YEAR IN REVIEW

YEAR IN REVIEW 1999: 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

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I. INTRODUCTION

Year in Review contains brief summaries of selected decisions handed down in 1999 by the 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. 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.

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 torts.

II. ADMINISTRATIVE LAW

In *White v. State Department of Natural Resources*,[1] the Alaska Supreme Court held that the Department of Natural Resources ("DNR") violated a lease assignee's due process rights.[2] DNR ruled that a lease had expired without first granting a hearing when a factual dispute existed over whether the conditions for automatic

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1. 984 P.2d 1122 (Alaska 1999).
2. *See id.* at 1126.

extension of the lease had been met.[3] White, the assignee, leased land from the state for oil and gas exploration.[4] The lease provided for automatic term extension if the lessee drilled such that the "bottom hole location is in the leased area . . . as of the date on which the lease otherwise would expire . . . ."[5] Because there was a factual dispute between DNR and White over whether this condition had been met, DNR's commissioner violated White's due process by not granting a hearing.[6] The court emphasized that a hearing would not have been required in the "absence of substantial and material issues crucial to the determination."[7]

In *Native Village of Elim v. State*,[8] the Native Village of Elim ("Elim") sued the Board of Fisheries, alleging that the Board was not sufficiently protecting their interests under the subsistence law.[9] Elim believed that a commercial fishery was depleting the supply of fish on which Elim residents lived, and requested that the Board intervene.[10] The Board had already limited the number of fish that the commercial interest could take, but refused to further lower this cap.[11] Elim brought suit contesting many of the Board's practices.[12] The supreme court held that the Board possessed the requisite experience necessary to set policy for enforcing the sustained yield clause of the Alaska Constitution[13] and the subsistence law.[14] Thus, the Board did not abuse its discretion by rejecting a numerical limit for fisheries in favor of a flexible standard.[15] The court reasoned that the Board was in the best position to devise a formula that saved time, money, and energy.[16] Applying a reasonable basis standard,[17] the court held that the Board also had authority to set geographical scope and type of fish restrictions in this situation.[18]

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3. *See id.*
4. *See id.* at 1124.
5. *Id.* at 1126.
6. *See id.* at 1127.
7. *Id.* at 1126 (quoting NLRB v. Bata Shoe Co., 377 F.2d 821, 826 (4th Cir. 1967)).
8. 990 P.2d 1 (Alaska 1999).
9. *See id*.
10. *See id*. at 4.
11. *See id*.
12. *See id*. at 1.
13. *See* ALASKA CONST. art. VIII, § 4.
14. *See Elim*, 990 P.2d at 5; *see also* ALASKA STAT. § 16.05.258 (LEXIS 1998).
15. *See Elim*, 990 P.2d at 5.
16. *See id*. at 7.
17. *See id*. at 10.
18. *See id*.

In *Halter v. Department of Commerce and Economic Development, Medical Board*,[19] the supreme court held that Alaska Statutes section 08.64.326(a)(8)(A) was not vague as applied to Dr. Halter to sanction him for professional incompetence.[20] Defendant filed a complaint against Halter, alleging professional incompetence based on the statute, because he had not properly recorded prescriptions for controlled substances on his patients' charts.[21] Halter argued that the statute was vague and violated his due process rights because it contained no standard of conduct regarding record keeping.[22] The supreme court held that the statute was not vague as applied to Halter because Alaska case law does not require the State to promulgate standards to further define "professional incompetence."[23] The statute sufficiently warns doctors that if their professional performance does not meet acceptable levels in the current state of the art, their license may be revoked.[24]

In *Willis v. State, Department of Revenue, Child Support Enforcement Division*,[25] the supreme court held that a Child Support Enforcement Division ("CSED") hearing officer failed to explain adequately her reasons for denying a financial hardship exemption to lower child support payments and provide relief from child support arrears.[26] The supreme court noted that the CSED usually is not required to explain a denial of the hardship exemption if the denial is based on a finding that no hardship exists.[27] The court noted that the denial could have been reached on any of three different reasons: (1) there was no finding of hardship with respect to the arrears; (2) the CSED hearing officer did not believe she had the authority to reduce arrears under the hardship exemption; or (3) the hearing officer simply did not consider the issue of reducing arrears.[28] However, due to the unique procedural facts of the case and the ambiguity of the decision, the supreme court could not determine the basis for the CSED hearing officer's decision.[29] Moreover, the supreme court

19. 990 P.2d 1035 (Alaska 1999).
20. *See id.* at 1038.
21. *See id.* at 1036.
22. *See id.* at 1037.
23. *See id.*
24. *See id.*
25. 992 P.2d 581 (Alaska 1999).
26. *See id.* at 588.
27. *See id.* at 585.
28. *See id.*
29. *See id.* at 586.

stated that the hearing officer had the authority to reduce arrears retroactively and that there was adequate evidence of past financial hardship to require consideration of this request. Therefore, the supreme court remanded the case to the hearing officer for determination on the question of a retrospective exemption covering Willis's child support debt.[30] The supreme court rejected Willis's claim that the hearing officer failed to explain adequately her reasons for refusing to reduce Willis's ongoing obligations.[31] The court reasoned that the exemption is an exception within a broader rule, Alaska Civil Rule 90.3, and applies only to unusual cases.[32] Therefore, the rule must be sufficiently flexible to be applied to unique circumstances.[33]

In *Romann v. State, Department of Transportation and Public Facilities*,[34] the supreme court held that the Department of Transportation and Public Facilities ("DOT") correctly auctioned a lease to state-owned airport property because there were two competing applications for the lease.[35] A month before Romann's twenty-year lease of state-owned airport property expired, he applied for renewal.[36] Before the thirty-day period for public comment ran, another person applied to lease the property.[37] After determining that both applications met its approval, the DOT Review Committee decided to sell the lease at public auction.[38] Romann argued that Alaska Administrative Code section 40.320(c)(1)'s "first come-first served" rule governed and, therefore, he should have received the lease when the DOT Review Committee first approved his application.[39] However, the supreme court noted that a harmonious reading of sections 40.320(c)(1) and 40.320(c)(8)(A) requires that the latter section's public auction provision governs when there are conflicting applications.[40] Additionally, failing to require an auction would defeat the purpose of the notice requirement.[41]

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30. *See id.* at 589.
31. *See id.* at 588.
32. *See id.*
33. *See id.*
34. 991 P.2d 186 (Alaska 1999).
35. *See id.* at 192.
36. *See id.* at 188.
37. *See id.*
38. *See id.*
39. *See id.* at 191.
40. *See id.* at 190.
41. *See id.*

In *McConell v. Department of Health and Social Services, Division of Medical Assistance*,[42] the supreme court held that the State was not contractually required to provide Dr. McConell with education pertaining to proper Medicaid billing protocols before it sanctioned him for improper billing practices.[43] Dr. McConell argued that in a previous incident, the State had agreed in a settlement to provide education that would have prevented the instant violations.[44] Thus, the State's failure to do so caused these most recent violations.[45] The supreme court held that the State did not in fact have a contractual duty to provide the education, because the settlement on its face did not create such a duty.[46] In fact, the agreement required Dr. McConell to pay for the education.[47] The court further held that the State did not violate the covenant of good faith and fair dealing implied in the settlement because the State's conduct did not breach the objective or subjective components of the covenant.[48]

In *Boyd v. State*,[49] the supreme court held that an applicant for a hunting guide license should be permitted to seek a modification of a suspended imposition of sentence ("SIS") because he detrimentally relied on the effect of the SIS regarding his license renewal.[50] Boyd pled no contest to two counts of failing to provide a licensed assistant guide to non-resident hunters.[51] Boyd agreed to pay $2,500 as part of the SIS.[52] While completing his application to renew his own hunting guide license, the Division of Occupational Licensing asked whether Boyd had ever been fined more than $1,000 for a violation of a state hunting or guiding regulation.[53] The Assistant District Attorney assured Boyd that the Division would not deny Boyd's application.[54] Boyd continued with the application process on the Assistant District Attorney's assurance.[55] Nonetheless, the Division determined that the $2,500 paid in

42. 991 P.2d 178 (Alaska 1999).
43. *See id.* at 182.
44. *See id.*
45. *See id.*
46. *See id.*
47. *See id.*
48. *See id.* at 183-84.
49. 977 P.2d 113 (Alaska 1999).
50. *See id.* at 117.
51. *See id.* at 114.
52. *See id.*
53. *See id.*
54. *See id.*
55. *See id.*

connection with the SIS was a fine and denied Boyd's application.[56] The supreme court agreed with the Division's determination that the payment was a "fine."[57] In noting that Boyd had relied on the Assistant District Attorney's statements rather than seek modification of the SIS, the supreme court stated that Boyd should be permitted to seek modification of the SIS to avoid suspension of his license.[58]

In *Rollins v. State, Department of Revenue*,[59] the supreme court held that the Alcohol Beverage Control Board did not err when it denied Rollins's fifth annual operating requirement waiver and application renewal.[60] Rollins applied for a liquor license in late 1990 and received a license in 1991.[61] Over the next four years, because of burglaries and compliance problems, she never actually opened a bar.[62] Instead, she applied for and received waivers of the annual 30-day operating requirement.[63] The Board denied her application for a fifth 30-day annual operating requirement waiver and her request for renewal of the liquor license.[64] The Board applied 15 Alaska Administrative Code section 104.170, which allowed the Board to deny a third or subsequent waiver unless the premises were "condemned or substantially destroyed."[65] The supreme court upheld the Board's decision because Alaska Statutes section 04.11.330 granted broad powers to the Board in implementing the statute and because the administrative code is reasonably related to the statute's purpose of preventing a licensee from claiming that the premises is under construction year after year.[66]

III. BUSINESS LAW

In *Northern Fabrication Co. v. Unocal*,[67] the Alaska Supreme Court held that mere economic necessity to settle a contract dispute was insufficient to establish the coercive act element of a

56. *See id.* at 115.
57. *See id.* at 117.
58. *See id.*
59. 991 P.2d 202 (Alaska 1999).
60. *See id.* at 206.
61. *See id.* at 205.
62. *See id.* at 205-06.
63. *See id.*
64. *See id.*
65. *See id.* at 207.
66. *See id.* at 207-08.
67. 980 P.2d 958 (Alaska 1999).

breach of contract test for economic duress.[68] Northern Fabrication Company ("NFC") exceeded his budget in fulfilling a construction contract with Unocal, and Unocal offered to pay half of the overrun.[69] NFC accepted and signed a general release.[70] NFC then sued, alleging that because it faced bankruptcy and needed the income from the settlement, it had been coerced into settling.[71] The supreme court noted that because economic necessity is often the reason for compromise, imminent bankruptcy is not enough to satisfy the economic duress requirement that Unocal committed a coercive act.[72] The court distinguished *Totem Marine Tug & Barge, Inc. v. Alyeska Pipeline Service Co.*,[73] a key economic duress case. In the present case, Unocal did not place NFC in dire economic straits; by contrast, in *Totem*, the Unocal "deliberately withheld payment of an acknowledged debt."[74]

In *Oliver v. Sealaska Corp.*,[75] the Ninth Circuit held that the district court was correct in dismissing Oliver's case without prejudice because the federal statutes under which Oliver was attempting to sue do not create a private cause of action.[76] Oliver is a native Alaskan and owns shares in two regional corporations organized under the Alaska Native Claims Settlement Act ("ANCSA").[77] Oliver's class action claim, which was directed at all twelve regional corporations, contended that ANCSA § 7(i)[78] deprives him and other shareholders of their proper revenue sharing.[79] Both the Ninth Circuit and the district court agreed that there are no provisions in ANCSA or Alaska corporate law that provide Oliver with a private cause of action.[80] Both courts recognized that Oliver had a derivative claim under Alaska law,[81] but Oliver refused to amend his complaint.[82]

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68. *See id.* at 961.
69. *See id.* at 960.
70. *See id.*
71. *See id.*
72. *See id.* at 961.
73. 584 P.2d 15 (Alaska 1978).
74. *Northern Fabrication Co.*, 980 P.2d at 961.
75. 192 F.3d 1220 (9th Cir. 1999).
76. *See id*. at 1222.
77. *See id.* at 1223; 43 U.S.C. §§ 1601-1629f (1994).
78. *See* 43 U.S.C. § 1606(i) (1994).
79. *See Oliver*, 192 F.3d at 1223.
80. *See id*. at 1222.
81. *See id.* at 1225.
82. *See id*. at 1223.

In *Gossman v. Greatland Directional Drilling, Inc.*,[83] the supreme court held that corporate survival statutes permitted suits against dissolved corporations for actions accruing after dissolution.[84] The court reinstated the cause of action of Gossman, who had brought a negligence suit against Greatland Directional Drilling, Inc. after Gossman was injured at Greatland's storage facility.[85] Greatland had voluntarily dissolved itself prior to Gossman's accident.[86] The court held that the corporate survival statute did not impose any statute of limitations on such actions.[87] The court declared that it is a legislative policy to permit a dissolved corporation to exist for an indefinite period of time during which it may be sued for actions, regardless of when such actions arose.[88]

In *Hayes v. Bering Sea Reindeer Products*,[89] the supreme court held that a partner is bound by a default judgment entered against the partnership, even if that partner did not take part in the litigation.[90] Bering Sea Reindeer Products sued the partnership and two partners individually for breach of contract when the partners defaulted on a purchase contract.[91] Hayes's partner failed to defend the partnership, and a default judgment was entered against the partnership and Hayes's partner.[92] Hayes did not himself participate, so he obtained a continuance to contest the claims against him personally.[93] The supreme court held that Hayes's non-participation in the litigation was irrelevant, since his status as a partner made him jointly and severally liable for the default judgment against the partnership.[94] Since Hayes did not contest his status as a partner, he remained liable for the default judgment.[95] The supreme court then dismissed Hayes's counterclaims against Bering Sea for breach of contract and express warranties as meritless.[96]

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83. 973 P.2d 93 (Alaska 1999).
84. *See id*. at 94.
85. *See id*.
86. *See id.*
87. *See id*. at 98.
88. *See id*. at 99.
89. 983 P.2d 1280 (Alaska 1999).
90. *See id.* at 1283.
91. *See id.* at 1282.
92. *See id.*
93. *See id.*
94. *See id.* at 1283.
95. *See id.*
96. *See id.* at 1284.

In *Alaska Southern Partners v. Prosser*,[97] the supreme court held that an undocumented agreement, where the creditor had accepted an unconventional form of payment as satisfying the loan in full, satisfied the "no asset" exception to 12 U.S.C. § 1823.[98] A representative, acting on behalf of the bank, accepted Huffman Hills Development Company's ("HHDC") proposal to convey five notes to satisfy a loan.[99] Despite the agreement, the bank credited the debtor only for four notes and indicated in the loan file that $362,000 remained due for the fifth note.[100] The bank later received $294,861.43 for the fifth note and sent a letter to HHDC confirming that the loan would "be considered satisfied in full."[101] Two days later, the bank failed, and the Federal Deposit Insurance Corporation ("FDIC") was appointed as its receiver.[102] Alaska Southern Partners then purchased the note, determined by the FDIC to be $77,179 plus interest, and sued HHDC for payment.[103] The supreme court concluded that because the bank had accepted the payment of the fifth note as satisfying the loan in full, the FDIC acquired no asset and, thus, section 1823 did not apply.[104]

In *Briggs v. Newton*,[105] a business owner, Hess, entered into a fixed-price contract with a first contractor, Shea, to remodel his business premises.[106] After the first week of work, Hess refused to pay a bill that exceeded the flat rate he had expected.[107] Consequently, Shea discontinued the remodeling work, and Hess hired a second contractor, Christensen, to complete the work.[108] Christensen made disparaging comments to Hess about the quality of Shea's work and speculated that the unexpected price increase was part of Shea's plan to induce Hess to contract with him, and then force him to pay higher prices once work had begun.[109] While

97. 972 P.2d 161 (Alaska 1999).

98. *See id.* at 166. (providing that when the loan asset had been discharged by the payment and cancellation of the underlying debt before the FDIC obtained the assets of the bank, a rebuttable presumption arises in favor of the paying party, and the FDIC must come forward with evidence to prove that the note has not been paid in full.)

99. *See id*.

100. *See id.* at 163.

101. *Id.*

102. *See id*.

103. *See id.*

104. *See id.* at 165-66.

105. 984 P.2d 1113 (Alaska 1999).

106. *See id.* at 1115.

107. *See id*.

108. *See id*.

109. *See id.* at 1119.

Hess and Shea were suing each other in district court for breach of contract, Shea's co-contractor from the initial project declared bankruptcy and listed the lawsuit as an asset.[110] The supreme court held that: (1) only the bankruptcy estate, and not Shea's co-contractor, had standing to sue to enforce Shea's former interests, (2) the fact that Shea breached the contract blocked his claim that Christensen later interfered with Shea's contract with Hess, and (3) Christensen's comments about Shea were defamatory but privileged.[111] On the first holding, the court reasoned that when a "debtor's assets include causes of action, the bankruptcy trustee becomes the proper plaintiff to pursue those claims; only the trustee has standing to pursue causes of action that now belong to the estate."[112] The breach claim was collaterally estopped because breach requires intentional interference with the contract.[113] Since Christensen made the defamatory statements after Shea had breached the contract, there was no contract to interfere with when he made the statements.[114] A court could find that Christensen's comments were defamatory because they tended to lower Shea's reputation in the community and deter third parties from dealing with him.[115] However, they were shielded from suit by the business privilege existing when a statement is made to protect a lawful business interest.[116]

In *Thompson v. United Parcel Service*,[117] the supreme court held that the Worker's Compensation Board should have applied the statutory definition of "spendable weekly wage," because the employer did not present substantial evidence to justify a deviation from the statute governing temporary total disability benefits.[118] Thompson, an employee of United Parcel Service ("UPS"), injured her knee at work.[119] Because UPS classified Thompson as a part-time employee, the Alaska Worker's Compensation Board issued her a lower disability award than the statutory formula required.[120] Thompson filed an Application for Adjustment of Claim, based on the work she did in a previous full-time position, in an effort to

110. *See id*. at 1117.
111. *See id.* at 1116.
112. *Id*. at 1118.
113. *See id.* at 1119.
114. *See id*.
115. *See id*. at 1120 (citing French v. Jadon, Inc., 911 P.2d 20, 32 (Alaska 1996)).
116. *See id*.
117. 975 P.2d 684 (Alaska 1999).
118. *See id*. at 691.
119. *See id*. at 684.
120. *See id*.

increase her benefits.[121] The supreme court remanded to the Board to award Thompson compensation calculated under the formula in Alaska Statutes section 23.30.220(a)(1), as well as reasonable attorney's fees and costs.[122]

In *Philbin v. Matanuska-Susitna Borough*,[123] the borough contracted with Philbin to pave its roads with gravel.[124] Winter set in before Philbin could complete the job, and Philbin attempted to negotiate a "winter shutdown" so that he could resume work in the spring.[125] The borough terminated the project for nonperformance, and compelled Philbin to sign a release from the contract.[126] The supreme court found that the issue of whether the release foreclosed Philbin's action for breach of contract was a genuine of issue of fact, and not fit for summary judgment.[127] Alaska law affords two tests concerning the enforceability of a release document.[128] A court looks either to the parties' intentions or to the aggrieved party's understanding of the release.[129] Here, under either test, a question of material fact existed that warranted a trial.[130] Further, a trial was necessary to determine whether Alaska's codification of section 1-107 of the Uniform Commercial Code applied.[131] That provision indicates that a claim arising from an alleged breach can be discharged, but the release must be signed after the breach.[132] In this case, there was a factual dispute regarding whether the release was signed before or after the breach.[133] Finally, the supreme court rejected the borough's contention that the parol evidence rule mandated integration of the release into the contract.[134] The rule does not apply when the contract is formed as the result of mistake or misunderstanding, and Philbin permissibly used external evidence to show mistake.[135]

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121. *See id*. at 685.
122. *See id*.
123. 991 P.2d 1263 (Alaska 1999).
124. *See id.* at 1264.
125. *Id*.
126. *See id.* at 1265.
127. *See id.* at 1270.
128. *See id.* at 1266.
129. *See id.*
130. *See id.* at 1269 (citing ALASKA STAT. § 45.01.107 (LEXIS 2000)).
131. *See id.*
132. *See id*.
133. *See id.*
134. *See id.* at 1270.
135. *See id.*

In *International Investors v. Business Park Fund*,[136] the supreme court held that Business Park Fund's ("BPF") limited partners were liable to BPF's unpaid creditors for their obligations to BPF, which included their unpaid contributions.[137] BPF, a limited partnership, defaulted on a note payable to International Investors ("II").[138] II sued BPF's limited partners, and the superior court released BPF from all liability.[139] The supreme court reversed, finding the limited partners liable for their contribution to the partnership because the limited partners' unpaid capital contributions were enforceable by a partnership creditor.[140] Under Alaska law, limited partners are not liable for the obligations of the partnership, but they are liable to partnership creditors to the extent they do not pay promised capital contributions.[141] Further, although a six-year statute of limitations would have barred a claim by BPF for unpaid contributions from the limited partners, II was not similarly barred from its claim.[142] The limited partners' defenses, if the claim had been brought by BPF, were not available against II.[143]

IV. CIVIL PROCEDURE

A. Costs and Attorney's Fees

In *Noey v. Bledsoe*,[144] the Alaska Supreme Court held that a client disputing attorney's fees waives his right to binding arbitration when he fails to timely request arbitration, or he commences or maintains a legal action to settle the dispute.[145] Noey petitioned for arbitration three weeks before his trial date and nearly eighteen months after the complaining attorney, Bledsoe, initially informed him of his right to arbitration.[146] Bledsoe claimed that his petition for arbitration was timely because the complaining co-counsel, Davis, filed an interpleader action concerning funds in his possession which both Noey and Bledsoe

136. 991 P.2d 219 (Alaska 1999).
137. *See id.* at 221.
138. *See id.*
139. *See id.*
140. *See id.* at 223.
141. *See id.* at 224 (citing ALASKA STAT. § 32.10.160(c) (LEXIS 2000)).
142. *See id.* at 225.
143. *See id.*
144. 978 P.2d 1264 (Alaska 1999).
145. *See id.* at 1269.
146. *See id.* at 1268.

claimed.[147] Rejecting Noey's argument, the supreme court held that Bledsoe violated Alaska Bar Rule 39(a), which requires attorneys who are recovering fees from clients to serve their clients with written notice of the client's right to binding arbitration at the time of service of a summons in the civil action.[148] In so holding, the court interpreted Rule 39(a) to include any action to recover fees from a client, regardless of which attorney files the action.[149] Moreover, the court noted that Noey participated in the interpleader action by answering Davis's complaint.[150] The court also refused to be lenient with Noey on the ground that he was a pro se litigant because Bledsoe provided him with multiple notices of his right to arbitration.[151]

In *North Slope Borough v. Green International, Inc.*,[152] the supreme court held that the superior court used an incorrect standard in denying defendant's costs and attorney's fees.[153] Instead of granting a motion for a change in venue from Anchorage to Barrow, the Anchorage superior court dismissed North Slope Borough's ("NSB's") case without prejudice provided the case were refiled within fifteen days in Barrow.[154] After refiling in Barrow, NSB filed a motion requesting costs and attorney's fees associated with litigating the venue issue.[155] Green International opposed the motion and asked for costs and fees associated with fighting NSB's motion for costs.[156] The superior court denied both motions, stating that the issues could be resolved at the conclusion of the action.[157] The supreme court, without analyzing whether the dismissal without prejudice by the Anchorage court was the proper procedure, concluded that the dismissal without prejudice did not amount to a de facto change in venue.[158] Therefore, the motions for defendant's costs and attorney's fees could not be combined with the Barrow appeal and must be litigated separately.[159]

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147. *See id.* at 1269.
148. *See id.*
149. *See id.*
150. *See id.*
151. *See id*. at 1269-70.
152. 969 P.2d 1161 (Alaska 1999).
153. *See id*. at 1164.
154. *See id*. at 1162.
155. *See id*.
156. *See id*.
157. *See id*.
158. *See id*.
159. *See id*. at 1164.

In *Strong Enterprises, Inc. v. Seaward*,[160] the supreme court held that the superior court correctly awarded attorney's fees to Seaward at the thirty percent level because it was a non-monetary judgment under Alaska Civil Rule 82(b)(2), but that Seaward was not entitled to receive accountancy fees incurred prior to judgment based on Civil Rule 79(b) or Administrative Rule 7(c).[161] Strong argued that requiring it to pay Seaward's portion of the partnership profits and interests meets the definition for a money judgment; accordingly, the court should apply the attorney's fees schedule contained in Civil Rule 82(b)(1).[162] The supreme court disagreed, reasoning that the final judgment required Seaward's former partners to perform accountings and pay Seaward for his interest, but the judgment did not specify the amounts to be paid and was, therefore, self-executing.[163] However, the supreme court held that the superior court had abused its discretion by granting accountancy fees that occurred prior to the judgment.[164] According to the supreme court, it "would be anomalous to deny full preparation costs for expert witnesses who testify under Administrative Rule 7(c), but to award full costs under Civil Rule 79(b) for expert consultants who do not testify on the theory Administrative Rule 7(c) does not apply."[165]

In *City of Kodiak v. Parish*,[166] the supreme court upheld the superior court's decision that Columbia Cascade Company ("CCC") was entitled to recover costs and attorney's fees against the City of Kodiak.[167] A child had been injured on playground equipment produced by CCC and maintained by the City of Kodiak.[168] Parish, the child's mother, sued the city, which then filed a third-party complaint against CCC, seeking equitable apportionment for its damages.[169]

Kodiak argued on appeal that the trial court misinterpreted the state rules of civil procedure addressing the allocation of costs and attorney's fees in situations concerning third-party plaintiffs and third-party defendants.[170] The issue was whether Parish

160. 980 P.2d 456 (Alaska 1999).
161. *See id*. at 457.
162. *See id*. at 458.
163. *See id*.
164. *See id*.
165. *Id*. at 459-60.
166. 986 P.2d 201 (Alaska 1999).
167. *See id*. at 204.
168. *See id*. at 201.
169. *See id.*
170. *See id*. at 202.

asserted a direct claim against third-party defendant CCC.[171] The court concluded that Parish did, in fact, assert such a claim and thus, Civil Rule 82(e), which applies only when a plaintiff does not assert a direct claim against a third-party defendant, does not apply.[172] Since Rule 79(h) is nearly identical in language and intent to Rule 82(e), it's interpretation must be consistent with Rule 82(e).[173] Thus, since Rule 82(e) doesn't apply with respect to attorneys fees, Rule 79(h) must not apply with respect to costs.[174]

B. Damages

In *Nelson v. Progressive Corp.*,[175] the supreme court upheld the jury's award of damages.[176] The court concluded that the trial court did not err in denying a new trial on the question of damages because Nelson neither raised an inconsistent verdict argument nor sought resubmission before the jury was discharged.[177] Nelson, therefore, waived his right to a new trial on the damages question.[178] Furthermore, the jury's decision to award compensatory damages and refusal to award punitive damages were not inconsistent.[179] The jury could have found that Progressive's misrepresentations during an arbitration were made knowingly, but not with reckless indifference to Nelson's rights.[180]

In *International Brotherhood of Electric Workers Local 1547 v. Alaska Utility Construction, Inc.*,[181] the supreme court affirmed the trial court's decision to deny a new trial on the condition that Alaska Utility Construction ("AUC") accept a remittitur.[182] The supreme court also applied a modified Donovan rule and permitted AUC to appeal the trial court's remittitur.[183] The case arose from several incidents where members of the International Brotherhood of Electrical Workers ("IBEW") picketed at the work sites of

171. *See id*.
172. *See id*. at 204.
173. *See id.* at 203.
174. *See id*.
175. 976 P.2d 859 (Alaska 1999).
176. *See id.* at 869.
177. *See id.* at 864.
178. *See id.*
179. *See id.*
180. *See id.* at 865.
181. 976 P.2d 852 (Alaska 1999).
182. *See id.* at 859.
183. *See id.* at 858 (citing Donovan v. Penn Shipping Co., 429 U.S. 648 (1977) (barring plaintiffs from challenging on appeal the amount of a remitted award when they accept the trial court's remittitur.)).

