THE YEAR IN REVIEW 2004: SELECTED CASES FROM THE ALASKA SUPREME COURT, THE ALASKA COURT OF APPEALS, AND THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

TABLE OF CONTENTS

I. Introduction
II. Administrative Law
III. Business Law
IV. Civil Procedure
V. Constitutional Law
VI. Contract Law
VII. Criminal Law
VIII. Criminal Procedure & Evidence
IX. Employment Law
X. Ethics & Professional Responsibility
XI. Family Law
XII. Property Law
XIII. Tort Law

I. INTRODUCTION

The *Year in Review* is a collection of brief summaries of selected state and federal appellate cases concerning Alaska law from the year 2004. They are neither comprehensive in breadth (several cases are omitted) nor in its depth (many issues within individual cases are omitted). Attorneys should not rely on these summaries as an authoritative guide; rather, they are intended to alert the Alaska legal community about judicial decisions from the previous year. The summaries are grouped by subject matter and presented alphabetically within each grouping.

II. ADMINISTRATIVE LAW

In *Alaska Center for the Environment v. Rue*,[1] the supreme court found that, although the Fish and Game Commissioner misconstrued the definition of a "subspecies" under Alaska law, the commissioner's ruling against extending endangered status to the Cook Inlet beluga whale was valid.[2] Several environmental

[1] 95 P.3d 924 (Alaska 2004).
[2] *Id.* at 927.

groups petitioned the Commission under the state Endangered Species Act to protect the Cook Inlet beluga, whose population had dramatically decreased over the last decade.[3] The Commission found that new federal regulations would correct and control this problem and declined to extend endangered status to the beluga.[4] The supreme court upheld the ruling under a rational basis review.[5] Applying a "substitution of judgment" standard, however, the court held that the Commission incorrectly limited the term "subspecies" to a narrow taxonomic category.[6] Instead, the court determined that "subspecies" may be more broadly defined, with consideration given to relevant scientific information, and held that this broader standard should guide the commission in future evaluations of the belugas' status.[7]

In *Alaskans for Efficient Government, Inc. v. Knowles*,[8] the supreme court held that Alaska law requires the appointment of a FRANK commission to assess the costs of a proposed governmental relocation only after the voters pass such an initiative.[9] Alaska Statutes section 44.06.060 requires that the legislature establish a commission to determine costs associated with relocating a "present function of state government."[10] Alaskans for Efficient Government, Inc. (AFEG) filed suit in response to a ballot initiative that proposed moving the legislature, arguing that state law requires the appointment of a FRANK Commission to determine the costs of relocation before voters vote on a relocation initiative.[11] The superior court adopted the government's interpretation of the statute, which called for the creation of a commission only after a relocation initiative had passed.[12] The supreme court affirmed, holding that based on the statute's own language, as well as its context and public policy, the correct interpretation calls for the creation of a FRANK commission only after a relocation initiative is passed as a ballot measure.[13]

In *Alaska Native Tribal Health Consortium v. Settlement Funds Held for E.R.*,[14] the supreme court held that the Consortium can enforce a health care provider lien on settlement proceeds

---

[3] *Id.* at 926.
[4] *Id.*
[5] *Id.* at 928.
[6] *Id.* at 931.
[7] *Id.* at 933.
[8] 91 P.3d 273 (Alaska 2004).
[9] *Id.* at 274.
[10] ALASKA STAT. § 44.06.060 (Michie 2004).
[11] 91 P.3d at 274–75.
[12] *Id.* at 275.
[13] *Id.* at 278.
[14] 84 P.3d 418 (Alaska 2004).

received by Alaska Native patients from third-party tortfeasors.[15] The Consortium entered a health care provider lien for the value of services provided to Warden after Warden was injured in an automobile accident.[16] Allstate, the tortfeasor's insurer, subsequently settled with Warden to cover all losses.[17] Warden's attorney informed and sent the Consortium the amount of settlement after he deducted his attorney fees from the settlement.[18] The Consortium refused to endorse the check and filed a complaint for the remaining fees.[19] The court held that federal law allows for the enforcement of the Consortium's health care provider lien because a tribal organization providing health services has the right to recover reimbursement from third parties for reasonable expenses.[20] Additionally, the court held that the Consortium's health care provider lien must be reduced by the pro rata share of the patient's attorney's fees.[21]

In *Alaska Trademark Shellfish v. State*,[22] the supreme court held that the Aquatic Farming Act precluded the Alaska Department of Fish and Game ("Department") from issuing exclusive rights to harvest and sell wild geoduck clam stocks that existed on aquatic farms.[23] Alaska Trademark Shellfish and other shellfish farmers ("applicants") filed an application with the Department for permits to harvest and sell geoduck clams.[24] The Department ruled that the farmers would only be permitted to use the wild geoduck clams for brood stock or active cultivation rather than for harvest and sale.[25] The Department therefore refused to issue the permits unless the applicants could develop a method to distinguish farmed from wild geoduck clams and would agree to use the proposed method when farming.[26] The applicants refused to comply, and their applications were denied.[27] The superior court affirmed the Department's decision.[28]

On appeal, the State argued that the Aquatic Farming Act prohibited the Department from issuing exclusive rights to harvest and sell wild geoduck stocks that already existed on the applicants'

---

[15] *Id.* at 421.
[16] *Id.*
[17] *Id.*
[18] *Id.* at 421–22.
[19] *Id.* at 422.
[20] *Id.* at 424.
[21] *Id.* at 428.
[22] 91 P.3d 953 (Alaska 2004).
[23] *Id.* at 959.
[24] *Id.* at 954.
[25] *Id*. at 954–55.
[26] *Id.* at 954.
[27] *Id*. at 955.
[28] *Id*.

farm sites.[29] The court agreed with the State, noting that the operation permit statute[30] only allows the Department to grant farmers permits to acquire and sell stock that is used or reared for the purpose of further growth or propagation, which precludes the harvesting of unfarmed, wild stock.[31] Similarly, the stock acquisition permit statute[32] only allows permit-holders to acquire aquatic plants or shellfish from wild stock in order to supply stock to the Department or to a licensed aquatic hatchery or farm; it does not grant a right to harvest wild geoducks for general commercial purposes.[33] Thus, the supreme court affirmed the Department's denial of the applications for aquatic farming permits.[34]

In *Anderson v. Alaska Bar Association*,[35] the supreme court held that while the superior court lacks jurisdiction to review appeals from the Alaska Bar Association regarding attorney misconduct, the Alaska Supreme Court may review these matters.[36] Anderson alleged cases of attorney misconduct and filed a grievance with the Alaska Bar Association, but the Bar Counsel denied his request for an investigation.[37] Anderson appealed the administrative agency's decision to the superior court; the case was dismissed, and he appealed to the supreme court.[38] The supreme court held that it has the authority to hear appeals regarding grievance-closing decisions made by the Alaska Bar Association pursuant to Bar Rule 22(a).[39] The appropriate standard of review is whether the Bar Counsel abused its discretion in denying the request for an investigation.[40]

In *Boyd v. Artic Slope Native Association*,[41] the supreme court held that the Alaska Workers' Compensation Board erred in ignoring testimony from a claimant's treating psychiatrist[42] but was within its discretion to implicitly deny the claimant's motion to exclude certain evidence.[43] After the Board denied her workers' compensation claim, Boyd challenged the decision**,** alleging that the Board failed to make adequate findings and violated her due

---

[29] *Id*. at 958.
[30] ALASKA STAT. § 16.40.100 (Michie 2004).
[31] 91 P.3d at 958.
[32] ALASKA STAT. § 16.40.120.
[33] 91 P.3d at 958.
[34] *Id.* at 960.
[35] 91 P.3d 271 (Alaska 2004).
[36] *Id.* at 272.
[37] *Id*. at 271.
[38] *Id*. at 272.
[39] *Id.*
[40] *Id.*
[41] No. S-10793, 2004 Alas. LEXIS 77 (Alaska 2004).
[42] *Id.* at *12.
[43] *Id*. at *20.

process rights.[44] The supreme court held that, although the Board's findings do not have to be exhaustive, the Board must make some findings for every material contested issue.[45] Hence, the Board erred in failing to consider disputed testimony from Boyd's treating psychiatrist,[46] and in failing to explain what inferences it drew from an investigator's report about the work incident that allegedly caused Boyd's illness.[47]

The court also found that the Board's failure to rule explicitly on Boyd's motion to exclude expert witnesses was not an abuse of discretion because the Board implicitly denied the motion by relying on those witnesses' testimony in reaching its decision.[48] The court concluded that the Board did not violate Boyd's due process rights because it held a hearing on the motions to exclude, it was not bound by any formal rules of civil procedure, and Boyd had adequate access to the testimony via discovery.[49]

In *Fairbanks North Star Borough v. Dena' Nena' Henash*,[50] the supreme court held that at least some of Dena' Nena' Henash's properties were eligible for charitable-purpose tax exemptions and that most of the exemption applications should have been granted by the borough.[51] Dena' Nena' Henash, a regional Native nonprofit corporation that provides services throughout the interior of Alaska, applied to the borough for charitable-purposes tax exemptions on several parcels of its real property.[52] The borough denied the application after finding that the corporation was funded largely through government money.[53] The corporation appealed the assessor's decision.[54] The supreme court used a two-part inquiry to determine tax-exempt status: (1) whether there is a nonprofit, charitable purpose and (2) whether the property is being exclusively used for an exempt purpose.[55] The supreme court concluded that a property does not necessarily lose tax-exempt status by deriving a profit[56] or because of government financial support.[57] The court refused to limit its analysis to the factors advanced by the borough, preferring to consider any

---

[44] *Id.* at *8.
[45] *Id.* at *9–10.
[46] *Id.* at *12.
[47] *Id.* at *13.
[48] *Id*. at *21.
[49] *Id.* at *21–23.
[50] 88 P.3d 124 (Alaska 2004).
[51] *Id.* at 126.
[52] *Id.* at 127.
[53] *Id.*
[54] *Id.*
[55] *Id.* at 130.
[56] *Id.* at 133.
[57] *Id.* at 134–35.

relevant circumstances in the charitable-purpose analysis.[58] The supreme court held that some, but not all, of Dena' Nena' Henash's properties were eligible for charitable-purpose exemption.[59]

In *Libertarian Party of Alaska, Inc. v. State*,[60] the supreme court upheld a soft money regulation promulgated by the Alaska Public Offices Commission.[61] The Campaign Disclosure Act specifically restricts "hard money" [62] contributions and more generally limits campaign expenditures for the purpose of influencing an election.[63] The Alaska Libertarian Party challenged the regulation, which required that political parties disclose "soft money" contributions and expenditures.[64] Finding that soft money can be used to avoid hard money limitations, the supreme court ruled that the disclosure requirement fulfilled the Act's public information purposes.[65] The regulation was consistent with Alaska law and therefore was a legitimate exercise of the Commission's authority.[66] The supreme court affirmed the superior court in denying an injunction and sustaining the regulation.[67]

In *Mechanical Contractors of Alaska, Inc. v. State*,[68] the supreme court held that the Department of Public Safety and the Department of Community and Economic Development had the authority to adopt the International Mechanical Code (IMC) because it conformed to the requirements of the Administrative Procedures Act (APA).[69] Plaintiff argued that adoption of the IMC violated statutory authority[70] and was inconsistent with the Uniform Mechanical Code.[71] The court held that the agencies had statutory authority to adopt a code different from the Uniform Mechanical Code because the legislature did not intend to confine

---

[58] *Id.* at 135.
[59] *Id.* at 126, 143.
[60] 101 P.3d 616 (Alaska 2004).
[61] *Id.* at 617.
[62] "'Soft money' and 'hard money' are exclusive categories. 'Hard money' refers to donations made for the purpose of influencing the nomination or election of a candidate. 'Soft money' is most easily defined negatively as donations to political parties that are not 'hard money,' thus not made directly for the purpose of influencing the nomination or election of a candidate."
Id. at 617–18.
[63] *Id.* at 618.
[64] *Id.* at 620.
[65] *Id.* at 626–27.
[66] *Id.* at 622.
[67] *Id.*
[68] 91 P.3d 240 (Alaska 2004).
[69] *Id*. at 242.
[70] *Id.* at 244–45.
[71] *Id.* at 251.

them to the Uniform Mechanical Code.[72] Moreover, the court held that adoption of the IMC did not violate the APA because it was a reasonable decision, and a fiscal note was not required.[73]

In *Nason v. State*,[74] the court of appeals upheld a statute[75] requiring the Department of Public Safety to collect DNA samples from individuals convicted of felony "crimes against a person."[76] Nason argued the State violated his privacy under the Alaska State Constitution and Fourth Amendment of the United States Constitution by requiring submission of a DNA sample and criminalizing refusal.[77] Nason also argued that the statute violated the equal protection guarantee of the Alaska Constitution because only individuals convicted of "crimes against a person" were required to submit.[78] The court presumed that the statute was constitutional in the absence of contrary authority; it did not address the merits of the Fourth Amendment argument.[79] However, the court held that the equal protection argument failed because there was a valid reason to require a sample from individuals convicted of felonies against a person.[80] The court chose to limit its holding because of the difficult constitutional issues presented by the case.[81]

In *Simpson v. State*,[82] the supreme court affirmed the decisions of the Commercial Fisheries Entry Commission ("CFEC") to limit the number of permits in a non-distressed area and to deny Simpson skipper status in 1984.[83] CFEC decided to limit the number of permits to seventy-three for the Northern Southeast Inside sablefish fishery.[84] The CFEC then set up a point system to determine order of priority for permit applicants based on past participation and economic dependence.[85] Simpson applied for a permit and claimed sixty-five points.[86] CFEC awarded him fifty points, concluding he did not qualify as a skipper in 1984.[87] The superior court affirmed.[88] The supreme

---

[72] *Id.*
[73] *Id.* at 251–52.
[74] 102 P.3d 962 (Alaska Ct. App. 2004).
[75] ALASKA STAT. § 44.41.034 (Michie 2004).
[76] *Id.*; *see also* 102 P.2d at 963.
[77] 102 P.2d at 963.
[78] *Id.*
[79] *Id.* at 964.
[80] *Id.* at 965.
[81] *Id.* at 966.
[82] 101 P.3d 605 (Alaska 2004).
[83] *Id.* at 607.
[84] *Id.* at 607–08.
[85] *Id.* at 608.
[86] *Id.*
[87] *Id.*
[88] *Id.* at 609.

court held that CFEC has the authority to limit permits in non-distressed fisheries as long as it sets "the maximum number at a level that is no lower than the highest number of units of gear fished in any one year of the four years prior to the limitation."[89] The court also held that the CFEC did not err in denying Simpson skipper status in 1984.[90] Under clear statutory language, Simpson did not qualify as a skipper because he lacked the requisite license.[91]

In *State v. Greenpeace, Inc.*,[92] the supreme court upheld the application of a public interest exception to the mootness doctrine.[93] Greenpeace appealed a ruling of the Alaska Department of Natural Resources (DNR) issuing a water use permit to an oil company.[94] The appeal triggered an automatic stay on the permit, which was lifted upon a motion by the oil company on one day's notice.[95] Greenpeace appealed to the superior court, arguing that the lifting of the stay was clear error, and the extremely short notice amounted to a denial of due process.[96] The company subsequently notified DNR that it no longer needed the permit.[97] Although the water use permit was no longer in dispute, the superior court continued the action under the doctrine of the public interest exception to mootness, ultimately holding that lifting the stay was arbitrary and clear error.[98] On appeal, the supreme court held that, although the permit's expiration rendered the controversy technically moot, the superior court rightly considered the due process claim under the public interest exception because a similar dispute could arise again and might never be heard if the mootness doctrine were rigidly applied, and also because the issue was vitally important to the public.[99] The supreme court further held that review of the merits of the decision to lift the stay did not fall under the public interest exception because DNR amended the regulation granting an automatic stay and future similar disputes would not arise.[100] The supreme court held that the public interest exception should not allow a "proxy" decision on the water use permit and vacated the award of attorney's fees to Greenpeace.[101]

---

[89] *Id.* at 611.
[90] *Id.* at 614.
[91] *Id.* at 614–15.
[92] 96 P.3d 1056 (Alaska 2004).
[93] *Id.* at 1068–69.
[94] *Id.* at 1059.
[95] *Id*.
[96] *Id.*
[97] *Id.* at 1059–60.
[98] *Id.* at 1061.
[99] *Id.* at 1062–63.
[100] *Id.* at 1068–69.
[101] *Id.*

In *State v. Kenaitze Indian Tribe*,[102] the supreme court held that the Alaska Joint Boards of Fisheries and Game did not act arbitrarily and capriciously in promulgating a regulation[103] that identified nonsubsistence areas.[104] The superior court held that the regulation was inconsistent with Alaska state law.[105] The supreme court disagreed and upheld the disputed regulation as originally adopted, finding that the Boards did not exceed their discretion because they gave careful consideration to the proper criteria in their evaluation of the starting boundaries for the nonsubsistence areas.[106]

In *State v. Municipality of Anchorage*,[107] the supreme court held that an electricity subsidiary of the Municipality of Anchorage was exempt from a state tax on gas for the gas it produced for city use.[108] The state argued that the tax should apply because municipalities were not expressly listed as statutory exceptions.[109] The supreme court held that state law exempted municipalities from tax absent an express provision to the contrary.[110] The court found no legislative intent to apply the gas production tax to municipalities; therefore, the gas used by the subsidiary to produce electricity for Anchorage was exempt from taxation.[111]

III. BUSINESS LAW

In *Disotell v. Stiltner*,[112] the supreme court held that the Alaska Uniform Partnership Act[113] does not require liquidation of partnership assets upon dissolution, even upon request by a lawfully dissolving partner.[114] Disotell and Stiltner formed a partnership to construct and operate a hotel but were unable to agree on the details of their plan, leading Disotell to seek dissolution of the partnership.[115] Disotell argued that he could demand liquidation under the Partnership Act because he did not wrongfully cause the dissolution.[116] The supreme court held that

---

[102] 83 P.3d 1060 (Alaska 2004).
[103] ALASKA ADMIN. CODE tit. 5, § 99.015 (1992).
[104] 83 P.3d at 1062.
[105] *Id.* at 1071–72.
[106] *Id.*
[107] 104 P.3d 120 (Alaska 2004).
[108] *Id.* at 121.
[109] *Id.* at 121–22.
[110] *Id.* at 121.
[111] *Id.* at 123.
[112] 100 P.3d 890 (Alaska 2004).
[113] ALASKA STAT. § 32.05.330 (Michie 2004).
[114] 100 P.3d at 894.
[115] *Id.* at 892.
[116] *Id.* at 893.

liquidation was discretionary and that the lower court did not err in permitting Stiltner to acquire Disotell's partnership interest.[117]

In *Hallam v. Alaska Airlines, Inc.*,[118] the supreme court held that a *pro se* litigant cannot represent a class in an unfair trade practices and antitrust action.[119] Claiming that the airline breached a series of contracts by failing to honor various terms of his airline tickets, Hallam sued the airline.[120] He also contended, on behalf of a class of passengers, that the airline's standard ticket terms and policies contravened Alaska's Fair Trade Practices Act[121] and state antitrust law.[122] The superior court dismissed all of Hallam's claims, and he appealed.[123] The supreme court affirmed these holdings because Hallam's appeal challenged findings of fact that were not clearly erroneous;[124] the supreme court also affirmed the dismissal of Hallam's unfair trade practices and antitrust claims because the plain language of the Federal Airline Deregulation Act preempted such claims.[125]

In *Hikita v. Nichiro Gyogyo Kaisha, Ltd.*,[126] the supreme court affirmed the re-imposition of litigation-ending sanctions against Hikita and Alaska Foods, Inc. (collectively Alaska Foods) for failing to produce pretrial discovery.[127] Prior to the present appeal, the court had already remanded once for the trial court's consideration of possible and meaningful alternatives to its sanctions against Alaska Foods.[128] On remand, the superior court did, in fact, consider lesser sanctions but renewed its dismissal based on a finding that additional monetary sanctions or a contempt citation would not cure compliance with discovery requirements.[129] The supreme court affirmed, holding that the superior court did not abuse its discretion by relying on Alaska Foods' actions after the initial grant of sanctions in 1990.[130]

In *Industrial Commercial Electric, Inc. v. McLees*,[131] the supreme court reversed the lower court's grant of summary judgment for McLees.[132] McLees, a former Industrial Commercial

---

[117] *Id*. at 894.
[118] 91 P.3d 279 (Alaska 2004).
[119] *Id.* at 287.
[120] *Id.* at 281.
[121] ALASKA STAT. § 45.50.471 (Michie 2004).
[122] 91 P.3d at 281.
[123] *Id.*
[124] *Id.* at 281.
[125] *Id*. at 287–88.
[126] 85 P.3d 458 (Alaska 2004).
[127] *Id.* at 459.
[128] *Id.*
[129] *Id.*
[130] *Id.* at 462–63.
[131] 101 P.3d 593 (Alaska 2004).
[132] *Id.* at 594.

