However, the court reversed the valuation of the offset because the lower court did not account for Mr. Pealatere's share of the marital property.[871]

In *Child Support Recovery Services, Inc. v. Inn at the Waterfront*,[872] the supreme court affirmed summary judgment for the Inn at the Waterfront, holding that the Inn did not owe the Child Support Recovery Services ("CSRS") certain wages withheld from one of its employees.[873] The Inn at the Waterfront employed Cullinane, a non-custodial parent who was delinquent on child support payments.[874] The Alaska Child Support Enforcement Division made efforts to collect the payments, including three Orders to Withhold [Income] and Deliver Property ("WID") in accordance with Alaska Statutes section 25.27.260.[875] However, Cullinane later fully paid the child support in full satisfaction of his outstanding obligations.[876] The court found that the Inn's liability for failure to comply with the WIDs was "joint and several with Cullinane's [liability]."[877] Therefore, the Inn did not owe CSRS any money since its obligation ended with Cullinane's.[878]

In *Schuyler v. Briner*,[879] the supreme court held that an increase in a father's child support payments without a hearing was improper where the father alleged that his rise in income was solely

866. *See id*. at 85.
867. *See id*.
868. 983 P.2d 1249 (Alaska 1999).
869. *See Pealatere*, 996 P.2d at 87.
870. *See id*.
871. *See id.*
872. 7 P.3d 63 (Alaska 2000).
873. *See id.* at 64.
874. *See id*.
875. *See id.* (citing ALASKA STAT. § 25.27.260 (LEXIS 2000).
876. *See id.* at 65.
877. *Id.* at 73.
878. *See id.*
879. 13 P.3d 738 (Alaska 2000).

attributable to overtime worked in an effort to provide for his new family.[880] Pursuant to a divorce agreement, Bill Schuyler had been paying child support to his former wife Florence Briner for their daughter, Valerie.[881] In September 1999, the Child Support Enforcement Division ("CSED") moved for an increase in Bill's child support payments based on its review of his income information.[882] The supreme court held that the superior court should have considered Bill's efforts to provide for his new family as a defense to the upward modification, because the commentary to Alaska Civil Rule 90.3 provides that "the interests of the subsequent family may be taken into account as a defense to a modification action where an obligor proves he or she has . . . increased his or her income specifically to better provide for a subsequent family."[883]

The court next held that the lower court did not err in denying a hearing for modified custody where the father failed to demonstrate a substantial change in circumstances affecting the child's welfare.[884] The supreme court reasoned that Bill failed to establish that a change in custody would be in Valerie's best interests.[885] The court reasoned that Valerie's new living arrangement with her brother did not necessitate a custody modification in order to serve her best interests, because both Florence and Bill had agreed that Valerie should live with her brother.[886]

B. Child Custody

In *A.B. v. Department of Health and Social Services*,[887] the supreme court remanded a parental rights case for determinations regarding whether parental rights were terminated in accordance with the relevant statute.[888] Under Alaska Statutes section 47.10.088(a), parental rights may be terminated "for purposes of freeing a child for adoption or other permanent placement."[889] The court must find the child to be "in need of aid" under Alaska Statutes section 47.10.011 and that the parent "has not remedied the conduct or conditions that place the child at risk."[890] The court

880. *See id.* at 745.
881. *See id.* at 740.
882. *See id.*
883. *Id.* at 743 (citing Alaska R. Civ. P. 90.3, commentary VI.B.2).
884. *See id.* at 745.
885. *See id.* at 742.
886. *See id.*
887. 7 P.3d 946 (Alaska 2000).
888. *See id*. at 953-54.
889. *Id.* at 950.
890. *Id.*

must also consider the best interests of the child and must find that the Division of Family and Youth Services ("DFYS") "has made reasonable efforts to support the family and foster the safe return of the child to the family home."[891] The court found that because DFYS was attempting to reunite the child with her biological father at the time of the proceedings, it was not clear that the mother's parental rights were terminated for purposes of adoption or permanent placement.[892] In addition, the court found that if efforts to reunite the child with her father were successful, terminating the mother's parental rights may not be in the child's best interests.[893]

In *A.H. v. Department of Health and Social Services*,[894] the supreme court affirmed the termination of A.H.'s parental rights.[895] The superior court did not err in finding that A.H.'s children were Children In Need of Aid ("CINA") "due to neglect, domestic violence, and mental illness," any one of which would be sufficient on its own to render them CINA.[896] The record also supported the superior court's determination that A.H. had not corrected the conditions that put his children at risk.[897] Further, the court did not err in finding that the state made active, reasonable efforts to promote the children's safe return to their parents.[898] As required by the Indian Child Welfare Act, the state also proved likely "serious emotional and physical damage" would result from continued custody by A.H.[899]

In *Allen v. Child Support Enforcement Division*,[900] the supreme court held that the superior court erred in dismissing Allen's appeal of the Child Support Enforcement Division's ("CSED") decision not to modify his child support order as untimely.[901] Allen petitioned CSED to seek a court order reducing his child support obligations and also requested review of a CSED decision regarding his unpaid child support.[902] After CSED denied review of both of his claims, he appealed to the superior court, which dismissed his

891. *Id.*
892. *See id.* at 954.
893. *See id.* at 954-55.
894. 10 P.3d 1156 (Alaska 2000).
895. *See id.* at 1158.
896. *Id.* at 1161.
897. *See id.* at 1163.
898. *See id.* at 1165.
899. *Id.*
900. 15 P.3d 743 (Alaska 2000).
901. *See id*. at 745.
902. *See id*.

appeal as untimely.[903] However, because CSED did not notify Allen that its decisions were final, the thirty-day appeal period did not begin to run, and therefore, the court held that Allen's appeals were not untimely.[904] As a result, the court reversed and remanded the dismissal of Allen's appeal.[905] Because another court was considering Allen's appeal of the CSED decision regarding his unpaid child support, the court held that dismissal of that appeal as untimely was harmless error.[906]

In *D.M. v. Division of Family and Youth Services*,[907] the supreme court held that Children In Need of Aid ("CINA") rules governing adjudication and termination processes did not preclude the State from using the clear and convincing standard of evidence at an adjudication hearing.[908] CINA rules required different standards of proof for adjudication and termination stages, with the termination stage requiring the clear and convincing standard, as opposed to the usual preponderance of the evidence standard used for the adjudication stage.[909] The State filed a petition to adjudicate D.M.'s children as CINA, and once a hearing was held on the petition, the State asked that the clear and convincing standard be used in the adjudication proceeding.[910] The State had not given notice to D.M. that it sought to use the stricter evidentiary standard.[911] After a finding that the children were CINA, the State sought to terminate D.M.'s parental rights for four of her five children.[912] In terminating those rights, the superior court relied on the clear and convincing standard findings of the adjudication proceeding.[913] The supreme court affirmed this finding and noted that D.M. was not foreclosed from litigating issues relevant to the termination of her rights at the termination proceeding.[914]

In *In re Dissolution of the Marriage of Alaback,*[915] the supreme court affirmed the superior court's denial of a motion to unseal records regarding a child custody proceeding where the movant had not shown that her interest in disclosure outweighed the potential

903. *See id*. at 745-46.
904. *See id*. at 748.
905. *See id*. at 749.
906. *See id*. at 748-49.
907. 995 P.2d 205 (Alaska 2000).
908. *See id*. at 209.
909. *See id*. at 208.
910. *See id*. at 207.
911. *See id*.
912. *See id*. at 207-08.
913. *See id*. at 207.
914. *See id*. at 209.
915. 997 P.2d 1181 (Alaska 2000).

harm to the child.[916] The dispute giving rise to the motion centered on a tape made by a guardian ad litem ("GAL") of a session with a child who was the subject of a custody proceeding.[917] The GAL had turned the tape over to the opposing attorney after the attorney stipulated that she would not reveal its contents to her client, the child's mother.[918] When the attorney violated this stipulation, the superior court ordered the contents of the tape sealed.[919] Four years later, the attorney sought to unseal the material for use in other cases involving the GAL, but the superior court denied her motion because it could not determine the potential significance of the records outside the context of the proposed litigation and the attorney had not demonstrated that unsealing the files would have no adverse impact on the child.[920] The supreme court held that, because the attorney's motion did not challenge the original order, the superior court acted within its discretion in denying the motion.[921]

In *Jenkins v. Handel,*[922] the supreme court affirmed the superior court's denial of Jenkins's motion to modify a custody agreement, finding that the superior court had adequately weighed factors relevant to the best interests of the children.[923] Jenkins argued that her improved living conditions, the children's desire to live with her, and Handel's failure to comply with visitation agreements all supported her claim to modify custody.[924] Alaska Statutes section 25.20.110(a) requires a court to consider the best interests of a child and requires that the non-custodial parent establish a change in circumstances.[925] In considering the best interests of the children, the superior court found that Handel had shown "mature parental judgment" in his monitoring of the children and that this judgment outweighed the children's desire to live with Jenkins.[926] Because the supreme court agreed that the children's preferences were not "mature and well reasoned" and that the children needed a highly monitored environment, it upheld the superior court's ruling.[927]

916. *See id.* at 1186.
917. *See id.* at 1182.
918. *See id.* at 1183.
919. *See id.* at 1183-84.
920. *See id.* at 1184, 1186.
921. *See id.* at 1186.
922. 10 P.3d 586 (Alaska 2000).
923. *See id.* at 588.
924. *See id.* at 589.
925. *See id.*
926. *Id.* at 590.
927. *Id.* at 590-91.