AUC.[184] During the picketing, IBEW members threatened to kill AUC workers and rape their daughters, threw and kicked stones at AUC workers, vandalized work performed by AUC, and prevented AUC from completing work.[185] After trial, the trial court denied IBEW's motion for a new trial on the condition that AUC accept a remittitur that reduced punitive damages from $425,000 to $212,500.[186] The trial court did not abuse its discretion in denying the new trial because there was ample evidence to support a jury determination of outrageous conduct.[187]

In allowing AUC to appeal the remittitur, the supreme court applied a modified Donovan rule because the benefits a party receives in accepting a remittitur (avoiding delay, reducing uncertainty of outcome, and reducing litigation costs) are negated when the opposing party raises the issue on appeal.[188] Nonetheless, the supreme court was not "left with the definite and firm conviction that the [trial] judge made a mistake in granting the remittitur,"[189] because the trial court carefully applied the balancing test for evaluating when a remittitur is necessary.[190] The supreme court then rejected IBEW's arguments that punitive damages of $212,500 was still excessive, noting the flagrant behavior of IBEW members and the fact that the Local's insurer paid it $220,000 to settle its liability.[191]

In *McCubbins v. State*,[192] the supreme court held that the trial court abused its discretion by not ordering a new trial on the issue of damages when the jury award was internally inconsistent.[193] McCubbins dove into the water in a roped-off swimming area maintained by the state and hit his head on a submerged rock.[194] The jury awarded McCubbins damages for future medical expenses, but failed to award any damages for loss of future earning capacity.[195] The supreme court had held that it would not disturb a jury verdict if a logical theory existed to reconcile any

184. *See id.* at 854.
185. *See id.* at 854-55.
186. *See id.* at 858.
187. *See id.*
188. *See id.* (citing Plesko v. City of Milwaukee, 120 N.W.2d 130 (Wis. 1963)).
189. *Id.* at 857.
190. *See id.* at 858 (applying the test set forth in Sturm, Ruger & Co. v. Day, 594 P.2d 38 (Alaska 1979)).
191. *See id.* at 859.
192. 984 P.2d 501 (Alaska 1999).
193. *See id*. at 509.
194. *See id*. at 502.
195. *See id*. at 503.

apparent inconsistencies.[196] In this case, however, the court found that no logical theory existed for the jury award.[197]

C. Miscellaneous

In *Renwick v. State*,[198] the supreme court held that claims in a declaratory judgment action were not barred by *res judicata* or issue preclusion if the superior court did not consider those claims in a separate ruling and the party asserting the claims did not, but could have, raised those questions on the appeal of the other action.[199] Renwick brought two separate claims in superior court: the first was a declaratory judgment action to determine certain questions of law, and the second was an appeal from an Alaska Board of Marine Pilots' ruling to suspend his marine pilot's license.[200] The court heard arguments for the declaratory judgment action during Renwick's other suit, the appeal of the Board's decision.[201] The superior court ultimately found an issue not presented in the declaratory judgment action to be determinative in the Board decision.[202] During the appeal of the superior court's ruling, Renwick failed to raise three questions that the superior court did not consider.[203] The superior court subsequently granted the State's motion to dismiss Renwick's declaratory judgment action on the ground of *res judicata*.[204] The superior court granted the motion to dismiss and Renwick appealed.[205] The supreme court stated that *res judicata* would not prevent a party from raising claims in a later action if the party failed to raise those claims as alternate grounds in a previous action.[206] Those same claims were not barred by issue preclusion because the issues were not decided, were not resolved by a final judgment on the merits, and were not essential to the final judgment in the first action.[207] The court then affirmed the dismissal of the case on the grounds that Renwick failed to exhaust his administrative remedies, but modified that the

196. *See id*. at 506.
197. *See id*.
198. 971 P.2d 631 (Alaska 1999).
199. *See id.* at 634.
200. *See id.* at 632.
201. *See id.* at 633.
202. *See id.*
203. *See id*.
204. *See id.*
205. *See id.*
206. *See id.*
207. *See id.* at 634.

dismissal be without prejudice in order to permit Renwick to argue those claims later.[208]

In *Cramer v. Wade*,[209] Alaska resident Wade loaned $135,000 to a California business venture ("TSO") on a note guaranteed by Cramer's corporation ("Kokua").[210] Kokua was a Nevada corporation, and Cramer was a California citizen.[211] When the business venture failed to repay the loan, Wade sued Cramer and several others who were not party to the appeal.[212] Cramer moved under Alaska Civil Rule 60(b)(4) to set aside the resulting default judgment against him for lack of personal jurisdiction.[213] The court first reasoned that Cramer established sufficient minimum contacts to satisfy the due process requirements for personal jurisdiction because he actively solicited a loan from an Alaska resident.[214] The court also cited the rule that due process requirements are met when an out-of-state party receives funds from an Alaska resident.[215] The court rejected Cramer's arguments that his actions were outside Alaska's long-arm statute.[216] The statute defines the minimum reach of personal jurisdiction, and is supplemented by any case "in which exercise is permissible under the Fourteenth Amendment."[217] Personal jurisdiction is not barred by the Fourteenth Amendment because minimum contacts existed, and maintenance of the suit fits with traditional notions of fair play and substantial justice.[218] Agreeing to guarantee a loan satisfies the United States Supreme Court's minimum contacts requirement that Cramer must reasonably anticipate suit in Alaska by "'purposefully direct[ing]" his efforts at an Alaska resident.[219] The corporate shield doctrine did not protect Cramer because he was one of Kokua's only shareholders, and Kokua was not in the business of guaranteeing loans.[220]

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208. *See id.* at 635.

209. 985 P.2d 467 (Alaska 1999).

210. *See id*. at 469.

211. *See id.*

212. *See id.*

213. *See id.* at 470 (this rule allows the courts to set aside any judgment that is void, for instance, in this case, for lack of personal jurisdiction).

214. *See id*.

215. *See id.* (citing Kennecorp Mortgage & Equities, Inc. v. First Nat'l Bank of Fairbanks, 685 P.2d 1232, 1238 (Alaska 1984)).

216. *See id.* at 471; ALASKA STAT. § 09.05.015 (Michie 1998).

217. *Cramer*, 985 P.2d at 471 (citing Kennecorp, 685 P.2d at 1299).

218. *See id.*

219. *See id.* (quoting Burger King Corp. v. Rudzewicz, 471 U.S. 462 (1985)).

220. *See id.* at 472 (noting that this doctrine protects corporate officers from personal jurisdiction only when they are acting in corporate capacity).

In *Peter v. Progressive Corporation*,[221] the supreme court articulated the factors to be considered by a trial court contemplating appointment of a discovery master.[222] Peter sued Progressive, an insurance company, on behalf of his son, alleging bad faith and breach of fiduciary duty in denying knowledge that a driver who had hit Peter's son while he was crossing the street was a policyholder.[223] After receiving extensive discovery requests, the trial court granted Progressive's motion requesting appointment of a discovery master, and assessed the master's fees to the losing party in each disputed matter.[224]

The supreme court acknowledged that trial courts have a general power to appoint discovery masters under Alaska Civil Rule 53(a) and established the circumstances when a special master would be appropriate: "(1) where the issues are universally complex or specialized; (2) where discovery is particularly document intensive; (3) where resolving discovery disputes will be especially time consuming; (4) where the parties are particularly contentious or obstructionist; or (5) where a master will facilitate a more speedy and economical determination of the case."[225] Furthermore, the court stated that apportionment of the master's fees should be determined by the trial court after considering, among other things, the financial means and trial conduct of the parties and the effect a master would have on the speediness and cost of the trial.[226]

In *Baypack Fisheries, L.L.C. v. Nelbro Packing Co.*,[227] the supreme court held that a Washington packing company ("Nelbro") had not sufficiently proven that Alaska was a grossly inconvenient forum in which to litigate against an Alaska fishery ("Baypack") to merit transfer under the doctrine of *forum non conveniens*.[228] To obtain a grant of *forum non conveniens*, the movant must show that the forum is "seriously inconvenient."[229] The plaintiff's choice of forum is disturbed only when public and private interests weigh strongly in favor of dismissal.[230] The following five factors are relevant to proving *forum non*

221. 986 P.2d 865 (Alaska 1999).
222. *See id.* at 870-72.
223. *See id.* at 867.
224. *See id.*
225. *Id.* at 870.
226. *See id.* at 872.
227. 992 P.2d 1116 (Alaska 1999).
228. *See id.* at 1120.
229. *Id.* at 1119.
230. *See id.*

conveniens: (1) ease of access of proof; (2) availability and cost of finding witnesses; (3) level of harassment inherent to defending in the inconvenient forum; (4) enforceability of the judgment; and (5) burden on the community in litigating matters not of public concern.[231] Nelbro could show only that the ease of access to proof and the availability and cost of finding witnesses would be more inconvenient in Alaska.[232] However, even these factors were largely mooted because extensive discovery had already been completed.[233] Thus, the court reversed the dismissal on *forum non conveniens* grounds.[234]

In *Marathon Oil Co. v. Arco Alaska, Inc.*,[235] the supreme court held that arbitrators were not unreasonable in determining they could revise a finding of liability, nor did they commit gross error in refusing to grant a hearing on the question of their authority to make such a revision.[236] The arbitrators had split the proceedings into two hearings for the convenience of the parties.[237] Then, in the second hearing, the arbitrators revised a decision made in the prior hearing.[238] Applying a "reasonably possible" standard, the supreme court concluded that the arbitrators were not unreasonable in revising the decision because the determinations of the first hearing were related to the determinations of the second hearing.[239] The court also upheld the arbitrators' decision not to grant Marathon a hearing on the arbitrators' authority to revise determinations of liability.[240] The arbitrators did not commit gross error because the arbitration agreement granted them "considerable leeway in matters of procedure," and because they reasonably concluded that the parties should have known the liability decision was not binding.[241]

In *Andrus v. Lena*,[242] the supreme court held that Lena, the plaintiff in a personal injury action against Andrus, was not entitled to an award of increased prejudgment interest.[243] Since the

231. *See id.* (citing Crowson v. Sealaska Corp., 705 P.2d 905, 907-08 (Alaska 1985)).
232. *See id.*
233. *See id.* at 1120.
234. *See id.*
235. 972 P.2d 595 (Alaska 1999).
236. *See id.* at 602-03.
237. *See id.* at 602.
238. *See id.*
239. *See id.*
240. *See id*.
241. *Id.* at 603.
242. 975 P.2d 54 (Alaska 1999).
243. *See id*. at 57.

prejudgment offer rejected by Andrus was not more favorable than the jury award, the superior court erred in applying an interest penalty pursuant to Alaska Civil Rule 68.[244] The supreme court examined the formula for determining whether a prejudgment settlement offer was more favorable to the offeree than the final judgment, and the court held that this formula requires the addition of prejudgment interest only on the portion of the jury's award covering past damages.[245]

In *In the Matter of S.H.*,[246] the supreme court upheld a conservator's appointment to, and settlement of, S.H.'s case.[247] S.H. sued his former employer for sadistically and physically mistreating him.[248] During the suit, "S.H. displayed various indicia of instability, including irrational behavior, paranoia, inclinations toward gratuitous dismissal of his personal injury suit, a tendency to threaten his own witnesses, the desire to initiate direct and inappropriate dealings with opposition counsel and the judge, and a marked lack of confidentiality."[249] All but one of the psychiatric experts that examined S.H. agreed that a mental impairment caused S.H. to act irrationally at times.[250] After S.H. refused to settle the case for $500,000 and made unfounded accusations against the lawyers and judges, S.H.'s attorneys filed a Petition for Appointment of Limited Conservator/Guardian Ad Litem of a Person.[251] The trial court appointed a conservator who ultimately settled the case for $500,000.[252]

The supreme court rejected S.H.'s assertion that the conservator lacked the power to settle his claim, because conservators are specifically granted such power under Alaska Statutes section 13.26.280(c)(19).[253] The court also rejected S.H.'s argument that the trial court applied the wrong standard in appointing a conservator. The court reasoned that any error was harmless because Alaska Statutes section 13.26.165(b) would authorize the judge to appoint a conservator if S.H.'s property

244. *See id*. at 58. The lower court awarded Lena an enhanced attorney's fee award due to a mistaken assumption that Andrus had rejected an offer of judgment more favorable than the judgment.

245. *See id*. at 57-58.

246. 987 P.2d 735 (Alaska 1999).

247. *See id.* at 739-41.

248. *See id.* at 737.

249. *Id.*

250. *See id.* at 737-38.

251. *See id.* at 738.

252. *See id.*

253. *See id.* at 739.

interest in the personal injury suit could have been wasted by his own management of the suit.[254] The court then rejected S.H.'s argument that the trial court must find the person unable to make rational decisions in general.[255] Rather, a conservator may be appointed to address the individual's specific incapacity to protect the individual's property.[256] The supreme court also held that the conservator's settling of S.H.'s case did not violate S.H.'s jury trial rights.[257] The court noted that a conservator must have such authority, otherwise the ward, already deemed incapable by a court, could always regain control of the case by demanding a jury trial.[258]

In *Red Top Mining, Inc. v. Anthony*,[259] the supreme court held that the superior court did not abuse its discretion in denying Red Top's motion to intervene by right in a trial that had ended eight months earlier.[260] Anthony had been president of Red Top and transferred title of a mining claim to himself for debts allegedly owed to him by Red Top.[261] Anthony then filed suit against Red Top's predecessors in interest to quiet any claims they may have had against the mining claim.[262] Red Top was not named in Anthony's complaint and did not participate in the April 1996 trial.[263] In December 1996, eight months after the trial and three months after the court had entered its decision in favor of Anthony, Red Top filed an answer to Anthony's original complaint; Red Top later filed a motion to intervene by right.[264] The supreme court found that the trial court did not abuse its discretion when it denied Red Top's untimely motion to intervene.[265] The court also noted that two of Red Top's shareholders knew of the trial as early as 1994 because they had signed affidavits in connection with the original litigation.[266]

In *West v. Buchanan*,[267] the supreme court held that defendant's peremptory challenge request under Alaska Civil Rule

254. *See id.*
255. *See id.* at 740.
256. *See id.*
257. *See id.* at 741.
258. *See id.*
259. 983 P.2d 743 (Alaska 1999).
260. *See id.* at 746.
261. *See id.* at 744.
262. *See id.*
263. *See id.* at 745.
264. *See id.*
265. *See id.* at 746.
266. *See id.* at 747.
267. 981 P.2d 1065 (Alaska 1999).

42(c)(3), for a change of judge in a vehicle accident case was timely.[268] The court, thus, affirmed the lower court's decision to allow the defendant, Buchanan, to peremptorily challenge the lower court judge.[269] Due to Buchanan's filing of a Notice of Change of Judge, the case was reassigned from Judge Beistline to Judge Steinkruger.[270] Judge Steinkruger granted Buchanan summary judgment and determined that West's amended complaint, which had included Buchanan as a defendant, did not encompass the date of the original complaint.[271] West appealed from this decision.[272]

The supreme court held that one trial court may overrule another "in the proper exercise of judicial discretion."[273] The court noted that "Judge Steinkruger was within her discretion to reconsider whether West's amended complaint would properly relate back to the date her complaint was originally filed."[274] However, the amendment substituting Buchanan as the driver would properly relate back to the date the complaint was filed, thus falling within the statute of limitations.[275] Applying Rule 15 (c),[276] the supreme court concluded that "West proved that Buchanan received notice of the institution of the action and knew or should have known before expiration of the period for commencement of the action that [he] was the proper party in the suit."[277]

In *Compton v. Chatanika Gold Camp Properties,*[278] the supreme court held that the superior court's dismissal of legal malpractice claims against the debtor's estate violated the automatic stay imposed by 11 U.S.C. § 362(a)(3) because the claims were part of the bankruptcy estate and the dismissal was without the trustee's permission.[279] A creditor purchased litigation claims from the defendant-debtor; the creditor then filed a malpractice suit against the debtor's attorney.[280] The bankruptcy court set aside the order approving sale of the claims, and ruled that the trustee

268. *See id.* at 1066.
269. *See id*.
270. *See id*.
271. *See id.* at 1065.
272. *See id.*
273. *Id.*
274. *Id.* at 1066.
275. *See id*. at 1067.
276. ALASKA R. CIV. P. 15(c).
277. *Id*.
278. 988 P.2d 598 (Alaska 1999).
279. *See id.* at 599.
280. *See id.*

was the real party in interest in the claims.[281] When the creditor and debtor agreed to dismiss the claims, plaintiff trustee attempted to substitute himself as the real party in interest.[282] The supreme court overruled the superior court's dismissal of the claims because the claims were property of the estate and, as such, were subject to the trustee's control and the automatic stay provision.[283]

V. CONSTITUTIONAL LAW

A. Due Process

In *Church v. State*,[284] the Alaska Supreme Court held that it was not improper for the Permanent Fund Dividend Division to deny Church a 1993 Permanent Fund Dividend because he was absent from Alaska for more than 180 days in 1992.[285] Church left the state for 274 days to care for his dying mother, which was not one of the allowable absences enumerated in Alaska Statutes section 43.23.095(8) (A)-(G) or 15 Alaska Administrative Code 23.163(c).[286] The court held that strict adherence to the statute was not unreasonable, given that the purpose of section 43.23.095(8) was to ensure that dividends are given only to permanent residents.[287] Moreover, to ease the administrative burden of determining eligibility, discretionary review for absences not specifically excused is limited to absences of 180 days or less.[288] Further, even though the recently enacted subsections 43.23.095(8)(H) and (I) allow absences to care for ailing relatives, the new subsections did not apply to Church because they were not effective until 1997.[289] Church was not denied due process because there is only a right to an evidentiary hearing in the face of a factual dispute.[290] Finally, Church's rights to travel and to family relationships were not infringed because the State's purpose in

281. *See id.*
282. *See id.*
283. *See id.* at 603.
284. 973 P.2d 1125 (Alaska 1999).
285. *See id*. at 1127.
286. *See id*.; ALASKA STAT. § 43.23.095(8)(A)-(G) (LEXIS 1998); 15 AAC 23.163(c) (LEXIS 1997).
287. *See Church*, 973 P.2d at 1129; ALASKA STAT. § 43.23.095(h) (LEXIS 1998).
288. *See Church*, 973 P.2d at 1129.
289. *See id.*
290. *See id*.; ALASKA STAT. § 43.23.095(H)-(I) (LEXIS 1998).

awarding dividends only to residents outweighed Church's right to reside outside Alaska.[291]

In *Nickerson v. University of Alaska, Anchorage*,[292] the supreme court held that due process under both the United States and Alaska Constitutions prevented a university from dismissing a student until providing him with adequate notice of the deficiency in his work and informing him that continued deficiency would result in dismissal.[293] Additionally, the supreme court noted that although dismissal for academic reasons required less procedural protection than dismissal for disciplinary reasons, the notice given to students must precede dismissal by a reasonable time to allow the student to cure his or her deficiency.[294] Nickerson was dismissed from a teaching practicum and the special education program because he had problems with the teachers.[295] Noting that the ability of teachers to "interact effectively with their students and colleagues" is a necessary skill for teachers, the supreme court accepted the university's characterization of the dismissal as academic, despite the fact that it was premised largely upon Nickerson's conduct.[296] Because the record was unclear as to whether Nickerson received adequate notice of his pending dismissal, the supreme court remanded the case for further findings.[297]

In *Hoople v. State*,[298] the court of appeals held that "Alaska's felony DWI statute did not require proof that the defendant acted with any culpable mental state regarding his prior misdemeanor DWI convictions."[299] Further, the court held that the DWI statute did not violate the due process guarantees of the federal and state constitutions.[300] Hoople had been convicted of misdemeanor DWI at least two times within the five years prior to this DWI conviction, which raised this third conviction to a class C felony.[301] Hoople argued that the increase from a misdemeanor to a class C felony violated her constitutional due process rights because the

291. *See Church*, 973 P.2d at 1131 (citing Alaska Dep't. of Revenue, 900 P.2d 728, 734 (Alaska 1995)).
292. 975 P.2d 46 (Alaska 1999).
293. *See id.* at 53.
294. *See id.*
295. *See id.* at 48-49.
296. *Id.* at 53.
297. *See id.* at 54.
298. 985 P.2d 1004 (Alaska Ct. App. 1999).
299. *Id*. at 1006.
300. *See id*.
301. *See id*. at 1005.

increase required no proof of a culpable mental state regarding the aggravating circumstances.[302] The court rejected Hoople's claim because the underlying crime, driving while intoxicated, does not require proof of a culpable mental state.[303] Therefore, the court refused to require proof of a culpable mental state for the aggravating factor.[304]

In *Patterson v. State*,[305] the court of appeals upheld the Alaska Sex Offender Registration Act[306] ("ASORA") against many challenges.[307] ASORA requires those convicted of sex offenses to register periodically with the police regardless of when they were convicted.[308] Patterson, who had previously been convicted of first-degree sexual abuse of a minor, decided not to register because ASORA was enacted after Patterson was unconditionally discharged from custody.[309]

The court of appeals held that ASORA did not violate (1) the prohibition against ex post facto laws because ASORA was intended to regulate, not punish, sex offenders; (2) double jeopardy because Patterson's failure to register was not a renewed jeopardy of his original sex offense (registration is a separate duty imposed on those previously convicted of sex offenses); (3) Patterson's right to privacy because the legislature's interest in public safety is greater than Patterson's subjective expectation of privacy; (4) procedural due process or fundamental fairness because ASORA does not require any administrative adjudication past the conviction of the sex offense that invoked the registration requirement; (5) substantive due process because ASORA is a legitimate public policy based on the legislature's concern for public safety; (6) equal protection because Patterson failed to show that sex offenders are treated any differently than any similarly situated group; and (7) Patterson's plea agreement because the registration requirement is not a direct result of the agreement, but rather a collateral consequence of Patterson's conviction of a sex offense.[310]

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302. *See id*.
303. *See id.* at 1006.
304. *See id*.
305. 985 P.2d 1007 (Alaska Ct. App. 1999).
306. *See* Alaska STAT. §§ 12.63.010 - .100 (LEXIS 1998).
307. *See id*. at 1019.
308. *See id*. at 1010.
309. *See id*. at 1010-11.
310. *See id*. at 1013-19.

In *Wilkerson v. State*,[311] the supreme court held that 7 Alaska Administrative Code 50.210(c)(5) does not violate the due process or equal protection clauses of the Alaska Constitution.[312] Wilkerson was charged with, but not convicted of, several offenses including assault, weapons possession, and various drug offenses.[313] Section 50.210(c)(5) required the Division of Family and Youth Services ("DFYS") to deny foster care licenses to applicants who have been charged with a "serious offense" within ten years of application.[314] The court first rejected Wilkerson's equal protection argument that the regulation improperly distinguishes those who are charged with crimes, but not convicted, from those who are not charged with crimes.[315] The court applied a rational basis review, since it found Wilkerson's interest in a foster care license to be "[a]t most . . . merely economic."[316] It then found a rational basis for the challenged distinction, pointing out that the State cannot charge a defendant without at least having "probable cause," a standard that requires some evidence to support the charge.[317] The supreme court stated that automatic denial was an efficient means of eliminating applicants whom the state had reason to believe may have engaged in criminal behavior.[318] The supreme court then rejected Wilkerson's substantive due process claim, stating that the nexus required for substantive due process is lower than the standard for equal protection.[319] Finally, the supreme court held that the regulation did not violate procedural due process because the private interest affected is minimal, the possibility of improper denial is low, and requiring hearings would place a heavy burden on DFYS.[320]

B. Equal Protection

In *Eldridge v. State Department of Revenue*,[321] the supreme court held that Plaintiffs were not denied equal protection when their applications for Permanent Fund dividends were denied.[322]

311. 993 P.2d 1018 (Alaska 1999).
312. *See id.* at 1026.
313. *See id.* at 1020.
314. *See id.*
315. *See id.* at 1022.
316. *Id.* at 1024.
317. *See id.* at 1025.
318. *See id.*
319. *See id.*
320. *See id.* at 1026.
321. 988 P.2d 101 (Alaska 1999).
322. *See id.* at 104.