Electric employee, and his wife took several corporation documents,[133] and to recover them, the president of Industrial Commercial Electric entered into a settlement and release agreement with them.[134] Both the corporation and the president filed a suit against the McLees, and the McLees filed counterclaims.[135] The lower court granted summary judgment for the McLees, finding that the corporation's claims were barred by the settlement agreement and mutual releases.[136] However, the supreme court held that the settlement agreement and mutual releases would not bar a claim if they are invalid.[137] The court concluded that there were genuine issues of material fact as to whether the president was induced to sign the agreement by a fraudulent misrepresentation, and whether his reliance was justified.[138] The court declined to hold that a releasing party is never justified in relying on factual representations of a released party during settlement of claims which accused the released party of fraud or dishonesty.[139] The supreme court reversed the grant of summary judgment and remanded the case for further proceedings.[140]

In *Matanuska Electric Association v. Chugach Electric Association*,[141] the supreme court held that Chugach did not breach its contractual obligation to act in accordance with "prudent utility practice" when it failed to comply with terms outlining the procedures for submitting proposed rate changes to a state regulatory agency.[142] Matanuska claimed that Chugach had violated its obligations under a purchase-and-sale agreement to act according to "prudent utility practice" and to submit proposed rate changes to a joint committee of company executives before submitting them to the Regulatory Commission of Alaska.[143] The supreme court reversed the superior court's grant of summary judgment for Chugach on the "prudent utility practice" claim, holding that the lower court erred in finding that the contract imposed no such duty.[144] However, the supreme court affirmed summary judgment for defendants with respect to the proposed rate changes, holding that under the terms of the contract the

---

[133] *Id.*
[134] *Id.* at 595.
[135] *Id.* at 596.
[136] *Id.*
[137] *Id.* at 597.
[138] *Id.* at 599.
[139] *Id.* at 601.
[140] *Id.* at 602.
[141] 99 P.3d 553 (Alaska 2004).
[142] *Id.* at 565.
[143] *Id.* at 556–57.
[144] *Id.* at 562.

disputed rate changes were exempt from the joint committee process.[145]

In *Matanuska Electric Association, Inc. v. Waterman*,[146] the supreme court held that the business judgment rule does not apply to situations where the plain language of a corporation's bylaws contradicts an action by its board of directors.[147] Janecek was elected to a seat on the board of directors of Matanuska Electric Association (MEA),[148] but after discovering his failure to disclose some campaign contributions, the board voted not to seat Janecek.[149] Waterman, an MEA board member, successfully sued to compel the board to seat Janecek.[150] The supreme court rejected MEA's argument that the business judgment rule protected the board's decision not to seat Janecek[151] because the plain language of MEA's bylaws allows any candidate in violation of campaign disclosure rules to cure such violations within thirty days.[152] Because Janecek complied with the bylaws and cured his violations, the board did not have the business discretion to unseat him.[153]

In *Runyon v. Association of Village Council Presidents*,[154] the supreme court held that the Association of Village Council Presidents (AVCP), a non-profit corporation consisting of fifty-six Alaska Native villages, was not entitled to the protection of the villages' tribal sovereign immunity and could be sued by private parties.[155] Parents of students who were injured while attending a Head Start program operated by AVCP sued the corporation for negligence in failing to adequately train the Head Start teachers.[156] AVCP filed motions to dismiss, asserting immunity from suit based on the tribal sovereign immunity of its incorporating villages.[157] The superior court granted the motions to dismiss, and the parents appealed to the supreme court.[158] The issue on appeal was whether the incorporating villages were the real parties in interest to the suit such that their sovereign immunity could extend to the corporation.[159] The court held that the villages were not the

---

[145] *Id.* at 565.
[146] 87 P.3d 820 (Alaska 2004).
[147] *Id*. at 824.
[148] *Id*. at 820.
[149] *Id*. at 821.
[150] *Id*. at 822.
[151] *Id*. at 824.
[152] *Id*. at 823.
[153] *Id*. at 824.
[154] 84 P.3d 437 (Alaska 2004).
[155] *Id.* at 441.
[156] *Id*. at 438.
[157] *Id*. at 439.
[158] *Id*.
[159] *Id*. at 439–40.

real parties in interest because a judgment against AVCP would not reach any village assets.[160] The villages' use of the corporate form to shield their assets from liability precluded the extension of sovereign immunity to AVCP, and therefore the suit against AVCP was remanded to the superior court and allowed to proceed.[161]

In *Sourdough Development Services, Inc. v. Riley*,[162] the supreme court affirmed the trial court's approval of a settlement agreement that required Sourdough to pay the receivership expenses accrued prior to either an acquisition or dissolution of the company.[163] The court refused to review the trial court's Alaska Civil Rule 79 award of litigation costs to the shareholders under an abuse of discretion standard, and instead found that contractual interpretation of the settlement agreement was the appropriate review of whether receivership expenses should be paid by the company or the shareholders.[164] The court held that the agreement expressly provided for payment of receivership costs by the company.[165] Therefore, the court required the company to pay such costs and declined to tax them as Rule 79 litigation costs.[166]

In *Western Star Trucks v. Big Iron Equipment Service, Inc.*,[167] the supreme court held that the Unfair Trade Practices and Consumer Protection Act[168] applies to both cases involving consumer goods and services as well as commercial transactions involving personal property or services used by businesses.[169] Big Iron, a parts and service dealer, relied to its detriment on an oral agreement that it entered into with Western Star, a manufacturer of commercial trucks, to establish a dealership.[170] Western Star subsequently rejected Big Iron's dealership application, and Big Iron filed suit against Western Star claiming breach of contract, promissory estoppel, intentional or negligent misrepresentation, and unfair trade practices.[171] Western Star Trucks argued that the scope of the Unfair Trade Practices and Consumer Protection Act was limited to consumer goods or services and thus did not apply to business transactions involving personal property or services used by businesses.[172] Based on the plain language and legislative history of the statute, the court found that non-real estate

---

[160] *Id.* at 441.
[161] *Id.*
[162] 85 P.3d 463 (Alaska 2004).
[163] *Id.* at 464.
[164] *Id.* at 466.
[165] *Id.* at 467–68.
[166] *Id.* at 468
[167] 101 P.3d 1047 (Alaska 2004).
[168] ALASKA STAT. § 45.50.471(b)(14) (Michie 2004).
[169] 101 P.3d at 1048.
[170] *Id.*
[171] *Id.*
[172] *Id.* at 1048–49.

commercial transactions are covered under the Unfair Trade Practices and Consumer Protection Act.[173]

IV. CIVIL PROCEDURE LAW

In *Alaska Community Colleges' Federation of Teachers v. University of Alaska*,[174] the supreme court held that the trial court did not abuse its discretion in awarding attorney's fees under Alaska Civil Rule 82.[175] The university prevailed on an appeal reversing an arbitrator's award to the teachers' union.[176] The union argued that the award was unfair because it was obligated to defend the arbitration award that led to the awarding of fees.[177] The court held that the union was not a public interest litigant, and thus was not covered by the public policy exception to Rule 82.[178] The court affirmed the fee award as within the trial court's discretion.[179]

In *Alderman v. Iditarod Properties, Inc.*,[180] the supreme court affirmed the trial court's judgment awarding unpaid rent and prejudgment interest to Iditarod Properties, but reversed that party's award of enhanced attorney's fees.[181] Iditarod, owner of the Fourth Avenue Theater in Anchorage, rented space in that building to the Aldermans.[182] In 1997, the Aldermans moved their business next door and operated under the name "Fourth Avenue Theater Trolley Tours," prompting Iditarod to sue for trademark infringement.[183] In 2001, the supreme court held that Alderman infringed Iditarod's trademark and upheld an award of enhanced attorney's fees to Iditarod.[184] The court also vacated the judgment for unpaid rent because the Aldermans had suffered substantial prejudice due to Iditarod's unduly delayed pleading of breach of contract claim.[185] Iditarod subsequently filed a new complaint against the Aldermans seeking damages for breach of the rental agreement.[186] The supreme court held that the claim for unpaid rent was not barred by *res judicata* because it was a separate and

---

[173] *Id.* at 1050–54.
[174] 2004 Alas. LEXIS 131 (Alaska 2004).
[175] *Id.* at 1–2.
[176] *Id.* at 3–4.
[177] *Id.* at 8.
[178] *Id.* at 11–13.
[179] *Id.* at 1.
[180] 104 P.3d 136 (Alaska 2004).
[181] *Id.* at 138.
[182] *Id.* at 130–39.
[183] *Id.*
[184] *Id.* at 139.
[185] *Id.*
[186] *Id.*

distinct claim from the trademark infringement action.[187] The court also held that the action was not barred by the statute of limitations, which had not tolled.[188] Finally, the court found that enhanced fees were not warranted because the court should not consider settlement negotiations in awarding enhanced fees.[189]

In *Kozevnikoff v. Tanana Village Council*,[190] the supreme court held that notations made by a clerk on an order of the court do not constitute judicial orders.[191] After prevailing on a motion to dismiss, the Council requested attorney's fees [192] under Alaska Civil Rule 82.[193] The court entered a final judgment awarding attorney's fees, but left the amounts blank, and on the certificate of distribution a clerk wrote "w/ out cost or atty fees." [194] Kozevnikoff argued that the clerical notation constituted a denial of fees.[195] The court held that the clerical notations were not judicial orders**,** and that orders may be issued prior to making final calculations of awards of attorney's fees and costs.[196]

In *Lakosh v. Alaska Department of Environmental Conservation*,[197] the supreme court affirmed the propriety of the superior court's judgment and denial of motions.[198] Lakosh filed an original suit contesting the validity of select regulations issued by the Department of Environmental Conservation ("DEC"), but subsequent events transpired that validated the regulation by statutory amendment.[199] As Lakosh's pending claim involved the superceded statute, and did not address the validity of the statutory amendment, Lakosh filed a motion seeking to amend his complaint to contest the amendment.[200] Additionally, prior to the amendment's passage but after the original regulation was held to be invalid, Lakosh filed motions to compel discovery, for declaratory judgment and injunctive relief, and for a status conference.[201] Lakosh also sought sanctions for the DEC, and restitution for the DEC's lack of compliance.[202] The court reviewed the denials of the motion to amend and the motion to

---

[187] *Id.* at 141.
[188] *Id.* at 142.
[189] *Id.* at 145.
[190] 89 P.3d 757 (Alaska 2004).
[191] *Id.* at 759.
[192] *Id.* at 758.
[193] ALASKA R. CIV. P. 82.
[194] 89 P.3d at 758.
[195] *Id.*
[196] *Id.*
[197] 2004 Alas. LEXIS 134, at *1 (Alaska 2004).
[198] *Id.* at *17.
[199] *Id.* at *2–6.
[200] *Id.* at *5.
[201] *Id.* at *4–5.
[202] *Id.* at *6.

compel discovery under an abuse of discretion standard and found that no such abuse existed.[203] The court further held that the superior court did not err by failing to award relief or restitution to Lakosh.[204] In so holding, the court noted that there was no merit in Lakosh's claims for restitution from unjust enrichment or in the claim for an equitable remedy.[205] Finally, the court also found no merit in Lakosh's final appellate claim that the superior court erred in "presenting its sua sponte motion … for entry of final judgment"; rather, the court held that the superior court was not acting sua sponte, but on instructions from the supreme court in entering final judgment.[206]

In *Maloney v. Progressive Specialty Insurance Co.*,[207] the supreme court held that an insurance company obliged to make a policy limits settlement offer has no duty to include the attorney's fees allowed under Alaska Civil Rule 82 as part of that offer when the claimant is not represented by counsel.[208] A Progressive policy holder struck Maloney's car, seriously injuring Maloney.[209] Progressive's settlement offer did not include Rule 82 attorney's fees, because Maloney was unrepresented by counsel at the time of the settlement, and the terms of the settlement offer did not require the payment of attorney's fees for unrepresented parties.[210] Maloney argued that the settlement should account for the future retention of counsel.[211] The court rejected Maloney's policy arguments based on the language of the settlement agreement.[212]

In *Miller v. Safeway, Inc.*,[213] the supreme court held that all of Miller's claims failed summary judgment, but that the trial court's failure to allow Miller leave to amend constituted error.[214] Miller, an Alaska Native, was terminated from his job at a Safeway store because his long hair violated Safeway company policy.[215] Miller originally claimed that the termination was unlawful because it violated his right to privacy and constituted discrimination on the basis of gender, religion, and race.[216] The supreme court held that none of his claims survived summary

---

[203] *Id.* at *8–14.
[204] *Id.* at *13–14.
[205] *Id.* at *14–16.
[206] *Id.* at *16.
[207] 99 P.3d 565 (Alaska 2004).
[208] *Id*. at 569.
[209] *Id.* at 566.
[210] *Id.* at 567.
[211] *Id.*
[212] *Id.* at 569.
[213] 102 P.3d 282 (Alaska 2004).
[214] *Id.* at 296.
[215] *Id.* at 284.
[216] *Id*.

judgment, and affirmed the trial court in this respect.[217] However, the court held that the failure to reach a decision on the merits of the claims in Miller's amended complaint resulted in significant hardship to Miller, and that litigating those claims would not prejudice Safeway.[218] The court therefore reversed and remanded the trial court's decision denying Miller's motion to amend his complaint.[219]

In *Simeon v. State*,[220] the court of appeals held that a lawyer's decision not to request a jury instruction on a lesser included offense was a reasonable tactical decision.[221] Simeon appealed his conviction for sexual assault in the first degree and argued that his conviction should be overturned because his lawyer failed to request jury instructions of lesser included offenses of sexual assault.[222] Simeon's lawyer admitted that it was a mistake not to request instructions to the jury on lesser included offenses.[223] However, the court held that a lawyer has the ultimate authority to make tactical trial decisions including whether to request lesser included offenses.[224] In general, the court held that to successfully challenge a tactical decision made by an attorney, the defendant must demonstrate that the tactic was one that no competent attorney would use.[225]

In *Thomann v. Fouse*,[226] the supreme court held that Fouse's settlement offer was too indefinite to qualify as an offer of judgment under Alaska Civil Rule 68.[227] Thomann sued Fouse for injuries resulting from an automobile accident.[228] Before trial, Fouse offered to settle for $25,000 plus medical costs to be determined through arbitration.[229] Thomann declined the offer and was subsequently awarded $29,018.88 at trial, including medical costs.[230] The lower court awarded Fouse with post-offer costs and attorney's fees under Rule 68 because Thomann's damage award was less than Fouse's offer.[231] The supreme court reversed and held that Fouse's offer was indefinite and did not constitute an

---

[217] *Id*. at 285.
[218] *Id*. at 295.
[219] *Id*. at 296.
[220] 90 P.3d 181 (Alaska Ct. App. 2004).
[221] *Id.* at 184.
[222] *Id.*
[223] *Id.* at 183.
[224] *Id.* at 184.
[225] *Id.* at 185.
[226] 93 P.3d 1048 (Alaska 2004).
[227] *Id.* at 1049.
[228] *Id.*
[229] *Id.*
[230] *Id.*
[231] *Id.* at 1050.

unconditional commitment to satisfy Thomann's medical bills.[232] Therefore, the offer did not meet the requirements of Rule 68 and Fouse was not entitled to costs and attorney's fees.[233]

V. CONSTITUTIONAL LAW

In *Alaska Legislative Council v. Knowles*,[234] the supreme court held that the definition of "appropriations" in article II of the Alaska Constitution extends only to monetary transfers.[235] The governor had vetoed a bill transferring state land to the University of Alaska.[236] In attempting to override the veto, the legislature had the two-thirds majority required to enact a bill over the governor's objection if the bill was not an "appropriation" under article II, but not the three-quarters majority required if it was an "appropriation" under that article.[237] Here, a two-thirds majority was sufficient to override the governor's veto because the transfer at issue was not an appropriation.[238] In reaching its conclusion, the court adopted different definitions of "appropriation" as that word is used in article II and in article XI of the Alaska Constitution. Although it found the idea of consistent definitions "appealing,"[239] the court reasoned that article XI was designed to prevent "give-away programs and maintain legislative control over the allocation of state assets," whereas article II was designed to "govern the balance of power between the legislative and executive branches of Alaska's government."[240] Because the articles serve different purposes, the court concluded that different definitions were appropriate.[241] The court also rejected the notion that dedicating income derived from the land constituted an "appropriation" because the amount of income derived from the land was not sufficiently certain.[242]