Additionally, the supreme court found that the superior court had given adequate consideration to Jenkins' changed circumstances and that the superior court was not in error when it failed to consider Handel's failure to comply with visitation agreements.[928]

In *Lauth v. Alaska Department of Health and Social Services,*[929] the supreme court upheld the superior court's denial of Lauth's claim for welfare benefits based on its interpretation of "physical custody."[930] The Alaska Temporary Assistance Program provides welfare to the families of needy children when one parent or both parents apply.[931] To qualify for the benefits, a parent must establish "physical custody of one or more . . . dependent children."[932] Lauth applied for benefits under this program, claiming that she had physical custody of her children even though she shared custody with John Hasty.[933] The Temporary Assistance Agency applied Alaska Administrative Code title 7, section 45.225(b) and denied her claim because she actually had custody of the children for fewer hours during each month than Hasty.[934] Lauth then appealed to the director of the agency, claiming that the agency should have applied Alaska Administrative Code title 7, section 45.225(d) to determine physical custody by weighing a number of different factors instead of simply adding up the hours.[935] The director denied Lauth's appeal, claiming that the factor test only applied when both parents claimed benefits and the hourly count applied when one parent claimed benefits.[936] The superior court upheld this denial, finding that the distinction made by the agency between the two ways of determining physical custody was a reasonable distinction consistent with the statute's purpose.[937] Further, the distinction posed no equal protection problems because "children with one economically secure parent who is providing for their care at least fifty percent of the time are not similarly situated with children having both parents economically eligible for benefits."[938]

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928. *See id.* at 591-92.
929. 12 P.3d 181 (Alaska 2000).
930. *Id.* at 182.
931. *See id.*
932. *Id.*
933. *See id.* at 183.
934. *See id.*
935. *See id.*
936. *See id.*
937. *See id.* at 185.
938. *Id.* at 187.

In *L.G. v. Alaska, Department of Health and Social Services*,[939] the supreme court held that the trial court did not err in terminating a native's parental rights following a long history of abandonment and substance abuse, or in deviating from the Indian Child Welfare Act's preferences by placing one of the children with a non-native foster parent.[940] Linda had a long history of substance abuse, imprisonment, and parole violations.[941] Throughout Linda's troubles, two of her children, J.G. and S.G., had been placed in and out of the custody of numerous adults.[942] Following a court order terminating Linda's parental rights and placing her children in foster homes, Linda appealed.[943] By statute, termination of parental rights of an Indian child requires a determination "'that continued custody of the child by the parent . . . is likely to result in serious emotional or physical damage to the child.'"[944] The supreme court clarified that this determination requires "both proof that the parent's conduct is likely to harm the children, and proof that it is unlikely that the parent will change her conduct."[945] Because qualified experts testified that Linda's repeated drug abuses and repeated separations from her children caused her children serious mental injury, the court found that "both girls were at a substantial risk of suffering further mental injury if returned to her care," and that Linda's parental misconduct was likely to continue.[946] Furthermore, the court reasoned that where there is "clear evidence that a child faces a serious risk of physical neglect if she remains in her parent's care, a trial judge may terminate parental rights without hearing testimony from an expert in Native cultures."[947] Accordingly, given the record in this case, the supreme court found that the termination of Linda's parental rights did not require testimony from an expert in Native culture.[948]

In *Pearson v. Pearson*,[949] the supreme court held that the superior court did not abuse its discretion in denying a father's request for a child custody investigation or in finding continued custody by

939. 14 P.3d 946 (Alaska 2000).
940. *See id.* at 955-56.
941. *See id.* at 947-49.
942. *See id.*
943. *See id.* at 949.
944. *Id.* at 950 (quoting 25 U.S.C. §1912(f) (1994)).
945. *Id.* at 950.
946. *Id.* at 951.
947. *Id.* at 952-53.
948. *See id.* at 954.
949. 5 P.3d 239 (Alaska 2000).

the mother to be in the children's best interests.[950] Sara Pearson was awarded custody of the children after a divorce from her husband, Mark.[951] After Sara moved to Pennsylvania, Mark sought changes to the custody arrangement.[952] While the trial court did not change the custody arrangement, it did alter the visitation schedule.[953] First, the supreme court noted that it is within the trial court judge's discretion to decide whether a child custody investigator should be appointed and that Mark "failed to explain how that discretion was abused."[954] Second, the supreme court affirmed the trial court's findings that continuing custody with the mother was in the children's best interest because Sara was not trying to alienate Mark and the children had an interest in a stable environment.[955] Finally, the court found that Mark's claim of gender bias did not warrant reversal of the trial court.[956]

In *P.G. v. Division of Family and Youth Services*,[957] the supreme court held that the Division of Family and Youth Services ("DFYS") breached its duty to a foster family by failing to disclose their foster child's past disciplinary and psychological problems.[958] The court overturned a summary judgment ruling in favor of the DFYS, because there was a genuine factual dispute on the issue of whether the child's physical and sexual assaults on his foster sister and brother were foreseeable consequences of the DFYS's failure to disclose the child's past history.[959] In response to the State's argument that nondisclosure was immaterial because the assaults on the family's children were not foreseeable, the court stressed that foreseeability requires only that the injuries are "of the *general* nature that could be expected."[960] Finally, the court held that the plaintiff's claim against the DFYS did not "arise from an invasion of financial or commercial interests," and, therefore, did not qualify as a "misrepresentation" claim against the State barred by Alaska Statutes section 09.50.250(3).[961] Accordingly, the court re-

950. *See id*. at 242.
951. *See id*. at 240.
952. *See id*.
953. *See id*. at 242.
954. *Id*.
955. *See id*. at 243.
956. *See id*. at 244.
957. 4 P.3d 326 (Alaska 2000).
958. *See id.* at 328.
959. *See id.* at 335.
960. *Id.* (emphasis added).
961. *Id.* at 336.

versed the superior court's grant of summary judgment based on this provision.[962]

In *R.I. v. C.C.*,[963] the supreme court held that the superior court did not abuse its discretion in giving a mother sole custody and denying the father's request for a paternity test.[964] Constance and Richard had custody of their daughter, Cindy, at varying times.[965] On August 5, 1996, Constance applied for sole custody of Cindy and asked for permission to apply for Cindy's permanent fund dividend.[966] In determining that Constance should be awarded sole custody, the superior court made findings of fact in addition to considering the guardian ad litem's recommendation that Constance be awarded custody.[967] The supreme court's review of the findings of fact found that none were clearly erroneous and that the superior court's ruling was not "prejudicial" to Richard.[968] Furthermore, the superior court was correct in denying Richard's request for a paternity test because neither Richard nor Constance had contested the paternity.[969]

In *R.M. v. S.G.*,[970] the supreme court upheld the trial court's modification of child custody because the trial court's factual findings were not clearly erroneous and its legal conclusions were properly reached.[971] Scott Greenville sought full custody of his children following allegations of physical abuse by Rose Marlowe's new husband, Michael.[972] Based on evidence provided by testimony of the children and the custody investigator, Dr. Glass, the trial court found that a substantial change in circumstances warranted the change in custody to Scott with supervised visitation by Rose.[973] The supreme court found that the trial court did not abuse its discretion in refusing to compel Dr. Glass to disclose Scott's psychological report.[974] The court found that Rose failed to seek reasonable relief and that conflicting expert interpretations of the raw psychological data would not have been likely to alter the out-

962. *See id.*
963. 9 P.3d 274 (Alaska 2000).
964. *See id*. at 277-79.
965. *See id*. at 275.
966. *See id*. at 276.
967. *See id*. at 277-78.
968. *See id*. at 278.
969. *See id*. at 279.
970. 13 P.3d 747 (Alaska 2000).
971. *See id.* at 747.
972. *See id.* at 749.
973. *See id.* at 750.
974. *See id.* at 751.