Plaintiffs were absent from Alaska for 328 days during 1994; Alaska law requires residents to be present at least 180 days in Alaska per calendar year to be eligible for the dividend, or to qualify under an "allowable absences" provision.[323] Plaintiffs argued that this provision denied them equal protection "because it treats Alaskans employed by Alaska companies working outside the state differently than state employees working outside the state."[324] The supreme court rejected this argument, holding that the statute conferred an economic interest and therefore was subject only to minimum scrutiny.[325] Under this scrutiny, the court ruled that the statute bore a fair and substantial relationship to a legitimate government objective.[326]

C. The Legislature

In *State v. Alaska Civil Liberties Union*,[327] the supreme court affirmed seven and rejected two of the Alaska Civil Liberty Union's challenges to Alaska's campaign finance reforms.[328] Most significantly, the court invalidated pre-election year and legislative session contribution bans.[329] The court identified the State's "legitimate interest in preventing corruption or the appearance of corruption in state election campaigns."[330] Finding many of the challenged provisions to be "narrowly tailored to achieve that interest," the court upheld them.[331] However, the court struck down the bans on pre-election campaign contributions and contributions to legislative candidates during a regular legislative session, because these provisions were not sufficiently narrow to avoid an unconstitutional limitation on free speech.[332]

In *Bess v. Ulmer*,[333] the supreme court held that Legislative Resolve No. 59, which would limit prisoners' rights to those rights and protections afforded by the United States Constitution, was a constitutional revision, not an amendment.[334] As such, it could be implemented only through a constitutional convention, not through

323. *See id.* at 102.
324. *Id.* at 103.
325. *See id.*
326. *See id.* at 104.
327. 978 P.2d 597 (Alaska 1999).
328. *See id.* at 600.
329. *See id*.
330. *Id*. at 601.
331. *Id.* at 600.
332. *See id.* at 627.
333. 985 P.2d 979 (Alaska 1999).
334. *See id.* at 987-88.

the procedures required for constitutional amendments.[335] Additionally, the Supreme Court held that Legislative Resolve No. 71, limiting marriages to persons of the opposite sex, and Legislative Resolve No. 74, reassigning the power to reapportion legislative districts from the executive to a neutral body, were amendments rather than revisions.[336]

The supreme court noted that the distinction between revision and amendment, although not precisely defined by the framers, served the valuable following purposes: promotion of stability, consideration of the Constitution as an organic whole, and separation of the legislature from the process of significantly revising the Constitution.[337] Looking to California precedent, the Alaska Supreme Court determined that the distinction between a revision and an amendment was one of degree.[338] "[A]n enactment which is so extensive in its provisions as to change directly the 'substantial entirety' of the Constitution by the deletion or alteration of numerous existing provisions may well constitute a revision thereof."[339] The court determined that Legislative Resolve No. 59 was a constitutional revision because it would "substantially alter the substance and integrity of the state Constitution," and it would potentially alter as many as eleven sections of the Alaska Constitution.[340] The court determined that Legislative Resolution No. 71 was an amendment because it was sufficiently limited in quantity and effect, and would not alter the basic governmental framework.[341] The court determined that Legislative Resolution No. 74 was an amendment despite reassigning executive power, because it did not deprive the executive of any "foundational power."[342]

In *Legislative Council v. Knowles*,[343] the supreme court held that Article III, Section 16 of the Alaska Constitution prohibited suits brought in the name of the state to be filed against the legislature.[344] Governor Knowles vetoed a bill which the legislature

335. *See id.* at 988. Amendments require approval by two-thirds of each legislative house and a majority of the voters. *See id.* at 982.

336. *See id.* at 988-89.

337. *See id.* at 982-84.

338. *See id.* at 984-87.

339. *Id.* at 985-86.

340. *Id.* at 987-88.

341. *See id.* at 988.

342. *Id.*

343. 988 P.2d 604 (Alaska 1999).

344. *See id.* at 605.

subsequently overrode after the legislative session's conclusion.[345] The Governor sued the Legislative Council to enforce his veto.[346] The supreme court concluded that the superior court erred in deciding the Governor's claim on its merits.[347]

In *Brooks v. Wright*,[348] the supreme court held that the state's wildlife management role as set forth in Article VIII of the Alaska Constitution did not give the legislature exclusive lawmaking powers over natural resource issues.[349] Wright brought this action to remove a ballot initiative that would prohibit the use of snares to trap wolves.[350] The court held that the snare issue was not outside the state's initiative power.[351] The legislative history of Article VIII indicates that the delegates intended natural resource issues to be subject to the initiative process.[352] The court further held that although the language of Article VIII might suggest that a "public trust" for the management of the state's wildlife has been created, such a trust would not confer exclusive lawmaking authority on the legislature.[353]

D. Miscellaneous

In *International Association of Fire Fighters, Local 1264 v. Municipality of Anchorage*,[354] the supreme court held that municipal workers did not have a legitimate expectation of privacy in their names and salaries.[355] The supreme court affirmed the superior court's decision that Anchorage's practice of releasing municipal employees' names and salaries to the Anchorage Daily News did not violate the constitutional or statutory rights of employees.[356] The court reasoned that this information, even if disclosed in the personnel records of employees, did not constitute "sensitive" or "personal" information.[357] Since public employment salary information is not information of a personal nature, its

345. *See id.*
346. *See id.*
347. *See id.* at 609.
348. 971 P.2d 1025 (Alaska 1999).
349. *See id*. at 1033.
350. *See id*. at 1026.
351. *See id*. at 1033.
352. *See id*. at 1029.
353. *Id*. at 1033.
354. 973 P.2d 1132 (Alaska 1999).
355. *See id.*
356. *See id*. at 1135.
357. *See id*. at 1136.

disclosure is justified by "legitimate public concern."[358] To satisfy an exception from disclosure, the material must constitute an invasion of privacy unwarranted by the circumstances.[359]

In *State v. Robart*,[360] the court of appeals held that Alaska Statutes section 44.09.015 prohibited Robart's use of the state seal on commemorative coins without permission.[361] The court upheld the statute's restriction on commercial speech because it did not impact any non-commercial uses of the seal, was sufficiently narrow, and advanced a legitimate governmental interest.[362]

In *Weber v. Kenai Peninsula Borough*,[363] the supreme court affirmed the superior court order upholding the creation of a utility special assessment district to finance a privately owned gas-line extension.[364] Weber claimed the pipeline extension was unconstitutional because it was privately owned and was created to benefit a private entity.[365] Weber further claimed that the assessment was an unconstitutional taking of his property without just compensation.[366] The supreme court held that the district conferred a public benefit even though it was privately owned because providing gas to residents constituted a public use.[367] The supreme court also held that the assessment against Weber was not an unconstitutional taking of property because the district met the special benefit requirement, *i.e.*, Weber received a special benefit from the gas-line extension.[368]

In *Ross v. Alaska*,[369] the Ninth Circuit dismissed three political parties' constitutional challenges to Alaska's blanket primary: it dismissed the Republican Party of Alaska's constitutional challenge to Alaska's blanket primary because the Republican Party of Alaska had already argued identical issues in a prior Alaska Supreme Court case.[370] The Ninth Circuit held that the Alaskan Independence Party's challenge to the primary election law lacked ripeness because the party failed to show the law

358. *See id*.
359. *See id*.
360. 988 P.2d 1114 (Alaska Ct. App. 1999).
361. *See id.* at 1116.
362. *See id*. at 1115.
363. 990 P.2d 611 (Alaska 1999).
364. *See id.* at 612.
365. *See id.*
366. *See id.*
367. *See id.* at 613.
368. *See id.* at 614.
369. 189 F.3d 1107 (9th Cir. 1999).
370. *See id.* at 1111.

conflicted in any way with the party's rules for primary elections.[371] Finally, the Ninth Circuit held that the Alaska Libertarian Party failed to establish ripeness because the Alaska primary law did not prevent the political "group" from deciding how it chooses to support political candidates.[372]

VI. CRIMINAL LAW

A. Constitutional Protections

1. *Search and Seizure*. In *McNeill v. State*,[373] the Alaska Supreme Court held that two state troopers' refusal to leave McNeill's house until he answered questions did not constitute seizure for *Miranda* purposes.[374] The troopers arrived at McNeill's house in response to a 911 call made by his wife.[375] When the police arrived, McNeill's wife informed the troopers of an injury she received.[376] She first claimed that McNeill intentionally inflicted the wound, causing her to arm herself with a handgun.[377] Later, she claimed to have sustained the wound accidentally.[378] The police officers then spoke with McNeill and refused to leave until he explained what had happened.[379] McNeill stated that he threw his jacket at his wife and an object in the jacket hit his wife and caused her injury.[380] The supreme court stated that because McNeill's wife's statements were unclear, and because the officers reasonably believed that violence may have continued if they left, the troopers were entitled to question McNeill without giving him *Miranda* warnings.[381] Because the troopers were peaceable and did not exert pressures that impaired McNeill's free exercise of his Fourth Amendment rights, the questioning did not ripen into *Miranda* custody.[382]

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371. *See id.* at 1114.
372. *See id.* at 1115.
373. 984 P.2d 5 (Alaska 1999).
374. *See id.* at 7.
375. *See id.* at 5.
376. *See id.* at 6.
377. *See id.*
378. *See id.*
379. *See id.*
380. *See id.*
381. *See id.* at 7.
382. *See id.*

In *Mangiapane v. Municipality of Anchorage*,[383] the court of appeals held that an officer's observation of the defendant during the defendant's telephone conversation with his attorney did not necessarily interfere with the defendant's right to counsel and that the margin of error of a breath analysis machine was irrelevant to the defendant's guilt.[384] The court noted that it has been consistent in its holdings related to the duty of police officers to maintain custodial observation of a defendant during a breath test.[385] The court reaffirmed that breath tests will be invalidated only if the police officer intruded upon the defendant's right to counsel.[386] Further, the court rejected the defendant's contention that the jury should have been instructed that the breath analysis machine has a margin of specific error, reasoning that such was contrary to the legislative intent of the statute enabling breath analysis and, therefore, the error is irrelevant to the defendant's guilt.[387]

In *Watkinson v. State*,[388] the court of appeals held that a minor voluntarily waived his *Miranda* rights when he confessed to murdering his father and stepmother.[389] Watkinson contended that his confession should be inadmissible because he did not understand the weight of his crime, had not spoken to his mother, and was exhausted when he waived his *Miranda* rights.[390] The court of appeals approved a test that considered surrounding factors in determining whether a waiver of *Miranda* rights was voluntary.[391] Watkinson seemed lucid and calm in conversation with officers, had above average intelligence, had rejected several offers to call his mother, and should have been able to infer that murder was a very serious charge.[392] The mere fact that he was a minor did not "automatically render him incapable of making a knowing and voluntary waiver."[393]

In *Joubert v. Alaska*,[394] the court of appeals held that the pat-down search of Joubert for weapons did not justify the search of his pockets.[395] Joubert was handcuffed in front of his apartment

383. 974 P.2d 427 (Alaska Ct. App. 1999).
384. *See id*. at 430.
385. *See id*. at 429.
386. *See id*.
387. *See id*. at 429-30.
388. 980 P.2d 469 (Alaska Ct. App. 1999).
389. *See id.* at 473.
390. *See id.* at 471.
391. *See id.* at 472.
392. *See id.* at 471.
393. *Id.* at 472.
394. 977 P.2d 753 (Alaska Ct. App. 1999).
395. *See id*. at 756.

because he was driving a stolen car.[396] During a pat-down, police felt a small, hard object in his pocket.[397] Police searched his pocket, suspecting the object might be a small weapon.[398] The court concluded, under the reasoning of *Terry v. Ohio*,[399] that the police should not have searched Joubert's pockets incident to an investigative stop because they did not suspect the object was evidence of a stolen vehicle, nor did they have an articulable suspicion that he was carrying an atypical weapon.[400] Thus, the cocaine seized from Joubert's pocket could not be used to establish probable cause for his arrest for cocaine possession.[401] The court explained that Alaska law is more restrictive than federal law in permitting a police officer to search all of the person and any possessions found upon that suspect incident to arrest.[402] Specifically, "[a] search that precedes an arrest can be justified as incident to arrest as long as the fruits of the search are not required to establish cause for the search."[403]

In *Schaffer v. State*,[404] the court of appeals held that the search of Schaffer's bag by airline personnel could have been state action subject to constitutional restrictions, and remanded the case to the superior court to determine if the search was legal under the "administrative search" exception to the warrant requirement.[405] An airline employee searched Schaffer's bag because Schaffer fit a criminal profile distributed by the Federal Aviation Administration.[406] Drugs were found, and Schaffer pleaded no contest to possession but challenged the validity of the search.[407] The court of appeals rejected the superior court's findings that the search was legal because it was either consented to or private in nature, rather than state action.[408] On remand, the state will have the burden of showing that the search was justified under the

396. *See id.* at 754.
397. *See id.* at 755.
398. *See id*.
399. 393 U.S. 1 (1968).
400. *See Joubert*, 977 P.2d at 757.
401. *See id*.
402. *See id.*
403. *Id*. at 756.
404. 988 P.2d 610 (Alaska Ct. App. 1999).
405. *See id.* at 612.
406. *See id.* at 611.
407. *See id.*
408. *See id.* at 611-12.

administrative search exception[409] as explained by the Alaska Supreme Court in *State v. Salit*.[410]

In *Bohanan v. State*,[411] the court of appeals affirmed Bohanan's conviction because the government's use of a Glass warrant, which authorizes tape recording of conversations with a subject, was adequately supervised.[412] Bohanan was convicted of second-degree sexual assault and attempted first-degree sexual assault for trying to rape one of his wife's friends.[413] The victim managed to escape and went to the state police.[414] The police obtained a Glass warrant enabling the victim to try to elicit incriminating statements from Bohanan over the phone without direct police supervision.[415] The court found that even though a police officer was not present during the telephone conversation, the Glass warrant was valid.[416] Futher, the court found that the victim's husband's participation in a telephone conversation when he was not listed on the Glass warrant was admissible because the police did not plan for him to participate, and, therefore, the husband was not an agent of the police.[417]

In *Gengler v. State*,[418] the court of appeals held that failure to timely perform the scheduled verification of a machine used to test suspects' breath for intoxication was irrelevant without evidence that the machine was out of calibration when the next test was performed.[419] Although the court of appeals agreed that Gengler should be able to attack the accuracy of the breath test result, it ruled that, without accompanying proof that the machine was out of calibration, the simple fact that the next scheduled test was missed had no bearing on the accuracy of Gengler's test.[420]

In *Vigue v. State*,[421] the court held that Vigue had been properly arrested after an initial investigative stop, but reversed Vigue's conviction for tampering with physical evidence.[422] Vigue was the subject of an investigative stop after a policeman saw him

409. *See id.* at 616.
410. 613 P.2d 245 (Alaska 1980).
411. 992 P.2d 596 (Alaska Ct. App. 1999).
412. *See id*. at 604.
413. *See id*.
414. *See id*.
415. *See id*.
416. *See id*. at 603.
417. *See id*.
418. 969 P.2d 1164 (Alaska Ct. App. 1999).
419. *See id*. at 1167.
420. *See id*. at 1166-67.
421. 987 P.2d 204 (Alaska Ct. App. 1999).
422. *See id*.

in what appeared to be the act of public urination.[423] In view of the police officer and immediately prior to the investigative stop, Vigue discarded what turned out to be crack cocaine.[424] Vigue was subsequently charged with possession of crack cocaine and with tampering with physical evidence.[425] Vigue was convicted on both counts.[426]

The court held that Vigue had not committed the actus reus required for tampering under Alaska Statutes section 11.56.610(a)(1).[427] The legislature did not intend to inflict greater punishment upon an individual who discarded evidence of a crime than he or she would receive for the commission of that crime.[428] According to the court, "a person who possesses drugs may not be found guilty of tampering with evidence simply because he discards or hides the drugs upon the approach of a police officer."[429]

In *Smith v. State*,[430] the court of appeals held that the trial court did not abuse its discretion in applying the inevitable discovery exception to the exclusionary rule.[431] Smith was arrested related to a drug transaction.[432] Before reading Smith his *Miranda* rights, the arresting police officer asked Smith for routine information including his address.[433] The police obtained a search warrant for his home and found more drugs and drug paraphernalia.[434] Smith claims that because he was not read his *Miranda* rights before he was asked for his address the evidence gathered at his home should be suppressed.[435] The trial court applied the inevitable discovery exception to the evidence because the police officers had independent verification of Smith's address from his vehicle registration.[436] The trial court also noted that the police were not acting in bad faith when they asked Smith for his address, because an address is standard booking information.[437]

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423. *See id*.
424. *See id*.
425. *See id*. at 205.
426. *See id*.
427. *See id*. at 206.
428. *See id*. at 209.
429. *Id*.
430. 992 P.2d 605 (Alaska Ct. App. 1999).
431. *See id*. at 612.
432. *See id*. at 605.
433. *See id*.
434. *See id*.
435. *See id*.
436. *See id.* at 610.
437. *See id*.

2. *Miscellaneous*. In *Reyes v. State*,[438] the supreme court held that the trial judge violated double jeopardy by imposing an additional condition on the defendant's existing parole.[439] Reyes was convicted of three counts of first-degree sexual abuse of a minor and was sentenced to twelve years and nine months.[440] Between the original sentencing and re-sentencing, the State stopped paying for the victim's rehabilitation, leaving that burden entirely on the victim's family.[441] During re-sentencing, the trial court added restitution for the cost of the victim's counseling as a condition to Reyes' already existing probation.[442] The supreme court noted that although trial courts are authorized to modify probation conditions, a change in state law regarding rehabilitation repayments by convicts did not constitute a reasonable basis for imposing more severe conditions.[443]

In *Walker v. State*,[444] the court of appeals held that Alaska Statutes section 11.71.050(a)(3)(E), which criminalizes possession of eight ounces or more of marijuana, did not violate the right to privacy guaranteed by the Alaska Constitution.[445] Based on an anonymous tip, the Fairbanks police went to Walker's house to check on a reported indoor marijuana garden.[446] Walker showed the officers a bag of marijuana and his indoor garden containing many marijuana plants and seedlings.[447] Walker claimed that based on the Alaska Supreme Court's decision in *Ravin v. State*,[448] AS 11.71.050(a)(3)(E) violated his right to privacy.[449]

In *Ravin*, the supreme court held that the right to privacy guaranteed in the Alaska Constitution encompassed the possession and use of marijuana in the home if such use is purely personal and non-commercial.[450] After the *Ravin* decision, the legislature defined the amount that could be possessed for personal use in a home to be four ounces or less.[451] The court of appeals held that eight ounces or more of marijuana is properly considered a

438. 978 P.2d 635 (Alaska 1999).
439. *See id*. at 641.
440. *See id.* at 636.
441. *See id.* at 637.
442. *See id.* at 638.
443. *See id.* at 640.
444. 991 P.2d 799 (Alaska Ct. App. 1999).
445. *See id*. at 803.
446. *See id*. at 800.
447. *See id*.
448. 537 P.2d 494 (Alaska 1975).
449. *See Walker*, 991 P.2d at 800.
450. *See id*. at 801.
451. *See id*. at 802.

commercial amount even if it is only possessed in a residence for personal use.[452] Therefore, AS 11.71.050(a)(3)(E) did not violate the right to privacy guaranteed by the Alaska Constitution.[453]

B. General Criminal Law

1. *Criminal Procedure*. In *Peterson v. State*,[454] the court of appeals held that Peterson could withdraw his no contest plea in a sexual assault case because the court had failed to inform him of the sex offender registration law.[455] Peterson was charged with first-degree sexual assault.[456] In exchange for a no contest plea, Peterson's charges were reduced to second-degree sexual assault.[457] Peterson alleged that he would not have entered a no contest plea if he had known of the sex offender registration requirement.[458]

The court concluded that the legislature expressly amended Criminal Rule 11(c) to include a warning to those charged with sex offenses, in order to ensure that defendants would consider the consequence of their pleas.[459] Further, the court held that failure to inform a defendant of the registration requirement is potentially manifest injustice for purposes of Criminal Rule 11(h)(3), which allows for the withdrawal of pleas when failure to allow the withdrawal would result in manifest injustice.[460]

In *Burrece v. State*,[461] the court of appeals upheld a search warrant and ruled that the trial court's error in violating a statute governing telephonic testimony was harmless and did not prejudice the case.[462] According to the court of appeals, Burrece did not show or argue any bad faith on the part of the testifying officer or the court.[463] Thus, the court of appeals affirmed the no contest plea of the defendant for fourth-degree misconduct involving a controlled substance.[464]

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452. *See id*. at 803.
453. *See id*.
454. 988 P.2d 109 (Alaska Ct. App. 1999).
455. *See id*. at 120.
456. *See id*. at 112.
457. *See id*.
458. *See id*.
459. *See id*. at 118.
460. *See id*. at 119.
461. 976 P.2d 241 (Alaska 1999).
462. *See id.* at 244.
463. *See id.*
464. *See id*.

Burrece had been arrested for growing marijuana in a boarded-up trailer.[465] She had claimed that the tip supporting the arrest warrant was stale because it was four months old.[466] She also claimed that the evidence of electronic consumption which indicated the site of marijuana cultivation could not corroborate the tip from Alaska State Trooper Timothy L. Bleicher.[467] Burrece claimed that the district court's reliance on the state trooper's telephonic testimony that supplemented his affidavit was impermissible.[468] In disagreeing, the court of appeals concluded that, "[c]onsidering the totality of the circumstances . . . Judge Ashman could properly find the information before him provided reasonable grounds to believe that evidence of a marijuana grow would be found when he issued the warrant."[469]

In *Davidson v. State*,[470] the court of appeals held that the superior court judge did not err when he asked the jury to clarify their decision.[471] The jury's verdict forms indicated that they found the defendant guilty of assault in the first degree, but that they did not find him guilty of several lesser-included offenses.[472] When the defendant moved for a new trial arguing that the jury's verdict was inconsistent, the judge reconvened the jury and asked them to clarify their decision.[473] The jury responded that they did not realize they could find the defendant guilty of the lesser-included offenses and then changed the verdict form to indicate they also found the defendant guilty of the lesser-included offenses.[474] The court of appeals held that while Alaska Evidence Rule 606 prevents asking a jury to justify their verdict or to explain how they arrived at a decision, Rule 606 does not prevent asking a jury to clarify its decision.[475]

In *Taylor v. State*,[476] the court of appeals held that the superior court did not violate a criminal defendant's rights when it allowed a witness to explain ex parte why her testimony would be self-incriminating.[477] The defendant was on trial for assaulting his wife,

465. *See id*. at 242.
466. *See id.*
467. *See id*.
468. *See id*.
469. *See id.* at 243.
470. 975 P.2d 67 (Alaska Ct. App. 1999).
471. *See id*. at 73.
472. *See id*. at 70.
473. *See id*. at 70-71.
474. *See id*. at 71.
475. *See id*. at 73-74.
476. 977 P.2d 123 (Alaska Ct. App. 1999).
477. *See id*. at 130.

a security guard, and a police officer.[478] The court permitted the defendant's wife to explain ex parte why she refused to testify on the grounds of self-incrimination.[479] The defendant appealed on grounds that the ex parte hearing violated his right to due process as well as his rights under Criminal Rule 38(a).[480] The court held that a defendant's right to be present at all proceedings may be waived by the trial judge when a witness asserts a privilege against self-incrimination.[481] The court provided a set of factors for judges to weigh in these situations: "(1) the privilege-claimer's interest in . . . [not] revealing protected information to others, (2) the defendant's . . . interests in being present during . . . the proceedings, and (3) the public's interest in assuring that the justice system operates in the public view and subject to public scrutiny."[482]

In *State v. Couch*,[483] the court of appeals held that the trial court abused its discretion under Criminal Rule 35(b)(1) when it granted a temporary release to an inmate to visit his dying grandfather more than 180 days after the distribution of the written judgment.[484] Couch's grandfather became seriously ill during Couch's incarceration, and Couch petitioned the court for a furlough to be with him.[485] Criminal Rule 35(b)(1) permits a trial judge to modify or reduce a sentence within 180 days of the distribution of the written judgment.[486] The court of appeals reversed the trial court's ruling because the 180-day post-judgment period had expired.[487] Since convict furloughs are within the authority of the Department of Corrections and not the judiciary, the court of appeals reasoned that to allow the trial court to order a furlough after the 180-day limit had expired would improperly impinge on the executive branch of government.[488]

In *Dutton v. State*,[489] the court of appeals held that changing a federal felony plea as required by a plea agreement constituted a material breach of the plea agreement.[490] Under these circumstances, the double jeopardy clause did not prevent the

478. *See id*. at 124.
479. *See id*. at 125.
480. *See id*.
481. *See id*. at 129.
482. *Id*.
483. 999 P.2d 1286 (Alaska Ct. App. 1999).
484. *See id.* at 1287.
485. *See id.*
486. *See id.*
487. *See id.* at 1289.
488. *See id.*
489. 970 P.2d 925 (Alaska Ct. App. 1999).
490. *See id*. at 930.

superior court from vacating the misdemeanor conviction and reinstating the original charge.[491] Plea agreements are considered enforceable contracts between a defendant and the government.[492] Materially breaching the terms of a plea agreement in this case required rescission, thereby placing the parties in status quo ante.[493] Further, for double jeopardy to be circumvented, the government is not required to include special clauses in a plea agreement stating that the original charges will be reinstated if the plea agreement is not followed.[494] It is assumed when a defendant enters into a plea agreement that if he does not uphold his end of the bargain, the government will not be bound by the agreement.[495]

In *Fermin v. State*,[496] the court of appeals held that a defendant's flight does not waive his right to appeal, but a fleeing defendant must show good cause before the appeal will be reinstated.[497] Fermin appealed his conviction and fled Alaska shortly thereafter.[498] The appeal proceeded and was eventually dismissed because of Fermin's absence.[499] Fermin argued his appeal should be reinstated because it was unfair for the court to proceed with his appeal in his absence.[500] The court of appeals ruled there was no good cause to reinstate Fermin's appeal because defendants who voluntarily abscond from court hearings have no right to complain when the hearings proceed without them.[501]

In *State v. Aloysius*,[502] the court of appeals reinstated an indictment because irregularities in telephonic testimony and dismissal of two alternate grand jurors did not unfairly prejudice Aloysius.[503] The superior court had invalidated an indictment because the prosecutor had taken a witnesses's testimony over the telephone without asking the witness to verify that he/she was alone and that no one else could hear what was being said.[504] In another instance, the prosecutor asked questions without waiting

491. *See id*. at 935.
492. *See id*. at 928.
493. *See id*. at 938.
494. *See id*. at 935.
495. *See id*.
496. 975 P.2d 61 (Alaska Ct. App. 1999).
497. *See id.* at 62.
498. *See id.*
499. *See id.*
500. *See id.* at 64.
501. *See id.*
502. 975 P.2d 1096 (Alaska Ct. App. 1999).
503. *See id*. at 1097.
504. *See id.*

until the witnesses were sworn in.[505] Also, despite Criminal Rule 6(f)'s requirement that alternate grand jurors be impaneled in the order in which they were designated, the prosecutor excused the two middle alternates.[506] The indictment was reinstated, however, because the defense failed to show that the telephone irregularities affected the testimony or the grand jury's decision to return the indictment,[507] and the error in juror impanelment was not shown to result from the prosecution's attempt to gain a favorable panel.[508]

In *Collins v. State*,[509] the court of appeals held that the rule requiring court certification of expert witnesses did not apply to police officers testifying about their observations from work experience.[510] Collins ran a crack house and drug dealing operation from an apartment in which police discovered several items associated with the drug trade, including ledgers, beepers, scales, plastic bags, and traces of cocaine.[511] Even though Alaska Rule of Civil Procedure 16(b)(1)(B) generally requires court certification for expert witnesses, the court stated that such approval was unnecessary for police officers who made observations and conclusions based on their training and experience.[512] In this case, Anchorage police officers testified as to the common characteristics of crack houses they had seen in the line of duty.[513]