In *Crawford v. State*,[243] the court of appeals held that, under certain circumstances, statements that a criminal defendant made after receiving his *Miranda* warnings must be suppressed.[244] Crawford admitted under police questioning that he had marijuana

---

[232] *Id.* at 1051.
[233] *Id.* at 1052.
[234] 86 P.3d 891 (Alaska 2004).
[235] *Id.* at 895.
[236] *Id.* at 893.
[237] *Id.*
[238] *Id.* at 894.
[239] *Id.*
[240] *Id.* at 895.
[241] *Id.*
[242] *Id.* at 898.
[243] 100 P.3d 440 (Alaska Ct. App. 2004).
[244] *Id.* at 451.

and cocaine in his car, was subsequently advised of his *Miranda* rights, and then once again admitted to the drug possession under police interrogation.[245] The trial court suppressed Crawford's statements made prior to the *Miranda* warnings, but admitted the post-*Miranda* statements.[246] On appeal, Crawford argued that the post-*Miranda* statements should have been similarly suppressed.[247] The court chose not to reach the state constitutional issue of whether to adopt the older *Brown v. Illinois*[248] "dissipation of taint" test versus the modern *Oregon v. Elstad*[249] analysis for post-*Miranda* statements, and held that under either federal test Crawford's post-*Miranda* statements would be suppressed.[250]

In *Doe v. State*,[251] the supreme court held that the Alaska Sex Offender Registration Act (ASORA)[252] violated the due process right of an individual whose conviction was set aside before ASORA became effective.[253] In 1987 Doe was convicted of child sexual abuse, but his conviction was set aside in April 1994.[254] ASORA became effective in August 1994.[255] The Department of Public Safety (DPS) created a regulation applying ASORA to all defendants, regardless of whether a conviction was set aside.[256] Doe argued that ASORA should not be applicable in his case because it is unconstitutional and DPS does not have the authority to create such regulations.[257] Since ASORA did not become applicable to set-aside convictions until after Doe's conviction had been set aside, the court held that imposing ASORA's registration requirement on Doe violated due process because the government could not state a compelling interest to justify this requirement.[258]

In *Doe v. Tandeske*,[259] the Ninth Circuit uphrlf Alaska's Sex Offender Registration Act[260] against procedural and substantive due process challenges.[261] Doe argued that Alaska's registration law violated procedural due process because it

---

[245] *Id*. at 442.
[246] *Id.* at 442–43.
[247] *Id*. at 443.
[248] 422 U.S. 590 (1975).
[249] 470 U.S. 298 (1985).
[250] 100 P.3d at 443–51.
[251] 92 P.3d 398 (Alaska 2004).
[252] ALASKA STAT. §§ 12.63.010–.100 (Michie 2004)
[253] 92 P.3d at 400.
[254] *Id.*
[255] *Id.* at 401.
[256] *Id.*
[257] *Id.* at 402.
[258] *Id.* at 411–12.
[259] 361 F.3d 594 (9th Cir. 2004).
[260] 1994 Alaska Sess. Laws 41.
[261] 361 F.3d at 596.

infringed upon a liberty interest with notice or a hearing.[262] The court held these procedural safeguards had already been provided at the trial that resulted in Doe's conviction.[263] The court also rejected Doe's substantive due process claim, because convicted sex offenders do not have a constitutional liberty interest in freedom from registration and the Alaska statute was reasonably related to the legitimate nonpunitive purpose of public safety.[264] Thus, summary judgment for the state was affirmed.[265]

In *Dunn v. Municipality of Anchorage*,[266] the court of appeals affirmed Dunn's sentence for driving under the influence.[267] Dunn challenged the validity of the sentencing statute on equal protection and due process grounds; he argued that the State did not have a reasonable basis for expanding a ten-year "look-back" limitation to a new provision requiring courts to examine all previous DUI convictions.[268] The court held that because he advanced different arguments on appeal, Dunn had failed to preserve his constitutional claims.[269] Assuming, arguendo, that Dunn had preserved his claims for appeal, the court held that he failed to show that the statute lacked a reasonable basis and that his equal protection claim was without merit.[270] Having rejected all constitutional claims, the court affirmed the sentence.[271]

In *Evans v. McTaggart*,[272] the supreme court held that a third-party must meet a clear and convincing evidence standard when applying for custody and visitation rights.[273] Evans had two children, both fathered by different men.[274] The McTaggarts had successfully filed in the trial court for custody of their biologically related grandchild and visitation rights with Evan's other child.[275] On appeal, Evans claimed that the trial court violated her constitutional rights as a parent by granting custody to the McTaggarts based on a preponderance of the evidence. [276] The supreme court held that in custody cases between parents and non-parents, the correct standard of review is the clear and convincing

---

[262] *Id.*
[263] *Id.*
[264] *Id.* at 597.
[265] *Id.*
[266] 100 P.3d 905 (Alaska Ct. App. 2004).
[267] *Id*. at 906.
[268] *Id.*
[269] *Id*. at 907.
[270] *Id*. at 908–09.
[271] *Id*. at 910.
[272] 88 P.3d 1078 (Alaska 2004).
[273] *Id.* at 1079.
[274] *Id*.
[275] *Id.* at 1080.
[276] *Id.* at 1082.

evidence standard.[277] Evans also challenged the McTaggerts' visitation rights to her other son, who was not biologically related to them.[278] The court held that Alaska Statutes section 25.20.060(a),[279] which "permits a court to provide for visitation based on the best interests of the child," is constitutional if narrowly interpreted. [280] To protect parental rights, the court held that clear and convincing evidence should be used to determine whether a third-party can obtain visitation rights over the parent's consent.[281]

In *Larson v. Cooper*,[282] the supreme court held that neither the free exercise clause of the Alaska Constitution nor the free exercise clause of the United States Constitution protects an inmate's right to contact visitation with his wife.[283] It also held that restrictions on contact visitation did not violate the right to rehabilitation nor any liberty interest in contact visits while incarcerated.[284] Larson, a maximum security prisoner at the Spring Creek Correctional Center, sued the Director of the Division of Institutions at the Department of Corrections and a correctional officer claiming that his religion required kissing his wife and holding her hand, and that the Department's refusal to permit this contact violated his right to exercise his religion.[285] The court held, because the rules governing prison visitation had an incidental effect on the exercise of religion and were reasonably related to a legitimate state interest, they were permissible under the U.S. Constitution.[286] Applying its reasoning from *Frank v. State*,[287] the court also concluded that the regulations did not violate the Alaska Constitution's free exercise clause.[288]

In *Miller v. Safeway, Inc.*,[289] the supreme court held that all of Miller's claims failed summary judgment, but that the trial court's failure to allow Miller leave to amend constituted error.[290] Miller, an Alaska Native, was terminated from his job at a Safeway store because his long hair violated Safeway company policy.[291] Miller originally claimed that the termination was unlawful

---

[277] *Id.* at 1085.
[278] *Id.* at 1087.
[279] ALASKA STAT. § 25.20.060(a) (Michie 2002).
[280] *Evans*, 88 P.3d at 1089–90.
[281] *Id.* at 1091.
[282] 90 P.3d 125 (Alaska 2004).
[283] *Id.* at 126.
[284] *Id.* at 133–34.
[285] *Id.* at 127–28.
[286] *Id.* at 129–30 (citing Turner v. Safley, 482 U.S. 78, 89 (1987)).
[287] 604 P.2d 1068, 1070–73 (Alaska 1979).
[288] 90 P.3d at 131.
[289] 102 P.3d 282 (Alaska 2004).
[290] *Id.* at 296.
[291] *Id.* at 284.

because it violated his right to privacy and constituted discrimination on the basis of gender, religion, and race.[292] The supreme court held that none of his claims survived summary judgment, and affirmed the trial court in this respect.[293] However, the court held that the failure to reach a decision on the merits of the claims in Miller's amended complaint resulted in significant hardship to Miller, and that litigating those claims would not prejudice Safeway.[294] The court therefore reversed and remanded the trial court's decision denying Miller's motion to amend his complaint.[295]

In *Ruckle v. Anchorage School District*,[296] the supreme court held that the mother of a student lacked citizen-taxpayer standing with respect to claims against the school district over its grant of school transportation contracts.[297] However, the supreme court also held that a litigant must be allowed to amend pleadings when the litigant demonstrates valid reasons for dong so and the allegations do not appear futile. [298] The Anchorage School District (ASD) granted a five-year student transportation contract to First Student in lieu of renewing with the current provider, Laidlaw Transit.[299] Laidlaw's superior court challenge against ASD was converted into an administrative appeal.[300] Then, Ruckle, a parent of ASD school children, also sought relief.[301] Citing the absence of Ruckle's citizen-taxpayer standing, the superior court granted ASD's motion to dismiss for lack of subject matter jurisdiction and refused to grant Ruckle leave to amend her complaint.[302] The supreme court agreed that Ruckle did not have standing because under the appropriateness test,[303] a more directly affected plaintiff, Laidlaw, had already brought suit.[304] However, the court held that while Ruckle was not necessarily entitled to file an amended complaint without seeking leave of the court,[305] the superior court erred in later refusing to grant leave to amend. Leave must be freely given when such leave is neither motivated by bad faith nor would result in a futile amendment.[306]

---

[292] *Id*.
[293] *Id*. at 285.
[294] *Id*. at 295.
[295] *Id*. at 296.
[296] 85 P.3d 1030 (Alaska 2004).
[297] *Id.* at 1032.
[298] *Id.* at 1039.
[299] *Id.* at 1032.
[300] *Id.*
[301] *Id.*
[302] *Id.*
[303] *Id.* at 1035.
[304] *Id.* at 1037.
[305] *Id.* at 1039.
[306] *Id.*

In *Thomas v. Anchorage Equal Rights Commission*,[307] the supreme court upheld the constitutionality of an Alaska statute[308] and an Anchorage Municipal Code ordinance[309] requiring landlords to rent to unmarried couples despite the landlords' personal religious objections to such a practice.[310] Thomas and Baker sought a declaratory judgment enjoining enforcement of the statute and code, arguing that the threat of sanctions and compulsion of rental, regardless of marital status, violated their rights of free exercise of religion and free speech.[311] Although the court found that the plaintiffs had standing and that the issue was ripe,[312] the court nonetheless held that the plaintiffs failed to meet the standards justifying a departure from *stare decisis*.[313] Therefore, the court affirmed the decisions of the lower courts that the ordinance was the least restrictive means available.[314]

In *Treacy v. Municipality of Anchorage*,[315] the supreme court upheld the constitutionality of a juvenile curfew ordinance.[316] In an effort to curb juvenile crime, Anchorage enacted an ordinance that prohibited a minor unaccompanied by a parent or guardian from visiting a public place during specified curfew hours unless engaged in certain exempt activities.[317] Minors cited under the ordinance challenged its constitutionality on the grounds that it was void for vagueness and violated their right to equal protection under the Fourteenth Amendment.[318] Their parents also challenged the ordinance as impermissibly infringing on their substantive due process right to raise their children.[319]

The supreme court held that the ordinance was not void for vagueness because ordinary people could understand the terms of the ordinance with sufficient clarity,[320] and it did not allow for undue discretion in enforcement.[321] In response to the minors' equal protection claims, the court decided to apply strict scrutiny to the ordinance because it affected the fundamental rights to intrastate travel, privacy, and speech.[322] The court held that the

---

[307] 102 P.3d 937 (Alaska 2004).
[308] ALASKA STAT. §18.80.240 (Michie 2004).
[309] ANCHORAGE, ALASKA, CODE §5.20.020.
[310] 102 P.3d at 939.
[311] *Id.*
[312] *Id.* at 942–43.
[313] *Id.* at 947.
[314] *Id.*
[315] 91 P.3d 252 (Alaska 2004).
[316] *Id.* at 271.
[317] *Id.* at 257–58.
[318] *Id.* at 260.
[319] *Id.* at 268.
[320] *Id.* at 260.
[321] *Id.* at 263.
[322] *Id.* at 265–66.

ordinance survived strict scrutiny because it was the least restrictive available means to achieve the municipality's compelling interest in protecting minors and curbing juvenile crime.[323] The supreme court also held that, among available alternatives, the ordinance was the least restrictive infringement on parents' fundamental right to make decisions concerning the care, custody, and control of their children.[324]

In *Varilek v. City of Houston*,[325] the supreme court held that the Matanuska-Susitna Borough's administrative appeal process violates the procedural due process rights of indigent litigants.[326] Varilek claimed that the borough's ordinances were unconstitutional, but this claim was dismissed as unripe because he had not exhausted his administrative remedies.[327] The borough's administrative appeal process required a flat fee with no waiver provision.[328] The supreme court concluded that a fee without possibility of waiver amounted to a denial of access to the legal system.[329] The court did not address Varilek's constitutional claims,[330] and remanded his case to superior court to determine whether Varilek met the criteria for an indigence-based claim.[331]

VI. CONTRACT LAW

In *Imperial Manufacturing Ice Cold Coolers v. Shannon*,[332] the supreme court held that the Little Miller Act did not grant a subcontractor a private right of action to sue a school district when the school district failed to ensure that the bonding requirements of the act were met.[333] Lower Kuskokwim School District contracted with Shannon for the construction of two buildings, though Shannon did not provide bonds under the Act.[334] Shannon purchased supplies from Imperial and subsequently failed to pay.[335] Imperial sued the school under the Little Miller Act, arguing the school owed Imperial a duty to ensure that Shannon complied with the bond requirements.[336] The court held that under

---

[323] *Id.* at 267.
[324] *Id.* at 269.
[325] 104 P.3d 849 (Alaska 2004).
[326] *Id.* at 850.
[327] *Id.* at 851.
[328] *Id.*
[329] *Id.* at 854–55.
[330] *Id.* at 855–56.
[331] *Id.* at 856.
[332] 101 P.3d 627 (Alaska 2004).
[333] *Id.* at 628.
[334] *Id.*
[335] *Id.*
[336] *Id.*

the Little Miller Act government entities are not liable to third parties with whom the government has no contractual relationship.[337]

In *Jackson v. American Equity Ins. Co.*,[338] the supreme court held that a trial court may decline to give the jury a special verdict form, where the form would allow a finding of insurer's breach of duty in a guarantee of payment of a judgment, were that amount to exceed the insured's policy limits.[339] Likewise, the court held that it was not plain error for the court to instruct the jury as to the duties owed to an insured by the insurer, and that the insured had failed to preserve its claim of misinstruction.[340] The Jacksons' alleged bad faith on the part of American Equity in its role as insurer of the mechanic who installed a trailer hitch that later malfunctioned, causing serious bodily injury to the Jacksons.[341] The trial jury found for the insurer, and the Jacksons appealed, claiming error on numerous counts, including: an improper special verdict form, an improper admission of expert testimony, and misinstruction of the jury.[342] The court held that the proposed special verdict form was not supported by legal authority.[343] The court further held that the instructions given to the jury did not constitute plain error because the failure to object to the instructions at trial was part of the Jacksons' legal strategy.[344] Finally, the court held that expert testimony was admissible, even when it was not in the expert report, because the report provided sufficient disclosure prior to trial and because similar evidence offered by another witness was admitted without objection.[345]

In *Peterson v. Ek*,[346] the supreme court, applying Washington state law as required by a contract's choice-of-law provision, found that Peterson breached a contract to renovate and sell a boat.[347] Peterson and Ek had agreed that Ek would purchase a boat and that Peterson would then renovate the boat for resale.[348] Peterson failed to complete the renovations on schedule, used Ek's cell phone and credit card without her authority, and then refused to turn over control of the vessel upon written demand.[349] Peterson argued that the trial court had failed to compensate him for the full

---

[337] *Id.* at 630.
[338] 90 P.3d 136 (Alaska 2004).
[339] *Id.* at 138.
[340] *Id.* at 138–39.
[341] *Id.* at 139–40.
[342] *Id.* at 140–41.
[343] *Id.* at 142.
[344] *Id.* at 144–45.
[345] *Id.* at 145–46.
[346] 93 P.3d 458 (Alaska 2004).
[347] *Id.* at 464–65.
[348] *Id.* at 461.
[349] *Id.* at 463.

value of his labor and had improperly awarded Ek certain costs and expenses.[350] The supreme court found that the contractual damages were foreseeable and that the trial court did not err in refusing to compensate Peterson for the value of his labor or materials.[351]

In *Still v. Cunningham*,[352] the supreme court held that a woman who prevailed on a civil rights claim against a bank's requirement that she sign a guaranty was entitled to the full recovery of attorney's fees.[353] In support of Vern's business, Premier Homes, Vern and Wanda Still signed identical guaranties to Northrim Bank, which Vern later revoked.[354] Premier defaulted on a loan, and the loan's assignee sued Vern and Wanda as guarantors to collect the outstanding balance.[355] Vern and Wanda claimed the revocation precluded liability for the loan and that their right to be free from discrimination based on marital status was violated because Northrim required Wanda to sign a guaranty despite Vern's creditworthiness.[356] The superior court dismissed Vern's claim, but held that Wanda's guaranty was void, and awarded her partial attorney's fees.[357] On appeal, the supreme court upheld the finding that Vern's guarantee applied to the loan in question,[358] and Vern had failed to preserve any defense of mistake or misrepresentation for appeal.[359] However, the supreme court found that the trial court erred in failing to award Wanda reasonable actual attorney's fees.[360]

VII. CRIMINAL LAW

In *Alvarez v. Ketchikan Gateway Borough*,[361] the court of appeals held that convictions under the Borough's leash law and anti-molestation ordinance require a showing of at least negligence,[362] and that minor offenses are governed by the same speedy trial requirements as other offenses.[363] Alvarez was held strictly liable for failure to properly restrain an animal and

---

[350] *Id.* at 464.
[351] *Id.* at 464–65.
[352] 94 P.3d 1104 (Alaska 2004).
[353] *Id.* at 1106.
[354] *Id.* at 1106–07.
[355] *Id.*
[356] *Id.* at 1112–13.
[357] *Id.* at 1116–17.
[358] *Id.* at 1111–12.
[359] *Id.*
[360] *Id.* at 1118.
[361] 91 P.3d 289 (Alaska Ct. App. 2004).
[362] *Id*. at 292.
[363] *Id*. at 294.