come.[975] The court also found no error in requiring Rose to pay $1200 to depose Dr. Glass, because Rose did not argue or demonstrate that the $1200 fee constituted "manifest injustice" under Alaska Civil Rule 26(b)(4)(C).[976] Furthermore, the supreme court found that since Rose did not properly raise her objections to the admission of hearsay from Dr. Glass' report at trial, she had waived them on appeal.[977] Finally, Rose's objections to the modification of custody were denied because there was no clear error in the trial court's determination that circumstances had changed and that the modification was in the best interest of the children.[978]

In *S.S.M. v. Division of Family and Youth Services*,[979] the supreme court vacated the trial court's order dismissing S.S.M.'s motion to gain custody of her brother pursuant to Alaska Statutes section 47.14.100(e) and remanded to the trial court.[980] S.S.M. is the natural sister of J.M., a child placed in the State's custody "for adoptive purposes" in 1996 and who was living with a foster family as of June 1999.[981] In July 1999, S.S.M. filed a pro se Motion to Place Child with Relative.[982] Alaska Statutes section 47.14.100(e) provides that, except under certain exceptional circumstances, a child in need of aid should be placed in the home of a relative at that relative's request.[983] However, Alaska Statutes section 47.14.100(f) renders this preference for placement with a relative inapplicable to "child placement for adoptive purposes."[984] The court held that the statutory meaning of "for adoptive purposes" requires "a specific nexus between the existing placement and the ultimate purpose of adoption," not merely the hope of eventually finding adoptive parents.[985] Thus, S.S.M. is not disqualified from seeking preferential placement.[986]

In *Valentino v. Cote*,[987] the supreme court affirmed the trial court's grant of a father's motion to transfer legal and physical custody of his fourteen-year-old son from his former wife to him.[988]

975. *See id.*
976. *See id.* at 752.
977. *See id.*
978. *See id.* at 752-53.
979. 3 P.3d 342 (Alaska 2000).
980. *See id*. at 348.
981. *Id*. at 344.
982. *See id*.
983. *See id*. at 345-46.
984. *Id.* at 346.
985. *Id*. at 347.
986. *See id*. at 347-48.
987. 3 P.3d 337 (Alaska 2000).
988. *See id*. at 338.

After the child's relationship with his mother deteriorated, the child moved into his father's home and refused to live with his mother.[989] Custody modification is valid if the father shows that a significant change in the child's circumstances has occurred and that a modification would be in the child's best interests.[990] The court held that the present circumstances qualified as significant changes.[991] The court also held that the child's preferences had been properly considered because the child was of sufficient age and capacity to form a preference.[992]

C. Dissolution of Marriage and Distribution of Marital Property

In *Coffland v. Coffland,*[993] the supreme court affirmed the trial court's sanction of appellant, Ken Coffland, under Alaska Civil Rule 37 for failure to comply with court-ordered discovery, but remanded for reevaluation of the allocation of the marital property.[994] Because Mr. Coffland had refused repeated requests, including a court order, to produce documents related to the business he and his wife, Susan Coffland, had owned, Mr. Coffland was permitted to present at trial only his own testimony and documentation that had previously been disclosed to Mrs. Coffland.[995] The court imposed this sanction to "[strike] an appropriate balance between sanctioning recalcitrant discovery behavior and allowing [Mr. Coffland] the opportunity to present his case."[996] The trial court refused to allow Mr. Coffland to testify about two promissory notes signed by Mrs. Coffland, because they did not substantiate his testimony; as a result, these debts were characterized as nonmarital.[997] The supreme court affirmed the sanctions but held that it was error to conclude that these debts did not exist as marital property, when Mrs. Coffland admitted their existence and signed the notes herself.[998]

In *Edelman v. Edelman*,[999] the supreme court reversed in part the superior court's division of the marital property debts between plaintiff, Tammi Edelman, and her former husband, Duane Edel-

989. *See id.*
990. *See id*. at 340.
991. *See id*.
992. *See id*.
993. 4 P.3d 317 (Alaska 2000).
994. *See id.* at 322.
995. *See id.* at 319-320.
996. *Id.* at 321.
997. *See id.* at 319-20.
998. *See id.* at 321-22.
999. 3 P.3d 348 (Alaska 2000).

man, and upheld the decision to vacate all alimony arrearages that Duane owed her.[1000] The court upheld the superior court's determination that a fishing permit was a premarital asset of Duane not subject to distribution because Tammi did not take an active interest in its ongoing maintenance, management, and control.[1001] The supreme court then held that the award of the marital residence to Tammi was erroneous because it was based on the mistaken assumption that the property had been subdivided, and because the appraisal could not be challenged after both parties had previously agreed on a property value.[1002] The court remanded the issue of whether Tammi's claimed post-separation mortgage payments from non-marital income should be credited against the residence's value.[1003] The court held that any compensatory damages eventually awarded to Duane for lost income arising out of the Exxon Valdez disaster would be marital property, while any damages awarded for devaluation of the fishing permit would remain Duane's separate property.[1004] Finally, the court found that the superior court's allocation of Duane's entire pension fund to him was erroneous as a matter of law because retirement benefits earned during the marriage are marital assets subject to equitable division.[1005] The supreme court affirmed the superior court's decision to vacate alimony arrearages that Duane owed, because Tammi had remarried and had sufficient time to recover her financial stability.[1006]

In *Glasen v. Glasen*,[1007] the supreme court held that the superior court did not err when it denied the incorporation of a separation agreement into a later divorce, because the separation agreement was not a final order and because it terminated upon a subsequent reconciliation.[1008] Danny and Gail Glasen married in 1987.[1009] In July 1991, the Glasens were separated legally, but they remained married and reconciled a few months later.[1010] Upon filing for divorce in 1997, Danny sought to enforce the 1991 separa-

1000. *See id.* at 350.
1001. *See id.* at 351-52.
1002. *See id.* at 353.
1003. *See id.* at 354.
1004. *See id.* at 354-55.
1005. *See id.* at 355-56.
1006. *See id.* at 358.
1007. 13 P.3d 719 (Alaska 2000).
1008. *See id.* at 722-23.
1009. *See id.* at 720-21.
1010. *See id.* at 721.

tion agreement.[1011] The supreme court held that the Glasen's decree of separation was not a final order for two primary reasons.[1012] First, the court found that the decree was meant to be "provisional and conditional," because Danny's testimony indicated that the separation was not a permanent arrangement.[1013] Second, the agreement could not embody a final property distribution because it did not list or describe all the spouses' assets, and because the Glasens continued their marriage relationship for six years after the initial settlement agreement.[1014] The supreme court further held that a legal separation decree terminates "if the parties become reconciled and resume cohabitation."[1015] Since the "Glasens' reconciliation, cohabitation, and economic commingling [after the separation] indicated an intent to behave as a marital unit," their separation agreement was effectively rescinded and was properly withheld from the divorce decree.[1016]

In *McDougall v. Lumpkin*,[1017] the supreme court vacated and remanded the property division and alimony award in the parties' divorce decree, but affirmed the award of joint legal custody.[1018] The divorce decree divided the couple's marital net worth, giving Lumpkin assets worth approximately $35,600 and McDougall a net value of negative $14,200, including responsibility for the student loans she incurred during the marriage.[1019] In addition, the oral findings of the divorce proceeding provided for alimony for McDougall of $500 a month for four years, given the division of the property.[1020] However, the written findings did not specify the duration of the alimony and the court subsequently issued an addendum stating that the alimony would be payable for two years.[1021] Lastly, the divorce decree gave the parties joint custody of their four children.[1022] Because the division of property was "grossly inequitable," and it appeared that the alimony award had not been treated independently, the court vacated and remanded for an equitable division.[1023] In addition, the court held that the lower court

1011. *See id.* at 722.
1012. *See id.* at 722-23.
1013. *See id.*
1014. *See id.* at 723.
1015. *Id.* (quoting 24 AM. JUR. 2D *Divorce & Separation* § 409 (1998)).
1016. *Id.* at 724.
1017. 11 P.3d 990 (Alaska 2000).
1018. *See id*. at 991-92.
1019. *See id*. at 993-94.
1020. *See id*. at 995.
1021. *See id*.
1022. *See id*. at 995-96.
1023. *See id*. at 993.

abused its discretion when it treated McDougall's student loans as non-marital debt and allocated the entire amount to her.[1024] On remand, the court ordered the loans be treated as marital debt and ordered that the duration of the alimony payment be clarified.[1025] Finally, because the record did not show that the court abused its discretion in granting the parties' joint custody, the court affirmed the award.[1026]