In *Sivertsen v. State*,[514] the supreme court held that, although the prosecutor's closing argument was objectionable,[515] any resulting procedural error was harmless.[516] Sivertsen was convicted of second-degree burglary and theft.[517] The police saw him breaking out of a building at two o'clock in the morning.[518] Sivertsen was subsequently apprehended with $600 in cash, which was the amount of money missing from a store in the building.[519] The court noted that the prosecutor's argument that the jury may "assume" Sivertsen's criminal intent from evidence of his actions

505. *See id*.
506. *See id.*; *see also* ALASKA CRIM. R. 6(f).
507. *See Aloysius*, 975 P.2d at 1097.
508. *See id.* at 1099.
509. 977 P.2d 741 (Alaska Ct. App. 1999).
510. *See id*.
511. *See id*. at 744.
512. *See id.*
513. *See id.*
514. 981 P.2d 564 (Alaska 1999).
515. *See id.* at 565.
516. *See id.*
517. *See id*.
518. *See id.*
519. *See id*.

amounted to the functional equivalent of telling the jury that the law "presumes" intent from conduct.[520] Jurors might incorrectly assume that evidence of conduct is automatically sufficient to prove intent, either conclusively or presumptively, in violation of due process.[521] However, the prosecutor's statement was harmless because of the trial court's instructions and the evidence against Sivertsen.[522] The court found it unlikely that the prosecutor's statement contributed in any substantial way to the jury's guilty verdict.[523]

In *A.A. v. State*,[524] the supreme court held that the trial court did not abuse its discretion when it denied A.A.'s motion to continue a hearing on a petition to terminate his parental rights.[525] A.A.'s paternity of I.K. was established while A.A. was serving a prison sentence for his murder conviction.[526] The court of appeals later overturned the murder conviction, but the Child Support Enforcement Division still sought to terminate A.A.'s parental rights.[527] The trial court denied A.A.'s motion to continue the hearing after his new murder trial and terminated A.A.'s parental rights based on his extensive history of violent behavior.[528] The supreme court affirmed, observing that the trial court based its termination of A.A.'s parental rights on his history of violence, rather than his murder conviction.[529] Also, further delay would jeopardize the child's best interest by hindering his timely placement in a stable home.[530]

In *Hosier v. State*,[531] the court of appeals held that neither the federal nor the state constitution created an entitlement to post-conviction bail.[532] Hosier was convicted of forgery and theft and was denied bail pending his appeal.[533] Hosier argued that Alaska Statutes section 12.30.040(b)(2), which prohibited his release pending appeal due to prior and current felony convictions. was

520. *See id.* at 566.
521. *See id.*
522. *See id*. at 565.
523. *See id.* at 567.
524. 982 P.2d 256 (Alaska 1999).
525. *See id*. at 258.
526. *See id.* at 259.
527. *See id.* at 258.
528. *See id.* at 260.
529. *See id.*
530. *See id.*
531. 976 P.2d 869 (Alaska Ct. App. 1999).
532. *See id*. at 871.
533. *See id.* at 870.

unconstitutional.[534] The court first held that Article I, section 12 of the Alaska Constitution is not intended to grant a right to postconviction bail because it parallels the Eighth Amendment to the United States Constitution, which has been interpreted not to grant a right to post-conviction bail.[535] Moreover, the court reasoned that while the Alaska Constitution may grant a right to bail in Article I, Section 12, "it does not guarantee any greater right to bail than the pre-conviction bail guaranteed by [Article I,] Section 11."[536]

In *Brant v. State*,[537] the court of appeals held that, for purposes of Alaska Statutes section 11.61.200(a)(1), a felon is "convicted of a felony" once he or she has entered a plea or has been found guilty of a felony; it is not necessary for the felon to have also been sentenced before this status takes effect.[538] After pleading no contest to assault but before sentencing was imposed, two co-defendants were indicted for misconduct involving weapons, because they were felons in possession of a concealable firearm.[539] Defendants argued they could not be charged with this crime because they technically did not become felons until the trial court entered a sentence.[540] They contended that because the term "convicted" is not defined in the code, it should be interpreted most favorably toward defendants.[541] The court of appeals rejected this argument, reasoning that "the procedural step of sentencing does not provide any additional confirmation that a defendant engaged in conduct that permits classification of the defendant as a felon."[542] The court noted that in many statutes, the legislature requires both conviction and sentencing before certain laws would be triggered; the fact that this particular statute does not mention sentencing militates in favor of not requiring it.[543]

In *Saathoff v. State*,[544] the court of appeals held that the five-year statute of limitations for second-degree theft prohibited the State from prosecuting a defendant in 1997 for a theft he

534. *See id*.
535. *See id.*
536. *Id*. at 871.
537. 992 P.2d 590 (Alaska Ct. App. 1999).
538. *See id.*
539. *See id.* at 591.
540. *See id.*
541. *See id.*
542. *Id.* at 592.
543. *See id.*
544. 991 P.2d 1280 (Alaska Ct. App. 1999).

committed in 1988.[545] In 1988, Saathoff knowingly purchased a stolen gun.[546] In 1997, the State attempted to prosecute Saathoff, arguing that the prosecution was timely because the charged offense was "theft by receiving," which continues for as long as the defendant retains the stolen property.[547] The court of appeals held that under Alaska law, theft by receiving is not a continuing offense, and the statute of limitations for retention of stolen property is identical to the statue of limitations for all other theft offenses.[548] This means that the statue of limitations begins to accrue as soon as the defendant is aware that he or she has retained stolen property.[549] The court reasoned that the legislature meant to create a "unified" theft statute, where every form of theft is subject to the same statute of limitations, based on the legislative history and the legislature's reliance on the Model Penal Code.[550]

In *In re Grand Jury Subpoena*,[551] the United States District Court for the District of Alaska held that financial institutions are obligated to comply with federal grand jury subpoenas regardless of whether the subpoenas are accompanied by court orders.[552] The National Bank of Alaska ("NBA") was served with a federal grand jury subpoena duces tecum that required it to produce depositor records.[553] NBA filed a motion to quash the subpoena because the subpoena was not accompanied by a court order, which they argued was required by Alaska Statutes section 06.05.175(a)(1).[554] The court noted that the legislative intent of this statute indicated banks were not obligated to release financial information without a court order.[555] The court further noted, however, that the legislators did not look closely at a subsequent statute, which states that the records should be released if "disclosure is required by federal or state law or regulation."[556] The court held that this subsequent statute made it clear there is no requirement that a court order accompany a grand jury subpoena.[557]

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545. *See id.* at 1281.
546. *See id.*
547. *See id.*
548. *See id.* at 1282.
549. *See id.*
550. *See id.* at 1285-86.
551. 41 F. Supp. 2d 1026 (D. Alaska 1999).
552. *See id*. at 1037.
553. *See id*. at 1028.
554. *See id*.
555. *See id*. at 1031.
556. *Id*.
557. *See id*.

2. *Evidence*. In *Martin v. State*,[558] the court of appeals held that the trial court correctly considered Martin's history of sex crimes even though Martin's present trial involved only drug-related charges.[559] Although in the present drug trial there was no charge for sexual assault, the trial court properly considered Martin's history of sex crimes, including spousal abuse, a felony conviction for attempted rape, and assault of a woman in a bar.[560] According to the court, these prior acts illuminated Martin's motive for distributing cocaine: to facilitate rape.[561] The court of appeals also rejected the argument that requiring Martin to attend sex offender counseling was excessive and inappropriate for a drug conviction.[562] The court concluded that the sentence was reasonably related to the rehabilitation of the drug offender and the protection of the public, and therefore a direct relation was not necessary.[563]

In *State v. Coon*,[564] the supreme court held that the trial court properly admitted scientific evidence based on standards articulated in *Daubert v. Merrell Dow Pharmaceuticals, Inc.*[565] and the Alaska Rules of Evidence.[566] Coon, who was convicted of making terroristic telephone calls, argued that the scientific evidence (voice spectrographic analysis) admitted to convict him did not satisfy the *Frye v. United States* test.[567] The supreme court held that *Daubert* and the Alaska Rules of Evidence now govern the admissibility of scientific evidence.[568] Coon also argued that since *Daubert* was decided after his trial, the use of the *Daubert* standard was prohibited as ex post facto legislation.[569] The supreme court held that the prohibition on ex post facto legislation does not apply to judicial decisions concerning the admissibility of evidence.[570]

In *Smithart v. State*,[571] the supreme court held that the trial court erred in not allowing the defendant to present evidence that

558. 973 P.2d 1151 (Alaska Ct. App. 1999).
559. *See id.* at 1156.
560. *See id.*
561. *See id.*
562. *See id.* at 1159.
563. *See id.* at 1157.
564. 974 P.2d 386 (Alaska 1999).
565. 509 U.S. 579 (1993).
566. *See Coon*, 974 P.2d at 388.
567. *See id.* at 391 (citing *Frey*, 293 F. 1013 (D.C. Cir. 1923)).
568. *See id.* at 402.
569. *See id*. at 391.
570. *See id.* at 392.
571. 988 P.2d 583 (Alaska 1999).

another man committed the charged crimes.[572] Smithart was charged with kidnapping, first-degree sexual-assault, and first-degree murder of an eleven-year-old girl.[573] Smithart wanted to introduce evidence that another person had perpetrated the crimes.[574] Generally, under Alaska law, a defendant may suggest that another person was the actual perpetrator.[575] However, evidence that a specific third party committed the crime is subject to a somewhat higher standard, i.e., other-suspect evidence is admissible if the evidence "links the third-party [to the crime] in a way that tends to create doubt about the defendant's guilt."[576] Smithart wished to present evidence that the prosecution's key witness had committed the crimes based on paint chips from the witness's shop matching those found near the victim.[577] The supreme court ruled that denial of this evidence was not harmless beyond a reasonable doubt.[578]

In *Alaska v. Bingaman*,[579] the court of appeals held that Alaska Rule of Evidence 404(b)(4), allowing the introduction of evidence from other crimes involving domestic violence by the defendant in a domestic violence prosecution, did not require proof of conviction before the evidence could be admitted at trial.[580] Bingaman was charged with assault and sexual abuse of a minor.[581] At trial, the judge entered an order excluding evidence of Bingaman's prior domestic violence crimes.[582] The court of appeals reversed the order, reasoning that prior case law interpreting other sections of Rule 404(b), the language of the Rule itself, and its legislative history all demonstrated that the legislature intended no requirement of proof of conviction of prior bad acts before such other bad acts may be admitted at trial.[583]

In *Wyatt v. Alaska*,[584] the supreme court held that a witness's "lethal situation" statement was admissible under the "state of mind" exception to the hearsay rule.[585] Wyatt was convicted of

572. *See id*. at 585.
573. *See id*.
574. *See id*.
575. *See id*. at 586.
576. *Id*. at 587.
577. *See id.* at 590.
578. *See id.* at 587.
579. 991 P.2d 227 (Alaska Ct. App. 1999).
580. *See id.* at 228-29.
581. *See id.* at 229.
582. *See id.*
583. *See id.* at 230.
584. 981 P.2d 109 (Alaska 1999).
585. *See id.* at 115.

murdering his wife.[586] The trial court admitted a witness's statement that Wyatt's wife had told her that "[t]here was a possible lethal situation when she told her husband about [the divorce]."[587] Such testimony could not be used to prove that Wyatt killed his wife, but the statement could be used to indicate the wife's intention to obtain a divorce.[588] Because the state relied on the wife's intent to divorce in order to establish Wyatt's motive, and Wyatt disputed her intent to divorce, the statement was admissible to prove the wife's intent under the "state of mind" hearsay exception.[589]

In *Wasserman v. Bartholomew*,[590] the supreme court held that the trial court should have allowed evidence rebutting allegations of witness bias.[591] Wasserman sued the local and state governments and three police officers on the ground that the officers used excessive force when apprehending him.[592] At trial, Wasserman's account of the force used by the police differed from the defendant police officer's account, and Wasserman tried to introduce corroborative testimony of a civilian witness and another officer.[593] The trial court disallowed both witnesses's testimony on the ground that it was cumulative.[594] In reversing, the supreme court held that the testimony was not cumulative because it supported the contested facts.[595]

In *Ashenfelter v. State*,[596] the court of appeals held that the State relied improperly during sentencing on hearsay evidence of an aggravating factor where Ashenfelter took the stand and refuted the State's factual allegations.[597] During sentencing, the State used hearsay evidence to prove an aggravating factor in Ashenfelter's trial for assault.[598] Under supreme court precedent, a defendant has a right to confront his accusers in court once he has taken the stand and refuted the State's allegations.[599] The supreme court held that the trial court improperly allowed the hearsay evidence when the

586. *See id.* at 110.
587. *Id.* at 111.
588. *See id.* at 114.
589. *See id.* at 114-15.
590. 987 P.2d 748 (Alaska 1999).
591. *See id.* at 752.
592. *See id*. at 750.
593. *See id*. at 751.
594. *See id*.
595. *See id.* at 753.
596. 988 P.2d 120 (Alaska Ct. App. 1999).
597. *See id.* at 127.
598. *See id.* at 122.
599. *See id.* at 127.

judge disbelieved Ashenfelter's testimony; regardless of Ashenfelter's credibility, once he took the stand, the supreme court ruled, the State could no longer rely on hearsay evidence.[600]

3. *Sentencing*. In *Brown v. State*,[601] the court of appeals found a 55-year sentence for second-degree murder to be excessive absent aggravating factors.[602] During a dispute over money in a cocaine transaction, Dixson, the victim, produced his gun, which Brown grabbed and aimed at Dixson.[603] Dixson's wife then entered the room and stood between Brown and Dixson.[604] Brown shot Dixson when, according to Brown, he was jostled by Dixson's wife.[605] The lower court, in imposing the 55-year sentence, decided that the main sentencing goals were to isolate Brown and reaffirm social norms.[606] The lower court reasoned that it was desirable to isolate Brown for as long as possible because his use of a gun and his involvement in the drug trade showed him to be dangerous, and there was a strong possibility he would return to the drug trade when released.[607] The court of appeals, applying the *Page* 20-30 year benchmark,[608] noted that 55 years was excessive because Brown had no prior record, turned himself in voluntarily, and was responding to Dixson's introduction of deadly force.[609] Thus, the murder was not the "gratuitous or otherwise inexplicable act of extreme violence required for a departure from the *Page* benchmark."[610]

In *George v. State*,[611] the court of appeals held that Alaska Statutes section 12.55.085(f)(1) would not prevent the trial court from granting George a suspended imposition of sentence ("SIS").[612] George was convicted of conspiracy to commit robbery after he helped Chevy Miller rob a McDonald's by furnishing information about the store's security systems, granting entry to

600. *See id.*
601. 973 P.2d 1158 (Alaska Ct. App. 1999).
602. *See id*. at 1159.
603. *See id*. at 1160.
604. *See id*.
605. *See id*.
606. *See id*.
607. *See id*.
608. Page v. State, 657 P.2d 850 (Alaska Ct. App. 1983) (establishing a benchmark sentencing range for second-degree murder of 20-30 years).
609. *See Brown*, 973 P.2d at 1164.
610. *Id.*
611. 988 P.2d 1116 (Alaska 1999).
612. *See id*. at 1116-17.

the store, and hiding incriminating evidence.[613] The court of appeals noted that section 12.55.085(f)(1) prohibits imposition of an SIS to persons convicted of robbery in the first degree.[614] Because conspiracy involves a wide range of activity, the court of appeals could not conclude with certainty that the legislature intended to bar courts from granting an SIS to a person convicted of conspiracy to commit robbery in the first degree.[615] Therefore, the trial court had the discretion to impose an SIS on George.[616]

In *Dawson v. State*,[617] the court of appeals held that a four-year sentence for selling cocaine at only a small retail level was excessive.[618] Dawson was a first-time felony offender whose activities resembled those of the defendant in *Major v. State*.[619] Based on *Major*, the court of appeals reversed Dawson's sentence and instructed the superior court to sentence him to no more than 6 years with 3 years suspended.[620]

In *Krack v. State*,[621] the court of appeals held that a twenty-eight year prison term for child sexual abuse and drug offenses was not excessive.[622] Krack's sentence was divided into two components to be served consecutively: fifteen years for drug possession, which was the maximum that his plea agreement would allow, and thirteen years for second-degree sexual abuse of a minor.[623] The court did not look to its past sentences for second-degree sexual abuse of a minor because Krack also distributed drugs to the minors.[624] Krack's behavior was plainly aggravated, and he could have received a substantially longer sentence for his drug offenses alone.[625] The court held that, given the entirety of defendant's conduct and history, the combined sentence was severe but not improper.[626]

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613. *See id*.
614. *See id*.
615. *See id.*
616. *See id.* at 1118.
617. 977 P.2d 121 (Alaska Ct. App. 1999).
618. *See id*. at 123.
619. *See id.* at 121 (citing Major v. State, 798 P.2d 341 (Alaska Ct. App. 1990) (holding that four years imprisonment was excessive and instructing the superior court to sentence defendant to no more than six years with three years suspended)).
620. *See id*.
621. 973 P.2d 100 (Alaska Ct. App. 1999).
622. *See id*. at 105.
623. *See id*. at 103-04.
624. *See id*. at 104-05.
625. *See id*. at 105.
626. *See id*.

4. *Miscellaneous*. In *State v. Otness*,[627] the supreme court held that the Department of Public Safety's definition of conviction, which required registration of any person who had a sex crime conviction set aside, was a reasonable construction of the Alaska Sex Offender Registration Act ("ASORA").[628] Each defendant was convicted of a sex crime and was required by ASORA to register at the local police or state trooper station nearest to their residence.[629] The legislature did not define "conviction" but instead authorized the Department of Public Safety to implement the act.[630] In so doing, the Department of Public Safety defined "conviction" to include convictions that were later set aside.[631] The supreme court stated that the Department's definition was consistent with the purposes of ASORA.[632]

In *Orr-Hickey v. Alaska*,[633] the court of appeals established civil negligence as the culpable mental state for hunting offenses.[634] The trial court convicted Orr-Hickey of hunting sheep in a closed area and of possessing illegally-taken game.[635] Orr-Hickey claimed that the jury received flawed instructions concerning the culpable mental state required for these crimes.[636] Specifically, Orr-Hickey argued that Alaska Statutes section 11.81.610(b)(2) superseded the court's holding in *State v. Rice*[637] that negligence is the applicable culpable mental state for hunting offenses.[638] However, the court of appeals held that civil negligence, not recklessness, was the culpable mental state that governed hunting offenses.[639] Furthermore, the court held that AS 12.55.085(f)(2) includes hunting offenses and precludes suspension of imposition of sentence in cases such as this where Orr-Hickey used a firearm in the commission of an offense.[640]

In *Jacko v. State*,[641] the court of appeals affirmed Jacko's conviction for violating a domestic violence protective order.[642]

627. 986 P.2d 890 (Alaska 1999).
628. *See id.* at 892.
629. *See id.* at 891.
630. *See id.*
631. *See id.*
632. *See id.* at 892.
633. 973 P.2d 612 (Alaska 1999).
634. *See id.* at 614.
635. *See id*.
636. *See id*.
637. 626 P.2d 104 (Alaska 1981).
638. *See Orr-Hickey*, 973 P.2d at 614.
639. *See id*.
640. *See id*. at 615.
641. 981 P.2d 1075 (Alaska Ct. App. 1999).

Jacko appealed his conviction based on the district court's retrospective finding that the original protective order was without merit.[643] The appellate court affirmed the conviction, holding that even though the protective order was unjustified, the person subject to that order must obey it until it is either vacated or reversed.[644] According to the court, this rule preserves peace, order, and the judicial process.[645]

In *Harris v. State*,[646] the court of appeals articulated several conditions under which courts should grant a petition to revoke probation.[647] Harris violated a sex offense probation by being charged with assaulting his girlfriend,[648] refusing to be tested for controlled substances,[649] and living with minors.[650] He first appealed the subsequent revocation of his probation on the ground that the charge of assaulting his girlfriend had been dismissed.[651] The court held that merely being charged with criminal conduct can be grounds for revocation of probation.[652] Harris next argued that because his refusals to submit to drug testing came after the initial petition to revoke, his refusals could not be considered.[653] As soon as the petition was filed, Harris suggested, he was no longer subject to the conditions of probation.[654] The court disagreed, stating that unless the conditions of probation continued to apply, the system would reward criminals who drew petitions to revoke.[655] Finally, Harris argued that since his probation officer knew he was living with minors and did nothing about it, this violation could not be considered by the court in revoking the petition.[656] The court ruled that the probation officer's failure to act did not imply a tacit approval of the violation such that the violation could not be considered.[657]

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642. *See id.* at 1076.
643. *See id*. at 1077.
644. *See id.*
645. *See id.*
646. 980 P.2d 482 (Alaska Ct. App. 1999).
647. *See id.* at 483.
648. *See id.*
649. *See id.* at 484.
650. *See id.* at 485.
651. *See id.* at 484.
652. *See id.*
653. *See id.*
654. *See id.*
655. *See id.* at 485.
656. *See id.* at 486.
657. *See id.*

In *Beltz v. State*,[658] the court of appeals held that "fellatio" and "cunnilingus," as used in a sex crime statute, did not require a showing that one or both participants derived sexual satisfaction.[659] A convicted child molester argued that because a sex offense statute did not define either of the terms, the jury should have been instructed according to the dictionary meaning, which sometimes included a requirement that the parties derive pleasure from the act.[660] The court disagreed, observing that the statute's legislative history specifically stated that all that needed to be shown was the occurrence of the sexual contact.[661] In addition, the court rejected Beltz's contention that the confession that led to his prosecution was involuntary.[662] A law enforcement officer's friendly disposition does not render the confession involuntary, nor does the suggestion that Beltz's cooperation would lead to more lenient treatment.[663] The court considered the fact that Beltz had himself been a law enforcement officer and was therefore a sophisticated party.[664]

In *Whitehead v. State*,[665] the court of appeals held that a judge cannot require a defendant to register as a sex offender as a special condition of probation when the conviction is not considered a "sex offense" within the meaning of Alaska Statutes section 12.63.100.[666] Whitehead pled no contest to a single count of coercion for assaulting a sleeping victim in a privately-run halfway house where he worked as a janitor.[667] The court of appeals acknowledged that as a general rule, conditions of probation that are reasonably related to the probationer's rehabilitation or the protection of the public are acceptable.[668] However, when the legislature passed the law requiring sex offender registration, it specified the offenses that trigger a registration requirement, and there is no component of the law that authorizes a judge to impose a registration requirement upon sex offenders as a part of probation.[669]

In *King v. State*,[670] the court of appeals held that a sleeping person is considered "incapacitated" for purposes of the second-

658. 980 P.2d 474 (Alaska Ct. App. 1999).
659. *See id.* at 476.
660. *See id.*
661. *See id.*
662. *See id.* at 478.
663. *See id.*
664. *See id.*
665. 985 P.2d 1019 (Alaska Ct. App. 1999).
666. *See id*. at 1020 (citing ALASKA STAT. § 12.63.100 (Michie 1998)).
667. *See id*.
668. *See id*.
669. *See id*.
670. 978 P.2d 1278 (Alaska Ct. App. 1999).

degree sexual assault statute.[671] The court held that a sleeping person is "temporarily incapable of appraising the nature of one's own conduct" and "physically unable to express unwillingness to act," thus satisfying the statutory definition of incapacitated.[672]

In *State v. Morgan*,[673] the court of appeals held that a credit card number was a credit card for the purposes of Alaska Statutes section 11.46.290(a), which prohibits obtaining a credit card by fraudulent means.[674] Morgan received an AT&T calling card number, not the actual card, from a fellow inmate as payment for a debt.[675] He proceeded to make $3,669.45 worth of long-distance phone calls without the card owner's permission.[676] The court found that the card number constituted a "device" used to obtain goods or services on credit.[677] Therefore, a person can be convicted of obtaining a credit card by fraudulent means by obtaining merely the credit card number.[678]

VII. EMPLOYMENT LAW

A. Discrimination

In *VECO, Inc. v. Rosebrock*,[679] the Alaska Supreme Court held that an employer could be vicariously liable for acts of a supervisor who created a hostile working environment, even where the acts were outside the scope of the supervisor's employment.[680] However, punitive damages could not be imposed for a supervisor's activities outside of employment: the court concluded it was unfair to punish an employer for acts committed by employees who were not at all pursuing the employer's objectives.[681] Defendants employed Kotowski to assist in the cleanup of the Exxon Valdez oil spill.[682] Kotowski's supervisor subjected her to numerous unwanted sexual advances, and the supervisor made it apparent that sexual favors could be exchanged

671. *See id*. at 1279 (citing ALASKA STAT. § 11.41.420(a)(3)(B) (Michie 1998)).
672. *Id*. (quoting ALASKA STAT. § 11.41.470(2) (Michie 1998)).
673. 985 P.2d 1022 (Alaska Ct. App. 1999).
674. *See id.*
675. *See id.*
676. *See id.*
677. *Id.* at 1024.
678. *See id.*
679. 970 P.2d 906 (Alaska 1999).
680. *See id.* at 908.
681. *See id.*
682. *See id.* at 909.

for his favorable treatment.[683] When Kotowski reported her supervisor's behavior, she was interrogated and subsequently terminated.[684] Borrowing from Justice Marshall's reasoning in *Meritor Savings Bank v. Vinson*,[685] the supreme court found it appropriate to hold the employer liable for the outside-employment wrongs of the supervisor because "it is precisely because the supervisor is understood to be clothed with the employer's authority that he is able to impose unwelcome sexual conduct on subordinates."[686]

In *Norcon, Inc. v. Kotowski*, [687] the supreme court decided that one of the defendants from *VECO, Inc. v. Rosebrock*[688] should be held liable for punitive damages, but that an award of nearly $4 million in punitive damages, in addition to $8,494.40 in lost earnings and $1,850 for emotional distress, was excessive in light of numerous considerations stemming from both policy and the facts of the case.[689] The supreme court affirmed that punitive damages could be awarded for "outrageous" conduct that was malicious or undertaken with "reckless indifference" to the interests of others.[690] Since the treatment Kotowski received at her supervisor's hands showed reckless indifference, punitive damages were proper.[691] However, the court concluded the punitive damages award was excessive given a number of factors, including duration of the harassment, policy, offender's wealth, and amount of compensatory damages.[692] The court was foreclosed from applying the new statutory standard for setting punitive damages[693] because the new damages statute applied only to cases arising after its effective date.[694]

In *Malabed v. North Slope Borough*,[695] the United States District Court for the District of Alaska found that Malabed successfully challenged the North Slope Borough's ("NSB") employment policy preferring Native Americans.[696] Malabed, a

683. *See id.*
684. *See id*.
685. 477 U.S. 57 (1986).
686. *Veco*, 970 P.2d at 913 (quoting *Meritor*, 477 U.S. at 76-77).
687. 971 P.2d 158 (Alaska 1999).
688. 970 P.2d 906 (Alaska 1999).
689. *See Norcon*, 971 P.2d at 161.
690. *Id.* at 173.
691. *See id.* at 174.
692. *See id.* at 176-77.
693. *See* ALASKA STAT. § 09.17.020(c) (LEXIS 1998).
694. *See Norcon*, 971 P.2d at 175.
695. 42 F. Supp. 2d 927 (D. Alaska 1999).
696. *See id.* at 927.