allowing an animal to run loose and bite a person.[364] The court of appeals reversed the convictions, finding the ordinances' use of the terms "permit" and "allow" imply some volition on the part of the actor and that conviction requires a showing of at least negligence.[365] Alvarez also alleged that her statutory right to a speedy trial was violated because the Borough failed bring her to trial within 120 days after her request for a jury trial,[366] as required by Alaska Criminal Rule 45(c)(6).[367] The court ruled that Rule 45(c)(2) applied to minor offenses, and therefore the time for trial did not begin to run until Alvarez was served with the Borough's second complaint.[368] Because trial commenced within 120 days of the date of service, the court rejected Alvarez's speedy trial claim.[369]

In *Cogdill v. State*,[370] the court of appeals affirmed the lower court's conviction of Cogdill for bootlegging in a community that had restricted the sale and/or possession of alcohol.[371] Codgill had been caught selling alcohol in a police sting and was convicted based on that evidence.[372] Cogdill appealed the case on the grounds that the state had refused to grant immunity to a potential witness who had asserted her privilege against self-incrimination.[373] In affirming the conviction, the court of appeals held that the witness's testimony was not essential to a fair trial, and the state had a good reason not to grant immunity to the witness.[374]

In *Howard v. State*,[375] the court of appeals held that Howard was properly convicted of second degree forgery but was improperly convicted of resisting arrest.[376] Howard was arrested after he provided a false name and fled from an officer during a traffic stop for speeding.[377] For the forgery claim, the trial court's jury instructions required the prosecution to prove that Howard intended to defraud another individual, Russell, by signing Russell's name on a traffic citation.[378] The appellate court found that the prosecution presented sufficient evidence for the jury to

---

[364] *Id*. at 291.
[365] *Id*. at 292.
[366] *Id*.
[367] *Id*. at 293.
[368] *Id.*
[369] *Id*. at 294.
[370] 101 P.3d 632 (Alaska Ct. App. 2004).
[371] *Id.* at 632–33.
[372] *Id.* at 633.
[373] *Id.*
[374] *Id.* at 636.
[375] 101 P.3d 1054 (Alaska Ct. App. 2004).
[376] *Id.* at 1059.
[377] *Id.* at 1055.
[378] *Id.* at 1057.

conclude that Howard intended to defraud Russell because Howard knew of the consequences that Russell would face as a result of his signature appearing on the citation.[379] Therefore, the conviction for forgery was affirmed.[380]

The appellate court reversed Howard's conviction for resisting arrest because it found that he did not use "force" in resisting arrest, as required by statute.[381] The court interpreted the relevant statute as requiring physical contact between the arresting officer and the defendant beyond mere noncompliance with arrest.[382] Because the arresting officer only grabbed Howard's jacket as Howard fled, this was not sufficient contact under the resisting arrest statute.[383] Furthermore, the statute does not apply to situations where the defendant is merely trying to evade arrest or hide from the officer.[384]

In *Jackson v. State*,[385] the court of appeals held that the requirement for joint operation of conduct and culpable mental state is satisfied when the defendant's mental state triggers the prohibited conduct, even if the two do not occur simultaneously.[386] Jackson mistakenly missed two scheduled court dates, and was convicted on two counts of failure to appear in court.[387] Jackson argued that the joint operation requirement necessitated a finding that his failure to appear was accompanied by a *mens rea* of knowledge about the failure.[388] The court of appeals upheld his convictions, concluding that Jackson's criminal act was attributable to his previous culpable mental state.[389]

In *Knutsen v. State*,[390] the court of appeals held that Knutsen was liable for eight counts of indecent photography when he hid a video camera in a women's locker room.[391] Knutsen was convicted of two misdemeanor counts of indecent photography of adult women and six felony counts of indecent photography of young girls.[392] Knutsen appealed, arguing that he did not have a culpable mental state with regard to videotaping children, but only with regard to videotaping adults.[393] The court of appeals rejected

---

[379] *Id.*
[380] *Id.* at 1060.
[381] *Id.* at 1059.
[382] *Id.*
[383] *Id.*
[384] *Id.*
[385] 85 P.3d 1042 (Alaska Ct. App. 2004).
[386] *Id.* at 1043.
[387] *Id.*
[388] *Id.* at 1042–43.
[389] *Id.* at 1043–44.
[390] 101 P.3d 1065 (Alaska Ct. App. 2004).
[391] *Id.* at 1071.
[392] *Id.* at 1066.
[393] *Id.*

this argument, holding that the fact that he did not intend to videotape minors when he set up the camera was no defense when his act of setting up the camera led to the taping of young girls.[394] The court also rejected Knutsen's double jeopardy argument and concluded that Knutsen could be liable for eight criminal counts even though he had only set up the video camera once. [395]

In *McGee v. State*,[396] the court of appeals upheld the defendant's conviction rejected the claim of self-defense because there was no evidence that he faced imminent injury.[397] McGee was convicted of third-degree criminal mischief for breaking the windows of a truck belonging to Alexander.[398] McGee claimed that he did so to prevent Alexander from running him over with the truck.[399] The court of appeals found no evidence in the record to suggest the threat of harm was imminent, and therefore, the claim of self-defense failed.[400] In addition, based on its assessment of the trial record, the court of appeals upheld the sentencing judge's rejection of mitigating factors and imposition of an enhanced sentence for committing an offense while on felony probation.[401]

In *Ridlington v. State*,[402] the court of appeals held that double jeopardy did not bar the state from prosecuting a defendant for felony Driving While Intoxicated (DWI) even though the defendant has already plead guilty to a misdemeanor DWI charge stemming from the same conduct.[403] Ridlington was initially charged with a misdemeanor DWI and later charged with a felony DWI when police discovered that he had two prior DWI convictions.[404] Ridlington pled guilty to the misdemeanor, but the superior court dismissed the misdemeanor charge and indicted him for felony DWI.[405] The court of appeals held that the Double Jeopardy Clause does not preclude the state from prosecuting greater pending offenses when the defendant has pled guilty to lesser included offenses, especially when only one trial was contemplated by the state.[406]

In *Robart v. State*,[407] the court of appeals affirmed Robart's conviction for using the state seal for commercial purposes without

---

[394] *Id.* at 1071.
[395] *Id.*
[396] 95 P.3d 945 (Alaska Ct. App. 2004).
[397] *Id.* at 947.
[398] *Id.* at 946.
[399] *Id.*
[400] *Id.* at 947.
[401] *Id* .at 949.
[402] 93 P.3d 471 (Alaska Ct. App. 2004).
[403] *Id.* at 472.
[404] *Id.* at 471.
[405] *Id.* at 472.
[406] *Id.* at 472–73.
[407] 82 P.3d 787 (Alaska Ct. App. 2004).

permission.[408] Robart argued on appeal that federal copyright law preempted the state seal protection statute and, alternatively, that the jury instructions provided by the trial court had not adequately explained his defense.[409] The court of appeals found that federal copyright law did not preempt the state statute because state seals were more similar to trademarks than they were to the types of works covered by copyright law.[410] The court of appeals also found that the jury instructions adequately explained a "mistake of fact" defense.[411] Thus, the court of appeals upheld Robart's conviction under the state seal protection statute.[412]

In *Robbins v. State*,[413] the court of appeals affirmed a probation condition that required the defendant to pay 40% of his net income for the support of his family.[414] Robbins plead guilty to one count of attempted first-degree abuse of a minor for sexually abusing his eleven-year old daughter.[415] Subsequent sentencing resulted in an eight year term with three years suspended and probation conditions including a requirement that Robbins send up to 40% of his net income to support his family.[416] In rejecting Robbins's argument that said probation condition was not reasonably related to the protection of the public or his rehabilitation, the court explained that a judge may consider a defendant's financial support of his family as part of the defendant's rehabilitation.[417] Thus, the court held that the trial court's conclusion that Robbins's rehabilitation would benefit by imposing such financial conditions was reasonable.[418]

In *State v. Yi*,[419] the court of appeals held that an unreasonable belief in the legality of a transaction would not suffice to establish the defense of entrapment.[420] Yi illegally traded alcohol for a bear gall bladder to an undercover state trooper.[421] At trial, Yi raised the defense of entrapment and claimed that the trooper suggested structuring the deal as a trade rather than a sale.[422] The court of appeals rejected the defense, noting that both the sale of alcohol and the sale of bear gall

---

[408] *Id.* at 789.
[409] *Id.* at 790.
[410] *Id.* at 792–93.
[411] *Id.* at 794.
[412] *Id.* at 789.
[413] 97 P.3d 84 (Alaska Ct. App. 2004).
[414] *Id.* at 85.
[415] *Id.*
[416] *Id.*
[417] *Id.*
[418] *Id.* at 85–86.
[419] 85 P.3d 469 (Alaska Ct. App. 2004).
[420] *Id.* at 473.
[421] *Id.* at 470.
[422] *Id.*

bladders are illegal and merely restructuring the two transactions as one would not make the trade legal.[423] Therefore, Yi's reliance on the officer's suggestion was unreasonable and insufficient to establish entrapment.[424]

In *Timothy v. Alaska*,[425] the court of appeals held that the legal definition of "burglary" does not include a motor vehicle not "adapted for overnight accommodation," and thus an Illinois burglary conviction that included all motor vehicles was too broad to be used for sentence enhancement.[426] Timothy was convicted of assault and his sentence was enhanced based on three prior convictions in Illinois.[427] Timothy argued that the Alaska definition of burglary is narrower than the definition of burglary in Illinois and that presumptive sentencing must be based on prior convictions which are similar under both Alaska law and the law of the convicting state.[428] The court found that Timothy's prior convictions did not qualify for presumptive sentencing because only vehicles adapted for overnight accommodation fit the definition of "building."[429] The court vacated the sentence and remanded the case.[430]

In *Wells v. State*,[431] the court of appeals held the statutory definition of "medical treatment" received by a child for injuries sustained was unclear and therefore reversed the petitioner's third degree assault conviction.[432] Wells was caring for his girlfriend's nine-month-old child when the child sustained several bruises to the head.[433] Over Wells's objections, the child was taken to the hospital where several tests were performed to check for internal injuries but the child was deemed stable enough no to be admitted.[434] In order to commit third degree assault a person eighteen years of age or older must recklessly cause physical injury to a child under ten which requires medical treatment.[435] Wells claimed that since the child's injuries healed on their own the care received by the child did not constitute medical treatment.[436] The court held that the statutory definition of medical treatment was unclear, and therefore, the statute must be construed against the

---

[423] *Id.* at 472.
[424] *Id.* at 473.
[425] 90 P.3d 177 (Alaska Ct. App. 2004).
[426] *Id.* at 180.
[427] *Id.* at 178.
[428] *Id.* at 178–79.
[429] *Id.* at 181.
[430] *Id.*
[431] 102 P.3d 972 (Alaska Ct. App. 2004).
[432] *Id.* at 973.
[433] *Id.*
[434] *Id.* at 975.
[435] *Id*. (citing ALASKA STAT 11.41.220(a)(1(C)(i) (Michie 2004)).
[436] 102 P.3d at 974.

government.[437] Accordingly, the court found that the child's medical care did not constitute medical treatment and reversed Wells's conviction for third degree assault.[438]

VIII. CRIMINAL PROCEDURE & EVIDENCE

In *Adams v. State*,[439] the court of appeals held that a police officer's pat-down search was not warranted when there was no imminent public danger or likelihood that serious harm to persons or property had recently occurred, and that evidence obtained during that search was inadmissible.[440] During an investigative stop, a police officer conducted a pat-down search of Adams, a passenger in a car, and found cocaine in Adams's possession.[441] The trial court held that the officer was entitled to conduct the pat-down search and denied Adams's motion to suppress the evidence.[442] Following the *Coleman v. State*[443] standard, the court held that the officer was not authorized to conduct a pat-down search because he did not have information that would lead a reasonable officer to believe that there was imminent public danger or the recent occurrence of serious harm to persons or property.[444]

In *Albers v. State*,[445] the court of appeals held that a police officer was justified in ordering a suspect to open his hand during a drug-related investigative stop because the officer reasonably believed that the suspect was holding an object that could be used as a weapon.[446] Albers sought to exclude drug evidence that the officer found in his clenched hand, arguing that the officer had no reason to believe that he was armed.[447] The court held that the officer's search was reasonable in light of the fact that persons suspected of a felony drug offense are likely to carry small weapons and engage in violence when confronted by police.[448]

In *Anderson v. State*,[449] the court of appeals affirmed a conviction for misconduct involving a controlled substance despite an illegal search due to the fact that the contraband discovery was

---

[437] *Id.* at 976.
[438] *Id.* at 977.
[439] 103 P.3d 908 (Alaska Ct. App. 2004).
[440] *Id.* at 911.
[441] *Id.* at 909.
[442] *Id.* at 910.
[443] 553 P.2d 40 (Alaska 1976).
[444] 103 P.3d at 910–11.
[445] 93 P.3d 473 (Alaska Ct. App. 2004).
[446] *Id.* at 476–77.
[447] *Id.* at 476.
[448] *Id.*
[449] 91 P.3d 984 (Alaska Ct. App. 2004).

inevitable.[450] Anderson was arrested on an outstanding warrant with a pre-set bail.[451] When he arrived at the police station, an officer conducted a pre-incarceration inventory of Anderson's pockets without first asking if he could post bail.[452] The search revealed trace amounts of methamphetamine.[453] The court of appeals held that this search was impermissible because the State could not demonstrate any exigency that would necessitate conducting the search before providing Anderson with an opportunity to raise bail.[454] Nonetheless, the court affirmed Anderson's conviction because the methamphetamine would have been discovered through predictable investigative processes.[455]

In *Brodigan v. State*,[456] the court of appeals held that the district court could impose a mandatory minimum sentence based on the defendant's prior convictions when the defendant failed to provide evidence that these convictions were based on an unconstitutionally vague regulation.[457] Brodigan was convicted of misdemeanor Driving While Intoxicated (DWI) and faced an enhanced sentence of 360 days imprisonment because of six prior DWIs.[458] Brodigan argued that the court should presume that his prior convictions were invalid because a clause in the regulation under which he was convicted was later held to be unconstitutionally vague.[459] The court of appeals disagreed, holding that a defendant carries the burden of producing some evidence of a constitutional flaw in a prior conviction[460] Here Brodigan did not produce any evidence to show that his convictions were among the small number of DWI convictions struck down for vagueness under the regulation.[461] The district court, therefore, properly relied on Brodigan's prior convictions in imposing a mandatory minimum sentence.[462]

In *City of Kodiak v. Samaniego*,[463] the supreme court held that exigent circumstances must be present for police to detain a witness to a crime[464] and affirmed the lower courts' decisions to

---

[450] *Id*. at 988.
[451] *Id*. at 985.
[452] *Id*. at 986.
[453] *Id.*
[454] *Id*. at 987.
[455] *Id*. at 988.
[456] 95 P.3d 940 (Alaska Ct. App. 2004).
[457] *Id.* at 944–45.
[458] *Id.* at 940–41.
[459] *Id.* at 941.
[460] *Id.* at 944.
[461] *Id.*
[462] *Id.* at 945.
[463] 83 P.3d 1077 (Alaska 2004).
[464] *Id*. at 1084.

refuse proposed jury instructions[465] and to exclude certain evidence.[466] Kodiak Police Sergeant Marsh detained Julia Samaniego and her daughter, Marsha, as potential witnesses.[467] The superior court denied Kodiak's motion for summary judgment, refused to give Kodiak's jury instructions, and excluded two items of Kodiak's evidence, expert testimony and a pocket knife.[468] A jury found that Marsh falsely confined and committed battery against Marsha.[469] Kodiak appealed the superior court's denial of summary judgment, claiming that Marsh reasonably believed exigent circumstances justified stopping Martha, and in the alternative, that exigent circumstances should not be required for an officer to detain witnesses at the scene of a traffic stop.[470] Kodiak also appealed the superior court's refusal to give requested jury instructions, exclusion of the knife and the expert, and adjustment of Martha's award of attorney's fees.[471] The supreme court held that exigent circumstances are necessary to justify detention of a witness to a crime.[472] The court upheld rulings of the superior court.[473]

In *Cleveland v. State*,[474] the court of appeals rejected Cleveland's argument that the trial court improperly excluded evidence tending to show that the crimes of second-degree sexual assault and second-degree assault were committed by someone else.[475] The appellate court concluded that the trial court did not abuse its discretion when it refused to admit hearsay and certain physical evidence offered by the defendant because such exclusions were not based on a determination that the evidence was offered for an improper purpose, but rather were soundly excluded based on the Alaska Rules of Evidence.[476] Further, no exception to the hearsay rules was available based on Cleveland's defense that another may have committed the crime because the evidence sought to be admitted was that of a mere motive or character and failed to directly connect another party with the actual commission of the crime.[477] The court also upheld sentencing for a term greater than the normal ten year ceiling based on Cleveland's two prior felony convictions, his conviction history

[465] *Id*. at 1085–86.
[466] *Id*. at 1087–88.
[467] *Id*. at 1080–81.
[468] *Id*. at 1081.
[469] *Id*.
[470] *Id*. at 1083–84.
[471] *Id*. at 1082.
[472] *Id*.
[473] *Id*. at 1088.
[474] 91 P.3d 965 (Alaska Ct. App. 2004).
[475] *Id.* at 966.
[476] *Id.* at 971.
[477] *Id.* at 972, 981.

for criminal assaults, and because substantial aggravating factors existed to support a greater sentence.[478]

In *Crawford v. Drvenkar*,[479] the supreme court held that police officers conducted a legal search of plaintiff Crawford's car and were immune from common law claims.[480] A police officer pulled Crawford over for a traffic violation and asked for his driver registration.[481] When Crawford retrieved the registration from his glove compartment, the officer believed he spotted a metallic object resembling a handgun.[482] A search revealed that the metal object was a vice grips, not a handgun.[483] Crawford sued the officers for monetary damages and argued that his right to be free of unreasonable searches under the state and federal constitutions had been violated.[484] In light of Crawford's admission that the pat-down search was reasonable, the court held that the search was not unreasonable.[485] The court also held that qualified immunity protects the police officers from § 1983 claims because it was reasonable to believe that this search was lawful.[486]

In *Crawford v. State*,[487] the court of appeals upheld the search of a vehicle's console during a traffic stop when the police officer conducting the stop reasonably believed the console contained a concealed weapon.[488] Crawford was stopped by a police officer who observed him driving erratically, then "fidgeting" in the driver's seat as if moving an object.[489] The officer arrested Crawford for reckless driving, and then opened the center console expecting to find a weapon.[490] Instead, the officer found crack cocaine and paraphernalia, which served as evidence toward Crawford's conviction for misconduct involving a controlled substance.[491] The court of appeals held that the search was justified as incident to arrest and the officer had an articulable and reasonable basis to conclude that the console contained a weapon.[492]

---

[478] *Id.* at 982.
[479] 2004 Alas. LEXIS 111 (Alaska 2004).
[480] *Id.* at 2, 29–30.
[481] *Id.* at 3.
[482] *Id.* at 5–6.
[483] *Id.* at 6.
[484] *Id.* at 8.
[485] *Id.* at 18.
[486] *Id.* at 24.
[487] 87 P.3d 824 (Alaska Ct. App. 2004).
[488] *Id*. at 826.
[489] *Id*. at 825–26.
[490] *Id*. at 826.
[491] *Id*.
[492] *Id*.