In *Sampson v. Sampson*,[1027] the supreme court held that the trial court abused its discretion by including inheritance in marital property subject to a divorce.[1028] After inheriting securities from his deceased mother in 1990, William Sampson placed the securities in an account bearing only his name.[1029] In 1994, Susan Sampson cashed in her retirement account from her employment as a police officer partly because "she knew that William's inheritance would be available for their future needs."[1030] The supreme court found it was error to include the inheritance as marital property in the divorce proceedings, because William's promise that the inheritance would be available to him and Susan during the marriage was "not sufficient to overcome the strong presumption that inheritance is separate property."[1031] Furthermore, the court reasoned that the inheritance was not marital property, because Susan alone made the decision to cash in the retirement fund, not in reliance on any promises by William.[1032] Finally, the court remanded the case to determine whether and to what extent invasion of William's separate property was required.[1033]

IX. INSURANCE LAW

In *Moore v. Allstate Insurance Co.*,[1034] the supreme court held that federal courts do not have exclusive jurisdiction over fraud and misrepresentation claims against write-your-own ("WYO") insurers under the National Flood Insurance Program.[1035] Moore acquired flood insurance from an Allstate agent under the WYO

1024. *See id*. at 994.
1025. *See id*.
1026. *See id*. at 996-97.
1027. 14 P.3d 272 (Alaska 2000).
1028. *See id.* at 277.
1029. *See id.* at 274.
1030. *Id.* at 275.
1031. *Id.* at 276.
1032. *See id.* at 277.
1033. *See id.*
1034. 995 P.2d 231 (Alaska 2000).
1035. *See id.* at 239.

program, in which private insurance companies sell Federal Emergency Management Agency ("FEMA") flood insurance policies.[1036] When her house was condemned, FEMA awarded her forty percent of the house's fair market value.[1037] Disappointed with the payment, Moore filed suit in state court against Allstate and its agent, making various claims, including fraud and misrepresentation.[1038] Because the superior court held that federal courts had exclusive jurisdiction over such claims, Moore's claims were dismissed for lack of subject matter jurisdiction.[1039] The supreme court reversed, holding that while federal courts do have exclusive jurisdiction over direct claims under the policy, they do not have exclusive jurisdiction over claims of fraud and misrepresentation.[1040]

In *Bennett v. Hedglin,*[1041] the supreme court held that the lower court properly granted summary judgment to an insurer that denied coverage for the loss of a cabin destroyed in a fire.[1042] The insurer denied coverage on the grounds that the appellant policyholder made numerous misrepresentations on his application, including a false statement that the cabin was his primary residence.[1043] The court concluded that this misrepresentation was material to the insurer's acceptance of the risk of insuring the cabin, and that consequently, Alaska Statutes section 21.42.110 permitted the insurer to deny coverage.[1044] The court further concluded that it was not necessary for the insurer to have cancelled the policy prior to the fire, because the policyholder's misrepresentation rendered the insurance policy void ab initio.[1045] Although the court determined that the appellant improperly had been denied an oral argument, it held that the denial was harmless error because the appellant failed to demonstrate that it prejudiced him.[1046]

In *C.P. v. All-State Insurance Co.*,[1047] the supreme court held that salaried insurance adjusters owe a tort duty of reasonable care to the insured, and that the policy in question covered claims involving the insured's alleged negligent failure to protect a visiting

1036. *See id.* at 232, 234.
1037. *See id.* at 233.
1038. *See id.*
1039. *See id.*
1040. *See id.* at 238-39.
1041. 995 P.2d 668 (Alaska 2000).
1042. *See id.* at 674.
1043. *See id.* at 671.
1044. *See id.* at 672.
1045. *See id.* at 674.
1046. *See id.*
1047. 996 P.2d 1216 (Alaska 2000).

child.[1048] The plaintiff was a child who was assaulted while visiting the home of the insured, the Lancasters, by their adult son.[1049] The Lancasters reached a settlement with the plaintiff and her family and assigned to them their rights against All-State Insurance.[1050] The supreme court held that a salaried adjuster employed by the insurer owes a duty of care to the insured in addition to any contractual duty.[1051] The court "construe[d] grants of coverage broadly and interpret[ed] exclusions narrowly,"[1052] finding that the insurance policy covered the claim that the homeowners were negligent in failing to protect the visiting child.[1053]

In *Kim v. National Indemnity Co.*,[1054] the supreme court held that Kim's automobile insurance did not cover the injuries caused by Kim's sexual abuse of a minor in his taxicab.[1055] Kim was convicted of second- and third-degree sexual abuse of a minor and assigned his indemnity rights against his insurance company to the mother of the minor child in the corresponding civil suit.[1056] Kim's automobile insurance policy covered damages that were caused by an accident.[1057] However, because Kim was convicted of knowingly engaging in sexual contact, the child's injuries were not accidental.[1058] Furthermore, the court inferred intent to cause injury as a matter of law, and therefore, there was no coverage under the policy because the sexual abuse was not accidental.[1059] In addition, the court held that the abuse or molestation exclusion in the policy did not provide coverage for injuries caused by Kim even if the minor was not in the care, custody, or control of the insured.[1060]

In *Lloyd's & Institute of London Underwriting Cos. v. Fulton*,[1061] the supreme court held that an insurer must inform an insured of potential coverage issues, and that breach of this duty to inform estops the insurer from denying coverage if the breach caused actual harm to the insured.[1062] Fulton was injured while

1048. *See id.*
1049. *See id.* at 1218.
1050. *See id.*
1051. *See id.* at 1221-22.
1052. *Id.* at 1223.
1053. *See id.* at 1229.
1054. 6 P.3d 264 (Alaska 2000).
1055. *See id*. at 266.
1056. *See id*.
1057. *See id*. at 267.
1058. *See id*.
1059. *See id*.
1060. *See id*. at 269.
1061. 2 P.3d 1199 (Alaska 2000).
1062. *See id.* at 1206, 1210.

working aboard a fishing vessel owned by Clark.[1063] Clark was insured under an indemnity policy provided by Pacific Marine Insurance Company ("PacMar") and Lloyd's & Institute of London Underwriting Companies ("Lloyd's").[1064] The vessel's coverage under the policy was limited to specific geographical areas.[1065] Upon notification of Fulton's injury, PacMar immediately recognized potential problems with coverage and began to investigate the claim.[1066] As a result, an investigator questioned Clark and his son without their attorney present and obtained information that the vessel had been outside the policy's geographical limits when Fulton was injured.[1067] After the investigation, PacMar notified Clark of its intent to reserve the right to dispute coverage.[1068] Clark settled with Fulton and assigned Fulton his right to proceed against the insurers.[1069] In the meantime, PacMar became insolvent and the court held that PacMar's actions bound Lloyd's, noting that there should be only one defense because there was only one policy.[1070]

The court held that PacMar had enough information about its potential coverage defenses to give Clark notice and that it breached its duty of loyalty by failing to give notice before investigating the coverage problem.[1071] The court further held that, by interviewing the Clarks without their counsel or informing them of their rights, PacMar prejudiced the Clarks. As such, PacMar was estopped from denying coverage even though the claim would have been denied because the injury occurred outside the policy's geographical limits.[1072]

In *Makarka v. Great American Insurance Co.*,[1073] the supreme court affirmed the superior court's grant of summary judgment in favor of Great American Insurance Company ("Great American").[1074] Members of the Makarka family were killed when their car was hit by a truck driven by Voliva.[1075] The Makarkas learned that the breaks on Voliva's truck were improperly serviced by

1063. *See id.* at 1201.
1064. *See id.*
1065. *See id.*
1066. *See id.*
1067. *See id.*
1068. *See id.*
1069. *See id.*
1070. *See id.*
1071. *See id.* at 1206.
1072. *See id.* at 1209.
1073. 14 P.3d 964 (Alaska 2000).
1074. *See id*. at 970.
1075. *See id*. at 965.