Filipino, was denied equal employment apparently on the basis of being non-Native American.[697] NSB relied on an Equal Employment Opportunity Commission opinion letter stating that an exemption in Title VII of the Civil Rights Act of 1964, allowing employment preferences for Indians living on or near reservations, applied to the NSB.[698] The court applied the United States Supreme Court's reasoning in *Alaska v. Native Village of Venetie Tribal Government*[699] in holding that the land in question was not a federally defined reservation and thus not eligible for the exemption.[700] Additionally, the NSB's charter prohibiting employment preference based on national origin applied to policies affecting Native Americans.[701] Finally, the court held that the policy did not withstand strict scrutiny equal protection analysis, absent particularized evidence that the NSB had discriminated against Native Americans in the past.[702]

B. Labor Law

In *International Association of Firefighters, Local 1264 v. Municipality of Anchorage*,[703] the supreme court held that an interest arbitration clause was a nonmandatory subject of bargaining and that the International Association of Firefighters committed an unfair labor practice by insisting on bargaining over the clause.[704] Employers are required to bargain in good faith on "subjects involving wages, hours, and other terms and conditions of employment."[705] All other topics are considered permissive bargaining subjects, and employers are not required to bring them to the bargaining table.[706] Because interest arbitration does not directly affect an employee's relationship with the employer in the workplace, it is not considered a mandatory subject of bargaining.[707]

In *University of Alaska Classified Employees Association, APEA/AFT v. University of Alaska*,[708] the supreme court held that the superior court was correct in granting summary judgment to

697. *See id.* at 929.
698. *See id.* at 928.
699. 522 U.S. 520 (1998).
700. *See Malabed*, 42 F. Supp. 2d at 932.
701. *See id.* at 930-31.
702. *See id.* at 941.
703. 971 P.2d 156 (Alaska 1999).
704. *See id*.
705. *Id*. at 157.
706. *See id*.
707. *See id*.
708. 988 P.2d 105 (Alaska 1999).

the university on the union's claim that the university violated a collective bargaining agreement by not implementing pay increases.[709] Although the university and the union had entered into a collective bargaining agreement requiring yearly cost-of-living salary adjustments, the adjustments were contingent on legislative appropriation of the funds and the legislature had not appropriated the funds for that year.[710] Further, Alaska Statutes section 23.40.215(a) requires that the monetary terms of a bargaining agreement be subject to legislative appropriation.[711]

In *Abbott v. State*,[712] the supreme court held that the federal equitable tolling doctrine allowed an injured seaman to avoid a statute of limitations bar on an injury claim.[713] Abbott was injured while working on a ship but did not pursue traditional maritime remedies because her union's collective bargaining agreement provided ample benefits.[714] In 1991, the supreme court held that a similar collective bargaining agreement could not provide benefits in lieu of traditional maritime remedies,[715] and Abbott's collective bargaining benefits subsequently ceased.[716] She then sought traditional remedies, but lower courts found that these were foreclosed to her because the three-year statute of limitations on maritime torts had passed.[717] The supreme court determined that Abbott was entitled to an extension under the federal precedent of "equitable tolling," because "the plaintiff, by exercising reasonable diligence, could not have discovered essential information bearing on his or her claim."[718]

In *International Brotherhood of Electrical Workers Local Union 547 v. Lindgren*,[719] the supreme court held that the appropriate measure of damages for Lindgren, a former employee of the city of Fairbanks, was the amount of attorney's fees he incurred in pursuing his claims against the city.[720] The court held that the union could not be charged with the attorney's fees that were allowable to Lindgren's punitive damages claim under the

709. *See id*. at 106.
710. *See id*.
711. *See id*. at 107-08.
712. 979 P.2d 994 (Alaska 1999).
713. *See id*. at 998.
714. *See id*. at 995.
715. *See id*. (citing Brown v. State, 816 P.2d 1368 (Alaska 1991)).
716. *See id.*
717. *See id*. at 996.
718. *Id*. at 998.
719. 985 P.2d 451 (Alaska 1999).
720. *See id*. at 455.

Whistleblower Act.[721] The court remanded to litigate the issue of whether Lindgren's settlement of his claims against the city had been fully compensatory.[722] Specifically, the question on remand was "whether lost income after reinstatement was offered and declined would have been a remedy available to Lindgren under the collective bargaining agreement."[723] The court further held that there was no need to apportion damages between the city and the union.[724] Alaska law, unlike federal law, does not require the employee to prove a breach of duty of fair representation before proceeding against the employer.[725]

C. Workers' Compensation

In *Aleck v. Delvo Plastics, Inc.*,[726] the supreme court reversed a Workers' Compensation Board determination that an employee's claim for additional benefits was time-barred because it did not fall within the latent injury exception to the statute of limitations for bringing new claims.[727] Aleck filed an Application for Adjustment of Claim in November 1995, claiming she was experiencing new pain symptoms related to a work injury for which she had been compensated in 1973. The Board denied Aleck's application, ruling that her new injury was not latent because she should have known the relationship of this injury to her employment.[728] The Board concluded that because a doctor had warned Aleck in the 1970's that her disability could worsen, she should have sought regular medical attention to track the injury's progress.[729] The supreme court rejected the Board's reasoning, however, because the employer did not present any evidence to contradict Aleck's assertions that her pain symptoms suddenly worsened, nor did the employer present any case law which suggested that Aleck must periodically visit a doctor in order to track an injury's progress even when there is no change in symptoms.[730]

In *Seville v. Holland America Line Westours, Inc.*,[731] the supreme court held that if an employer was required to keep the

721. *See id*. at 459; *see also* ALASKA STAT. § 39.90.120(a) (LEXIS 1999).
722. *See Lindgren*, 985 P.2d at 459.
723. *Id*. at 458.
724. *See id*.
725. *See id*. at 456.
726. 972 P.2d 988 (Alaska 1999).
727. *See id.* at 989.
728. *See id.* at 991.
729. *See id.* at 992.
730. *See id.*
731. 977 P.2d 103 (Alaska 1999).

sidewalk outside its place of business free of ice, an injury to an employee who slipped on ice was work-related and therefore covered by worker's compensation benefits.[732] Although the sidewalk could not be considered an actual part of the defendant's premises, traversing the sidewalk was a condition of Seville's employment and therefore covered by an exception to the going and coming rule.[733] Specifically, the court held that "when the hazard results in an injury to a worker who is coming to work or going home, 'there is a distinct 'arising out of' or causal connection' to the course of employment."[734] The court emphasized that this ruling was "narrowly confined to the workers' compensation context, where compensability hinges on work-relatedness arising from the existence of a duty, rather than on a breach of the duty or a determination that the duty is owed to any particular individual. . . ."[735]

In *Malone v. Lake and Peninsula Borough School District*,[736] the court of appeals held that injuries sustained while traveling to a place of prospective employment were not valid workers' compensation claims.[737] Mr. and Mrs. Malone were told by a school official that they were likely to be employed to work as teachers in a remote fishing village.[738] Excited to visit the school, the Malones ignored warnings about poor travel conditions from school officials and others and flew out to the school.[739] Mrs. Malone was injured en route, and Mr. Malone was killed.[740] Although the court was willing to assume that there was an employment contract, it would not award workers' compensation because it held that the Malones were not injured in the course of employment.[741] It was not foreseeable to the employer school board that the Malones would visit before they were to begin teaching.[742]

In *Lindekugel v. George Easley Co.*,[743] the supreme court held that claimants are not barred from pursuing subsequent additional benefits even once they have received lifetime personal disability

732. *See id*. at 105.
733. *See id*. at 107.
734. *Id*. at 109 (citing LARSON, LARSON'S WORKER'S COMPENSATION LAW § 15.15, at 4-72 to 4-73 (1998)).
735. *Id*. at 111-12.
736. 977 P.2d 733 (Alaska Ct. App. 1999).
737. *See id.* at 736.
738. *See id.*
739. *See id.*
740. *See id.*
741. *See id.* at 738.
742. *See id.*
743. 986 P.2d 877 (Alaska 1999).

benefits.[744] Lindekugel was deemed permanently and totally disabled after an injury at work in 1976 and received benefits for permanent disability.[745] He retired, relying on these benefits and on social security, until two years later when the social security administration determined he could return to work in a lessened capacity and terminated his benefits.[746] After a week with a new employer, Lindekugel injured himself at work and became permanently and totally disabled.[747] The Alaska Workers' Compensation Board denied benefits for the new injury on the ground that a claimant cannot seek additional benefits after receiving lifetime benefits for a permanent disability.[748]

The supreme court disagreed, noting that a disability is an inability to "earn the wages which the employee was receiving at the time of the injury in the same or any other employment."[749] Thus, the consideration is earning capacity, not physical impairment.[750] The central policy of the rule is that a worker can regain earning capacity by "education or vocational rehabilitation."[751] Thus, a classification of permanently and totally disabled is not immutable, and a worker may make claims even after receiving lifetime benefits.[752]

In *Phillip Weidner & Assocs. v. Hibdon*,[753] the supreme court held that the Workers' Compensation Board wrongfully interfered with a reasonable treatment decision by Hibdon and her physician.[754] Hibdon injured her back while on the job in 1993.[755] Hibdon's physician, Dr. Garner, suggested surgery, but the insurance company refused to pay.[756] Hibdon's pain persisted after a year-and-a-half of rehabilitative therapy, and Dr. Garner again recommended surgery.[757] After the insurance company's physician again advised that therapy would be the correct treatment, Hibdon filed an application for adjustment with the Board.[758] The supreme

744. *See id*. at 878.
745. *See id.*
746. *See id*.
747. *See id*.
748. *See id*. at 879.
749. *Id*. (quoting ALASKA STAT. § 23.30.041(10) (LEXIS 1998)).
750. *See Lindekugel*, 986 P.2d at 879.
751. *Id.*
752. *See id.* at 880.
753. 989 P.2d 727 (Alaska 1999).
754. *See id.* at 733.
755. *See id.* at 728.
756. *See id.* at 729.
757. *See id.* at 729-30.
758. *See id.* at 730.

court noted that Hibdon filed her claim within two years of her injury, requiring the Board to apply a reasonableness of requested treatment standard, rather than its own discretion among reasonable alternatives.[759] At the hearing, the insurer's doctors neither disputed Dr. Garner's diagnosis nor the general efficacy of the proposed treatment.[760] Rather, they insisted on additional testing and argued that Hibdon was not fit for the proposed surgery.[761] The supreme court noted that "where a claimant receives conflicting medical advice, the claimant may choose to follow his or her own doctor's advice, so long as the choice of treatment is reasonable."[762] Accordingly, the Board had incorrectly dismissed Dr. Garner's testimony and Hibdon had met her burden of establishing the reasonableness of surgery as a treatment.[763]

In *Bockness v. Brown Jug, Inc.*,[764] the supreme court held that under the Workers' Compensation Act, employers need only pay reasonable and necessary treatment expenses of injured employees.[765] Bockness injured his back and received "controversial" injection therapy and chiropractic treatments.[766] His employer medically examined him and refused to pay for some of the treatment, which it deemed unnecessary and too frequently administered.[767] The Alaska Workers' Compensation Board agreed with the employer that the employer was only required to compensate for necessary treatment.[768] The supreme court found that the Workers' Compensation Act implicitly required employers to compensate only for treatment reasonable and necessary to recovery.[769] Because the Board used substantial evidence to find that the treatment was more frequent than needed, its finding was appropriate.[770]

In *Bolieu v. Our Lady of Compassion Care Center*,[771] the supreme court held that the state Workers' Compensation Board inquired too narrowly as to whether two employees' injuries were

759. *See id.* at 731.
760. *See id.* at 733.
761. *See id.*
762. *Id.* at 732.
763. *See id.* at 733.
764. 980 P.2d 462 (Alaska 1999).
765. *See id.* at 466.
766. *See id.*
767. *See id.*
768. *See id.* at 465.
769. *See id.* at 466.
770. *See id.* at 467.
771. 983 P.2d 1270 (Alaska 1999).

work-related.[772] The employees developed skin rashes that were diagnosed as Staph A infections by two independent physicians.[773] The Board denied the employees' claims when it could not find a sufficient legal connection between the Staph A infections and the workplace.[774] The court held that the Board's error in failing to address other possible work-related causes of the employees' rashes was not harmless and remanded the case for redetermination.[775]

In *Robles v. Providence Hospital*,[776] the supreme court held that the superior court improperly remanded a workers' compensation case to the Workers' Compensation Board for a second time where the Board properly interpreted and acted upon the original remand order.[777] The superior court originally remanded the case to the Board when it found insufficient evidence upon which to base a decision against compensability.[778] The Board reversed the unsupported finding and awarded benefits to Robles.[779] Defendant appealed to the superior court, arguing the Board should have heard additional evidence; the superior court remanded the case for further findings of fact.[780] The supreme court held that the superior court lacked the authority to remand when an employee is presumed compensable and an appellate court finds no substantial evidence supporting the Board's finding against compensability.[781]

D. Miscellaneous

In *Era Aviation, Inc. v. Seekins*,[782] the supreme court held that an employer did not violate the implied covenant of good faith and fair dealing when it fired an at-will employee because of a personality conflict.[783] The covenant works only to effectuate the reasonable expectations of the parties and to prevent the employer from firing the employee to further an impermissible motive or

772. *See id*. at 1272.
773. *See id*.
774. *See id*. at 1273.
775. *See id*. at 1280.
776. 988 P.2d 592 (Alaska 1999).
777. *See id.* at 593.
778. *See id.* at 596.
779. *See id.* at 597.
780. *See id.*
781. *See id.*
782. 973 P.2d 1137 (Alaska 1999).
783. *See id.* at 1141.

objective.[784] The supreme court ruled that using the covenant to convert at-will employment into good-cause employment would impermissibly alter the basic character of the employment agreement, and that the employer's alleged desire to avoid a personality conflict between two employees was a permissible motive for firing Seekins.[785]

In *Holland v. Union Oil Co. of California, Inc.*,[786] the supreme court held that a memo addressing potential behavior problems, prohibiting certain conduct, and stating possible consequences did not modify an "at-will" employment agreement to one "for cause."[787] In addition, the employer did not breach the covenant of good faith and fair dealing in demoting the employee.[788] Holland was an employee of Union Oil and discussed doing work for one of Union Oil's contractors while on the company's premises.[789] Holland admitted to having the discussion, but denied having any intent to go through with the work.[790] Holland's supervisor then demoted Holland, reducing Holland's annual salary by approximately $20,000.[791] The supreme court rejected Holland's assertion that the company improperly demoted him without cause.[792] The supreme court stated that a memo distributed by Union Oil which discussed prohibited behavior and possible consequences, but contained hedging terms such as "can result," "[i]n most instances," and "steps in the progressive discipline system may be bypassed," did not create a reasonable expectation that employees were granted certain rights.[793]

The supreme court then rejected Holland's assertions that Unocal breached the covenant of good faith and fair dealing.[794] Holland claimed he was treated differently than other employees because he was punished for "thinking about" doing the same thing that other employees did.[795] However, the projects and incidences that Holland referred to cost about $150, while Holland's project would have cost approximately $8,000-$10,000 and were therefore,

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784. *See id.*
785. *See id.*
786. 993 P.2d 1026 (Alaska 1999).
787. *See id.* at 1032.
788. *See id.*
789. *See id.* at 1028.
790. *See id.*
791. *See id.*
792. *See id.* at 1030.
793. *Id.* at 1032.
794. *See id.*
795. *See id.* at 1033.

not the same.[796] Furthermore, Holland's claim that he had no intention of doing the work was a fact disputed by Union Oil who determined otherwise after a good faith investigation of the facts.[797] An employer has not breached the covenant of good faith if it makes a good faith but incorrect determination that misconduct occurred.[798]

In *Tolbert v. Alascom, Inc.*,[799] the supreme court held that a worker who showed a preliminary link between an injury and her job was entitled to compensation because her employer failed to overcome the presumption in favor of employees.[800] However, the supreme court also held that the "presumption of compensability" did not apply to the establishment of medical expenses.[801] Tolbert, who claimed to have sustained hand injuries, established the preliminary link between the injury and her work.[802] Alascom failed to overcome the presumption of compensability because the evidence it presented did not rule out Tolbert's work as a cause for her injury, and Alascom failed to show an alternative probable cause of her injury.[803] However, Tolbert could not collect for medical expenses for which she had no records.[804]

In *Chijide v. Manilaq Association of Kotzebue*,[805] the supreme court held that an employee with a year-to-year employment contract that the employer could decline to renew for any reason did not have a property interest in the renewal of the contract because the employee had "no legitimate expectation" of indefinite employment.[806] Chijide argued that she was denied due process because the hospital decided to end her employment without giving her notice or a hearing.[807] The supreme court rejected that argument, noting that *Storrs v. Lutheran Hospitals & Homes*

796. *See id.* at 1034.
797. *See id.* at 1035.
798. *See id.*
799. 973 P.2d 603 (Alaska 1999).
800. *See id.* at 611.
801. *See id.* at 607.
802. *See id.* at 610.
803. *See id.* at 611.
804. *See id.* at 608.
805. 972 P.2d 167 (Alaska 1999).
806. *Id.* at 171.
807. *See id.* at 170.

Society of America[808] does not entitle all doctors terminated by quasi-public hospitals to a hearing.[809]

In *Alyeska Pipeline Service Co. v. Shook*,[810] the supreme court held that a terminated employee's separation agreement released Alyeska Pipeline from all claims arising from that employment.[811] Further, the court decided that an employee did not violate the Alaska Wage and Hour Act, under which an employee may not privately settle a wage and hour claim for less than the damages required in the Act,[812] when that employee received a severance package in excess of the Act's requirements.[813] When Shook was released from employment with Alyeska Pipeline, he received a $141,496.73 severance payment in consideration for signing a general release of liability for any claims against Alyeska arising out of his employment.[814] Soon afterwards, he sued Alyeska alleging unpaid overtime.[815] The court, pointing to the broad language of the agreement and the court's policy of interpreting contracts to effectuate the "reasonable expectations of the parties," concluded that the severance payment was consideration for any AWHA claim Shook had.[816] In dicta, the court commented that it would possibly have found an exception had Shook reserved AWHA claims, or had the contract violated public safety.[817] Since the severance package far exceeded the claim mandated by the AWHA, however, no public policy was offended when Shook accepted payment as a release of liability from employment claims.[818]

In *Brassea v. Person*,[819] the supreme court held that Brassea, a seaman, was "in the service of the ship" when a hernia sustained on the job yielded a second hernia seemingly unrelated to Brassea's employment.[820] The initial injury occurred while Brassea was lifting

808. 609 P.2d 24 (Alaska 1980)(holding that when a quasi-public hospital that is the only hospital in a given location terminates a doctor's hospital privileges, it must give the doctor notice and a hearing prior to terminating those privileges).

809. *See Chijide*, 972 P.2d at 171.

810. 978 P.2d 86 (Alaska 1999).

811. *See id*. at 88.

812. *See id*. at 87.

813. *See id*. at 91.

814. *See id*. at 87.

815. *See id*.

816. *Id*. at 89-90.

817. *See id*.

818. *See id*. at 91.

819. 985 P.2d 481 (Alaska 1999).

820. *Id*. at 484-85.

a gas tank, incident to his employment.[821] While performing surgery to repair this hernia, the doctor discovered a second, unrelated hernia and performed a second surgery to repair it.[822] According to the court, Brassea's "injury, and subsequent surgery, were incidents of his position as a seaman and closely related to the business of the ship."[823] The court further found a "pervasive" tradition of interpreting liberally the owner of a ship's liability in cases of maintenance and cure.[824] Thus, Brassea was found to be "in the service of the ship" at the time he required surgery for the second hernia.[825]

In *Henash v. Ipalook*,[826] the supreme court upheld the superior court's finding that Ipalook's position was not overtime-exempt, but found error in the superior court's failure to use the parties' stipulated pay rate in calculating damages.[827] Ipalook had been hired into an overtime-exempt managerial position, but was never given actual supervisory status in the course of her job.[828] As part of her position, Ipalook had to be on call twenty-four hours a day.[829] Given the facts presented at trial, the superior court did not err in finding that Ipalook's position was not supervisory and she was therefore entitled to overtime.[830] The supreme court remanded for a determination of the amount of damages because the court failed to use the stipulated hourly rate in its calculation.[831]

In *Alaska State Employees' Association/AFSCME Local 52 v. State*,[832] the supreme court affirmed the Alaska Labor Relations Agency's ("ALRA") reclassification of three state positions as supervisory.[833] The reclassification affected the membership of the union representing non-supervisory state employees.[834] The supreme court reviewed the ALRA's actions deferentially, testing (1) whether the agency has a grant of authority to make regulations, (2) whether the regulations are "consistent with and reasonably necessary" to further the statute, and (3) whether the

821. *See id*. at 482.
822. *See id.* at 481.
823. *Id*.
824. *See id*. at 485.
825. *Id*. at 484.
826. 985 P.2d 442 (Alaska 1999).
827. *See id*. at 451.
828. *See id*. at 444.
829. *See id*.
830. *See id*. at 443.
831. *See id*. at 450.
832. 990 P.2d 14 (Alaska 1999).
833. *See id*.
834. *See id.* at 17.

regulations are "reasonable and not arbitrary."[835] The court concluded the regulation in this case was consistent with the ALRA's rulemaking authority, and it worked well with the "community of interest test,"[836] requiring employees with theoretical supervisory power to be treated as supervisors.[837] The new regulation merely clarified the statute.[838]

In *Stone v. Fluid Air Components of Alaska*,[839] the supreme court held that "the employer's pro rata share of fees and costs should be based on both past and future benefits to the employer."[840] Stone was injured at his place of employment and received worker's compensation from Fluid Air Components of Alaska.[841] Stone later received a third-party judgment for his tort claim arising from the injury.[842] Fluid Air petitioned for a reimbursement on its prior payments to Stone, arguing that the statutory scheme in Alaska, in contrast with other jurisdictions, "does not include the right to future reimbursement on the part of the employer."[843] The court concluded that this remedy squares with the text of Alaska Statutes section 23.30.015(g), which allows for the deduction of litigation costs prior to an insured person's reimbursement of his employer.[844] Therefore, the employer's pro rata share of the litigation costs must be based on the past and future benefits to the employee.[845]

VIII. FAMILY LAW

A. Child Support

In *Brown v. Brown*,[846] the Alaska Supreme Court held that a child support obligation may be fulfilled by depositing money in a trust fund to benefit a child, instead of sending money directly to the custodial parent.[847] Further, the court held that the non-custodial parent breached the divorce decree by failing to deposit

835. *Id*. at 18.
836. ALASKA STAT. § 23.40.090 (LEXIS 1998).
837. *Alaska State Employees' Ass'n*, 990 P.2d at 19.
838. *See id*.
839. 990 P.2d 621 (Alaska 1999).
840. *Id.* at 624.
841. *See id*. at 621.
842. *See id*.
843. *Id*. at 623.
844. *See id*.
845. *See id*. at 624.
846. 983 P.2d 1264 (Alaska 1999).
847. *See id*. at 1268.

money into the trust fund.[848] The breach gave the superior court the power to alter the original decree to ensure that the child would receive appropriate support.[849] The supreme court also agreed with the superior court that the Child Support Enforcement Division ("CSED") has authority to collect the child support arrears at statutory interest levels.[850] The court reiterated its holding in *In re Adoption of K.M.M. and B.M.M.*[851] that proper maintenance of a trust fund fulfills, but does not replace, a child support obligation.[852]

In *Scully v. Scully*,[853] the supreme court addressed a question that arose after the Alaska legislature amended Alaska Statutes section 25.24.170(a) to permit trial courts to extend child support for children who have reached the age of eighteen, but who are still living at home and are attending high school.[854] The court affirmatively concluded that "this change in the law constitutes a change in circumstances permitting modification and extension of existing child support orders entered before the legislature's action."[855] Thus, the court declared, "as long as an eighteen-year-old child meets [the] statutory conditions, a custodial parent may move for continued child support."[856]

In *Rusenstrom v. Rusenstrom*,[857] the supreme court held that the trial court abused its discretion in denying Allan Rusenstrom's motion for credit against his child support obligation.[858] Rusenstrom provided health insurance for his children, then attempted to credit it against his child support obligation.[859] Rusenstrom paid for the health insurance through a deduction from his employer's contribution to his retirement plan.[860] This loss to his "income stream" was functionally equivalent to his paying cash and, therefore, could be credited against his child support obligation.[861]

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848. *See id.*
849. *See id*. at 1268-69.
850. *See id*. at 1270.
851. 611 P.2d 84 (Alaska 1980).
852. *See Brown*, 983 P.2d at 1268.
853. 987 P.2d 743 (Alaska 1999) (consolidating appeals in Scully v. Scully).
854. *See id*. at 744.
855. *Id.*
856. *Id.* at 745.
857. 981 P.2d 558 (Alaska 1999).
858. *See id.* at 559.
859. *See id.*
860. *See id.* at 562.
861. *Id.*

In *State v. Kovac*,[862] the supreme court held that Kovac, the biological father of R.M., owed child support from the date R.M. was born, not from the date the presumed father's paternity was disestablished.[863] Furthermore, Kovac, by virtue of an estoppel claim, could not bring a paternity suit against Romer, the presumed father.[864] The court reasoned that even if the biological father could bring such a suit, Kovac's claim would fail on the ground that the presumed father and child had a close relationship and that the child had come to accept the presumed father as his true father, Kovac's claim would fail.[865] The court had previously narrowed the scope of this defense in equity by holding that paternity by estoppel applies only when there is proof of economic reliance.[866] It is not enough to risk emotional harm in severing a child's relationship with a parent.[867] Kovac failed to show that potential economic detriment to R.M. or his mother would result from severing R.M's relationship with his presumed father.[868]

In *Child Support Enforcement Division v. Bromley*,[869] the supreme court held that CSED had authority to modify another state's child support obligation under certain conditions.[870] Bromley divorced his wife in Maine, after which he moved to Alaska and his child and former wife moved to Pennsylvania.[871] Maine issued the child support obligation.[872] In 1992, Pennsylvania asked CSED to impose a child support order on Bromley.[873] Bromley waived his right to appeal and began to make the CSED payments.[874] Three years later, Bromley registered and CSED accepted the Maine support order, which had lower child support payments.[875] CSED refused, however, to restore the amounts in