In *Custer v. State*,[493] the court of appeals held that the composite jail time for multiple offenses is the relevant factor in reviewing the length of a sentence.[494] Custer was convicted on two assault counts, and sentenced to five years imprisonment with four years suspended in each case.[495] After multiple probation violations, the superior court revoked Custer's probation and imposed the remaining 38 months on one count and three months on the other.[496] Custer appealed the 38-month sentence, arguing that it violated sentencing rules and was mistakenly severe.[497] The court of appeals upheld the long sentence because it was part of a composite and the combined time was justified by Custer's repeated probation violations.[498] The court concluded that Custer's composite sentence was not mistakenly severe given his criminal history, his two felony convictions, and his probation violations.[499]

In *Dayton v. State*,[500] the court of appeals affirmed a superior court ruling admitting DNA profile evidence in a sexual assault case.[501] Dayton argued that expert testimony was inadmissible under Alaska Evidence Rule 703 because the state failed to establish reliability of the Athabascan DNA database on which the expert relied.[502] The superior court determined that the database was reliable under Rule 703 because it constituted the type of data that DNA experts rely upon and because it was described in a peer-reviewed publication.[503] The court of appeals held that the superior court's finding that the database was reliable was supported by substantial evidence.[504]

In *Frank v. State*,[505] the court of appeals held that the Alaska Parole Board did not provide an adequate basis for its denial of a prison inmate's application for discretionary parole.[506] After serving twenty years of a life sentence, Frank was denied discretionary parole and told that he could reapply only after serving an additional ten years.[507] The court held that pursuant to statutory law the Board must provide sufficient details in a denial of parole such that an inmate can guide his future behavior and

---

[493] 88 P.3d 545 (Alaska Ct. App. 2004).
[494] *Id.* at 549–50.
[495] *Id.*
[496] *Id.* at 548.
[497] *Id.* at 547.
[498] *Id.* at 549–50.
[499] *Id.*
[500] 89 P.3d 806 (Alaska Ct. App. 2004).
[501] *Id.* at 807.
[502] *Id.* at 808.
[503] *Id.* at 809.
[504] *Id.*
[505] 97 P.3d 86 (Alaska Ct. App. 2004).
[506] *Id.* at 87.
[507] *Id*.

prepare for a more successful future application.[508] Further, sufficient detail is necessary because a reviewing court must be able to determine whether parole was denied for an impermissible reason.[509] The court ordered the Board to reissue a revised decision because it failed to sufficiently describe the deficiencies of Frank's release plan.[510]

In *Goldsbury v. State*,[511] the court of appeals held that the superior court committed a procedural error by failing to require the defendant's attorney to give a detailed explanation of why he believed his client had no arguable claims for post-conviction relief.[512] Goldsbury's court-appointed counsel filed a certificate conceding that his client had no arguable claim for post-conviction relief.[513] The court of appeals held that a certificate filed pursuant to Alaska Criminal Rule 35.1(e)(2)(B) must contain sufficient detail to allow the superior court to independently assess whether the defendant has any potential claims for post-conviction relief.[514] The court held that Goldsbury's attorney failed to meet this standard because the certificate was conclusory and lacked sufficient factual detail.[515] Therefore, the superior court did not fulfill its obligation to independently assess the potential merit of Goldsbury's claims under Alaska.[516]

In *Gross v. State*,[517] the court of appeals held that the superior court's exclusion of testimony offered as character evidence constituted harmless error.[518] At trial, Gross attempted to call a character witness, but the court ruled that the evidence would be inadmissible unless Gross testified as well.[519] Gross testified and did not further contest the issue.[520] The court of appeals held that the evidence was admissible even if Gross did not testify.[521] However, the error was harmless because Gross did not contend that the ruling affected his decision to testify.[522]

In *Guerre-Chaley v. State*,[523] the court of appeals held that an expert opinion based on scientific evidence is not admissible

---

[508] *Id.* at 90.
[509] *Id.*
[510] *Id.* at 89–93.
[511] 93 P.3d 468 (Alaska Ct. App. 2004).
[512] *Id.* at 469.
[513] *Id.*
[514] *Id.*
[515] *Id.* at 470.
[516] *Id.* at 470–71.
[517] 96 P.3d 525 (Alaska Ct. App. 2004).
[518] *Id.* at 526.
[519] *Id.* at 525.
[520] *Id.* at 526.
[521] *Id.* at 525.
[522] *Id.* at 526.
[523] 88 P.3d 539 (Alaska Ct. App. 2004).

under Alaska Evidence Rule 703 unless the underlying evidence meets the *Daubert-Coon* test.[524] Guerre-Chaley was charged with driving while intoxicated.[525] At trial, the judge excluded the results of a preliminary breath test because the defense did not present evidence to establish that the test satisfied the *Daubert-Coon* standard of scientific validity.[526] On appeal, Guerre-Chaley argued that the results of the breath test were admissible under Rule 703, which permits an expert witness to base an opinion on otherwise inadmissible scientific evidence as long as other experts reasonably rely on such evidence.[527] The court of appeals disagreed, holding that Rule 703 requires that data underlying a scientific conclusion also must meet the *Daubert-Coon* test for admissibility.[528]

In *Herrin v. State*,[529] the court of appeals held that the superior court is not required to order explicitly the tolling of a defendant's probation when the judge orally pronounces a defendant's sentence.[530] Herrin was serving a prison sentence for first-degree stalking and assault against his then-wife.[531] Shortly before he was released on parole, he wrote threatening letters to her.[532] Herrin was indicted for first-degree stalking and the state petitioned the superior court to revoke his probation.[533] The superior court revoked Herrin's prior probation date and extended the probation period by the length of time the petition was pending.[534] Herrin argued that the court erred because the judge did not orally order revocation of his probation; however, while an oral proclamation controls when there is a discrepancy between the written judgment and the oral sentence in discretionary matters, this rule does not apply to non-discretionary matters set by statute.[535] Here the disputed issue was covered by statute, therefore it was inconsequential that the judge did not orally revoke Herrin's probation sentencing.[536]

In *Hertz v. State*,[537] the court of appeals held that it did not have jurisdiction to consider a post-conviction petition from a state prisoner alleging improper and unconstitutional treatment by the

---

[524] *Id*. at 544.
[525] *Id*. at 541.
[526] *Id*.
[527] *Id*. at 541–42.
[528] *Id*. at 544.
[529] 93 P.3d 477 (Alaska Ct. App. 2004).
[530] *Id*. at 478.
[531] *Id.*
[532] *Id.*
[533] *Id.*
[534] *Id.*
[535] *Id.*
[536] *Id.*
[537] 81 P.3d 1011 (Alaska Ct. App. 2004).

Alaska Department of Corrections.[538] Hertz, an inmate convicted of second-degree murder, claimed that he was denied adequate legal assistance and medical care in prison and was subject to retaliation by the Department of Corrections after filing a petition for post-conviction relief.[539] The court of appeals noted that state law provides that procedural matters related to conviction and sentencing be brought before that court.[540] However, the state supreme court was the proper venue for raising prison condition and disciplinary claims.[541] Therefore, the court of appeals dismissed Hertz's appeal for lack of jurisdiction.[542]

In *James v. State*,[543] the supreme court held that the trial court improperly failed to consider whether a recantation by the key prosecution witness would have resulted in James' acquittal in a new trial.[544] James had been convicted of sexual assault and sexual abuse of a minor, largely on the strength of the testimony of Danielle M., a fourteen year-old girl claiming to have seen the assault.[545] When Danielle later recanted her testimony in an affidavit, James appealed for a new trial.[546] After an evidentiary hearing, the trial court found that the recantation was not credible.[547] James appealed, arguing the court had erred in basing its denial entirely upon the credibility of the recantation.[548] The supreme court agreed, holding that the proper standard required the trial court to consider whether the recantation, in addition to all other evidence, would likely result in an acquittal at a new trial.[549]

In *Jeffries v. State*,[550] the court of appeals found no error in the admission of evidence of Jeffries' prior bad acts, and that there was a sufficient showing of the defendant's mental state for the jury to convict him of second-degree murder.[551] Driving while intoxicated, Jeffries turned in front of another vehicle, and his passenger died in the ensuing collision.[552] Jeffries was convicted of second-degree murder, which requires a reckless state of mind demonstrating "an extreme indifference to the value of human

---

[538] *Id.* at 1014–15.
[539] *Id.* at 1012.
[540] *Id.* at 1013–14.
[541] *Id.* at 1014.
[542] *Id.* at 1015.
[543] 84 P.3d 404 (Alaska 2004).
[544] *Id.* at 408.
[545] *Id.* at 404–05.
[546] *Id.* at 405.
[547] *Id.* at 405–06.
[548] *Id.* at 406.
[549] *Id.* at 408.
[550] 90 P.3d 185 (Alaska Ct. App. 2004).
[551] *Id.* at 194.
[552] *Id.* at 187.

life."[553] The State introduced evidence to establish "extreme indifference," including facts related to Jeffries' recidivism and consumption of alcohol in violation of his probation on the date of the accident.[554] Jeffries argued that there was insufficient evidence to support his conviction because his mental state should only be inferred from his actions while driving and his only demonstrated driving error was a left turn into an oncoming vehicle.[555] The court evaluated the difference between manslaughter and second-degree murder, and concluded the question for the jury was whether the defendant's "level of awareness of the risk" was equal to or greater than "recklessness" as defined by the statute.[556] The court held that the jury was entitled to consider the evidence submitted by the State to evaluate whether or not Jeffries acted with such extreme recklessness to warrant a murder conviction.[557] Consequently, evidence admitted to show the degree of the defendant's recklessness was not unfairly prejudicial, and Jeffries' conviction was affirmed.[558]

In *Johnson v. State*,[559] the court of appeals held that evidence of cocaine possession was admissible when discovered during a search incident to arrest for a "minor on licensed premises" violation.[560] A city police officer arrested Johnson for being in a bar and underage alcohol consumption.[561] Patting down Johnson's pockets, the officer found four small bags of cocaine.[562] Johnson moved to suppress this evidence as beyond the scope of a search for weapons or for evidence related to crimes for which the police have probable cause to arrest. [563] The court of appeals upheld the search because evidence supporting a "minor on licensed premises" charge could be concealed on an individual's person.[564]

In *Keller v. State*,[565] the court of appeals affirmed the lower court's denial of Keller's motion to dismiss because the delay in bringing Keller to trial was for good cause.[566] Charges against Keller alleging that he drove intoxicated were originally filed in

---

[553] *Id.*
[554] *Id.* at 186.
[555] *Id.* at 187.
[556] *Id.* at 189.
[557] *Id.* at 193–94.
[558] *Id.* at 194.
[559] 88 P.3d 1137 (Alaska Ct. App. 2004).
[560] *Id.* at 1139.
[561] *Id.* at 1138.
[562] *Id.*
[563] *Id.* at 1139.
[564] *Id.*
[565] 84 P.3d 1010 (Alaska Ct. App. 2004).
[566] *Id.* at 1015.

the Bethel district court.[567] However, the case was ultimately assigned to a judge in Fairbanks after three judges recused themselves due to their professional relationship with Keller's father, the local bailiff.[568] As a result of the delay caused by the recusals and reassignments, Keller was not brought to trial within the 120 days required.[569] Judges have a duty to recuse themselves not only when they cannot be fair and unbiased but also when a reasonable person may question their impartiality.[570] The court of appeals held that the four-day delay in this case was excused because it was for good cause.[571]

In *Landt v. State*,[572] the court of appeals held that a trial court judge did not abuse his discretion by allowing jurors to pose questions to witnesses in a criminal trial.[573] Landt was convicted of driving while intoxicated and tampering with evidence, but acquitted of manslaughter and criminally negligent homicide.[574] At trial, the judge allowed the jury to submit questions for witnesses.[575] The jury presented fifty-two questions, of which the judge put forth forty-two to the witnesses.[576] The court of appeals determined that the judge had avoided compromising the jury's impartiality by reviewing the submitted questions with counsel for both parties outside the jury's presence.[577]

In *Larkin v. State*,[578] the court of appeals held that a defect in form in the indictment was not grounds for reversing a jury verdict as long as it did not prejudice the ability of the defendant to prepare or present a defense.[579] Larkin was convicted for second-degree sexual abuse of a minor.[580] On appeal, Larkin argued that because the date specified in the indictment was not the same date shown by the evidence, he could not be convicted as a matter of law.[581] Affirming the trial court, the court of appeals concluded that the allegation of date is not an element of a crime unless made material by the statute defining the offense.[582] The outcome of a trial cannot be affected by a defect of form in the indictment unless

---

[567] *Id.* at 1010.
[568] *Id.*
[569] *Id.* at 1011.
[570] *Id.* at 1011–12.
[571] *Id.* at 1012.
[572] 87 P.3d 73 (Alaska Ct. App. 2004).
[573] *Id*. at 80.
[574] *Id*. at 76.
[575] *Id*. at 75.
[576] *Id*. at 76.
[577] *Id*. at 80.
[578] 88 P.3d 153 (Alaska Ct. App. 2004).
[579] *Id*. at 157.
[580] *Id*. at 154.
[581] *Id.*
[582] *Id.* at 157.

it can be shown that the defect prejudiced the substantial rights of the defendant.[583]

In *MacDonald v. State*,[584] the court of appeals dismissed a petition for post-conviction relief.[585] MacDonald was convicted of second degree escape after he fled from police.[586] In his appeal for post-conviction relief, MacDonald asserted that his trial attorney was incompetent for failing to argue that his conduct did not constitute second-degree escape, because the police had not yet arrested him but merely touched him.[587] The court of appeals held, however, that an arrest is complete if the arrestee is touched by an officer, even if the officer "does not succeed in stopping or holding [him] even for an instant."[588] The court of appeals affirmed the lower court's dismissal of MacDonald's petition for post-conviction relief because he was under arrest, according to the common law definition, at the time he escaped.[589]

In *Nason v. State*,[590] the court of appeals held that the trial court judge erred by allowing Nason to be shackled in front of a jury without a hearing to determine whether restraints were necessary.[591] Nason was convicted of first degree assault and third degree weapon misconduct.[592] At trial, Nason's wrists and ankles were shackled.[593] Nason's attorney objected to the shackles, but the trial court judge refused to hold a hearing on the necessity of the restraints.[594] On appeal, the court of appeals held that the judge erred by failing to hold a hearing, but remanded to the trial court to determine whether Nason was prejudiced by the error.[595] Also on appeal, Nason argued that the police did not have valid consent to search the cabin in which he was found.[596] The court of appeals held that the victim of the assault, who was the owner of the cabin, had given valid consent.[597]

In *Parker v. State*,[598] the court of appeals denied Parker's request that the court reconsider allowing him to withdraw his plea

---

[583] *Id*. at 158.
[584] 83 P.3d 549 (Alaska Ct. App. 2004).
[585] *Id.* at 552.
[586] *Id.* at 550.
[587] *Id.*
[588] *Id.* at 550–51.
[589] *Id.*
[590] 102 P.3d 966 (Alaska Ct. App. 2004).
[591] *Id.* at 967.
[592] *Id*. at 969.
[593] *Id*.
[594] *Id*.
[595] *Id*. at 970.
[596] *Id*.
[597] *Id*. at 971.
[598] 90 P.3d 194 (Alaska Ct. App. 2004).

bargain agreement.[599] Parker was indicted for unlawful exploitation of a minor, possession of child pornography, third degree controlled substance abuse, interference with official proceedings and three counts of first-degree controlled substance abuse.[600] Parker initially pleaded no contest to the three felonies in a plea bargain with the state, but later tried to withdraw his pleas.[601] Parker sought to withdraw his plea on the ground that he had misunderstood the strategic consequences of losing a suppression motion.[602] The court of appeals rejected this petition because nothing in the record supported his contention.[603] However, the court did find that Parker had successfully offered mitigating evidence for two of his crimes and remanded the case to the lower court for resentencing.[604]

In *Powell v. State*,[605] the court of appeals held that a consecutive sentence imposed for multiple violations of the same offense may exceed the maximum allowable sentence for a single offense if the defendant poses a danger to the public safety and previous attempts at rehabilitation have failed.[606] Powell was convicted of two counts of first-degree assault, one count of reckless endangerment, and one count of driving while intoxicated in connection with a vehicular accident in which four persons were injured.[607] Citing Powell's criminal history,[608] the trial judge sentenced him to 26 years in prison.[609] Powell argued on appeal that the sentence was too harsh because it exceeded the twenty-year maximum for first-degree assault and was longer than any sentence imposed for vehicular manslaughter.[610] The court of appeals upheld the consecutive sentence, finding it justified by Powell's extensive criminal history.[611]

In *Reichel v. State*,[612] the court of appeals held that an investigative stop of a parolee was improper because there was no evidence indicating that the parolee's conduct posed an imminent

---

[599] *Id.* at 199.
[600] *Id.* at 196.
[601] *Id.* at 195.
[602] *Id.*
[603] *Id.* at 199.
[604] *Id*. at 200.
[605] 88 P.3d 532 (Alaska Ct. App. 2004).
[606] *Id*. at 539.
[607] *Id*. at 533.
[608] *Id*. at 536. This history included three prior felony convictions, eleven convictions for driving while intoxicated, eight convictions for driving on a suspended license, and numerous other misdemeanors. *Id.* at 534.
[609] *Id*. at 538.
[610] *Id*. at 533.
[611] *Id*. at 539.
[612] 101 P.3d 197 (Alaska Ct. App. 2004).