Calihan prior to the accident.[1076] Calihan's employer was insured by Great American when the brakes were worked on and by Interstate Fire and Casualty when the accident occurred.[1077] The court held that the insurance policy provided by Great American was an "occurrence policy" that only covered bodily injury that occurred during the dates of coverage.[1078] Because the accident and resulting bodily injury occurred outside Great American's coverage, Great American did not have a duty to indemnify.[1079] The court also rejected the Makarkas' claim that Calihan caused property damage by improperly servicing Voliva's breaks during the dates of coverage because the damage was done to the breaks, not to the Makarkas.[1080] Consequently, the court affirmed the grant of summary judgment in favor of Great American.[1081]

In *M.C. v. Northern Insurance Co. of New York,*[1082] the supreme court affirmed summary judgment for the defendant, Northern Insurance, against the claims of a fifteen-year-old girl and her mother.[1083] The appellant was employed by the Anchorage Daily News to deliver papers. During the course of her employment, she engaged in sexual relations with her supervisor, Steven Flory, a thirty-four-year-old man.[1084] The appellant sued the Anchorage Daily News's insurer, Northern Insurance, since the relations in question occurred while Flory was employed there.[1085] The court held that Steven Flory was not covered by the insurance because the policy explicitly excludes "bodily injury to a co-employee."[1086]

In *Nichols v. State Farm Fire and Casualty Co.*,[1087] the supreme court affirmed summary judgment to an insurer sued on theories of negligent and intentional spoliation of evidence, which the court refused to recognize under Alaska law.[1088] The suit stemmed from an incident in which Nichols was injured when a ladder collapsed beneath him while he was repairing a neighbor's roof; Nichols filed a claim with the neighbor's insurer, State Farm, for payment of

1076. *See id*.
1077. *See id*.
1078. *See id*. at 967.
1079. *See id*.
1080. *See id*. at 967-68.
1081. *See id*. at 970.
1082. 1 P.3d 673 (Alaska 2000).
1083. *See id.*
1084. *See id.* at 674.
1085. *See id.*
1086. *Id.* at 675.
1087. 6 P.3d 300 (Alaska 2000).
1088. *See id.* at 304-05.

medical expenses.[1089] State Farm investigated the claim but could not locate the ladder, allegedly because it was destroyed in a fire at the neighbor's home that occurred before Nichols filed his claim.[1090] When State Farm determined that the neighbor was not negligent and refused to pay Nichols's medical expenses, Nichols sued the neighbor and State Farm, alleging that State Farm had negligently, recklessly, or intentionally failed to locate critical evidence.[1091] The supreme court held that there was no evidence that State Farm acted recklessly or intentionally, and that because Alaska has not recognized an independent tort for negligent spoliation of evidence, Nichols's suit against State Farm could not be maintained.[1092]

In *Powers v. United Services Automobile Ass'n*,[1093] the supreme court held that an injured plaintiff who successfully arbitrated an uninsured motorist claim against a primary insurance carrier cannot preclude a secondary carrier from further arbitration where the secondary carrier had neither adequate notice of the first arbitration nor an opportunity to participate in it.[1094] The plaintiff, Karl Roth Powers, was injured in an automobile collision involving an uninsured driver.[1095] State Farm Insurance had the primary obligation to pay any damages resulting from Powers' injury, up to the limit of its policy coverage; United Services Automobile Association ("USAA") was obligated to pay damages that exceeded those covered by State Farm.[1096] Powers and his wife demanded arbitration with State Farm on the issue of damages.[1097] After the State Farm arbitration, the Powers demanded that USAA pay compensation for the excess damages, but USAA disputed the amount of damages claimed by the Powers and demanded separate arbitration.[1098] The court held USAA was not collaterally estopped from demanding arbitration of the Powers' claim because USAA did not participate in State Farm's arbitration and had no contractual relationship with State Farm.[1099] The court also held that, because the Powers did not demand that USAA participate or make any effort

1089. *See id.* at 301.
1090. *See id.* at 302.
1091. *See id.*
1092. *See id.* at 304-05.
1093. 6 P.3d 294 (Alaska 2000).
1094. *See id.* at 295.
1095. *See id.*
1096. *See id.* at 296.
1097. *See id.*
1098. *See id.* at 296-97.
1099. *See id.* at 298.

to consolidate the arbitrations, USAA did not waive its right to arbitration.[1100]

In *West v. Umialik Insurance Co.*,[1101] the supreme court applied the doctrine of reasonable expectations to reverse the lower court's ruling in favor of an insurer and to remand for entry of summary judgment for homeowners whose house had settled when soil under the foundation was eroded by water from broken plumbing.[1102] The insurer justified its original denial of coverage to the homeowners by citing exclusions in their policy for damage caused by "settling, shrinking, bulging or expansion," "earth movement," and water damage from "water below the surface of the ground."[1103] The court held that a reasonable person could understand "settling" and "water damage" as referring to exclusively natural or external phenomena.[1104] The "settling" clause was part of a list of exclusions entailing natural or environmental concerns, justifying the homeowners' belief that settling in their policy referred only to that caused naturally.[1105] A provision that the insurer would pay for "water damage not otherwise excluded" connoted coverage of some water damage.[1106] The earth movement exclusion was not limited to natural events but did not contemplate exclusion for damage from improvements to the house made by the insured.[1107] The court finally noted that case law interpreting similar provisions generally covered damage of the sort occurring here.[1108]

X. PROPERTY LAW

In *Alaska v. United States*,[1109] the Court of Appeals for the Ninth Circuit decided that title to an Alaskan riverbed, which lies within a tract of land withdrawn from sale in 1943 and made a federal reserve, did not pass from the federal government to the state upon Alaska's statehood in 1959 or upon a change in the status of the withdrawn land after statehood.[1110] When the U.S. conveyed parts of the riverbed to Alaska Native corporations, the State of Alaska challenged the conveyances in federal district court, claim-

1100. *See id.*
1101. 8 P.3d 1135 (Alaska 2000).
1102. *See id.* at 1138.
1103. *See id.* at 1137.
1104. *See id.* at 1140-43.
1105. *See id.* at 1139.
1106. *See id.* at 1142.
1107. *See id.*
1108. *See id.* at 1139.
1109. 213 F.3d 1092 (9th Cir. 2000).
1110. *See id.* at 1098.

ing that, because the river was navigable, the State acquired title upon statehood.[1111] The circuit court certified two questions: (1) whether Congress intended to defeat the passage of title to submerged lands, including the riverbed, to the state on the date of statehood; and (2) assuming that Congress did intend to defeat the passage of title, whether the submerged lands passed to the state when the withdrawal order was revoked after statehood.[1112] The circuit court held that the Alaska Statehood Act acknowledged the authority of the federal government to exercise the power of exclusive legislation over tracts of land held before statehood by the U.S for military purposes, and that the U.S. acquires title upon the exercise of that power.[1113] The court noted that the exclusive legislation power applied even if only small parts of the withdrawn tract were being used for military purposes.[1114] The court also held that, pursuant to the Statehood Act, the U.S. lost exclusive legislative jurisdiction when the withdrawal order was revoked but that this loss did not also cause loss of title.[1115] The court therefore held that the U.S. retained title to the riverbed and remanded the case to the district court for further proceedings.[1116]

In *Fairbanks North Star Borough Assessor's Office v. Golden Heart Utilities,*[1117] the supreme court held that the reversionary method, used to value Golden Heart's possessory interest of the Fairbanks downtown utilidor system, was a "recognized and appropriate method of valuation."[1118] The reversionary method "estimates the value of a leasehold interest by taking the value of the fee interest of the property and deducting both the value of the burden of use restrictions imposed by the City and the value of the City's reversionary interest in the property."[1119] The court held the reversionary method to be an appropriate valuation of a possessory interest for tax-exempt property, such as the utilidor system.[1120] The court did find, however, that the assessor erred in making a deduction for use restrictions, because when the property reverts to

1111. *See id.* at 1093.
1112. *See id.* at 1098.
1113. *See id.* at 1094-95.
1114. *See id.*
1115. *See id.* at 1097.
1116. *See id.* at 1098.
1117. 13 P.3d 263 (Alaska 2000).
1118. *Id.* at 265.
1119. *Id.* at 265-66.
1120. *See id.* at 272.

the City, it will not contain these restrictions.[1121] The court found no equal protection or due process violations.[1122]

In *Kottke v. Parker,*[1123] the supreme court upheld the admission of Kottke's will to formal probate despite claims of undue influence and insane delusions in the writing of the will.[1124] The supreme court found that Parker's presence during the revision of a will did not create undue influence and that Kottke's false belief that his first wife's children had stolen from him was not an insane delusion.[1125] The will, which Kottke had revised after his first wife's death and after discovering he had prostate cancer, left the majority of Kottke's estate to Parker.[1126] The children of Kottke's first wife claimed that, when Kottke rewrote his will, Parker had exerted an undue influence on him and he had suffered insane delusions that the children had stolen from him.[1127] Because "the trial court made an exemplary inquiry and specifically addressed each factual contention raised," the supreme court upheld the finding that Parker did not exert undue influence.[1128] The supreme court recognized that the superior court considered a number of factors, including the fact that Parker was not the sole beneficiary, Parker did not participate substantially in the writing of the will, and Kottke did not act hastily.[1129] Additionally, the supreme court found that, because Kottke had a factual basis for the belief that the children had stolen from him, he did not suffer insane delusions; thus, his will was not affected by these alleged delusions.[1130] "The superior court properly found that the facts urged by [the children] did not support theories of undue influence or insane delusions."[1131]

In *Laverty v. Alaska Railroad Corp.,*[1132] the supreme court upheld the superior court's decision that injunctive relief against the Alaska Railroad Corporation ("ARRC") under the Public Notice Clause was barred by laches.[1133] ARRC entered into a contract with Flamingo Brothers for removal of gravel from ARRC land.[1134]

1121. *See id.* at 272.
1122. *See id.* at 274.
1123. 6 P.3d 243 (Alaska 2000).
1124. *See id.* at 244.
1125. *See id.* at 247.
1126. *See id.* at 244-45.
1127. *See id.* at 245.
1128. *Id.*
1129. *See id.* at 247-48.
1130. *See id.* at 246-47.
1131. *Id.* at 247.
1132. 13 P.3d 725 (Alaska 2000).
1133. *See id.* at 738.
1134. *See id.* at 728.