862. 984 P.2d 1109 (Alaska 1999).
863. *See id*. at 1112.
864. *See id*.
865. *See id*. at 1113.
866. *See id*.
867. *See id*; *see also* B.E.B. v. R.L.B., 979 P.2d 514 (Alaska 1999) (overturning prior case law and holding that the paternity by estoppel doctrine may be invoked only upon a showing of economic, rather than emotional, prejudice).
868. *See Kovac*, 984 P.2d at 1113.
869. 987 P.2d 183 (Alaska 1999).
870. *See id*. at 185.
871. *See id.*
872. *See id*.
873. *See id.*
874. *See id.* at 186.
875. *See id.*

excess of the Maine order that Bromley had paid while under the CSED obligation.[876]

The supreme court first determined that CSED did have subject matter jurisdiction to establish a child support order, although the Maine order already existed.[877] The court also concluded that, although the child was in Pennsylvania, Alaska law controlled Bromley's child support obligation, because the obligee and the obligor did not live in the issuing state, the petitioner seeking modification was not a resident of Alaska, and the respondent was subject to Alaska's personal jurisdiction.[878] The supreme court also upheld CSED's child support order by determining that the lower court erred in departing from Rule 90.3(a).[879] Rules of finality preclude a Rule 90 adjustment until the movant shows a material change of circumstances.[880] The supreme court defined Bromley's claim of past overpayment as a collateral attack on the 1993 order, rather than a material change of circumstance.[881]

In *Dewey v. Dewey*,[882] the supreme court held that the superior court had subject matter jurisdiction and properly increased Michael Dewey's child support obligation pursuant to Civil Rule 90.3.[883] The court also held that Michael's request for relief due to mistake was time-barred by Rule 60(b)(1).[884] Michael claimed the superior court lacked jurisdiction to order him to pay child support because the child was not his biologically nor through adoption.[885] The supreme court held that the superior court's jurisdiction was not an abuse of discretion because Michael voluntarily agreed to provide child support.[886] Michael further claimed that conventional child support modification procedures under Rule 90.3, established in 1987, should not apply to him because his contractual agreement to support the child was entered into in 1985.[887] The supreme court held that Michael's support agreement was intended to provide the child with an amount necessary for her care, subject to his ability to

876. *See id.*
877. *See id.*
878. *See id.* at 189 (citing ALASKA STAT. § 25.25.611(b) (LEXIS 1998)).
879. *See id.* at 191 (citing ALASKA R. CIV. P. 90.3).
880. *See id.* at 193.
881. *See id.*
882. 969 P.2d 1154 (Alaska 1999).
883. *See id*. at 1161.
884. *See id*. at 1159.
885. *See id*. at 1160.
886. *See id*. at 1161.
887. *See id*. at 1157.

pay.[888] Therefore, Michael's monthly payment could be increased within the comprehensive scope of Rule 90.3.[889] Finally, Michael claimed he was entitled to equitable relief because there had been a mistake as to his obligation to provide support.[890] The supreme court held that Rule 60(b)(1), which time-bars relief due to mistake after one year, prevented Michael from arguing the issue of mistake.[891]

In *Rubright v. Arnold*,[892] the supreme court held Rubright liable for child support for his biological child, even though the lower court determined Rubright's paternity through an establishment order when he failed to comply with discovery.[893] Rubright fathered Mrs. Arnold's third child while she was still living with her husband.[894] The child was declared Mr. Arnold's son at birth and treated as such until Mr. Arnold determined he was not the father, at which point the couple separated.[895] At trial, Rubright repeatedly violated discovery by failing to submit blood tests; consequently, the court granted a declaratory motion stating that Rubright was the father.[896] The supreme court determined that this was not error because establishment orders are justified when there is a willful failure to comply with discovery.[897] On the merits, the order was acceptable because Mrs. Arnold made a prima facie showing of Rubright's paternity, which was not rebutted.[898]

The supreme court also rejected Rubright's argument that Mrs. Arnold was estopped from denying Mr. Arnold's paternity, because she had made no representation to Rubright.[899] Equitable estoppel requires representation of a position that is relied on in such a way as to prejudice the claiming party.[900]

In *Vinzant v. Elam*,[901] the supreme court held that the superior court's modification of a custody order at a show-cause hearing violated due process and that the superior court abused its

888. *See id*. at 1158.
889. *See id*. at 1159.
890. *See id*.
891. *See id*.
892. 973 P.2d 580 (Alaska 1999).
893. *See id.* at 583.
894. *See id.* at 581.
895. *See id.*
896. *See id.* at 583.
897. *See id.*
898. *See id.* at 584.
899. *See id.*
900. *See id.*
901. 977 P.2d 84 (Alaska 1999).

discretion when it denied a motion to recalculate child support.[902] The mother filed a motion with the court alleging that the father, who had primary custody, was frustrating her visitation rights.[903] The court ordered a show-cause hearing at which it modified the child custody order without notifying the parties that custody was at issue.[904] The custody modification at the show-cause hearing violated due process because it did not address the statutory factors relevant to the child's best interest.[905] The supreme court also held that a parent is obligated to support his or her children regardless of a support order, so the superior court abused its discretion by denying the father's motion to recalculate child support when he gained primary custody.[906]

In *Ferguson v. State*,[907] the supreme court held that a father who obtains relief from paternity and future support payments under Alaska Civil Rule 60(b)(5) is still liable for support arrearages accrued before paternity was disestablished.[908] Ferguson sought relief from support arrearages based on his successful paternity challenge.[909] The supreme court denied relief, holding that Rule 60(b)(5), by its own terms, only provides for prospective relief.[910]

In *State v. Dillon*,[911] the supreme court held that "[u]nder Alaska Civil Rule 90.3(h)(2), a revised child support order presumptively relates back to notice of a petition for modification," but that good cause may allow for a later effective date.[912] CSED appealed a superior court order altering Dillon's child support payment, because the payment was not made effective back to the date Dillon received the Notice of the Petition for Modification.[913] The supreme court held that the superior court had not shown good cause why it chose not to extend the effective date back to the month following Dillon's receipt of notice, and therefore the superior court abused its discretion in failing to make its order effective back to the date Dillon received the notice.[914]

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902. *See id*. at 87-88.
903. *See id*.
904. *See id*.
905. *See id.* at 87.
906. *See id*. at 88.
907. 977 P.2d 95 (Alaska 1999).
908. *See id.* at 103.
909. *See id.* at 97.
910. *See id.* at 99.
911. 977 P.2d 118 (Alaska 1999).
912. *Id*.
913. *See id*. at 119.
914. *See id*. at 120.

In *Koss v. Koss*,[915] the supreme court held that the ten-year statute of limitations contained in Alaska Statutes section 09.10.040 did not bar CSED from administratively enforcing child support judgments that were twelve years old.[916] In 1997, Koss sought to enjoin CSED from using its administrative powers to enforce judgments from 1982 and 1985.[917] The supreme court, however, characterized CSED's enforcement powers as more like standard judicial execution rather than beginning new legal proceedings.[918] Therefore, CSED's collection of child support judgments are not actions upon a judgment, but simply enforcement of an outstanding judgment, and are not governed by section 09.10.040.[919]

In *State v. Green*,[920] the supreme court held that a direct lump-sum pre-payment for court-ordered child support did not relieve an obligor of his responsibility to reimburse the state for future support provided through the Aid to Families with Dependent Children ("AFDC") program.[921] Green paid the mother of his minor child $54,000 for past and future child support in exchange for relief from any future claims for child support.[922] Eventually, the mother applied for and began receiving AFDC benefits and CSED sought reimbursement from the father, who claimed his agreement with the mother released him from such claims.[923] The court held that "[b]y paying directly, he took the chance [that the mother] might again receive assistance someday, thus exposing Green to additional liability. . . ."[924] Further, the court held that the "prepayment . . . could not discharge a future obligation Green might have to the state."[925]

In *State v. Schofield*,[926] the supreme court held that a trial court's judgment was a prohibited retroactive modification of the defendant's child support obligation when it reduced the obligation during the state's motion to convert defendant's support arrearages to judgment.[927] The defendant had a long history of non-payment and under-payment of child support, and the state moved to have

915. 981 P.2d 106 (Alaska 1999).
916. *See id.* at 109.
917. *See id.* at 106.
918. *See id.* at 108.
919. *See id.* at 109.
920. 983 P.2d 1249 (Alaska 1999).
921. *See id*. at 1257.
922. *See id*. at 1251.
923. *See id*. at 1252.
924. *Id*. at 1257.
925. *Id*.
926. 993 P.2d 405 (Alaska 1999).
927. *See id.* at 407.

these deficiencies reduced to judgment.[928] The state calculated the defendant's arrearages based on a monthly support payment that differed from the original support order.[929] The superior court entered judgment based on the defendant's figure, which differed from the original order and the state's figure, and the state appealed.[930] The supreme court held that under former Alaska Rule of Civil Procedure 90.3(h)(2), a trial judge may reduce child support arrearages only on a motion for modification of support arrearages.[931] Since the trial judge in this case modified the arrearages on a motion for judgment and not on a motion for modification, the trial judge violated Rule 90.3(h)(2), and the judgment was erroneous.[932]

B. Child Custody

In *John v. Baker*,[933] the supreme court decided that tribes have a sovereign and inherent power to decide child custody disputes between Native Americans in their own courts.[934] John and Baker had never married, but had two children and lived in a Native American village.[935] Upon the dissolution of the relationship, Baker petitioned the state trial court for sole custody.[936] John filed a motion to dismiss, pointing out that the action had already commenced in the tribal courts.[937] The trial court denied the motion, ruling it had "subject matter jurisdiction over the suit."[938] The supreme court held that tribes have a sovereign and inherent power to decide child custody disputes between Native Americans in tribal courts.[939] The court considered such jurisdiction to be concurrent with state court jurisdiction.[940]

In *Jensen v. Froissart*,[941] the supreme court held that the trial court properly corrected its judgment under Alaska Civil Rule

928. *See id.*
929. *See id.*
930. *See id.*
931. *See id.* at 408.
932. *See id.* at 409.
933. 982 P.2d 738 (Alaska 1999).
934. *See id*. at 742.
935. *See id*.
936. *See id*.
937. *See id.*
938. *Id*.
939. *See id.*
940. *See id.* at 764.
941. 982 P.2d 263 (Alaska 1999) .

60(a) when a clerical error was made in a child custody decree.[942] In 1995, the trial court ordered Jensen to pay $3,194, "plus interest," to Froissart for medical expenses incurred in 1989 on behalf of their child.[943] The order did not specify a starting date for the interest.[944] In 1996, Froissart successfully moved the trial court to amend its judgment to specify that interest accrued from 1989.[945] Jensen appealed the amended judgment.[946] The supreme court held that correcting the disputed omission entailed no factual findings or legal conclusions beyond those made to support the trial court's original judgment.[947] Accordingly, the superior court could correct the judgment's omission pursuant to Alaska Civil Rule 60(a).[948]

In *Harrington v. Jordan*,[949] the supreme court held that a husband did not show a substantial change in circumstances and was therefore not entitled to a custody modification hearing.[950] Harrington requested a hearing on custody modification.[951] As justification for the hearing, Harrington cited one daughter's visitation of more than 110 overnight visits, Jordan's behavior that made visitation difficult, and the daughters' decreased need to be together.[952] The supreme court noted that the increased number of overnight visits was due to a special visitation agreement made by the parties and the court to accommodate a family trip.[953] Because the special visitation was not likely to be repeated, it was not a substantial change justifying a modification hearing.[954] The court also concluded that Harrington's allegation that Jordan made visitation difficult was limited to one incident.[955] Enforcement of the current visitation order would be more appropriate than modification.[956] Finally, the court stated that the daughters' allegedly decreased need to be with each other was not a substantial change because the original visitation order was based

942. *See id.* at 265.
943. *Id.*
944. *See id.*
945. *See id.*
946. *See id.*
947. *See id.* at 269.
948. *See id*.
949. 984 P.2d 1 (Alaska 1999).
950. *See id.* at 4.
951. *See id.* at 3.
952. *See id.* at 3-4.
953. *See id.* at 3.
954. *See id.*
955. *See id.* at 4.
956. *See id.*

on Harrington's relationship with the daughters, not the daughters' relationship with one another.[957]

In *Park v. Park*,[958] the supreme court remanded a child custody case for further consideration of all statutory factors for determining the best interests of the child.[959] The Parks divorced after Michael Park discovered Tara Park's infidelity.[960] Michael took the couple's two children and resettled in Texas.[961] Michael was awarded interim custody and had the children for twenty months before the issue of permanent custody was adjudicated.[962] He was not cooperative, however, in allowing Tara to exercise her visitation rights.[963] Based upon the report of a custody investigator, which focused exclusively on Michael's refusal to accommodate visitation rights, the trial court awarded Tara legal custody without exploring whether Tara would be the more appropriate parent through examination of all statutory considerations.[964]

According to the supreme court, the trial court's "brevity, their almost exclusive focus on a single statutory factor, and their conclusionary adoption of the custody investigator's recommendations provide no assurance that the trial court followed the thorough, deliberate reasoning process required under AS 25.24.150(c)."[965] The supreme court instructed the trial court to allow each of the Parks to present more evidence and to determine the best interests of the children.[966]

In *Crane v. Crane*,[967] the supreme court enforced a custody agreement over a father's objections that the document represented neither his nor his children's interests and wishes.[968] Mr. Crane argued that because his attorney erroneously advised him that certain witnesses would not be allowed to testify, he was more inclined to accept a settlement that he felt was not in his children's best interest.[969] The supreme court found that the agreement met minimal contractual requirements, and that it also

957. *See id.*
958. 986 P.2d 205 (Alaska 1999).
959. *See id*.
960. *See id.* at 206.
961. *See id*.
962. *See id*.
963. *See id*.
964. *See id*.
965. *Id.* at 210-11.
966. *See id*. at 211.
967. 986 P.2d 881 (Alaska 1999).
968. *See id*. at 883.
969. *See id*.

satisfied the best interests of the children standard.[970] The court reasoned that the contracts resulting from parental cooperation and a settlement are always in the child's best interests.[971] The supreme court enforced the settlement in order not to deter future settlements in similar cases by giving the appearance that settlements will not be respected on appeal.[972]

In *Naquin v. Naquin*,[973] the supreme court held that a former husband who opposed a motion to modify a child custody order was entitled to an evidentiary hearing before the motion was granted.[974] The superior court had granted the former wife's motion to modify child custody without a hearing because it found "no material facts at issue."[975] The supreme court held that both procedural due process under the Alaska Constitution and the supreme court's prior holdings provide a right to an evidentiary hearing prior to the modification of a child custody order.[976]

In *Morino v. Swayman*,[977] the supreme court held that long-term informal changes to custodial or visitation arrangements could constitute a "change in circumstances" under Alaska Statutes section 25.20.110(a) and thus entitle a parent to an evidentiary hearing.[978] Morino, the divorced father of two children, brought suit to modify the visitation arrangement after informally agreeing for ten months with the children's mother to keep the children for three consecutive overnight visits, rather than two nights and a mid-week visit.[979] Although the supreme court acknowledged that "[c]ustodial parents should have the flexibility to experiment with new visitation schedules without fearing that every change could be the basis for modifying visitation," it determined that, "at some point, informal or de facto modifications of custodial or visitation rights should be formalized."[980]

In *Todd v. Todd*,[981] the supreme court held that the superior court did not err in granting full physical and legal custody of K.T., the Todds' minor child, to K.T.'s paternal grandparents.[982] The

970. *See id.* at 885.
971. *See id*. at 889.
972. *See id*.
973. 974 P.2d 383 (Alaska 1999).
974. *See id.* at 384.
975. *Id.*
976. *See id.* at 384-85.
977. 970 P.2d 426 (Alaska 1999).
978. *Id.* at 429.
979. *See id.* at 428.
980. *Id.* at 429.
981. 989 P.2d 141 (Alaska 1999).
982. *See id*. at 145.

standard applied in a custody battle between a parent and a non-parent differs from the standard in proceedings between parents.[983] Between parents, the standard is "the best interest of the child."[984] Between a parent and a non-parent, however, the parent will be denied custody only if it is clearly detrimental for the child to be in the parent's custody.[985] In this case, the court determined that parental custody would be detrimental because K.T. spent the majority of her life living with her paternal grandparents while her father was in jail, where he remains, and her mother was in and out of the child's life.[986]

In *V.D. v. State Department of Health and Social Services*,[987] the supreme court overturned the superior court's decision to deprive V.D. of custody of her children.[988] V.D. left her six children with close friends in Alaska while she traveled to Florida to secure employment and housing.[989] When her friends' funds became depleted and they could no longer support the children without state aid, they brought the children to the Department of Family and Youth Services to request state assistance.[990] The state petitioned to take custody of the children, and the court granted custody to the state.[991] V.D. appealed on the ground that the trial was skewed because it examined the children's need to enter the state's care based on their situation eight months before the trial, rather than at the time of the trial.[992] The supreme court examined the relevant statute,[993] and determined that the lower court erred by not looking at the facts at the time of trial to assess the need for state intervention.[994]

C. Dissolution of Marriage and Distribution of Marital Property

In *Song v. Song*,[995] the supreme court held that the superior court properly granted a Rule 60(b) motion to set aside a marriage

983. *See id.* at 143.
984. *Id.*
985. *See id.*
986. *See id*. at 142.
987. 991 P.2d 214 (Alaska 1999).
988. *See id*. at 215.
989. *See id*.
990. *See id*.
991. *See id*.
992. *See id.* at 216.
993. *See* ALASKA STAT. § 47.10.010(a) (LEXIS 2000).
994. *See V.D.*, 991 P.2d at 217-18.
995. 972 P.2d 589 (Alaska 1999).

dissolution agreement because of fraud.[996] The court also held that the superior court denied one party basic procedural fairness when it treated a stipulated marriage dissolution as a divorce and resolved property division issues without the consent of both parties.[997] The court reasoned that a claim of fraud in disclosing the full value of marital assets and debts fits well within Rule 60(b)(3), and because the superior court could properly resolve credibility issues, it did not abuse its discretion in awarding relief under the rule.[998] The court further held that divorce decrees and dissolution decrees are not interchangeable.[999] Modification of a marriage dissolution agreement in a dissolution proceeding can occur only with the written consent of both parties.[1000] The superior court, by converting a previously stipulated marriage dissolution into a divorce without affording both parties an opportunity to litigate disputed property division issues, deprived one party of basic procedural fairness.[1001]

In *Jordan v. Jordan*,[1002] the supreme court held that a divorce litigant with marital assets between $200,000 and $300,000 was not indigent and that the superior court's error in excluding expert testimony in a child custody hearing was harmless.[1003] Lucy Jordan, an Alaska Native, sued Michael Jordan for divorce.[1004] Michael requested court-appointed counsel on the ground he was indigent.[1005] The supreme court stated that the superior court was not clearly erroneous in denying the motion because Michael could have liquidated marital assets without encumbering the family home.[1006]

During a custody hearing, the superior court excluded Michael's experts' testimony because the experts were neither acquainted with Lucy nor experts of Native or Yupik culture.[1007] The supreme court commented that during Indian child custody hearings a court must allow expert testimony by professional persons with substantial education in their specialty.[1008] The court

996. *See id*. at 592.
997. *See id*. at 594.
998. *See id*. at 592.
999. *See id*. at 594.
1000. *See id*. at 593.
1001. *See id*. at 594.
1002. 983 P.2d 1258 (Alaska 1999).
1003. *See id.* at 1264.
1004. *See id.* at 1260.
1005. *See id.* at 1262.
1006. *See id.* at 1263.
1007. *See id.* at 1261.
1008. *See id.*

concluded that the error of excluding the testimony was harmless, however, because the proposed experts had no knowledge of Lucy's parental fitness nor the services available at the public schools the child would attend if he lived with Lucy.[1009] Thus, even if the court had admitted the experts' testimony, Michael would not have met the burden imposed by the Indian Child Welfare Act to remove the child from Lucy's custody.[1010]

In *Tybus v. Holland*,[1011] the supreme court held that the trial court could award rehabilitative alimony to an employed spouse to earn a second master's degree.[1012] The court upheld the trial court's determination that Holland sacrificed her career on several occasions for the benefit of Tybus's career.[1013] When the couple separated in 1996, Holland's earning capacity was approximately $32,000 per year, while Tybus was earning more than $65,000 per year.[1014] After separation, Holland incurred nearly $10,000 in student loans to earn a master's degree and developed a plan to earn a master's degree in business administration.[1015] The supreme court held that the trial court could properly have determined that the loans were marital and that the second master's degree was necessary to increase Holland's minimal earning capacity.[1016]

In *Knutson v. Knutson*,[1017] the supreme court upheld the superior court's authority to interpret an ambiguous marriage dissolution agreement.[1018] The dissolution agreement, signed in 1988, stated that the parties agreed to postpone selling the marital residence until its market value rose.[1019] In 1997, the former husband sought a court order to buy out the former wife's interest in the house.[1020] The supreme court reversed the superior court's valuation and held that for purposes of valuing the debt on the marital home, the 1997 value should be used.[1021]

In *McGee v. McGee*,[1022] the supreme court held that a former wife may move under Rule 60(b) to obtain relief from a marriage

1009. *See id.* at 1262.
1010. *See id.*
1011. 989 P.2d 1281 (Alaska 1999).
1012. *See id.* at 1287-88.
1013. *See id.* at 1283.
1014. *See id.* at 1284.
1015. *See id.* at 1283.
1016. *See id.* at 1288.
1017. 973 P.2d 596 (Alaska 1999).
1018. *See id.* at 600.
1019. *See id*. at 598.
1020. *See id.*
1021. *See id.* at 603.
1022. 974 P.2d 983 (Alaska 1999).

dissolution decree that did not address the issue of individual fishing quotas.[1023] The husband and wife were engaged in the fishing industry from 1978 until their divorce in 1993.[1024] Shortly after the divorce, the National Marine Fisheries Service issued individual fishing quotas to individuals who had fished in the regulated waters between 1984 and 1990.[1025] Both the former husband and wife were entitled to the quotas, but the husband kept the quotas for himself.[1026] Although the quota system was not instituted until after the dissolution of the marriage, the court deemed the quotas marital property, because income and assets received after the dissolution for activities performed during the marriage constitute divisible marital property.[1027]

In *Williams v. Crawford*,[1028] the supreme court held that federal regulations prevented Camille McVey from being eligible as a named beneficiary on her deceased ex-husband William's civil service pension survivorship benefits.[1029] The McVeys included in their divorce agreement a provision requiring William to name Camille as a beneficiary to his pension benefits.[1030] Camille remarried before the age of fifty-five, however, and therefore rendered herself statutorily ineligible to be named on the insurance policies.[1031] Despite this condition, the court granted Camille relief in equity because her entitlement for the survivorship benefits was assumed in the property division by both her and William.[1032] Neither was aware of the federal regulations providing that Camille would lose the benefit if she remarried before the age of fifty-five.[1033] Thus, equity demanded that Camille receive half of the value of the marital portion of William's civil service pension.[1034]

In *Dixon v. Pouncy*,[1035] the supreme court held that the superior court had abused its discretion when it denied an ex-husband's motion to set aside several divorce decree provisions based on res judicata.[1036] Dixon, the ex-husband, attempted to

1023. *See id.* at 986.
1024. *See id.*
1025. *See id.*
1026. *See id.*
1027. *See id.* at 988.
1028. 982 P.2d 250 (Alaska 1999).
1029. *See id*.
1030. *See id.* at 252.
1031. *See id.*
1032. *See id*. at 250.
1033. *See id*. at 252.
1034. *See id.*
1035. 979 P.2d 520 (Alaska 1999).
1036. *See id*. at 527.

contest the portion of the divorce decree declaring him the father of a child born during the marriage and ordering him to pay child support.[1037] This attempt followed a paternity test taken subsequent to the divorce decree.[1038] The superior court's denial of Dixon's motion "was based solely on the ground that res judicata barred him from litigating the issue of paternity," because Dixon had had the opportunity to litigate the matter of paternity in previous proceedings.[1039] The supreme court concluded that because res judicata cannot bar a direct attack upon a judgment, it could not bar Dixon's direct attack on the divorce decree.[1040]

In *Hammer v. Hammer*,[1041] the supreme court held that long-term alimony was just and reasonable when one spouse was deaf, had a much lower earning potential, and would have to care for a child of the marriage.[1042] The Hammers married in 1973 and divorced in 1996.[1043] Kathi Hammer had been deaf since infancy and was capable of earning only about $15,000 annually.[1044] Ken Hammer's gross annual income, by contrast, exceeded $95,000.[1045] The superior court awarded Kathi custody of the Hammers' minor daughter.[1046] The supreme court upheld the trial court's finding that long-term alimony was just and reasonable because Kathi would care for the Hammers' daughter and undergo job retraining, all while coping with her deafness and other medical problems.[1047] Because uneven distribution of marital assets could not meet Kathi's needs, long-term alimony was appropriate.[1048]

In *Virgin v. Virgin*,[1049] the supreme court held that the superior court did not abuse its discretion in making interim orders for alimony and child custody in favor of Ms. Virgin before Mr. Virgin's appeal had been heard.[1050] Mr. Virgin appealed the superior court's order because it failed to make factual findings regarding the parties' relative economic positions, Mr. Virgin's

1037. *See id*. at 522.
1038. *See id.*
1039. *Id*. at 523.
1040. *See id*. at 524.
1041. 991 P.2d 195 (Alaska 1999).
1042. *See id.* at 199.
1043. *See id.* at 197.
1044. *See id.*
1045. *See id.*
1046. *See id.*
1047. *See id.* at 199.
1048. *See id.*
1049. 990 P.2d 1040 (Alaska 1999).
1050. *See id.* at 1043.

ability to pay, and child custody.[1051] The supreme court held that a trial court need not make such findings, so long as the reasons for its holding are obvious from the record.[1052] In this case, the record was replete with information and findings concerning the parties' economic positions and the child custody issue.[1053]

D. Miscellaneous

In *R.J.M. v. State*,[1054] the supreme court held that two parents were objectively unwilling to provide care for their children.[1055] P.M., the mother, suffered from mental problems that precluded her from caring for her children.[1056] R.J.M., the father, did not spend much time with his son and in 1992 stipulated that his son should be in state custody for a period of not more than two years.[1057] Moreover, when his son was to be returned to him, R.J.M. refused to take custody saying that "it would not be in the child['s] best interest to return home that day."[1058] The supreme court upheld the court's termination of each parent's rights based on its finding that no available person was willing to provide care for the child.[1059] The supreme court rejected R.J.M.'s arguments that Alaska Statutes section 47.10.010(a)(2)(A) "fails to give adequate notice of prohibited conduct" and "encourages arbitrary enforcement."[1060] Though the supreme court acknowledged the potential problems in allowing courts to terminate parental rights for emotional neglect, it observed that this case involved "more than simple coldness."[1061]

In *B.E.B. v. R.L.B.*,[1062] the supreme court overturned its prior case law and held that the paternity by estoppel doctrine may be invoked against a putative father only upon a showing of economic, rather than emotional, prejudice.[1063] The trial court, relying on current case law, estopped B.E.B. from disputing paternity because

1051. *See id.*
1052. *See id.*
1053. *See id.* at 1044.
1054. 973 P.2d 79 (Alaska 1999).
1055. *See id.* at 85-86.
1056. *See id.* at 80-81.
1057. *See id.* at 82.
1058. *Id.*
1059. *See id.* at 85-86.
1060. *Id.* at 87.
1061. *Id.* at 86.
1062. 979 P.2d 514 (Alaska 1999).
1063. *See id.* at 519.

of possible emotional harm to the child K.[1064] The supreme court rejected as erroneous the emotional test's assumption that forcing the non-biological parent to pay child support will encourage a lasting emotional bond.[1065]

In *T.P.D. v. A.P.D.*,[1066] the supreme court held that a father's disestablishment claim was not barred by laches.[1067] T.P.D. was not A.P.D.'s biological father but was listed as her father on her birth certificate.[1068] T.P.D. married A.P.D.'s mother while she was still pregnant with A.P.D. and separated from the mother when A.P.D. was four years old.[1069] CSED issued a support order to T.P.D., who then filed a complaint in superior court seeking disestablishment of paternity and termination of his duty to support.[1070] The supreme court stated that it was not unreasonable for T.P.D. to wait until after the separation before initiating disestablishment, because he would have expected to support A.P.D. until the actual decision to separate.[1071] The court further held that laches should not be a defense against disestablishment in cases where there has not been a prior judicial determination of paternity.[1072]

In *Elliot v. James*,[1073] the supreme court held that a husband's misrepresentations about his marital and criminal history did not entitle the wife to an annulment.[1074] Elliot sought an annulment of her marriage to James on the grounds that his misrepresentations that he was never married and that he had not been convicted of a misdemeanor were fraudulent.[1075] Elliot did not argue that she was induced by the absence of a prior marriage, but that she married James believing him to be an honest person.[1076] The supreme court rejected Elliot's fraud claim, noting that almost every marriage could be annulled if misrepresentations of character justified annulment.[1077]

1064. *See id.* at 515-16.
1065. *See id.*
1066. 981 P.2d 116 (Alaska 1999).
1067. *See id.* at 121.
1068. *See id.* at 118.
1069. *See id.*
1070. *See id.*
1071. *See id.* at 121.
1072. *See id.*
1073. 977 P.2d 727 (Alaska 1999).
1074. *See id.* at 731-33.
1075. *See id.* at 729.
1076. *See id.* at 731.
1077. *See id.* at 731-32.