danger to public safety.[613] Reichel, on parole following a DWI conviction, was observed by police officers as he violated the terms of his parole, which prohibited him from either consuming alcohol or being on premises where alcoholic beverages are sold.[614] After stopping Reichel and contacting his parole officer, the police officers searched Reichel and found cocaine in his pocket.[615] The trial court denied Reichel's motion to suppress the cocaine evidence during a trial for controlled substances misconduct.[616] Without evidence that Reichel posed an imminent threat to public safety by driving while intoxicated, the court of appeals held that the investigative stop was not authorized and that the suppression of evidence motion should have been granted.[617]

In *Riggins v. State*,[618] the court of appeals held that the superior court abused its discretion when it admitted evidence that a criminal defendant accused of assaulting his girlfriend had committed prior assaults against a different girlfriend.[619] After admitting evidence that Riggins had previously committed assaults on a prior girlfriend, the lower court convicted Riggins of assault in the second degree for striking his girlfriend in the face with a dangerous instrument.[620] The court of appeals held that although the evidence did suggest defendant's character to become violent, the state had more relevant evidence to establish this character trait, including defendant's prior assaults on his current girlfriend.[621] Additionally, the danger of unfair prejudice from admitting the evidence of these assaults outweighed its probativity.[622] Therefore, the court could not find that admission of the evidence constituted harmless error and reversed Riggins's conviction.[623]

In *Ritter v. State*,[624] the court of appeals held that a crime for which the defendant was separately convicted and sentenced could not serve as an aggravating factor in determining the sentence for another crime.[625] Ritter, a massage therapist, was indicted for sexually assaulting three of his clients and pled no contest to a single count of second-degree assault.[626] After

---

[613] *Id.* at 202–03.
[614] *Id.* at 198.
[615] *Id.*
[616] *Id.* at 203.
[617] *Id.* at 202–03.
[618] 101 P.3d 1060 (Alaska Ct. App. 2004).
[619] *Id.* at 1061.
[620] *Id*.
[621] *Id.* at 1064.
[622] *Id*.
[623] *Id*.
[624] 97 P.3d 73 (Alaska Ct. App. 2004).
[625] *Id*. at 82.
[626] *Id.* at 74.

sentencing, Ritter challenged his plea and it was set aside.[627] Ritter was then convicted at trial for the three original counts and an additional count that occurred while he was out on bail.[628] The court of appeals upheld the four convictions concluding there was sufficient evidence that Ritter's sexual contact was made without consent.[629] Ritter also appealed his sentence on four different theories. First, he claimed that it violated his right to due process because it was greater than the sentence he initially received under his plea bargain.[630] The court rejected this argument because Ritter chose to challenge and set aside his plea.[631] Second, Ritter claimed his sentence was excessive because it was greater than the presumptive term for a second time offender.[632] Although Ritter was a first time offender, the court held that the judge had good reason for exceeding the presumptive term considering the nature of Ritter's four counts.[633] Third, Ritter challenged the conclusion that his crime was "aggravated" because his victims were particularly vulnerable.[634] The court held that his victims were vulnerable due to the therapist-patient relationship.[635] Fourth, Ritter argued that the judge erred in finding his conduct was aggravated because of repeated sexual assaults.[636] The court agreed and held that Ritter's separate conviction could not be double counted as an aggravating fact.[637] As a result, the court remanded for consideration of a new sentence without this aggravator.[638]

In *Sipary v. State*,[639] the court of appeals affirmed Sipary's conviction, rejecting the application of both the common law and evidentiary "rule of completeness" and the "excited utterance" hearsay exception.[640] The State charged Sipary with first-degree assault, on the theory that he initially injured the victim in self-defense but then went well beyond the bounds of self-defense when he continued to beat the victim to exact retribution for an earlier incident.[641] To prove its case, the State introduced various

---

[627] *Id.*
[628] *Id.*
[629] *Id.* at 74.
[630] *Id.* at 79.
[631] *Id.* at 81.
[632] *Id.*
[633] *Id.*
[634] *Id.* at 83.
[635] *Id.* at 83–84.
[636] *Id.* at 81.
[637] *Id.* at 82.
[638] *Id.* at 84.
[639] 91 P.3d 296 (Alaska Ct. App. 2004).
[640] *Id.* at 299.
[641] *Id.* at 307.

witness statements.[642] Sipary argued that the State introduced partial statements that violated the common law rule of completeness as well as the Alaska Rules of Evidence by taking these selected portions out of context.[643] In finding that the relevant rule does not give a party an absolute right to introduce omitted portions of a statement except where relevant and necessary to a proper understanding of previously admitted portions, [644] the court held that the rule of completeness was inapplicable because Sipary's counsel did not preserve the issue for appeal by objecting in a timely manner to the select testimony.[645] Further, the court rejected the defendant's argument that certain out-of-court statements should have been admissible under the "excited utterance" exception of Alaska Evidence Rule 803(2),[646] because defense counsel failed to make a proper offer of proof and such statements did not appear to be made in a sufficient state of excitement to justify waiving reliability concerns.[647] Therefore, the court upheld Sipary's conviction.[648]

In *Smith v. State*,[649] the court of appeals held that an anonymous phone call can give a police officer reasonable suspicion to pull over a potentially intoxicated driver.[650] Smith was arrested for driving while intoxicated, following an anonymous call to the police.[651] Smith argued that evidence from his DWI stop should have been suppressed because the police stop was not supported by reasonable suspicion of driving while intoxicated.[652] The court of appeals held that an anonymous call gave police reasonable suspicion that a driver was intoxicated, reasoning such a phone call would probably come from a person that observed the offender.[653] Smith also argued that his prior DWIs from Arkansas were improperly considered in deeming him a second felony offender, given differences in Arkansas and Alaska DWI laws.[654] The court held that Alaska DWI laws governed in determining whether the dates of Smith's previous DWIs were sufficiently recent for him to be considered a second felony offender.[655] The court held that Smith should have been

---

[642] *Id.*
[643] *Id.*
[644] *Id.* at 300.
[645] *Id.* at 305.
[646] *Id.*
[647] *Id.*
[648] *Id.* at 306.
[649] 83 P.3d 12 (Alaska Ct. App. 2004)
[650] *Id.* at 17–18.
[651] *Id.* at 13.
[652] *Id.*
[653] *Id.* at 14.
[654] *Id.* at 17.
[655] *Id.*

sentenced as a first-time felony offender. The court reasoned that the district court should have considered whether or not Smith would have been a first or second-time felony offender, if the Arkansas DWIs had occurred in Alaska.[656]

In *Sheridan v. Municipality of Anchorage*,[657] the court of appeals held that the defendant's prior convictions could be considered in determining his mandatory minimum sentence for driving while intoxicated.[658] Sheridan was previously convicted for driving while intoxicated under a now invalid Anchorage ordinance.[659] Because Sheridan did not explain in his briefing why the invalidity of a similar state statute rendered his prior convictions invalid, the court held that the briefing was inadequate and constituted a waiver of his claim.[660] In addition, the court held that, even if Sheridan had adequately briefed his argument, it would still have failed because he could not present evidence to show that he was previously convicted under the allegedly invalid provision of the ordinance.[661]

In *State v. Andrews*,[662] the court of appeals held that the use of Loran C readings without their corresponding printouts to show a violation of commercial fishing laws in a criminal trial was not a due process violation.[663] Andrews was charged with fishing in closed waters after Fish and Wildlife Protection troopers had used Loran C technology to determine the location of his fishing vessel.[664] Andrews moved to exclude this evidence because the troopers failed to preserve a record of the readings and because the state failed to demonstrate that the troopers were adequately trained to use Loran C technology.[665] The court of appeals affirmed the admissibility of such evidence, holding that the state was not required to maintain a record of Loran C readings because commercial fishers had the ability to independently obtain Loran C readings from equipment on their own fishing vessels.[666] In addition, the court held that there was evidence that the troopers were sufficiently qualified to use Loran C technology, despite the fact that the state had no formal training procedures.[667]

---

[656] *Id.* at 18.
[657] 100 P.3d 898 (Alaska Ct. App. 2004).
[658] *Id.* at 899.
[659] *Id.* at 899–900.
[660] *Id.* at 900–01.
[661] *Id.* at 901.
[662] 84 P.3d 441 (Alaska Ct. App. 2004).
[663] *Id.* at 442.
[664] *Id.* at 442–43.
[665] *Id.* at 442.
[666] *Id.* at 444.
[667] *Id.* at 445.

In *State v. Blank*,[668] the supreme court held that a warrantless breath test of a driver is potentially valid under Alaska law when exigent circumstances exist. Blank fatally struck a pedestrian while driving home and failed to stop.[669] The investigating officer obtained a warrantless breath test after being told by Blank that she had consumed alcohol prior to driving home that night.[670] The court of appeals reversed Blank's convictions, holding that Alaska Statutes section 28.35.031(g) violated federal and state constitutional protections against unlawful searches and seizures. The court of appeals reasoned that exigent circumstances could not exist where Blank had not been placed under arrest before or substantially contemporaneously with the breath test.[671] The supreme court reversed, holding that the warrantless search of Blank's breath may have been a valid and constitutional exigent circumstance.[672] In reversing, the court expressly overruled the requirement from Layland v. State[673] that justification of exigent circumstances requires a prior or substantially contemporaneous arrest.[674] Therefore, the court remanded for further factual determinations of whether exigent circumstances did exist.[675]

In *State v. Crocker*,[676] the court of appeals affirmed the dismissal of charges and the suppression of evidence from an illegal search of the defendant's home.[677] Crocker was indicted for fourth-degree controlled substance misconduct after police "found marijuana plants, harvested marijuana, and marijuana-growing equipment."[678] However, in order to obtain a search warrant to gather evidence of marijuana possession, the state must establish the limits that are constitutionally protected under *Ravin v. State*,[679] and *Noy v. State*[680].[681] The court affirmed the superior court's ruling that such probable cause was not established and thus all evidence obtained from that search warrant must be suppressed.[682]

---

[668] 90 P.3d 156 (Alaska 2004).
[669] *Id.* at 158.
[670] *Id.* at 158–59.
[671] *Id.*
[672] *Id.*
[673] 535 P.2d 1043 (Alaska 1975).
[674] 90 P.3d at 160.
[675] *Id.* at 164.
[676] 97 P.3d 93 (Alaska Ct. App. 2004).
[677] *Id.* at 95.
[678] *Id.* at 94.
[679] 537 P.2d 494 (Alaska 1975).
[680] 83 P.3d 538 (Alaska Ct. App. 2003), *reh'g denied*, 83 P.3d 545 (Alaska Ct. App. 2003).
[681] *Crocker*, 97 P.3d at 94.
[682] *Id.* at 512.

In *State v. Semancik*,[683] the supreme court overruled *Adkins v. State*,[684] a prior decision that permitted a defendant to challenge a burglary indictment for the first time on appeal.[685] After Semancik was convicted of attempted burglary in the first degree, he successfully challenged the indictment on the grounds that it did not specify the crime that he intended to commit in the dwelling.[686] On the State's appeal, the supreme court affirmed part of its prior holding in *Adkins* by continuing to require the State to specify a defendant's intended crime in a burglary indictment.[687] However, the court overruled the *Adkins* holding that a failure to include the intended crime is a substantive defect.[688] Rather, the court found this defect to be one of form that cannot be raised for the first time on appeal.[689] Thus, the court reinstated Semancik's conviction because its decision was applied retroactively and his rights were not prejudiced by the defective indictment.[690]

In *Valencia v. State*,[691] the court of appeals held that credit for good behavior could only be earned by prisoners serving sentences in correctional facilities and could not be earned by residents of a court-ordered alcohol rehabilitation center.[692] Upon revocation of his parole, Valencia was sentenced to prison and awarded credit against his sentence for 437 days spent in a court-ordered alcohol rehabilitation center.[693] Valencia argued that he should be awarded an additional 146 days of "good time" credit, equivalent to what he would have received had he served an equivalent period of time in prison.[694] Valencia appealed the superior court's refusal to award the additional credit.[695] The court affirmed, holding that a state statute[696] restricted such "good time" credit to prisoners in correctional facilities.[697] The court reasoned that inmates in rehabilitation programs, for whom misbehavior results in return to prison, already have incentive for good behavior.[698]

---

[683] 99 P.3d 538 (Alaska 2004).
[684] 389 P.2d 915 (Alaska 1964).
[685] *Semancik*, 99 P.3d at 539.
[686] *Id.*
[687] *Id.* at 543.
[688] *Id.*
[689] *Id.*
[690] *Id.* at 544.
[691] 91 P.3d 983 (Alaska Ct. App. 2004).
[692] *Id*. at 984.
[693] *Id*. at 983.
[694] *Id*.
[695] *Id*.
[696] ALASKA STAT. § 33.20.010(a) (Michie 2002).
[697] *Valencia*, 91 P.3d at 984.
[698] *Id*.

In *Way v. State*,[699] the court of appeals held that a state trooper had probable cause to stop a vehicle for having an illegible license plate.[700] Way challenged the stop of his vehicle as pretextual, based on the trooper's suspicion that Way was using his vehicle as a methamphetamine lab.[701] The court held that the trooper had probable cause to stop the vehicle because the license plate was not clearly legible.[702] Because the stop was based on a legitimate law enforcement objective, the court did not address the constitutionality of pretext traffic stops.[703]

In *Way v. State*,[704] the court of appeals held that, under certain circumstances during a search, police have the authority to restrain and frisk occupants of a building.[705] Way was restrained in a private home while the police executed a search for an escaped fugitive.[706] Based on the police's prior knowledge of the defendant, Way was singled out for "special questioning" and was frisked.[707] During the frisk, the police found drug paraphernalia, and Way was arrested for "fourth-degree controlled substance misconduct."[708] He appealed, claiming that the methods the police used to discover the drug paraphernalia were illegal.[709] Specifically, Way argued that "the officers had no authority to detain him at the scene, handcuff him, and subject him to questioning."[710] Relying primarily on the United State Supreme Court's decision in *Michigan v. Summers*,[711] the Alaska Court of Appeals held that temporarily restraining the occupants while executing the search was reasonable.[712] However, absent the necessary prerequisite "suspicion of criminal activity," the continued detention of Way beyond the completion of the search was unjustified.[713] Furthermore, the court held that police are not authorized to frisk individuals who are present, but are apparently unconnected to the crime, during a search unless there is "some additional affirmative indication" that the individuals are "armed and presently dangerous."[714] In this case, the police's prior

---

[699] 100 P.3d 902 (Alaska Ct. App. 2004).
[700] *Id*. at 905.
[701] *Id*. at 904.
[702] *Id*. at 905.
[703] *Id*.
[704] 101 P.3d 203 (Alaska Ct. App. 2004)
[705] *Id.* at 205.
[706] *Id.* at 204.
[707] *Id.* at 205.
[708] *Id.*
[709] *Id.*
[710] *Id.*
[711] 452 U.S. 692 (1981).
[712] 101 P.3d at 209.
[713] *Id.*
[714] *Id.* at 211.

knowledge of Way in relation to drug use and weapon possession justified the frisk.[715]

In *Whitesides v. State*,[716] the court of appeals held that a buyer's fatal overdose was not an aggravating factor in the sentencing of a defendant convicted of selling a controlled substance.[717] Whitesides was arrested and charged with second-degree substance misconduct for selling heroin to a user who overdosed and died.[718] The sentencing judge added two-and-a-half suspended years to Whitesides's sentence after finding an aggravating factor: that a person, other than an accomplice, sustained physical injury as a direct result of Whitesides's conduct.[719] The court of appeals reversed, holding that the term "direct result" signaled the legislature's intent to require a closer connection between cause and effect than would be required to establish proximate cause.[720] Recognizing that Whitesides's conduct was egregious, however, the court of appeals remanded the case with specific authorization to consider the applicability of another aggravating factor.[721]

In *Wholecheese v. State*,[722] the supreme court held that the refusal of a defendant's request for a specific venue was within the trial court's discretion.[723] Wholecheese was indicted on several felony charges in Galena.[724] Wholecheese moved to have the venue changed from Fairbanks to Galena, which was not an approved felony venue.[725] The superior court held the trial would be held in Nenana.[726] The supreme court held Wholecheese did not meet his burden to show the jury pool in Nanana was insufficient and the trial judge did not abuse her discretion.[727]

IX. EMPLOYMENT LAW

In *Barry v. University of Alaska*,[728] the supreme court held that a pre-retirement release did not bar an employee's claim for enforcement of a promise to be performed after the release was

---

[715] *Id.* at 213.
[716] 88 P.3d 147 (Alaska Ct. App. 2004).
[717] *Id.* at 148.
[718] *Id.*
[719] *Id.* at 149.
[720] *Id.* at 151.
[721] *Whitesides*, 88 P.3d at 153.
[722] 100 P.3d 14 (Alaska Ct. App. 2004).
[723] *Id*. at 15.
[724] *Id*. at 14.
[725] *Id*. at 15.
[726] *Id*.
[727] *Id*. at 17.
[728] 85 P.3d 1022 (Alaska 2004).

executed.[729] Barry negotiated an agreement with the University of Alaska, his employer, in which the university agreed to give Barry credit for twenty years of service in order for Barry to secure certain benefits from a newly implemented retirement incentive program.[730] In exchange, Barry signed a document releasing the university from any future claims related to his employment.[731] When his first benefit check did not reflect the terms of this agreement, Barry sued the university.[732] The superior court granted summary judgment for the university, holding that the release barred the litigation.[733] The supreme court reversed because the promise by the university to credit Barry with twenty years of service had to be performed after the release was signed.[734] The supreme court held that summary judgment was erroneously granted because no reasonable person in Barry's position would believe that the release barred a suit for breach of contract that occurred after the release was executed.[735]

In *Bd. of Trade Inc., v. Dep't of Labor, Wage & Hour Administration,*[736] the supreme court held that a hearing officer had improperly relied on an overly narrow test to determine that a location was "on-site" for the purposes of the Little Davis-Bacon Act ("Act").[737] Board of Trade, Inc. argued that the Camp Nome Quarry was not "on-site" for the purposes of the Act and that it was therefore not obligated to pay the prevailing wage for work performed at the location.[738] The supreme court reiterated that the hearing officer should have considered the following in making his decision: "the normal meaning of 'adjacent' and 'nearby;'" "the availability of alternative closer sites;" "the physical lay-out of the project;" and "whether the area was developed or undeveloped."[739] However, the hearing officer applied a different, narrower test.[740] The supreme court applied the correct test to the factual findings and determined that the location was not "on-site."[741]