The court found that ARRC's land was state land, therefore, it was subject to the Public Notice Clause before it was disposed of.[1135] The court also found that when ARRC made a contract with Flamingo Brothers, ARRC disposed of an interest in the land.[1136] In addition, despite the applicability of the Public Notice Clause, ARRC did not provide adequate prior notice.[1137] The court reversed the lower court's finding on notice, necessitating a remand for entry of a declaratory judgment in favor of Laverty, as well as an award of attorneys' fees for Laverty.[1138]

In *Simon v. State,*[1139] the supreme court affirmed the superior court decision that Public Land Order ("PLO") 1613 allowed Alaska to do subsurface work or lower the elevation of the Glenn Highway.[1140] The Simons filed suit against the State of Alaska and Quality Asphalt Paving, arguing that the easement granted by PLO 1613 only allowed the State to make improvements on the existing highway and did not allow the State to expand it or alter its course.[1141] Because PLO 1613 contained ambiguous language regarding the scope of the easement, reasonably necessary changes to the land were allowed.[1142] The supreme court held that the superior court's determination that the changes were reasonably necessary was not clearly erroneous.[1143]

In *Snook v. Bowers,*[1144] the supreme court affirmed both a superior court decision that the Bowerses were the sole owners of property and a denial of Snook's motion for relief from a stipulated judgment regarding ownership of the property.[1145] Prior to 1984, the property belonged to the Shaan-Seet Native Corporation (the "Corporation"), but in 1984, the Corporation conveyed the property to "the heirs and devisees of James Snook, who died October 23, 1973."[1146] These heirs then sold the property to the Bowerses who, upon payment of earnest money, began developing the land.[1147] Later investigation by a title insurance company revealed that James Snook had a brother, Russell, who had died before

1135. *See id.* at 731.
1136. *See id.*
1137. *See id.* at 738.
1138. *See id.*
1139. 996 P.2d 1211 (Alaska 2000).
1140. *See id.* at 1214-15.
1141. *See id.* at 1213.
1142. *See id.*
1143. *See id.*
1144. 12 P.3d 771 (Alaska 2000).
1145. *See id.*
1146. *Id*.
1147. *See id*. at 775.

James.[1148] The heirs of James Snook then blamed Shaan-Seet for the confusion, and Shaan-Seet filed an interpleader naming all of the potential heirs.[1149] The matter ended in a stipulation, which Snook sought unsuccessfully to amend.[1150] At the same time, Snook had also filed a complaint against the Bowerses to cancel their purchase of the property, and the trial court granted summary judgment to the Bowerses.[1151]

The supreme court found that the trial court properly denied Snook's motion to amend the stipulation finding that the motion did not present an extraordinary circumstance justifying relief.[1152] The supreme court also upheld the grant of summary judgment for the Bowerses.[1153] Additionally, the court found that the payment of earnest money gave the Bowerses equitable title and that they gained title to any remaining interests in the property through adverse possession.[1154] The property involved was not exempted from adverse possession by the Alaska Native Claims Settlement Act because, as a subdivision, it was considered developed land.[1155]

In *Winther v. Gainhart Samuelson*,[1156] the supreme court held that fishing rights cannot be sold as part of a partnership under a state law claim after federal courts had already determined that no fishing rights accrued to the partnership, and that the statute of frauds barred enforcement of any alleged contract for the fishing rights, because the alleged contract was not in writing.[1157] John Winther, Douglas Eaton, and Bud Samuelson owned a vessel, the F/V Prowler, as tenants-in-common according to an ownership agreement.[1158] After Samuelson sold his interest in the vessel to the other two in 1989, new fishing regulations allocated quota shares ("IFQ shares") to those individuals who owned vessels in order to regulate the amount of fish that were removed from the Alaska sea.[1159] Former partners of dissolved partnerships were eligible for the IFQ shares.[1160] A federal court upheld an administrative ruling that the parties had owned the vessel as individuals not as a part-

1148. *See id.*
1149. *See id.*
1150. *See id.*
1151. *See id.*
1152. *See id.* at 776.
1153. *See id.* at 777.
1154. *See id.* at 779.
1155. *See id.* at 780.
1156. 10 P.3d 1167 (Alaska 2000).
1157. *See id.* at 1173.
1158. *See id.* at 1168.
1159. *See id.* at 1169.
1160. *See id.*

nership and, therefore, Samuelson was entitled to one-third of the IFQ shares.[1161] The supreme court held that because the federal court had already determined Samuelson's IFQ shares belonged to him as an individual, the shares never accrued to the partnership interest that Samuelson sold and Winther's claim to those shares failed as a matter of law.[1162] Furthermore, the court held that Alaska Statutes section 45.01.206 barred any claim that Samuelson sold his IFQ shares in an alleged separate transaction because the shares were worth more than 5,000 dollars and the alleged transaction was not evidenced in writing.[1163]

XI. TORT LAW

In *Anderson v. Tuboscope Vetco, Inc.*,[1164] the court affirmed summary judgment for the defendant, Tuboscope Vetco, against the tort claims of a temporary employee.[1165] Anderson was a temporary employee provided by Olsten, a temporary employment company.[1166] Anderson was injured during his employment at Tuboscope while performing his job duties.[1167] The court held that Tuboscope was immune from tort liability under the Exclusive Remedy Provision of the Alaska Workers' Compensation Act.[1168] The court held that temporary employees are "employees of the employer for workers' compensation purposes as a matter of law."[1169] Tuboscope was a special employer for workers' compensation purposes, because the three criteria were met: "(a) the employee has made a contract of hire, express or implied with the special employer; (b) the work being done is essentially that of the special employer; and (c) the special employer has the right to control the details of the work."[1170]

In *Grant v. Stoyer*,[1171] the supreme court held that, where negligence and causation of physical injury resulting from a car accident are conceded or proved and there is substantial evidence indicating some pain and suffering, the jury must award damages.[1172] On De-

1161. *See id.* at 1170.
1162. *See id.* at 1171.
1163. *See id.* at 1171-73.
1164. 9 P.3d 1013 (Alaska 2000).
1165. *See id.* at 1020.
1166. *See id.* at 1015.
1167. *See id.* at 1016.
1168. *See id.*
1169. *Id.*
1170. *Id.* at 1017.
1171. 10 P.3d 594 (Alaska 2000).
1172. *See id.* at 598.

cember 19, 1994, Stoyer drove her car into Grant's car at an intersection.[1173] Grant complained of pain in her chest, shoulder, back, and knee, both to the paramedics who arrived at the scene of the accident and to the emergency room admitting nurse.[1174] Grant subsequently received additional medical treatment and physical therapy and underwent two shoulder surgeries.[1175] Stoyer conceded that she had been negligent, and thus the case went to trial only on the questions of causation and damages.[1176] The jury found that Stoyer's negligence did not cause Grant's damages, and therefore determined Grant should not receive any damage award.[1177] Because she immediately complained of injury and sustained ongoing treatment, "the jury had no evidentiary basis for finding that the accident had caused no compensable injury to Grant."[1178] The court reversed the superior court judgment and remanded Grant's damages claim for a new trial.[1179]

In *Guerrero v. Alaska Housing Finance Corp.*,[1180] the supreme court held that the plaintiff's complaint, which alleged that the Housing Finance Corporation negligently breached its duty to a minor who was struck by a car, was legally sufficient to withstand a Civil Rule 12(b)(6) motion, because the complaint alleged some potentially non-discretionary functions under circumstances requiring defendants to exercise due care.[1181] Five-year-old Alexander Guerrero was struck by a car and severely injured as he attempted to cross a dangerous intersection outside his family's apartment complex.[1182] Overturning the lower court's Rule 12(b)(6) dismissal, the supreme court found that Guerrero's conduct in crossing the street where no crosswalk existed did not absolve the defendant of the duty it owed him, but rather would "bear on the jury's determination of negligence, breach, causation, and damages."[1183] Furthermore, since it is not clear from the complaint that the landlord's duty was "vastly narrower than the duty alleged by Guerrero," dismissing the complaint under Rule

1173. *See id.* at 595.
1174. *See id.*
1175. *See id.*
1176. *See id.* at 594.
1177. *See id.* at 596.
1178. *Id.* at 597.
1179. *See id.* at 600.
1180. 6 P.3d 250 (Alaska 2000).
1181. *See id.* at 252.
1182. *See id.*
1183. *Id.* at 255.