IX. INSURANCE LAW

In *Ruggles v. Grow*,[1078] the Alaska Supreme Court held that once an insurer pays an insured party's claim for medical expenses, the insured party loses the right to unilaterally present a claim for medical expenses against the tortfeasor who caused the injuries.[1079] Ruggles was injured by Grow in a car accident.[1080] Ruggles' insurer covered her medical expenses from the medical payments coverage of her policy, and ordered her not to pursue any medical claims against Grow.[1081] Ruggles ignored her insurer and sought medical expenses from Grow.[1082] The supreme court held that once Ruggles's medical expenses were paid by her insurer, Ruggles' claim for medical expenses became subrogated and assigned to her insurer.[1083] Ruggles could not pursue any action for medical expenses without first obtaining the insurer's permission.[1084]

In *Fejes v. Alaska Insurance Co.*,[1085] the supreme court held that a contractor sued by a homeowner for misrepresentation and breach of warranty related to defects caused by a subcontractor's faulty construction could seek indemnification under his comprehensive general liability insurance policy.[1086] Plaintiff homeowner sued Fejes when her home's septic system failed; it was determined at trial that the failure was due to a subcontractor's faulty work.[1087] Fejes' insurance company refused to indemnify him.[1088] The supreme court held that the homeowner's claims were for property damage rooted in the faulty construction, and were thus covered under Fejes' insurance policy, notwithstanding that the judgment against Fejes was for misrepresentation and breach of warranty.[1089] The court reasoned that the misrepresentation and breach of warranty claims grew out of the construction defect, and were thus covered under the policy.[1090] The supreme court also held that coverage was not excluded by a clause in the policy that eliminated coverage for "property damage to the named insured's

1078. 984 P.2d 509 (Alaska 1999).
1079. *See id.* at 512.
1080. *See id.* at 511.
1081. *See id.*
1082. *See id.*
1083. *See id.* at 512.
1084. *See id.*
1085. 984 P.2d 519 (Alaska 1999).
1086. *See id.* at 521.
1087. *See id.*
1088. *See id.*
1089. *See id.* at 523.
1090. *See id.*

products arising out of such products."[1091] The court reasoned that a "product" under the policy did not encompass a completed building.[1092]

In *Williams v. Wainscott*,[1093] the Great Atlantic Insurance Company ("GAIC") contracted with Pacific Marine Insurance Company of Alaska ("PacAk") to reinsure its policies.[1094] PacAk was, at times, a subsidiary of Pacific Marine Insurance Company of Washington ("PacWa"), which became liable for all of PacAk's liabilities until 1985.[1095] In 1989, all three companies became insolvent; however, GAIC still retained four outstanding claims against PacAk.[1096] GAIC submitted its claims after a judicially imposed March 1, 1990, deadline.[1097] PacAk's receiver denied the submissions.[1098] GAIC objected to the denial and requested a hearing, where the superior court held the receiver's decision to deny the claim was supported by substantial evidence.[1099]

The supreme court reversed the superior court's application of the substantial evidence standard and held that insurance liquidation statutes require the receiver's denial of insurer's claims to be reviewed under a de novo standard.[1100] The court also held that the insured was entitled to notice of the liquidation order and deadline for filing claims against the reinsurer's estate.[1101] The court remanded for a determination of whether the notice requirements were met, since notice was not sent to GAIC's last known address.[1102] The court further held that the superior court should resolve the remaining issues in the case, such as whether the late filing with PacAk could be excused because of a timely filing with PacWa, and which of the two reinsurance companies should be liable as the reinsurer.[1103]

In *Alaska National Insurance Co. v. Jones*,[1104] the supreme court held that the trial court improperly dismissed the insurer's claims against the insured's attorneys, and that the insurer's claims

1091. *Id.* at 526.
1092. *Id.*
1093. 974 P.2d 975(Alaska 1999).
1094. *See id.* at 976.
1095. *See id.*
1096. *See id.* at 976-77.
1097. *See id.* at 977.
1098. *See id.*
1099. *See id.*
1100. *See id*. at 978.
1101. *See id.* at 980.
1102. *See id.*
1103. *See id.* at 981-83.
1104. 993 P.2d 424 (Alaska 1999).

stated a cause of action for which relief could be granted.[1105] The insured was injured on the job, and received worker's compensation benefits from the insurer.[1106] Later, the insured sued the third-party manufacturer of the machine that allegedly caused the insured's injury.[1107] The insurer filed suit against the insured and his two attorneys, Robert Rehbock and Paul Paslay, claiming that it was entitled to reimbursement from the settlement.[1108] The trial court dismissed the claims against Rehbock and Paslay, and the insurer appealed.[1109] The supreme court reversed and remanded the case.[1110] The court held that under Alaska Statutes section 23.30.015(g), the insurer is allowed to proceed against the settlement fund, not just the insured.[1111] Since the insurer claimed that Rehbock and Paslay held some or all of the insured's funds, the insurer's complaint stated a colorable cause of action "that could be enforced as a constructive trust or equitable lien against Rehbock and Paslay. . . ."[1112]

In *State Farm Insurance Co. v. Raymer*,[1113] the supreme court held that Raymer had an "insurable interest" in her husband's truck, despite her name not being on the title, because she would have been disadvantaged from its loss.[1114] Someone intentionally set fire to a truck that belonged to Raymer's husband.[1115] In a claim against the insurance company, the trial court granted summary judgment to Raymer and awarded her one-half the insurance proceeds on the grounds that she was an innocent co-insured.[1116] The supreme court stated that, "[a]s a general principle, a wife who has a pecuniary or beneficial interest in her husband's property, or would have some disadvantage from its loss, has an insurable interest therein."[1117] Because it was not clear whether the truck was marital property, the supreme court remanded for a factual determination of the extent of Raymer's interest in the truck.[1118]

1105. *See id.* at 425.
1106. *See id.*
1107. *See id.*
1108. *See id.* at 426.
1109. *See id.*
1110. *See id.* at 428.
1111. *See id.* at 427-28.
1112. *Id.* at 428.
1113. 977 P.2d 706 (Alaska 1999).
1114. *See id.* at 710.
1115. *See id.* at 707.
1116. *See id.* at 708.
1117. *Id.* at 710.
1118. *See id.* at 711.

X. PROPERTY

In *Beluga Mining Co. v. State*,[1119] the Alaska Supreme Court held that Alaska did not commit a taking when it refused to approve a mining lease application for Beluga Mining Company when the State was subject to a temporary injunction due to existing claims.[1120] In 1989 and 1990, Alaska leased mining rights for public land to Beluga.[1121] Yet in July 1990, in another case, *Weiss v. State*,[1122] a court granted a temporary injunction on Alaska's ability to control mining rights to public lands.[1123] As a result, Beluga was unable to secure a permit necessary to begin mining, although it continued to rent the land from the state until November 1994, when it ran out of funds to pay rent.[1124] The temporary injunction was lifted in December 1994.[1125]

The supreme court concluded there was no taking because a taking occurs only when the State deprives someone of a property right.[1126] In the instant case, although Beluga retained property rights in the land and never had the right to mine, it was clear from the beginning that the mining rights were contingent on State licensing.[1127] Additionally, the court found neither breach of contract nor unjust enrichment.[1128] Since there had been no intent to enter into a contract, and because there was no consideration, there was no contract between the State and Beluga.[1129] There was no unjust enrichment because Beluga received something for the rental payments: preservation of rights in the mining claims.[1130]

In *McDonald v. Harris*,[1131] the supreme court elaborated on the requirements for prescriptive easement: continuity, hostility, and notoriety for at least ten years.[1132] From 1983, Harris maintained and used a driveway leading to her land and encroaching on McDonald's property.[1133] However, McDonald did not realize that

1119. 973 P.2d 570 (Alaska 1999).
1120. *See id.* at 577.
1121. *See id.*
1122. 706 P.2d 681 (Alaska 1985).
1123. *See id.* at 681-84
1124. *See Beluga*, 973 P.2d at 573.
1125. *See id.* at 574.
1126. *See id.* at 575.
1127. *See id.*
1128. *See id.* at 578.
1129. *See id.*
1130. *See id.* at 579.
1131. 978 P.2d 81 (Alaska 1999).
1132. *See id.* at 83.
1133. *See id*. at 82.

the driveway occupied her property until a 1995 survey.[1134] The supreme court reasoned that Harris was entitled to a prescriptive easement because her use was continuous; it did not matter that a third party had also used the driveway.[1135] Furthermore, continuity was preserved as long as Harris was the primary user.[1136] In addition, the encroachment was hostile; McDonald was not permitting use, since she had no knowledge that the driveway was on her property.[1137] McDonald's lack of knowledge that the driveway encroached on her property did not refute the notoriety requirement; for notoriety, use need only be open and known.[1138]

In *Interior Regional Housing Authority v. James*,[1139] the supreme court held that the Alaska Landlord Tenant Act did not impose a duty of maintenance upon the State when it entered Mutual Help and Occupancy Agreements ("MHO Agreements").[1140] Denise James entered into an MHO Agreement with the Interior Regional Housing Authority ("IRHA") and moved into a home in Fort Yukon in 1988.[1141] Many of the occupants in the Fort Yukon Homes had complained about difficulties with the heating systems in the homes.[1142] In response, the IRHA and other parties collaborated to address the problems with the heating systems.[1143] In particular, the IRHA arranged for repairs to James' furnace.[1144] In 1995, a fire occurred in James' home resulting in the death of her son and injuries to her and her daughter.[1145]

The supreme court noted that the MHO Agreement was created in accordance with the Indian Housing Act ("IHA"), an act of the United States Congress.[1146] As mandated by the IHA, the MHO Agreement contained a provision that placed the responsibility of maintenance of the dwelling upon the occupying family.[1147] The supreme court determined that the IHA preempted the state act that might impose the duty of maintenance upon the

1134. *See id*.
1135. *See id*. at 84.
1136. *See id*.
1137. *See id*. at 85.
1138. *See id*.
1139. 989 P.2d 145 (Alaska 1999).
1140. *See id.* at 147.
1141. *See id.* at 146.
1142. *See id.* at 147.
1143. *See id.*
1144. *See id.*
1145. *See id.*
1146. *See id.* at 150.
1147. *See id.*

State.[1148] The supreme court remanded for a determination whether the IRHA had later assumed an obligation by its endeavors to repair James' heating system.[1149]

In *Moore v. State Department of Natural Resources*,[1150] the supreme court held that the State's grant of mining rights, contingent on the federal government's approval of transfer, constituted a mining right that was voidable under Alaska Statutes section 38.05.190(a).[1151] Pacific Ranier, Inc. ("PRI") located and recorded certificates for more than 200 mining claims and prospecting sites on federal land that had been selected pursuant to Section 6 of the Alaska Statehood Act.[1152] However, the director of the Division of Mining Rights nullified PRI's mining rights because PRI was not qualified to engage in business in Alaska.[1153] Section 38.05.190(a) requires that foreign corporations be qualified to engage in business in Alaska before they can acquire mining rights in Alaska.[1154] Moore, the President of PRI, appealed, arguing that the Division could not nullify PRI's priority because the mining rights would not actually be transferred until the federal government approved the transfer.[1155] Thus, according to Moore, PRI had only acquired a "claim in waiting" that would be transferable as a mining right upon federal approval.[1156] The supreme court disagreed, stating that a mining priority could not be separated from mining rights under Alaska Statutes section 38.05.190(a).[1157] Therefore, the Division was correct in nullifying PRI's mining claims.[1158]

In *AU International, Inc. v. State Department of Natural Resources*,[1159] the supreme court held that a mine owner abandoned its claims to 1035 mines when it failed to meet the statutory filing requirements, regardless of the mine owner's intent.[1160] The mine owner attempted to file statutorily required labor statements on the last available filing date for only four of the 1039 mines to

1148. *See id.*
1149. *See id.* at 151.
1150. 992 P.2d 576 (Alaska 1999).
1151. *See id.* at 579.
1152. *See id.* at 576.
1153. *See id.*
1154. *See id.*
1155. *See id.*
1156. *See id.* at 578.
1157. *See id.*
1158. *See id.*
1159. 971 P.2d 1034 (Alaska 1999).
1160. *See id.* at 1038.

which the owner had claim.[1161] Seven months later, when the mine owner attempted to record an amended affidavit and pay filing fees, the Department of Natural Resources ("DNR") notified the mine owner that its previous failure to file constituted an abandonment of the claims.[1162] The DNR later denied the mine owner's request for a Certificate of Substantial Compliance and denied reconsideration because its claims were "abandoned by action of law and . . . no compelling evidence of substantial compliance has been provided in support of a Certificate."[1163] The supreme court upheld the DNR decisions because "a statement of annual labor that does not accurately set out the 'essential facts' is void, has no effect, and may not be amended," and such failure to file constitutes abandonment, regardless of the mine owner's intent.[1164] In so holding, the court considered that the circumstances preventing the mine owner from filing were not beyond its control, the mine owner failed to learn the proper filing fees, and the mine owner did not attempt to correct the mistakes until seven months later.[1165]

In *Donnelly v. Eklutna*, *Inc*.,[1166] the supreme court affirmed the superior court's order granting summary judgment to the plaintiff corporation.[1167] Eklutna had a land patent in the contested property.[1168] The company sued the wife and children of deceased homesteader Joseph Donnelly in state court to have them ejected from the land, to quiet title, and to be awarded declaratory relief.[1169] The supreme court held that Donnelly's occupancy claim had been resolved in a prior federal case,[1170] and that, therefore, "the section 14(c)(1) claims of all members of the Donnelly family" were barred by res judicata.[1171] According to the court, Joseph Donnelly's wife and children were in privity with him as the family jointly occupied the land in dispute as homesteaders.[1172] In other words, each individual's claim derived from the family's common occupation

1161. *See id.* at 1036.
1162. *See id.*
1163. *Id.* at 1037-38.
1164. *Id*.
1165. *See id.* at 1040.
1166. 973 P.2d 87 (Alaska 1999).
1167. *See id*. at 90.
1168. *See id.*
1169. *See id*.
1170. *See id*. at 89 (citing Donnelly v. U.S., 850 F.2d 1313, 1319 (9th Cir. 1988)).
1171. *Id*. at 92.
1172. *See id.* at 93.

and thereby created a "unity of interests" between Joseph Donnelly and his family.[1173]

In *State v. Hale*,[1174] the supreme court held that Alaska Statutes section 43.23.015(a) did not bar a person from permanent fund dividend eligibility when that person leaves Alaska to accompany an eligible spouse on military service.[1175] Hale, an Alaska resident, was denied a dividend check when she left Alaska to accompany her eligible spouse to a new military station.[1176] The supreme court held that Hale's absence was allowable, and not a "principal" factor in determining her residency, because of the Alaska residency of her spouse.[1177] Alternatively, the supreme court held that Hale could prevail by showing an intent to return and live permanently in Alaska.[1178]

In *Ellingstad v. State Department of Natural Resources*,[1179] the supreme court held that the conveyance of a quitclaim deed satisfied contract terms, even though the state leasing agency had transferred its lessor rights.[1180] Ellingstad had purchased several properties under the state land lottery sales program subject to an installment contract.[1181] Subsequent to the transfers to Ellingstad, the State transferred its interest in the land.[1182] When Ellingstad was late with payments to the State's assignee, the assignee conveyed a quitclaim deed to Ellingstad.[1183] The supreme court held that the conveyance of the quitclaim deed satisfied the terms of the purchaser's contract with the State,[1184] and that the State was free to transfer its interest in the land.[1185] In addition, the court held that it would be poor public policy to compel creditors to file counterclaims for repayment when sued by debtors, because such counterclaims would preclude any amicable settlement.[1186]

In *Osborne v. Buckman*,[1187] the supreme court held that the statute of limitations had not run on a foreclosure claim, despite

1173. *Id.*
1174. 978 P.2d 1276 (Alaska 1999).
1175. *See id.* at 1277.
1176. *See id.* at 1276.
1177. *Id.* at 1278.
1178. *See id.* at 1277.
1179. 979 P.2d 1000 (Alaska 1999).
1180. *See id*. at 1012.
1181. *See id*. at 1003.
1182. *See id*.
1183. *See id*.
1184. *See id*. at 1004-05.
1185. *See id*. at 1006.
1186. *See id*. at 1011-12.
1187. 993 P.2d 409 (Alaska 1999).

the limit having run on a claim for the underlying debt.[1188] After a property changed hands several times, Kenai Merit Inn Corporation ("Kenai") was obligated to Kevin Buckman for a note secured by a second deed of trust. Buckman was, in turn, obligated to the Osbornes for a note secured by the first deed of trust. In 1988, Kenai stopped making payments on the second deed and in 1989, Buckman stopped making payments on the first deed and Kenai filed for bankruptcy, which resulted in an automatic stay.[1189] In 1990, the bankruptcy court granted Buckman's motion requesting relief from the stay.[1190] No actions were filed regarding the property until 1996 when Buckman initiated an action to foreclose on the second deed of trust.[1191] The Osbornes then sought to claim title by enforcing the first deed of trust.[1192] The supreme court rejected Buckman's assertion that the six-year statute of limitations barred the Osbornes' suit, noting that the Osbornes had the option of commencing suits to foreclose on the property or to recover the underlying debt at separate times.[1193] Because an automatic stay prevented suit on foreclosure of the property, the statute of limitations on the foreclosure claim did not begin running until the stay was lifted.[1194] Therefore, the Osbornes, who initiated their suit in September 1996, were within the six-year statute of limitations.[1195]

XI. TORT LAW

In *Dinsmore-Puff v. Alvord*,[1196] the Alaska Supreme Court affirmed a verdict in favor of the defendant on a negligence action based on the murder of the plaintiff's child by the defendant's child.[1197] The court concluded that general knowledge of the child's past misconduct, without more, was not sufficient to affix liability, as it places too much of a burden on parents to be prison wardens of their children until they turn eighteen.[1198] Because the parents had taken reasonable steps to attempt to control their child's known propensity for violent behavior, and because the parents

1188. *Id.* at 413.
1189. *See id.*
1190. *See id.*
1191. *See id.*
1192. *See id.*
1193. *See id.* at 412.
1194. *See id.*
1195. *See id.*
1196. 972 P.2d 978 (Alaska 1999).
1197. *See id*. at 987.
1198. *See id*.

could not have foreseen the need and opportunity to prevent their child from harming another child, they could not be held liable for their child's conduct.[1199]

In *Taylor v. Johnston*,[1200] Taylor was left a paraplegic after defendant treated him for migraine headaches.[1201] After a jury rejected Taylor's negligence claim, he appealed on the ground that the trial court erred by denying his motion to amend the complaint to include a battery claim.[1202] The battery claim was based on Taylor's contention that defendant was not properly licensed, and therefore had fraudulently induced Taylor to submit to his medical care.[1203] The supreme court noted that medical fraud could be analyzed and denied in two ways: (1) if the claim is so frivolous that it is legally insufficient on its face, or (2) the degree of prejudice to the opposing party outweighs the hardship to movant if the amendment is denied.[1204] Relying on the first approach, the supreme court indicated that a cause of action for medical fraud was valid where an imposter cajoled a victim into enlisting his services by using false credentials.[1205] This would be true even if the imposter intended to help the victim, because motive is not an element of the claim.[1206] In Taylor's case, the claim was insufficient because the defendant was fully accredited.[1207] The supreme court also rejected Taylor's second ground for appeal, that the trial court erred by not granting his motion to reopen discovery so that he could find evidence supporting his battery claim.[1208] Any error in this respect was harmless because the trial court afforded Taylor numerous opportunities to question the validity of defendant's medical credentials at trial.[1209] Lastly, the supreme court decided that although the trial court should have waited for a report from the medical panel that Alaska requires in malpractice cases,[1210]

1199. *See id*. at 985.
1200. 985 P.2d 460 (Alaska 1999).
1201. *See id*. at 461.
1202. *See id*. at 463.
1203. *See id*. at 464.
1204. *See id*. (citing Betz v. Chena Hot Springs Group, 742 P.2d 1346, 1348 (Alaska 1987)).
1205. *See id*. at 465.
1206. *See id*. at 464.
1207. *See id*. at 465.
1208. *See id*. at 466.
1209. *See id*.
1210. ALASKA STAT. § 09.55.536 (LEXIS 1998). Although this statute does not require the court to use the medical negligence panel, the supreme court seemed to feel that the trial court was obliged to allow it. *See Taylor*, 985 P.2d at 466.