In *Blackburn v. State,*[742] the supreme court held that probationary state employees are at-will employees, dischargeable

---

[729] *Id.* at 1022.
[730] *Id.* at 1023.
[731] *Id.* at 1023–24.
[732] *Id.* at 1023.
[733] *Id.* at 1024–25.
[734] *Id.* at 1026.
[735] *Id.*
[736] 83 P.3d 1072 (Alaska 2004).
[737] *Id.* at 1075.
[738] *Id.*
[739] *Id.* at 1076.
[740] *Id.*
[741] *Id.* at 1077.
[742] 103 P.3d 900 (Alaska 2004).

at any time with or without cause.[743] Blackburn had worked for the state for less than three months in early 2000, when the state terminated him for inadequate performance, including failure to follow instructions and failure to operate equipment in an appropriate manner.[744] Blackburn filed a grievance through his union, which was dropped once the union learned of Blackburn's probationary status.[745] Blackburn sued the state for wrongful termination, denial of due process, and misrepresentation.[746] The supreme court, on appeal of a grant of summary judgment in favor of the state, affirmed, holding that it could find nothing in the state statutes, state personnel rules, or the collective bargaining agreement to indicate that state probationary employees were not employees at will.[747] As an at-will employee, Blackburn did not have a property right in his continued employment and, therefore, was not denied due process.[748]

In *Brown v. Patriot Maintenance, Inc.*,[749] the supreme court affirmed the Alaska Worker's Compensation Board's denial of disability benefits.[750] Brown claimed that she suffered from work-related fibromyalgia; however, the independent medical examiners expressed the opinion that her condition was psychiatric and not work-related.[751] After the Board denied her benefit, Brown argued that the Board failed to resolve doubtful medical evidence in her favor and failed to address her lay witnesses' testimony.[752] The supreme court reaffirmed that the Board has the sole power to determine how to weigh the evidence; thus, review of its decisions is deferential.[753] The court held that the rule requiring that doubt be resolved in the claimant's favor did not extend to Brown's case because the conflicting medical testimony simply represented a difference of opinion and not a serious doubt as to any single expert's testimony.[754] The supreme court further held that the lay evidence in this case was not material, and the Board was not required to discuss it at length.[755] The supreme court reaffirmed the denial of disability benefits, finding that the Board's decision was adequately explained and supported by substantial evidence.[756]

---

[743] *Id.* at 902.
[744] *Id.*
[745] *Id.*
[746] *Id.*
[747] *Id.* at 906.
[748] *Id.*
[749] 99 P.3d 544 (Alaska 2004).
[750] *Id.* at 545.
[751] *Id.* at 546–47.
[752] *Id.* at 548.
[753] *Id.*
[754] *Id.* at 550.
[755] *Id.* at 553.
[756] *Id.*

In *Casey v. SEMCO Energy, Inc.*,[757] the supreme court held that an employer did not violate the covenant of good faith and fair dealing when, acting on the advice of counsel, it declined to include two terminated employees in an Early Retirement Plan (ERP).[758] Casey and Sinclair were employed as managers by ENSTAR Natural Gas Company.[759] In November 1999, SEMCO Energy, Inc. purchased ENSTAR and terminated both Casey and Sinclair.[760] As part of a negotiated severance agreement, SEMCO agreed to include Casey and Sinclair in an ERP established for other former ENSTAR employees, provided that doing so would not disqualify the ERP from tax-exempt status.[761] According to the terms of the agreement, determination of whether adding Casey and Sinclair to the ERP would cause loss of tax-exempt status was to be made by SEMCO's counsel and subject SEMCO's sole judgment in good faith.[762] In affirming the decision of the superior court, the supreme court held that the terms of the agreement only required SEMCO to obtain a good faith opinion from its counsel as to how including the two managers would affect the ERP's tax-exempt status.[763] Having done this, SEMCO had no further obligations to Casey and Sinclair with respect to the ERP.[764] The court concluded that under the agreement SEMCO was not required to find alternative means of applying the benefits of the ERP to Casey and Sinclair, nor did SEMCO violate the covenant of good faith and fair dealing when it failed to exhaust all possible means of doing so.[765]

In *Chalovich v. State*,[766] the supreme court held that Chalovich made a timely payment and therefore did not abandon his state mining claims.[767] To maintain a mining claim, the Alaska Administrative Code requires a miner either to put in some minimum amount of labor each year or to make a payment by September 1. The Department of Natural Resources (DNR) found that Chalovich had abandoned his state mining claims because he failed to make a timely payment.[768] Chalovich argued that even though his payment was received after the deadline, the DNR should treat his payment as timely.[769] He also argued that the

---

[757] 92 P.3d 379 (Alaska 2004).
[758] *Id.* at 380–81.
[759] *Id.* at 380.
[760] *Id.*
[761] *Id.* at 381.
[762] *Id.*
[763] *Id.* at 384.
[764] *Id.*
[765] *Id.*
[766] 104 P.3d 125 (Alaska 2004).
[767] *Id.* at 135.
[768] *Id.* at 126.
[769] *Id.* at 120.

section of the code that requires annual labor is "arbitrary and inconsistent with other regulatory deadlines."[770] The supreme court held that the Alaska Administrative Code's provision of payment in lieu of annual labor by September 1 was valid,[771] because it was "created by the legislature, and it is consistent with federal law."[772] However, contrary to the provisions of the DNR regulation, the court held that as long as a payment is postmarked by September 1, forfeiture cannot be imposed on a miner.[773] Because his payment was postmarked before the September 1 deadline, the court reversed DNR's decision that Chalovich forfeited his mining rights.[774]

In *Cowen v. Wal-Mart*,[775] the supreme court held that the medical opinions of two physician specialists constituted sufficient evidence to allow the Alaska Workers' Compensation Board to conclude that a claimed injury was not work-related.[776] Cowen, an employee of Wal-Mart, sought to receive workers' compensation benefits for the deflation of a saline implant.[777] In arguing that Cowen's implant was not work-related, Wal-Mart relied upon the expert opinions of two doctors.[778] Cowen argued that these medical opinions should not rebut the presumption of compensability because they were speculative and unsubstantiated.[779] The court held that the medical opinions were adequate to rebut the presumption of compensability, despite the fact that the opinions contained a degree of medical uncertainty.[780] The court affirmed the Board's determination that Cowen failed to show by a preponderance of the evidence that her injury was work-related.[781]

In *Excursion Inlet Packing Co. v. Ugale*,[782] the supreme court affirmed *per curiam* the superior court's reversal of an Alaska Workers' Compensation Board decision to deny compensation for Ugale's death.[783] Ugale's family argued that his death should be presumed compensable because it arose out of his employment with Excursion Inlet Packing Co.[784] However, the

---

[770] *Id.* at 127.
[771] *Id.* at 129.
[772] *Id.* at 132.
[773] *Id.* at 133.
[774] *Id.*
[775] 93 P.3d 420 (Alaska 2004).
[776] *Id.* at 422.
[777] *Id.*
[778] *Id*. at 425.
[779] *Id.*
[780] *Id.* at 426.
[781] *Id.*
[782] 92 P.3d 413 (Alaska 2004).
[783] *Id.*
[784] *Id.* at 414.

Board agreed with the employer that Ugale's death was not compensable because Ugale quit before he died and was no longer on the premises when he disappeared.[785] The superior court reversed, finding that a presumption of compensability should attach and that the employer failed to rebut that presumption with any substantial evidence.[786] The supreme court affirmed for reasons set forth in the superior court opinion and reprinted that opinion in an appendix.[787]

In *Fred Meyer of Alaska, Inc. v. Bailey*,[788] the supreme court held that the applicable statute of limitations did not bar a retail manager from asserting overtime compensation claims under the Alaska Wage and Hour Act (AWHA) that were more than two years old due to circumstances that prevented him from bringing his claims earlier.[789] While Bailey worked as a manager for Fred Meyer he did not receive overtime compensation because the company classified him as exempt.[790] As a threshold matter, the supreme court affirmed the trial court's finding that Bailey devoted nearly sixty percent of his time to non-management tasks and was therefore not exempt under AWHA.[791] The supreme court then affirmed the trial court's decision to grant recovery for the company's older violations, finding that the lower court's equitable tolling of the statute of limitations was proper. The court based its finding on the fact that Bailey was prevented from bringing claims because he was threatened by his employer from participation in the earlier class action lawsuit alleging the same overtime compensation claims.[792]

In *Gunter v. Kathy-O-Estates*,[793] the supreme court held that the Alaska Workers' Compensation Board did not have the authority to reimburse an employee for miscellaneous costs incurred as a consequence of a work-related injury, and that his guardian had the authority to dismiss the suit for reimbursement.[794] Gunter, an employee of Kathy-O-Estates, was severely injured as a result of an on-the-job accident and was entitled to benefits under the Alaska Workers' Compensation Act. [795] Gunter's guardian and attorney settled the workers' compensation disputes by signing a

[785] *Id.*
[786] *Id.* at 420.
[787] *Id.* at 413.
[788] 100 P.3d 881 (Alaska 2004).
[789] *Id.* at 886–87.
[790] *Id.* at 883.
[791] *Id.* at 885.
[792] *Id.* at 886–87.
[793] 87 P.3d 65 (Alaska 2004).
[794] *Id.* at 67.
[795] *Id.*

Compromise and Release form.[796] Nevertheless, Gunter argued that Kathy-O-Estates should reimburse him for a variety of costs he incurred subsequent to his injury.[797] The supreme court held that Gunter could not be reimbursed because the costs fell outside the narrow confines of workers' compensation benefits.[798] Gunter also challenged his guardian's decision to dismiss his claims for reimbursement.[799] The court held that Gunter's guardian was properly appointed and therefore had the authority to reasonably dismiss Gunter's challenge to the Compromise and Release form.[800]

In *Hutka v. Sisters of Providence in Washington*,[801] the supreme court held that the Alaska Wage and Hour Act (AWHA) did not apply to a supervisory employee who cared for patients in a nursing home.[802] Hutka was a registered nurse who had been promoted to a supervisory role at Providence Hospital's Home Healthcare Unit but who still provided direct medical care to patients on a weekly basis.[803] The court concluded that individuals who provide direct medical care to patients as part of their regular job duties are exempt from coverage under AWHA.[804] The court concluded, however, that the employer's behavior constituted a willful violation of the federal Fair Labor Standards Act (FLSA) and upheld the lower court's decision to allow a three-year, rather than a two-year, statute of limitations on Hutka's FLSA claims.[805]

In *Kaiser v. Royal Insurance Co. of Am*erica,[806] the supreme court stayed an individual's appeal of an Alaska Workers' Compensation Board's ("Board") decision to deny his claims until the validity of his Compromise and Release ("C&R") could be determined.[807] The court also remanded for additional findings on Kaiser's claim of interference against the insurance company.[808] Kaiser challenged the Board's decision not to address the validity of the C&R before denying his claims for reimbursement of medical expenses.[809] He also argued that there should be an imposition of penalties against the insurance company for late

---

[796] *Id.*
[797] *Id.* at 69.
[798] *Id.* at 70.
[799] *Id.* at 71.
[800] *Id.* at 73.
[801] 102 P.3d 947 (Alaska 2004).
[802] *Id.* at 961.
[803] *Id.* at 951–52, 54.
[804] *Id.* at 954.
[805] *Id.* at 961.
[806] 89 P.3d 740 (Alaska 2004).
[807] *Id*. at 741.
[808] *Id*. at 742.
[809] *Id*. at 740.

payment of an MRI.[810] On appeal, Kaiser argued that the C&R was not in his best interests, that the Board's statements in favor of the C&R were fraudulent, and that his agreement to the C&R was made under duress.[811] The court remanded the issue of whether the C&R was valid.[812] The court also ordered that the claim of interference against the insurance company be remanded to determine whether it inappropriately influenced or attempted to inappropriately influence Kaiser's physician.[813]

In *Kinzel v. Discovery Drilling*,[814] the supreme court held that Kinzel was entitled to a mixed motives instruction on his retaliatory discharge claim against Discovery and reversed the trial court's grant of summary judgment in Discovery's favor.[815] Kinsel alleged that Discovery terminated him in retaliation for filing safety complaints with the division of Occupational Safety and Health (OSH).[816] At trial, Kinzel's request for a mixed-motive instruction was denied.[817] The supreme court reversed, holding that email statements reflecting an animus based on Kinzel's protected conduct were sufficient to permit a jury to "infer that that attitude was more likely than not a motivating factor in the employer's decision."[818]

The supreme court also reversed the trial court's grant of summary judgment on defamation and intentional interference with a contract claim in favor of a second defendant, Hart Crowser.[819] It concluded that an email hypothesizing that Kinzel sabotaged a work site could be interpreted as fact, not opinion.[820] It also concluded that there were genuine issues of material fact as to whether Hart Crowser was responsible for Kinzel's firing, and whether the company was motivated by privileged economic interest or improper retaliatory interest. [821]

In *Municipality of Anchorage v. Gregg*,[822] the supreme court held that the Municipality of Anchorage violated Gregg's right to protected leave under the Family and Medical Leave Act (FMLA).[823] Gregg, an Anchorage police officer, had taken time away from work on account of her pregnancy, an automobile

---

[810] *Id.*
[811] *Id*. at 741.
[812] *Id*.
[813] *Id*. at 742–43.
[814] 93 P.3d 427 (Alaska 2004).
[815] *Id.* at 444.
[816] *Id.* at 431–32.
[817] *Id.* at 444.
[818] *Id*. at 436.
[819] *Id.* at 444.
[820] *Id.* at 440–41.
[821] *Id.* at 444.
[822] 101 P.3d 181 (Alaska 2004).
[823] *Id.* at 196.

accident, and an abusive personal relationship.[824] The court concluded that Gregg was entitled to protection under the FMLA even though her doctors had not made a precise and correct diagnosis of her condition at the time she requested leave under the Act.[825] The court also held that an employee does not have to specifically invoke the FMLA when requesting leave for a covered purpose and concluded that the appropriate rate of prejudgment interest was set by federal, not state, law.[826]

In *Odsather v. Richardson*,[827] the supreme court held that the trial court had insufficient facts to decide conclusively whether truck owners who leased their trucks to firms were employees of the firm or independent contractors.[828] Odsather was injured in a vehicle accident with Richardson while both were working as truck drivers.[829] Though the men owned their trucks, both were on lease to Sourdough Express.[830] Odsather claimed that his injuries were caused by Richardson's negligence.[831] Richardson claimed that both he and Odsather were employees of Sourdough Express and that Odsather's only remedy was under worker's compensation.[832] Under Alaska's "relative nature of the work" test, the court examined the degree of skill required, whether the worker puts himself out as a separate business, and whether the claimant bears accident risk.[833] The court reversed and remanded, holding that the trial court did not have sufficient facts to decide whether, under the relative nature of the work test, the drivers were employees of Sourdough Express or independent contractors.[834]

In *Raad v. Alaska State Commissionn for Human Rights*,[835] the supreme court held that a hearing officer of the Alaska State Commission for Human Rights incorrectly concluded that there was no evidence to support a finding of discriminatory retaliation.[836] Raad, a Muslim woman of Lebanese descent, brought a complaint against the school district alleging she had been the victim of discrimination on the basis of her religion and national origin.[837] Specifically, Raad pointed to the fact that, in spite of her qualifications, she had been denied employment by the

---

[824] *Id.* at 184–85.
[825] *Id.* at 188–89.
[826] *Id.* at 192, 194–96.
[827] 96 P.3d 521 (Alaska 2004).
[828] *Id*. at 522.
[829] *Id*.
[830] *Id*.
[831] *Id*.
[832] *Id*.
[833] *Id*. at 523.
[834] *Id*. at 524.
[835] 86 P.3d 899 (Alaska 2004).
[836] *Id*. at 910.
[837] *Id.* at 902.

school district on thirty-one separate occasions.[838] In reversing a decision of the superior court upholding the hearing officer's dismissal of the retaliation claim, the supreme court noted that while the school district had articulated legitimate reasons for its decision not to hire Raad, she had presented evidence sufficient to at least suggest that the reasons were merely pretextual.[839] This was inconsistent, the court held, with the hearing officer's finding that Raad had presented no evidence of pretext.[840] Given this inconsistency, the court reversed the decision of the superior court and remanded the case for further consideration regarding the evidence of pretext.[841]

X. ETHICS & PROFESSIONAL RESPONSIBILITY

In *Matter of the Reinstatement of Wiederholt*,[842] the Alaska Supreme Court accepted, without comment, the recommendation of the Alaska Bar Association's Disciplinary Board that Jon E. Wiederholt not be reinstated as an attorney.[843] The court attached the Disciplinary Board's recommendation to its opinion. Their recommendation indicates that Wiederholt had been disbarred for "extremely serious misconduct as an attorney."[844] The Bar's Hearing Committee recommended reinstatement on the condition that Wiederholt meet regularly with a mentoring panel and that he continue counseling until it was "not therapeutically beneficial."[845] Despite the Hearing Committee's recommendation, the Bar's Disciplinary Board recommended against reinstatement.[846] The Disciplinary Board thought that Wiederholt had not had an adequate amount of time to recover from the conditions that led to his disbarment.[847] The Board also believed that a supervised or restricted practice, as recommended by the Hearing Committee, was evidence that the Committee was not fully convinced of Wiederholt's readiness to resume practicing.[848] Finally, the Board noted that Wiederholt only seemed to take his rehabilitation seriously after the supreme court rejected his first petition for reinstatement.[849]

---

[838] *Id.*
[839] *Id.* at 909–10.
[840] *Id.*
[841] *Id.* at 911.
[842] 89 P.3d 771 (Alaska 2004).
[843] *Id.*
[844] *Id.* at 789
[845] *Id*. at 788
[846] *Id*. at 789–90
[847] *Id.*
[848] *Id.*
[849] *Id.*

In *Beal v. Beal*[850] the supreme court upheld both the grant of interim spousal support and the majority of the superior court's findings as to the division of marital property.[851] Following a particularly lititgious and contentious divorce, the Beals each filed a series of cross-appeals regarding the terms of the interim support order and the division of their marital property.[852] The court upheld the grant of the interim spousal support, noting that the explicit terms of the couple's prenuptial agreement precluded only post-divorce alimony.[853] The court also affirmed the terms of the interim spousal support, which included ordering the husband to pay arrearages and late fees related to the marital residence and property.[854] Additionally, the court upheld the superior court's determinations as to each party's credits, finding the following: (1) parties are not credited appraisal costs related to non-neutral appraisals, unless explicitly agreed to;[855] (2) a party's offer to pay health insurance costs prior to the interim spousal support connotes that the health insurance is in addition to the interim order;[856] (3) the superior court was correct as to various credits, regarding specific marital property;[857] and (4) the superior court correctly ruled as to educational awards regarding the wife and children.[858] The court did, however, reverse the superior court's inclusion of the parties' separate property and the children's property in evaluation of the award,[859] as well as the superior court's failure to account for appreciation of a premarital art collection.[860] Finally, the court remanded for the determination of specific factual inquiries.[861]

In *Brynna B. v. Department of Health and Human Services*,[862] the supreme court affirmed a judgment of the superior court refusing to place Brynna's niece, Jaclyn, in her care.[863] The dispute arose when the Alaska Division of Family and Youth Services (DFYS) removed Brynna's six-week old niece from

[850] 88 P.3d 104 (Alaska 2004).
[851] *Id.* at 111–13.
[852] *Id.* at 109.
[853] *Id.* at 113.
[854] *Id.* at 113–15.
[855] *Id.* at 115–16.
[856] *Id.* at 116.
[857] *Id.* at 119.
[858] *Id.* at 120.
[859] *Id.* at 119.
[860] *Id.* at 118.
[861] *Id.* at 123.
[862] 88 P.3d 527 (Alaska 2004).
[863] *Id.* at 528.