12(b)(6) amounted to error.[1184] Finally, it was not clear beyond doubt that all the complaints against the defendant were barred by the discretionary function immunity provision of Alaska Statutes section 09.50.250(1).[1185] Despite finding that the corporation was an instrumentality of the State for purposes of claiming sovereign immunity,[1186] the supreme court held that at least one of Guerrero's complaints could fall within the rubric of "operation acts," thus precluding Alaska Statutes section 09.50.250(1)'s discretionary function immunity defense, and precluding a 12(b)(6) dismissal.[1187]

In *Hutton v. Realty Executives, Inc.*,[1188] the supreme court held that, as a matter of law, constructive knowledge does not necessarily begin the running of the statute of limitations in claims of misrepresentation or breach of professional duty where the subject of constructive knowledge is the same subject about which there is an alleged professional duty to advise the plaintiff.[1189] In 1992, the Huttons purchased a nine-unit property from the State, which was represented by Realty Executives, Inc. ("Realty").[1190] The Huttons discovered in 1997 that the property violated zoning regulations, and filed suit against Realty in 1999 for negligent misrepresentation and breach of professional duty for failing to notify the Huttons of the zoning regulations.[1191] Because seven years had passed since the sale of the property, the trial court granted Realty's motion to dismiss on statute of limitations grounds.[1192] Under the discovery rule adopted by the supreme court, the statute of limitations does not begin to run until the plaintiff discovers or reasonably should have discovered the facts creating his cause of action.[1193] Realty argued that the Huttons had constructive knowledge of the law and should have known of the zoning violations on the date of the sale, triggering the statue of limitations.[1194] However, the supreme court held that constructive knowledge cannot be used to preclude causes of action arising out of a professional relationship where the plaintiff relied on the professional to convey knowledge, and the professional in turn claimed that the plaintiff had constructive

1184. *Id.* at 258.
1185. *See id.* at 258-64.
1186. *See id.* at 259.
1187. *See id.* at 264.
1188. 14 P.3d 977 (Alaska 2000).
1189. *See id*. at 981.
1190. *See id*. at 979.
1191. *See id*.
1192. *See id*.
1193. *See id*. at 980.
1194. *See id*. at 979.

knowledge.[1195] As a result, the question of when the Huttons should have known of the zoning problem and when the statute of limitations began was a question of fact.[1196] Therefore, the supreme court reversed the lower court's motion to dismiss and remanded the case for further proceedings.[1197]

In *In re Exxon Valdez Icicle Seafoods, Inc.,*[1198] the Court of Appeals for the Ninth Circuit determined that an agreement to "cede" back punitive damages was lawful and that the plaintiff was not required to disclose the existence of such an agreement to the jury determining punitive damages.[1199] This case arose out of the 1989 Exxon Valdez oil spill.[1200] Exxon reached a settlement agreement with the "Seattle Seven" processors of seafood.[1201] The settlement did not release the processors' claims against Exxon, but it included an agreement to cede back to Exxon any punitive damages received.[1202] However, because the jury determining the punitive damages award was not told of this agreement between Exxon and the Seattle Seven, the district court determined that the Seattle Seven could not participate in the allocation of the punitive damages.[1203] The court of appeals held that cede back agreements are enforceable, because they encourage settlement in mass tort cases.[1204] In addition, such agreements should not be revealed to the jury, because such disclosure would likely cause the jury to inflate the punitive damages assessed.[1205] There were no special circumstances in the case to justify revealing the agreement to the jury.[1206] The district court improperly excluded the Seattle Seven from the allocation plan.[1207]

In *Parks Hiway Enterprises v. CEM Leasing, Inc.*,[1208] the supreme court affirmed the superior court's grant of summary judgment against Parks Hiway on its strict liability, trespass, nuisance, and negligence claims against the supplier of petroleum to an adjacent landowner whose underground tanks leaked, causing con-

1195. *See id*. at 980.
1196. *See id*. at 981.
1197. *See id*.
1198. 229 F.3d 790 (9th Cir. 2000).
1199. *See id.* at 800.
1200. *See id.* at 792.
1201. *See id.*
1202. *See id.*
1203. *See id.* at 795.
1204. *See id.* at 798.
1205. *See id.*
1206. *See id.* at 800.
1207. *See id.* at 800-01.
1208. 995 P.2d 657 (Alaska 2000).

tamination.[1209] The groundwater under the property of Parks Hiway was contaminated by fuel that leaked from underground storage tanks owned by the Gold Hills Service Station.[1210] Parks Hiway sued the suppliers of the fuel, Petroleum Sales.[1211] Because Petroleum Sales was not an "owner" or "person having control" of the fuel, the "operator" of the facility from which the fuel leaked, nor was it a "transporter," as defined under Alaska Statutes section 46.03.822, the statute did not extend liability to Petroleum Sales for contamination that occurred after the sale and delivery of the fuel.[1212] The court denied the trespass claim because Petroleum Sales did not own or control the fuel when it leaked into the groundwater and because it did not "set in motion a force which, in the usual course of events, will damage property of another."[1213] In addition, because Petroleum Sales did not own or control the fuel or the tanks at the time of contamination, and was not a "substantial factor" in creating the nuisance, it could not be held liable for private nuisance.[1214] Lastly, the court rejected Parks Hiway's negligence claim on the ground that, even if the duty to investigate the tanks only requires constructive knowledge of the defective tanks, Parks Hiway did not present sufficient evidence to create an issue of fact on the duty element of negligence.[1215]

In *Smith v. Ingersoll-Rand Co.*,[1216] the supreme court held that the 1986 Tort Reform Act modified the definition of comparative negligence in product liability lawsuits to include ordinary negligence.[1217] Smith was injured when a door on an air compressor manufactured by Ingersoll-Rand fell on his head.[1218] Smith filed a product liability suit against Ingersoll-Rand, which argued that Smith was comparatively negligent by failing to wear a hard hat and by unsafely propping open the compressor door.[1219] As a result, the Federal District Court of Alaska certified to the supreme court the question of whether ordinary negligence is considered comparative negligence in a product liability action.[1220] Prior to the

1209. *See id*. at 668.
1210. *See id*. at 659.
1211. *See id*. at 659-60.
1212. *Id*. at 660-64.
1213. *Id*. at 664-65.
1214. *See id*. at 666-67.
1215. *See id*. at 667.
1216. 14 P.3d 990 (Alaska 2000).
1217. *See id*. at 996.
1218. *See id*. at 990-91.
1219. *See id*. at 991.
1220. *See id*. at 992.

1986 Act, comparative negligence was only allowed in product liability cases where the plaintiff knew the product was defective but unreasonably used it, and where the plaintiff misused the product, proximately causing his own injuries.[1221] However, the 1986 Tort Reform Act defined fault in relation to comparative negligence as "acts or omissions that are in any measure negligent, reckless or intentional."[1222] Therefore, the court held that the Act expanded the definition of comparative negligence in product liability actions to include ordinary negligence.[1223]

In *State v. Johnson*,[1224] the supreme court held that the State only owed a "duty of reasonable care" to an inmate who was knocked off a stairway landing.[1225] Finding improper the superior court's jury instruction requiring the State to exercise the "utmost caution," the supreme court reversed and remanded the case for further proceedings.[1226] Inmate Garry Johnson suffered serious injuries after being struck by a cell door and knocked off a stairway landing.[1227] Because Johnson "was not 'in danger' as contemplated by the court in *Wilson* [*v. City of Kotzebue*[1228]], the situation did not permit an instruction more stringent than reasonable and prudent care under the circumstances."[1229] The court limited the issue on remand to "whether the State was negligent in designing and building the stairway to Johnson's cell."[1230] Furthermore, it indicated that the superior court should instruct the jury that a violation of the 1979 building code was evidence of negligence, not negligence per se.[1231] The 1979 code, adopted before the State correctional facility received its building permit, required stairway landings to measure sixty inches, a foot longer than the landing in front of Johnson's cell.[1232] However, prior to Johnson's accident, the State and City had adopted the 1991 building code, which only required the landing to be forty-four inches.[1233] Because the landing complied with the 1991 code at the time of the accident, the court found that the appropriate instructions should allow the jury either