Taylor did not object to this failure.[1211] Thus, the issue was not preserved for appeal.[1212]

In *Kodiak Island Borough v. Exxon Corporation*,[1213] the supreme court held that the superior court erred when it granted Exxon's motion for summary judgment on the cities' diverted-services claim.[1214] On March 24, 1989, the oil tanker Exxon Valdez ran aground spilling millions of gallons of crude oil.[1215] In response to the disaster, several cities including Kodiak Island Borough were forced to participate in the massive cleanup operation.[1216] This action was commenced by Kodiak Island Borough to recover damages from Exxon for the services diverted to the cleanup.[1217] The trial court granted summary judgment to Exxon when it decided that the statute covering hazardous spill liability did not extend to diverted services costs.[1218]

Alaska Statutes section 46.03.822(a) imposes strict liability for the harm caused by the release of hazardous substances.[1219] Exxon contended that the common law free public services doctrine precluded recovery,[1220] but the supreme court found that the legislature intended broad coverage by the statute and that hazardous substances cleanup operations, including those for oil spills, are recoverable.[1221] Exxon also claimed that the statutes did not confer standing on the cities to claim diverted-services because the services actually belonged to the citizens,[1222] but the supreme court held that the cities had standing, since they were suing to replenish municipal funds that could be expended to benefit citizens.[1223] Finally, Exxon claimed that federal maritime law preempts the cities from recovering for diverted-services.[1224] The supreme court held that states are not barred from applying their own laws, unless the state remedy would work material prejudice to federal maritime law or interfere with the uniformity of the law

1211. *See id.* at 467.
1212. *See id.*
1213. 991 P.2d 757 (Alaska 1999).
1214. *See id*. at 769.
1215. *See id*. at 759.
1216. *See id*.
1217. *See id*.
1218. *See id*.
1219. *See id*.
1220. *See id*. at 760.
1221. *See id*. at 764-65.
1222. *See id*. at 765-66.
1223. *See id*. at 766.
1224. *See id*.

in its international or interstate application.[1225] The Alaska statutes did neither.[1226] The supreme court thus held that the superior court's granting of Exxon's summary judgment motion was error, reversed it, and remanded the case for further proceedings.[1227]

In *Chenga Corp. v. Exxon Corp.*,[1228] the supreme court held that the superior court erred in precluding jury consideration of claims under the Oil Pollution Act of 1990 ("the Act") for selected but not yet conveyed federal lands.[1229] Oil from the Exxon Valdez spill was pushed by currents and winds to the shores of lands owned by several Alaska Native corporations and federal land that was selected but not yet conveyed to the corporations.[1230] The corporations sued Exxon on various liability theories for damage to their real property and archeological sites and artifacts.[1231] The superior court found Exxon liable for damages on several claims,[1232] but precluded the jury from considering damages for injury to the not yet conveyed federal land.[1233] The supreme court held that the superior court erred by improperly requiring the corporations to establish loss of a federally permitted use.[1234] The supreme court held that section 8301 of the Act[1235] does more than simply confer standing to the corporations; it states that interests in federal land are considered vested in the corporations for purposes of the Act.[1236]

In *Falconer v. Adams*,[1237] defendant Taylor-Welch rear-ended plaintiff Falconer when Falconer stopped abruptly in the midst of a left turn to avoid colliding with defendant Adams, who was allegedly in the wrong traffic lane.[1238] The court rejected Taylor-Welch's claim that she was entitled to an offset of damages awarded to Falconer, because Adams' insurance company, Allstate, made a payment to Falconer's insurance company, State Farm.[1239] The court concluded that Taylor-Welch failed to prove

1225. *See id.* at 766-69.
1226. *See id*.
1227. *See id*. at 769.
1228. 991 P.2d 769 (Alaska 1999).
1229. *See id*. at 799.
1230. *See id*. at 774.
1231. *See id*.
1232. *See id*.
1233. *See id*. at 783.
1234. *See id*. at 786.
1235. 43 U.S.C. § 1642 (1994).
1236. *See Chenga*, 991 P.2d at 783.
1237. 974 P.2d 406 (Alaska 1999).
1238. *See id*. at 408.
1239. *See id*. at 410-11.

that Allstate's payment extinguished State Farm's right of subrogation against Falconer and was not merely a gratuitous benefit to Falconer.[1240] As the court explained, "no evidence was presented below that would have enabled the court to determine the basis for or the specific terms of any interagency agreement, or the legal effect of the Allstate payment to State Farm."[1241]

In *Ardinger v. Hummell*,[1242] the supreme court held that the trial court's instructions to the jury on the elements of negligent entrustment constituted reversible error.[1243] Sherie Ardinger, the mother of Joshua Van Barel, sued Normandy Hummel and her mother for negligence after Hummel and Van Barel were involved in a car accident in Hummel's mother's car.[1244] Von Barel was driving and died in the accident.[1245] Ardinger argued that the jury was improperly instructed that fifteen-year-old Hummel was not to be held to an adult standard of care, that the instruction on the elements of negligent entrustment was erroneous, and that the jury should have been given a negligence per se instruction.[1246]

The supreme court agreed with Ardinger that the trial court's instructions were erroneous.[1247] The court stated that driving is an adult activity; because Hummel took control of the car, she should be held to an adult standard of care.[1248] Furthermore, the trial court improperly included an extra element which may have affected the jury's verdict and therefore constituted reversible error.[1249] Last, with respect to negligence per se, the supreme court held that Hummel may have violated a statute, therefore potentially making her negligent per se. The trial court's failure to include this instruction constituted reversible error.[1250]

In *Chaffin v. United States*,[1251] the Ninth Circuit reversed the district court's granting of summary judgment on behalf of the federal government on a Federal Tort Claims Act suit.[1252] Chaffin was badly mauled and permanently disfigured by a polar bear that broke through his window at a remote radar system site owned by

1240. *See id*. at 412.
1241. *Id.*
1242. 982 P.2d 727 (Alaska 1999).
1243. *See id.* at 729.
1244. *See id*. at 730.
1245. *See id.*
1246. *See id.* at 730-34.
1247. *See id.* at 738.
1248. *See id.* at 731.
1249. *See id.* at 733.
1250. *See id.* at 734.
1251. 176 F.3d 1208 (9th Cir. 1999).
1252. *See id*. at 1214.

the U.S. Air Force.[1253] Chaffin argued that the government was negligent by allowing a dangerous condition to exist on its property.[1254] Specifically, Chaffin argued that the government created site housing that was not safe from intrusion by polar bears and that the government allowed whalemeat, known to entice polar bears, to be stored on premises near the housing.[1255] He also argued that the government was negligent in forbidding the employees at the remote site from maintaining firearms, which could have been used to mitigate the damages.[1256] The Ninth Circuit concluded that although Chaffin was an employee of a contractor and not of the government at the time of the injury, the record left "unresolved questions about the relationship between the government as landowner and the [independent] contractor as Chaffin's employer."[1257]

In *Sherbahn v. Kerkove*,[1258] the supreme court explored damage awards in a personal injury automobile collision case.[1259] The plaintiff suffered back problems and sought recovery for trigger-point spinal injections.[1260] On appeal, the defendants argued that the cost of treatment should be discounted to present value in accordance with Alaska law.[1261] The court held that although reduction to present value was required on the statute's face, such a result would be absurd in this case, in which the full amount would be immediately used for medical treatment.[1262] Further, the court held that testimony regarding cost need not necessarily be provided by a doctor from the institution to provide the proposed treatment, because the jury only required some information from which it could reasonably estimate the amount, and a chiropractor's testimony satisfied that requirement.[1263] The court also agreed with plaintiff that prejudgment interest on past economic loss is computed from the time when defendant has

1253. *See id.* at 1210.
1254. *See id*. at 1211.
1255. *See id*.
1256. *See id*.
1257. *Id*. at 1214.
1258. 987 P.2d 195 (Alaska 1999).
1259. *See id*. at 195.
1260. *See id.* at 201.
1261. *See id.* at 200; *see also* ALASKA STAT. § 09.17.040(b) (LEXIS 1998) (stating that in computing lump sum award, fact finder should reduce current award to an amount that will cover total damages if prudently invested over expected life of injured party).
1262. *See Sherbahn*, 987 P.2d at 200.
1263. *See id.*

notice of the claim.[1264] Finally, the court rejected the plaintiff's argument and ruled that the enhanced interest rule applies only to interest accruing before final judgment, not to post-judgment delays of payment.[1265]

In *Wilson v. United States*,[1266] the Ninth Circuit certified a question to the Alaska Supreme Court as to whether a plaintiff who suffered no physical injury may recover damages for negligent infliction of emotional distress when, through the negligence of another, the plaintiff unwittingly became the instrument that caused injury to an innocent victim.[1267] Kallstrom inadvertently fed poison negligently stored by the defendant to the plaintiff, causing severe injuries to plaintiff and severe emotional distress to Kallstrom.[1268] The district court dismissed Kallstrom's negligence claim because she failed to show physical injury and could not meet the exceptions to the bystander injury rule.[1269] The Ninth Circuit held that the present case did not fit neatly within the negligent infliction of emotional distress doctrine because Kallstrom was an active participant in causing injury to the plaintiff and not just a bystander.[1270]

In *Crosby v. United States*,[1271] the district court held that in the absence of controlling precedent, the Alaska Supreme Court would most likely not recognize a cause of action for "loss of chance" in medical malpractice actions.[1272] Plaintiff sued defendant when her husband died while in defendant's employ.[1273] The district court held that recognizing a "loss of chance" action against the plaintiff's husband's doctor would relax the strict causation standard enacted by the Alaska Legislature and that the Legislature's policy choice should be respected by the courts.[1274]

1264. *See id*. at 202 (quoting ALASKA STAT. § 09.30.070(b) (LEXIS 1998)).

1265. *See id.* at 203 (reasoning that applying the additional interest to the time period between final judgment and actual payment would not served the enhanced interest rule's policy of avoiding protracted litigation); *see also* ALASKA STAT. § 09.30.065 (LEXIS 1998) (assessing as a means of encouraging settlement before trial a penalty of 5% additional interest if the final judgment was not more favorable to the offeree than a pre-trial settlement offer).

1266. 190 F.3d 959 (9th Cir. 1999).

1267. *See id.* at 963.

1268. *See id.* at 961.

1269. *See id.*

1270. *See id.* at 962.

1271. 48 F. Supp. 2d 924 (D. Alaska 1999).

1272. *See id.* at 931.

1273. *See id.* at 925.

1274. *See id.* at 931-32.

In *Universal Motors, Inc. v. Neary*,[1275] the supreme court held that Alaska's former comparative fault statute did not require a one-action rule for all tortfeasors responsible for a plaintiff's injury.[1276] Plaintiff's tort action against one defendant was dismissed by summary judgment; plaintiff then filed a tort action against another defendant for the same injuries.[1277] The second defendant filed for summary judgment, contending that Alaska's comparative fault statute required plaintiffs to join all potential defendants into one action, and that plaintiff's failure to do so was fatal to his case.[1278] The supreme court reasoned that such a rule would lead to needless joinder of parties whose fault is remote; whether Alaska should adopt such a rule is a policy question best left to the legislature, not to the courts.[1279]

In *Cable v. Shefchik*,[1280] the supreme court held that the superior court's refusal to give negligence per se instructions was an abuse of discretion because General Safety Code section 01.0802(a) established a detailed standard of care applicable to machine guarding.[1281] Cable injured his hand in a flapper valve while clearing out a concrete pump that was missing a valve guard.[1282] Cable was not an employee of Shefchik at the time, but was "learning the ropes" with hopes of becoming an employee in the future.[1283] The jury found Shefchik negligent but concluded that his negligence did not legally cause Cable's injury.[1284] The supreme court noted that it was undisputed that the guard would have prevented the injury and concluded that the superior court abused its "extremely limited" discretion by refusing to issue a per se instruction.[1285] Because the jury did not state the nature of Shefchik's negligence, and because it was not given a per se instruction, it was unclear how the jury reached its conclusion on causation.[1286] Accordingly, the supreme court remanded the case for a new trial.[1287]

1275. 984 P.2d 515 (Alaska 1999).
1276. *See id.* at 516.
1277. *See id.*
1278. *See id.*
1279. *See id.* at 517.
1280. 985 P.2d 474 (Alaska 1999).
1281. *See id.* at 475.
1282. *See id.*
1283. *Id.* at 474.
1284. *See id.* at 478.
1285. *See id.* at 479.
1286. *See id.*
1287. *See id.* at 480-81.

In *Law Offices of Steven D. Smith, P.C. v. Borg-Warner Security Corp.*,[1288] the supreme court held that (1) the statute of limitations for Smith's claims of fraud and intentional interference with contract was not tolled during the time Smith believed he was collaterally estopped from bringing his claim due to the remoteness of the defendant's possible success in asserting collateral estoppel;[1289] (2) the two-year statute of limitations applying to economic losses rather than the six-year statute of limitations applicable to contract matters applied;[1290] and (3) the defendant was not equitably estopped from asserting that the claim was barred by the statute of limitations.[1291] This appeal arose from a complex set of facts relating to a wrongful death suit that resulted from an airplane crash.[1292] Attorney Smith missed a filing date for the wrongful death suit and was later sued for malpractice.[1293] The suit was reinstated when it was found, through discovery in another suit, that a defective carburetor and not pilot error had caused the plane crash.[1294]

Attorney Smith then tried to sue the carburetor manufacturer for intentionally concealing the defect and thereby causing his delayed filing (because he could not identify a cause of action) which led to his being sued for malpractice and his contingency fee contract being terminated.[1295] The court "conclude[d] that a party arguing that the statute of limitations should be tolled because of collateral estoppel must show that the estoppel bar made suit futile by clear and convincing evidence."[1296] Further, the court held that because Smith's economic losses did not arise from a contract between Smith and the defendant, the two-year statute of limitations governs the economic losses claim.[1297] Finally, the court held that because Smith could have filed suit on his own behalf and conducted discovery, he was not relying on the defendant's misrepresentation and, therefore, the defendant could assert the statute of limitations.[1298]

1288. 993 P.2d 436 (Alaska 1999).
1289. *See id*. at 444.
1290. *See id*. at 446.
1291. *See id*. at 447.
1292. *See id*. at 438.
1293. *See id*. at 439.
1294. *See id*. at 441.
1295. *See id*. at 442.
1296. *Id*. at 444.
1297. *See id*. at 446.
1298. *See id*. at 447.

In *Bennett v. Weimar*,[1299] the supreme court upheld summary judgment against Bennett because she failed to properly notarize her opposition to the condominium association board members' and officers' motion for summary judgment.[1300] Bennett brought claims of breach of fiduciary duty and intentional interference with prospective economic advantage against condominium association board members Weimar and Cronea in their individual capacities.[1301] Bennett had opposed Weimar's motion for summary judgment, but had relied on a declaration that was not notarized.[1302] The declaration did not state that Bennett was unable to locate a notary.[1303] The supreme court stated that such unverified pleadings are statutorily inadmissible.[1304] As a result, the court found no genuine issues of material fact regarding Bennett's claim.[1305]

In *Fancyboy v. Alaska Village Electric Cooperative*,[1306] the supreme court held that the superior court could reduce the plaintiffs' recovery by an amount allocated to a co-plaintiff that was not impleaded as a third-party defendant.[1307] The Fancyboys bought a small home that needed electricity in the Alaska bush.[1308] The Alaska Village Electric Cooperative ("AVEC") could not properly connect electricity for several months, so Mr. Fancyboy ran a cable routing some power from a neighbor's home to his.[1309] The house burned with most of the family inside, killing a child and injuring family members.[1310] The family sued AVEC for personal injuries, wrongful death, and property damage resulting from the fire.[1311] The jury found that Mr. Fancyboy and AVEC shared negligence.[1312] Mr. Fancyboy had used too weak a wire to connect the electricity, and was passed out from drinking beer at the time of the accident.[1313] For its part, AVEC negligently failed to discover or warn of the condition.[1314] On appeal, the supreme court upheld

1299. 975 P.2d 691 (Alaska 1999).
1300. *See id*. at 698.
1301. *See id*. at 693.
1302. *See id*.
1303. *See id*.
1304. *See id*. at 694; *see also* ALASKA STAT. § 09.63.010 (LEXIS 1998).
1305. *See Bennett*, 975 P.2d at 699.
1306. 984 P.2d 1128 (Alaska 1999).
1307. *See id.* at 1134.
1308. *See id.* at 1130.
1309. *See id.*
1310. *See id.* at 1131.
1311. *See id.*
1312. *See id.*
1313. *See id.*
1314. *See id.*

the trial court because Alaska law[1315] permits allocation of fault to a co-plaintiff without impleading the co-plaintiff as a third party, and because AVEC provided adequate notice of intent to allocate fault to Mr. Fancyboy.[1316]

In *Pugliese v. Perdue*,[1317] the supreme court ordered a new trial where the evidence did not support the jury's denial of compensation.[1318] At trial, Pugliese presented medical testimony showing that he suffered a back injury after being hit by Perdue's truck.[1319] Perdue admitted his negligence but claimed that Pugliese was "embellishing" his compensation claims.[1320] The jury awarded Pugliese no damages, in spite of the fact that the two parties had stipulated to $1,057 in medical bills.[1321] The supreme court ordered a new trial because the verdict was against the weight of the evidence.[1322] While a question remained as to the scope and seriousness of Pugliese's injury, Perdue offered no evidence refuting the existence of at least some back injury.[1323] Nor did the evidence show that Pugliese's injuries were sustained elsewhere.[1324] In addition, Perdue repeatedly acknowledged the existence of some liability.[1325]

In *Sauve v. Winfree*,[1326] the supreme court held that defendants who both owned a commercial premises and supervised the corporation that leased the premises could be liable as commercial landlords if neglect of their duties caused the injury.[1327] Winfree and Nix owned a commercial premise as partners.[1328] They leased the premises to 10th & M Seafoods, a corporation they owned entirely.[1329] In 1992, Sauve, an employee of 10th & M Seafoods, injured herself on a stairwell that violated Uniform Building Code regulations.[1330] However, the court also noted that the "inextricably intertwined" rule of liability relating to commercial landlords

1315. ALASKA STAT. § 09.17.080 (LEXIS 1998).
1316. *See Fancyboy*, 984 P.2d at 1134.
1317. 988 P.2d 577 (Alaska 1999).
1318. *See id*. at 583.
1319. *See id.* at 579.
1320. *See id*. at 580.
1321. *See id*.
1322. *See id*. at 579.
1323. *See id.*
1324. *See id.*
1325. *See id*.
1326. 985 P.2d 997 (Alaska 1999).
1327. *See id.* at 1003.
1328. *See id.* at 998.
1329. *See id.*
1330. *See id.* at 998-99.

prevented Winfree and Nix from being liable as both landlords and supervisors.[1331] The court then reversed the lower court's summary judgment because a genuine factual issue remained as to whether the duty to repair the stairwell belonged to Winfred and Nix as landlords or as supervisors.[1332]

In *Wal-Mart, Inc. v. Stewart*,[1333] the supreme court affirmed a lower court decision granting punitive damages to the plaintiff, Stewart, on tort claims for invasion of privacy and intentional infliction of emotional distress.[1334] Stewart, an African-American employee of a McDonalds located within Wal-Mart,[1335] sued Wal-Mart for regularly searching his personal belongings as he exited the Wal-Mart restroom.[1336] Wal-Mart asked for a directed verdict, a JNOV, and also asserted several evidentiary and procedural errors.[1337] The supreme court concluded that a jury could reasonably have viewed the actions of Wal-Mart to have been done on an unlawful basis, such as race, thus rendering a directed verdict or JNOV unwarranted.[1338] The court further held that a jury could reasonably have found that the actions of Hardy, a Wal-Mart assistant manager, were "sufficiently outrageous" to have caused Stewart "significantly severe" emotional distress and allowed Stewart to prevail on an intentional infliction of emotional distress claim.[1339]

In *Martinson v. ARCO Alaska, Inc.*,[1340] the supreme court held that the superior court erred in granting summary judgment in favor of ARCO because there were genuine issues of material fact in dispute as to the control ARCO had over the work site at which Martinson was injured.[1341] Martinson was employed by a company under contract with ARCO to haul water from Vern Lake.[1342] Martinson slipped and fell on some icy buildup near the pump house where he filled his truck.[1343] Martinson alleged that ARCO retained control of the site and thus owed a duty to him.[1344] ARCO

1331. *Id.* at 1002.
1332. *See id*. at 1003.
1333. 990 P.2d 626 (Alaska 1999).
1334. *See id*. at 626.
1335. *See id*.
1336. *See id.*
1337. *See id*. at 629.
1338. *See id*. at 630.
1339. *Id*. at 633.
1340. 989 P.2d 733 (Alaska 1999).
1341. *See id*. at 738.
1342. *See id*. at 735.
1343. *See id*.
1344. *See id*.

claimed that it did not retain control of the site and that the site was supposed to be maintained exclusively by Martinson's employer.[1345]

The supreme court used the *Moloso*[1346] independent contractor test, which states that "an employer does retain control if the employer (1) retains the right to direct the manner of the independent contractor's performance or (2) assumes affirmative duties with respect to safety."[1347] The supreme court held that the superior court correctly found that ARCO did not supervise the independent contractor's extraction of water.[1348] However, the supreme court reversed the trial court's finding that there were no genuine issues of material fact as to whether ARCO had contractual or implied responsibilities related to snow and ice removal.[1349]

In *Ace v. Aetna Life Insurance Co.*,[1350] the district court held that $950,000 was the maximum allowable punitive damages award in Ace's wrongful denial of benefits claim.[1351] Ace severely injured her knee in a sledding accident.[1352] Aetna denied Ace's claim for Long-Term Disability on several occasions, without ever independently investigating the actual nature of her work or whether she could actually perform her work.[1353] After a trial, the jury awarded Ace $27,009 for wrongful denial of disability, $100,000 for emotional distress and $16.5 million in punitive damages.[1354]

The Ninth Circuit determined the punitive damages to be excessive and remanded the case with an order that Aetna's request for a new trial for damages be denied, on the condition that Ace accept a remittitur to be determined by the district court.[1355] The district court stated that there is no exact formula for determining what constitutes excessive damages.[1356] However, the district court noted that the jury's punitive damages award was one hundred and thirty times the compensatory damages.[1357] The

1345. *See id*.
1346. *See* Moloso v. State, 644 P.2d 205, 210-11 (Alaska 1982).
1347. *Martinson*, 989 P.2d at 736.
1348. *See id*.
1349. *See id*.
1350. 40 F. Supp. 2d 1125 (D. Alaska 1999).
1351. *See id.* at 1136.
1352. *See id.* at 1129.
1353. *See id.*
1354. *See id.* at 1127.
1355. *See id.*
1356. *See id.*
1357. *See id.* at 1128.

district court also noted that Aetna's behavior could qualify for punitive damages, but was not as reprehensible as behavior in prior cases in which smaller punitive damage award ratios had been awarded.[1358] In determining that $950,000 would be the maximum allowable punitive damages award, the district court noted, among other factors, the importance of public confidence in insurance companies, the extent of Aetna's operations in Alaska, and the deterrent effect of punitive damages.[1359]

In *Denardo v. GCI Communication Corp.*,[1360] the supreme court held that Denardo's chance of winning GCI's sweepstakes was too remote and speculative to be the legal cause of Denardo's alleged injury.[1361] Denardo sued GCI for breach of contract when GCI terminated Denardo's inactive calling card account; this termination prevented Denardo from participating in GCI's sweepstakes.[1362] Denardo sought the value of the prizes he claimed he could have won if he had been able to enter the sweepstakes.[1363] The supreme court held that Denardo's damages claim was too speculative because of their remoteness from the alleged breach.[1364]

In *Bodzai v. Arctic Fjord, Inc.*,[1365] the supreme court held that the superior court erred when it dismissed Bodzai's claims based on his employment contract forum selection clause, because Bodzai's claims did not arise under the terms of his employment contract.[1366] Bodzai, who was injured while employed aboard a fishing vessel,[1367] sued his employer for (1) maintenance, cure, and unearned wages; (2) unseaworthiness; and (3) negligence.[1368] The employment contract had a forum selection clause, which the superior court used to dismiss the case without prejudice, so that it could be re-filed in the appropriate jurisdiction.[1369] The supreme court reversed the dismissal, finding that none of Bodzai's causes of action arose from his employment contract.[1370]

1358. *See id.* at 1128-30.
1359. *See id.* at 1130-35.
1360. 983 P.2d 1288 (Alaska 1999).
1361. *See id.* at 1289.
1362. *See id.*
1363. *See id.* at 1290.
1364. *See id.*
1365. 990 P.2d 616 (Alaska 1999).
1366. *See id*. at 621.
1367. *See id*. at 618.
1368. *See id*.
1369. *See id*.
1370. *See id*. at 621.

In *McGlothlin v. Municipality of Anchorage*,[1371] the supreme court held that the arena and city owed McGlothlin no duty of care, and that it was equitable to compel McGlothlin to pay twenty percent of the defense's legal fees.[1372] McGlothlin injured his back while loading a scoreboard belonging to his employer, Carrs, into the city's sports arena.[1373] The city owed no duty of care because the scoreboard belonged to Carrs, only Carrs employees were moving the board, the city had no actual control or contractual right to control the loading, and the injury resulted from McGlothlin's own actions.[1374] The court also concluded that the superior court did not abuse its discretion in awarding fees to the defendant because the award was not excessive and would not deter parties who brought claims in good faith.[1375]

In *Taranto v. North Slope Borough*,[1376] the North Slope Borough ("NSB") was sued for defamation when it publicly accused a Barrow taxicab driver of selling alcohol and drugs.[1377] The supreme court held that the appropriate standard for proving a defamation claim against a city was "actual malice."[1378] The common law confers a conditional privilege on government speech concerning matters of public health and safety.[1379] Under the actual malice standard, the plaintiff was unsuccessful because speech on matters of public concern is privileged unless the plaintiff can prove that the speaker "uttered untruths with actual malice."[1380]

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1371. 991 P.2d 1273 (Alaska 1999).
1372. *See id.* at 1273.
1373. *See id.* at 1276.
1374. *See id.* at 1279.
1375. *See id.* at 1280.
1376. 992 P.2d 1111 (Alaska 1999).
1377. *See id.* at 1112.
1378. *Id.*
1379. *See id.* at 1114 n.12.
1380. *Id*. at 1115 (citing Fairbanks Publishing v. Francisco, 390 P.2d 784, 784 (Alaska 1964)).

* The authors wish to thank Omar Swartz for his early assistance with this project.

APPENDIX

CASES OMITTED FROM 1999 YEAR IN REVIEW

CIVIL PROCEDURE

Tenala v. Fowler, 993 P.2d 447 (Alaska 1999)

(holding that the superior court did not abuse its discretion in awarding enhanced attorney's fees under Alaska Civil Rule 82(b)(3)).

Lane v. City of Kotzebue, 982 P.2d 1270 (Alaska 1999)

(holding that the trial court improperly granted summary judgment to the city and dismissed Lane's negligence claim).

Flynn v. E.I. du Pont de Nemours & Co., 988 P.2d 97 (Alaska 1999)

(denying Flynn's post-settlement effort to modify a stipulated protective order for failing to show particular good cause).

CRIMINAL LAW

Brueggeman v. Ashman, 973 P.2d 569 (Alaska 1999)

(dismissing Brueggeman's writ of prohibition because he could have raised the questions therein during his criminal trial and on appeal).

INSURANCE LAW

Coulson v. Marsh & McLennan, Inc., 973 P.2d 1142 (Alaska 1999)

(holding that the superior court properly granted summary judgment, directed verdicts and jury verdicts against an insurance broker whose employer was acquired by another brokerage firm and who declined a job offer with the new firm).

White v. Harvey, 979 P.2d 1012 (Alaska 1999)

(affirming the trial court's holding that a defendant's insurer is not entitled to deduct the amount of a subrogated claim from a defendant's offer of judgment).

EMPLOYMENT LAW

Ayele v. Unisea, Inc., 980 P.2d 955 (Alaska 1999)

(holding that the Workers' Compensation Board's failure to discuss lay witness testimony was not reversible error).

Irvine v. Glacier General Construction, 984 P.2d 1103 (Alaska 1999)

(holding that the Rehabilitation Benefits Administrator's failure to consider the opinion of the claimant's treating physician was harmless error).

Larsen v. Municipality of Anchorage, 993 P.2d 428 (Alaska 1999)

(reversing the superior court's grant of summary judgment and remanding the case because the officers had timely challenged their work assignments).

Belluomini v. Fred Meyer of Alaska, 993 P.2d 1009 (Alaska 1999)

(rejecting Belluomini's claims that his employer had not acted in good faith by not following sexual harassment policies in terminating him, and holding that Belluomini had no cause of action for interference with a constitutional right).

Wilson v. Municipality of Anchorage, 977 P.2d 713 (Alaska 1999)

(holding that the trial court properly granted summary judgment against Wilson, a former firefighter who claimed he should have had a preferential right to rehire to his previous position when he returned to the fire department).

FAMILY LAW

Tollefsen v. Tollefsen, 981 P.2d 568 (Alaska 1999)

(holding that the superior court erred in awarding the economically disadvantaged spouse the smaller share of the marital assets).

Nicholson v. Wolfe, 974 P.2d 417 (Alaska 1999)

(remanding the case to the trial court for a determination of the parties' intentions regarding the division of marital and business assets).

Benson v. Benson, 977 P.2d 88 (Alaska 1999)

(holding that the trial court did not retroactively modify child support arrearages when it calculated past due support in the absence of a support order for the relevant time period).

Berry v. Berry, 978 P.2d 93 (Alaska 1999)

(holding that the trial court did not abuse its discretion in a divorce action by not crediting the wife for mortgage and home repair payments, because a credit for post-separation payments was not required).

Berg v. Berg, 983 P.2d 1244 (Alaska 1999)

(holding that the trial court did not commit legal error when it used a 1996 appraisal instead of a 1997 appraisal for land valuation purposes).

Lacher v. Lacher, 993 P.2d 413 (Alaska 1999)

(holding that the trial court erred in its determination and division of marital assets and its calculation of child support).