1221. *See id*. at 993.
1222. *Id*. at 994.
1223. *See id*. at 996.
1224. 2 P.3d 56 (Alaska 2000).
1225. *See id.* at 61.
1226. *See id.* at 60-61.
1227. *See id.* at 58.
1228. 627 P.2d 623 (Alaska 1981).
1229. *Johnson*, 2 P.3d at 61.
1230. *Id.*
1231. *See id.* at 63.
1232. *See id.* at 58.
1233. *See id.* at 58-59.

to accept or reject the 1979 code violation as evidence of negligence.[1234]

In *Trombley v. Starr-Wood Cardiac Group*,[1235] the supreme court reversed in part and affirmed in part summary judgment granted to the defendants for claims arising out of a medical malpractice case.[1236] Mrs. Trombley accused the defendants of operating on the wrong artery during a cardiac bypass and using veins taken from the wrong leg.[1237] Her husband joined suit, claiming loss of consortium.[1238] The court sustained summary judgment with respect to Mr. Trombley's claim, since Mrs. Trombley was married to another man during the operation.[1239] The court reversed summary judgment against Mrs. Trombley, however, because the testimonies of an expert witness and the defendant raised sufficient evidence of an issue of material fact as to the claims of mistake, negligence, and causation.[1240]

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1234. *See id.* at 64.
1235. 3 P.3d 916 (Alaska 2000).
1236. *See id*. at 918.
1237. *See id.*
1238. *See id.*
1239. *See id.* at 923.
1240. *See id.* at 921.

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APPENDIX

CASES OMITTED FROM THE 2000 YEAR IN REVIEW

ADMINISTRATIVE

Kozulin v. INS, 218 F.3d 1112 (9th Cir. 2000)

(denying Kozulin's petition for review of a denial of his asylum petition).

Prowler Partnership v. National Marine Fisheries Service, 242 F.3d 383 (9th Cir. 2000)

(holding that two vessels used by the National Marine Fisheries Service to conduct a scientific research study were "scientific research vessels" within the meaning of the Magnuson Fishery Conservation and Management Act).

CIVIL PROCEDURE

Cole v. Bartels, 4 P.3d 956 (Alaska 2000)

(affirming the superior court award of prejudgment interest on the compensatory award and enhanced fees to the appellee).

Preblich v. Zorea, 996 P.2d 730 (Alaska 2000)

(holding that a plaintiff's malpractice claim was barred because the six-year statute of limitations had elapsed).

Hymes v. Alaska State Troopers, No. 00-35232, 2000 U.S. App. LEXIS 24036, at *1 (9th Cir. Sept. 11, 2000)

(holding that the district court did not abuse its discretion when it denied Hymes' motion for reconsideration and dismissed his action after Hymes failed to show clear error or present new evidence).

Thomas v. Anchorage Equal Rights Commission, 220 F.3d 1134 (9th Cir. 2000)

(dismissing a First Amendment challenge mounted by a group of landlords in opposition to Alaska's housing laws prohibiting discrimination on the basis of marital status).

CRIMINAL LAW

State v. Blackmore, 2 P.3d 644 (Alaska Ct. App. 2000)

(holding that in the absence of legislative prohibition, the Alaska Board of Game retains its common law power to enact regulations declaring any violators strictly liable, so long as punishments remain non-criminal).

Billy v. State, 5 P.3d 888 (Alaska Ct. App. 2000)

(affirming Billy's conviction and holding that Billy's attorney's mistakes were not so egregious as to constitute ineffective counsel).

Blank v. State, 3 P.3d 359 (Alaska Ct. App. 2000)

(reversing Blank's conviction because the portable breath test administered to Blank by the police constituted an unauthorized search).

Brown v. State, 12 P.3d 201 (Alaska Ct. App. 2000)

(affirming Brown's sentence despite his argument that the state missed the filing deadline for aggravating factors).

Cano v. Anchorage, No. A-7243, No. 4225, 2000 Alaska App. LEXIS 80, at *1 (June 7, 2000)

(holding it was not an abuse of discretion for a lower court judge to deny Cano, who was convicted of trespass, jury instructions on necessity and waiver, and the opportunity to give the final argument in his capacity as co-counsel).

Carter v. State, No. A-7085, No. 4233, 2000 Alaska App. LEXIS 85, at *1 (June 21, 2000)

(holding that a sexual assault victim's identification of her assailant while he was in handcuffs was not unreliable, and that the composite sentence of forty-five years was not excessive).

Castle v. State, 999 P.2d 169 (Alaska Ct. App. 2000)

(holding that the police stop that lead to the discovery of evidence used to convict Castle was illegal).

Clark v. Anchorage, 2 P.3d 639 (Alaska Ct. App. 2000)

(dismissing Clark's appeal for want of jurisdiction).

Haruch v. State, No. A-7253, No. 4232, 2000 Alaska App. LEXIS 84, at *1 (June 21, 2000)

(holding that the trial judge was not clearly mistaken when he adjusted Haruch's five-year presumptive sentence to twenty years with ten years suspended because Haruch's crime was a "worst offense").

Ivanoff v. State, 9 P.3d 294 (Alaska Ct. App. 2000)

(holding that the record did not support a probable cause finding for a search warrant for Ivanoff's home).

Jensen v. State, No. A-7471, No. 4228, 2000 Alaska App. LEXIS 88, at *1 (June 21, 2000)

(holding that Jensen may not appeal as excessive a judge's sentence pursuant to a plea agreement that doesn't exceed that plea agreement by two years).

Johnson v. State, No. A-7264, No. 4258, 2000 Alaska App. LEXIS 110, at *1 (August 9, 2000)

(holding that an arrest on an outstanding traffic warrant was not a pretext to search the defendant, and that the officer's discovery of a crack pipe in the defendant's pocket created sufficient prob-

able cause to justify opening the defendant's small box which contained cocaine).

Kingsley v. State, 11 P.3d 1001 (Alaska Ct. App. 2000)

(holding that the state showed Kingsley had control over his motor vehicle while intoxicated, and that the trial judge did not need to instruct the jury on the issue of operability).

Malloy v. State, 1 P.3d 1266 (Alaska Ct. App. 2000)

(affirming Malloy's convictions but directing the superior court to delete the restriction on her eligibility for discretionary parole).

Markgraf v. State, 12 P.3d 197 (Alaska Ct. App. 2000)

(holding that a lay witness may state in court that another person seemed scared).

Morrison v. State, 7 P.3d 955 (Alaska Ct. App. 2000)

(defining the proper procedure for sentencing when there is a disagreement between a single-sentencing judge and a three-judge sentencing panel).

Pierre v. State, No. A-7569, No. 4324, 2000 Alaska App. LEXIS 202, at *1 (Dec. 20, 2000)

(holding that Pierre's case needed to be remanded to the trial court to determine whether it considered Pierre to be a statutory "worst offender").

Powell v. State, 12 P.2d 1187 (Alaska Ct. App. 2000)

(holding that letters written by Powell did not meet the elements of the crimes of coercion or third-degree assault, reversing the superior and district court's judgments).

Schlagel v. State, 13 P.3d 275 (Alaska Ct. App. 2000)

(holding that the trial court erred when it held that Schlagel failed to demonstrate the first in time defense).

Schoenthaler v. State, No. A-7101, No. 4236, 2000 Alaska App. LEXIS 96, at *1 (June 28, 2000)

(reversing Schoenthaler's conviction on the grounds that he was arrested without probable cause, and that evidence obtained as a result of the illegal arrest was admitted at trial).

Shewfelt v. Alaska, 228 F.3d 1088 (9th Cir. 2000)

(holding that Shewfelt's absence during the replaying of his testimony, although violative of the Sixth Amendment, was harmless error).

Wilson v. State, 12 P.3d 210 (Alaska Ct. App. 2000)

(holding that the trial court should have disclosed appropriate parts of a search warrant application and in camera testimony to Wilson, allowing Wilson to challenge the search warrant).

Wood v. State, A-7592, No. 4261, 2000 Alaska App. LEXIS 113, at *1 (Aug. 9, 2000)

(holding that the trial court did not err when it imposed Wood's full suspended sentence after revoking his probation).

Workman v. State, No. A-7357, No. 4230, 2000 Alaska App. LEXIS 83, at *1 (June 21, 2000)

(holding that a composite sentence of four years and one month for a defendant with four felony convictions and several misdemeanor convictions was not excessive, given the totality of the defendant's conduct and record).

FAMILY LAW

Child Support Enforcement Division v. Maxwell, 6 P.3d 733 (Alaska 2000)

(holding that CSED denied Maxwell a fair and meaningful opportunity to deny its presumption of paternity).