Brynna's sister's home.[864] Brynna claimed that the superior court misinterpreted the "relative placement preference" in Alaska Statutes section 47.14.100 and that the superior court should have ordered the State to place Jaclyn in her care.[865] The supreme court found that the superior court's decision was not clearly erroneous and Brynna's likelihood of refusing instructions to keep Jaclyn away from her unfit mother constituted clear and convincing evidence that placing Jaclyn with Brynna would be harmful to the child.[866]

In *Carl N. v. State*,[867] the supreme court upheld the termination of a father's parental rights under the Indian Child Welfare Act.[868] The father had a history of mental and substance abuse problems and had repeatedly failed to conform to a reunification plan established by the Division of Family and Youth Services.[869] After the trial court terminated his parental rights, the father appealed, claiming that he had remedied his conduct such that there was no risk of serious emotional harm to his son and that reunification was in his son's best interest.[870] The supreme court, however, held that the father had shown only limited progress in the treatment of his mental and substance abuse problems and upheld the termination of his parental rights.[871]

In *Cline v. Cline*,[872] the supreme court held that the superior court abused its discretion by awarding more than 50% of Cline's pension to Lopez, his ex-wife, and remanded the case to calculate the correct amount owed.[873] In a 1992 divorce property division, the trial judge awarded 18% of Cline's pension to Lopez and set $500 as the monthly payment amount.[874] Ten years after settlement, Lopez sued for a revision.[875] The court awarded her past benefits and interest but lowered the payment amount.[876] Cline argued that this revision should apply retroactively because the initial amount was too high.[877] The supreme court, basing its judgment on the Uniformed Services Former Spouses' Protection Act, [878] which limits apportionment of military retirement benefits

---

[864] *Id.*
[865] *Id.*
[866] *Id.* at 532.
[867] 102 P.3d 932 (Alaska 2004).
[868] *Id.* at 937.
[869] *Id.* at 933–34.
[870] *Id.* at 932.
[871] *Id.* at 936–37.
[872] 90 P.3d 147 (Alaska 2004).
[873] *Id.* at 148.
[874] *Id.* at 149.
[875] *Id.*
[876] *Id.*
[877] *Id.* at 151.
[878] 10 U.S.C. § 1408(e)(1) (2003).

to 50%, held that the trial court abused its discretion by awarding Lopez 62% of Cline's pension.[879] The supreme court reversed the disposition of income and set the payment amount at 50% of retirement benefits.[880] The court also held that the imminent reduction of Mr. Cline's retirement income because of disability payments was a proper matter for reconsideration under federal law.[881]

In *Edwards v. Edwards*,[882] the supreme court held that a husband's motion to hold a child support order in abeyance while ex-wife and minor children continued to live with him was, in part, a prospective modification of child support based on changed circumstances.[883] The divorce agreement of Paul and Doris Edwards obligated Paul to pay child support for the couple's two minor children and Doris to leave the marital home, neither of which was performed.[884] The Child Support Enforcement Division began to withhold a portion of Paul's paycheck and Paul filed a motion for abeyance while the children lived in his household.[885] The motion largely sought impermissible retroactive modification of the support order for the period during which Doris and the children lived with him.[886] However, the court remanded the case so the superior court could make a determination as to whether the motion also sought a prospective modification of the support order.[887]

In *Evans v. McTaggart*,[888] the supreme court held that a third-party must meet a clear and convincing evidence standard when applying for custody and visitation rights.[889] Evans had two children, both fathered by different men.[890] The McTaggarts had successfully filed in the trial court for custody of their biologically related grandchild and visitation rights with Evan's other child.[891] On appeal, Evans claimed that the trial court violated her constitutional rights as a parent by granting custody to the McTaggarts based on a preponderance of the evidence. [892] The supreme court held that in custody cases between parents and non-parents, the correct standard of review is the clear and convincing

---

[879] 90 P.3d at 153.
[880] *Id.* at 154.
[881] *Id.* at 155.
[882] No. S-11320, 2004 Alas. LEXIS 142 (Alaska Nov. 24, 2004).
[883] *Id*. at *4–7.
[884] *Id*. at *3–4.
[885] *Id*. at *4.
[886] *Id.* at *5–6.
[887] *Id.* at *7–8.
[888] 88 P.3d 1078 (Alaska 2004).
[889] *Id.* at 1079.
[890] *Id*.
[891] *Id.* at 1080.
[892] *Id.* at 1082.

evidence standard.[893] Evans also challenged the McTaggerts' visitation rights to her other son, who was not biologically related to them.[894] The court held that Alaska Statutes section 25.20.060(a),[895] which "permits a court to provide for visitation based on the best interests of the child," is constitutional if narrowly interpreted. [896] To protect parental rights, the court held that clear and convincing evidence should be used to determine whether a third-party can obtain visitation rights over the parent's consent.[897]

In *Harris v. Westfall*,[898] the supreme court vacated a child support order proposed by the father, Westfall, and adopted by the superior court, finding that the order contained misrepresentations made by Westfall and that the mother, Harris's, untimely objection was justified by the circumstances. [899] On May 31, 2002 Harris moved to set aside the child support order granted by the superior court on December 27, 2001.[900] Harris claimed that her objections to the proposed child support order were not timely filed because her attorney's secretary had been sabotaging several cases and never filed her objections.[901] The superior court denied the motion without explanation.[902] After her motion for clarification was denied, Harris appealed to the supreme court.[903] The supreme court held that the superior court abused its discretion by denying Harris's motion to vacate the child support order under Alaska Civil Rule 60(b).[904] The supreme court held that Harris's motion was timely filed given her reasonable explanation for the delay in filing her motion to set aside the superior court's child support order. The court also held that because the order was obtained inadvertently through Westfall's misrepresentations, it could be set aside under Rule 60(b).[905] As a result, the supreme court vacated the child support order and remanded for recalculation of the child support due.[906]

In *Keturi v. Keturi*,[907] the supreme court affirmed in part and reversed in part several determinations regarding child

---

[893] *Id.* at 1085.
[894] *Id.* at 1087.
[895] ALASKA STAT. § 25.20.060(a) (Michie 2002).
[896] *Evans*, 88 P.3d at 1089–90.
[897] *Id.* at 1091.
[898] 90 P.3d 167 (Alaska 2004).
[899] *Id.* at 169, 172–73.
[900] *Id.* at 170.
[901] *Id.*
[902] *Id.* at 172.
[903] *Id.*
[904] *Id.* at 175.
[905] *Id.* at 173–75.
[906] *Id.* at 176.
[907] 84 P.3d 408 (Alaska 2004).

support, marital property, and income in divorce proceedings.[908] Troy Keturi appealed several factual findings made by the trial court during his divorce proceedings, namely the court's decisions: (1) to average four years of his income for child support purposes, (2) that Troy's arthritic illness would not affect his earning potential in the next three to four years, (3) that various properties were purchased with a loan or were a marital asset, and (4) the determination of his income in the year 1997.[909] The court upheld the first three findings, but held that the determination of Keturi's income in 1997 was clearly erroneous.[910] The superior court's determination of Troy's income for 1997 was deemed clearly erroneous due to a lack of any evidence to support the court's findings.[911] As a result, the court remanded for recalculation of child support.[912]

In *Louise A. v. State*,[913] the supreme court held that the increased chance for adoption of a child in need of aid warrants the termination of parental rights even if no prospective adoptive parent has been identified.[914] The superior court found Louise A.'s son to be a "child in need of aid" and that the child was still exposed to a substantial risk of harm. It therefore terminated Louise A.'s parental rights.[915] The court rejected Louise A.'s argument that termination is not in the best interests of her son because he would lose inheritance rights and because his chances for adoption were low.[916] The supreme court upheld the termination because the court was not required to consider inheritance rights and because the benefits to the child of being available for adoption were sufficient to make termination of his mother's parental rights in his best interest.[917]

In *Moeller-Prokosch v. Prokosch*,[918] the supreme court held that in a custody proceeding where one parent is contemplating relocation, a complete analysis of the child's best interests must consider the effect on the child of separation from both the moving and the non-moving parents.[919] A mother appealed a custody order that granted primary physical custody to the father on the assumption that she would move out of Alaska.[920] The mother

---

[908] *Id.* at 409–10, 418.
[909] *Id.* at 410.
[910] *Id*.
[911] *Id.* at 415.
[912] *Id.* at 418.
[913] No. S-11048, 2004 Alas. LEXIS 32 (Alaska Mar. 17, 2004).
[914] *Id.* at *11.
[915] *Id.* at *6.
[916] *Id.* at *9–11.
[917] *Id.* at *11.
[918] 99 P.3d 531 (Alaska 2004).
[919] *Id*. at 532.
[920] *Id.* at 533.

contended that the superior court placed too much emphasis on the geographic stability factor in awarding custody to the father.[921] The supreme court held that the superior court erred by analyzing the geographic stability factor narrowly and that the superior court should have evaluated the harm to the child if he were separated from his mother upon her relocation.[922]

In *Morgan B. v. State*,[923] the supreme court held that termination of parental rights does not require the court to specify whether the sexual abuse that places a child "in need of aid" is the result of abuse by the parent or whether the parent allowed the abuse to occur.[924] After Morgan's child was found to be in need of aid, his parental rights were terminated because the court found that the child was still exposed to a substantial risk of harm.[925] Morgan argued that his daughter was not a child in need of aid and that the findings were deficient because the court did not specify whether he personally was at fault for the abuse or whether he negligently allowed others to abuse the child.[926] The supreme court held that the statute did not turn on whether the abuse was by the parent or by conditions created by the parent and under the statute there was no need to "pinpoint" the abusers.[927] The court therefore upheld the termination of Morgan B.'s parental rights based on a clear finding of sexual abuse.[928]

In *Murphy v. Murphy*,[929] the supreme court held that a mother was owed child support reimbursement for prepaid payments when she was awarded interim custody of the children after obtaining a domestic violence protective order against the children's custodian-father.[930] The court held that the mother was entitled to child support for the interim custody only after she served her motion to modify.[931] The court also affirmed that if there is an existing support agreement and a de facto shift in custody occurs, the rule prohibiting retroactive modification also prohibits modifying support payments owed before the date of the motion to modify.[932]

In *Nelson M. v. State*,[933] the supreme court held that the state actively attempted to prevent the breakup of an Indian family

---

[921] *Id.*
[922] *Id.* at 537–38.
[923] No. S-11108, 2004 Alas. LEXIS 45 (Alaska Apr. 9, 2004).
[924] *Id.* at *10.
[925] *Id.* at *5–6.
[926] *Id.* at *9.
[927] *Id.* at *10.
[928] *Id.* at *16.
[929] No. D-10923, 2004 Alas. LEXIS 141 (Alaska Nov. 24, 2004).
[930] *Id.* at *11.
[931] *Id.*
[932] *Id.* at *19.
[933] No. S-11208, 2004 Alas. LEXIS 140 (Alaska Nov. 24, 2004).

and that parental rights should be terminated in the best interest of the child.[934] The Alaska Division of Family and Youth Services (DFYS) received numerous reports that Nelson and Dora neglected their child, Jason, who was often a witness to domestic violence between the two.[935] A DFYS social worker organized a plan that provided alcohol treatment, parental training, anger management, and mental health counseling for the parents,[936] but the state later filed for termination of Dora and Nelson's parental rights.[937] The supreme court affirmed the termination of parental rights because, despite DFYS's efforts, neither parent participated in the counseling and treatment programs offered.[938] Furthermore, Jason's health had improved in foster care.[939] The court held that it was not clearly erroneous for the trial court to conclude that terminating the parents' parental rights was in the best interest of the child.[940]

In *Nunley v. Stat*e,[941] the supreme court upheld a revenue examiner's determination that Nunley was voluntarily underemployed and affirmed child support payments in the amount of $209 a month.[942] A revenue hearing examiner from the Department of Revenue found Nunley to be voluntarily underemployed and ordered child support payments based on his earning potential.[943] Nunley appealed, claiming that he faces limited employment opportunities due to a criminal record and that he could not afford $209 a month.[944] The supreme court affirmed the examiner's decision and upheld the child support payments, finding that the decision was supported by substantial evidence and that the amount of income imputed to Nunley was reasonable.[945] The court also noted that Nunley had many marketable skills and the primary obstacle to his employment was his unwillingness to seek it.[946]

In *Ruth S. v. State*,[947] the supreme court held that the state was not equitably estopped from petitioning for termination of parental rights because one of the goals was reunification.[948] Ruth

---

[934] *Id.* at *30.
[935] *Id.* at *2–3.
[936] *Id.* at *3.
[937] *Id.* at *4–5.
[938] *Id.*at *16,*22.
[939] *Id.* at *26.
[940] *Id.* at *29–30.
[941] 99 P.3d 7 (Alaska 2004).
[942] *Id.* at 8.
[943] *Id.* at 10.
[944] *Id.*
[945] *Id.* at 13–14.
[946] *Id.*
[947] No. S-11210, 2004 Alas. LEXIS 104 (Alaska Sept. 1, 2004).
[948] *Id.* at *2.

S. and the Division of Family and Youth Services (DFYS) agreed to a case plan regarding Ruth's two minor children.[949] While the plan contained concurrent goals of reunification and adoption,[950] DFYS eventually informed Ruth that due to Ruth's difficulties with alcoholism, frequent relapses, and the special needs of the children, the department's goal was adoption.[951] The court held that because DFYS never stated that it would refrain from pursuing termination of parental rights, and actually made its intention to terminate clear, it was not equitably estopped from petitioning to terminate parental rights.[952]

In *Schmitz v. Schmitz,*[953] the supreme court affirmed the superior court's decision to award shared custody when the child turned five, but reversed the trial court's ruling that various accounts were the separate property of Michael, the father, and vacated a ruling that one of Michael's businesses was his separate property.[954]

The mother, Christina, appealed the award of future shared custody to the Michael, claiming that the order had no evidentiary basis and violated her due process rights.[955] The court held that the trial court appropriately considered the factors specified by Alaska Statutes section 25.24.150(c),[956] including the child's lack of special needs, Michael's desire to change his life to better provide for his son, and the child's need to have contact with his father in the future.[957] The court held that because all procedural requirements were met, Christina's due process rights were not violated.[958] The superior court, therefore, properly awarded shared custody after the child's fifth birthday and the order was affirmed.[959]

Christina also appealed the superior court's designation of Michael's businesses, bank accounts, stock accounts and IRA as separate, non-marital property.[960] The court vacated the trial court's holding that one business, Schmitz & Buck, was separate property, and remanded to allow Christina to present evidence under the active appreciation doctrine.[961] The court held, however, that Christina failed to demonstrate the element of marital

---

[949] *Id.* at *9.
[950] *Id*.
[951] *See id.* at *4–6.
[952] *Id.* at *16.
[953] 88 P.3d 1116 (Alaska 2004).
[954] *Id*. at 1131–32.
[955] *Id*. at 1122.
[956] ALASKA STAT. § 25.24.250(c) (Michie 2004).
[957] 88 P.3d at 1123.
[958] *Id*. at 1124.
[959] *Id*. at 1131.
[960] *Id*.
[961] *Id*. at 1127.

contribution for the other business, the Nugget Men's Store, and thus the separate property designation for that business was appropriate.[962] The court found that because the stock accounts, bank accounts and IRA each increased in value during the marital period, the designation of these assets as separate property was inappropriate.[963] The superior court's holdings with respect to these assets were therefore reversed and remanded.[964]

In *Stanley B. v. State*,[965] the supreme court concluded that there was clear and convincing evidence that a father's criminal conduct, incarceration, and substance abuse impaired his ability to parent his children, and thus his children were "children in need of aid."[966] The court therefore affirmed the lower court's decision terminating the father's parental rights to his two children.[967] The court applied the "clearly erroneous standard" to its review of the factual findings underlying the termination of parental rights.[968] The supreme court noted that the children's father has a significant addiction to illegal substances which has resulted in his incarceration for lengthy periods throughout his children's minority, that there was no other parent to care for the children, and that the father had failed to provide for the children's care during his incarceration.[969] Under these circumstances, Alaska law allows a court to declare such children to be "children in need of aid."[970] The court also affirmed the lower court's holding that the Department of Youth and Family Services had made reasonable efforts to provide family support services to the children's family.[971]

In *State v. DeLeon*,[972] the supreme court held that the superior court has the authority to order a delinquent father to either apply for a Permanent Fund Dividend (PFD) in order to pay court-ordered child support or to demonstrate his ineligibility for the dividend.[973] The superior court denied a motion by the state to order DeLeon to apply for a PFD on the grounds that it had no statutory or inherent authority to issue the order.[974] The supreme court found that this authority existed both expressly under Alaska

---

[962] *Id*.
[963] *Id*. at 1127–1130.
[964] *Id*. at 1131–32.
[965] 93 P.3d 403 (Alaska 2004).
[966] *Id.* at 409.
[967] *Id.* at 406–07.
[968] *Id.* at 405.
[969] *Id*. at 406–07.
[970] ALASKA STAT. § 47.10.011 (Michie 2004).
[971] 93 P.3d at 408.
[972] 103 P.3d 897 (Alaska 2004).
[973] *Id.* at 898.
[974] *Id.*

Statutes section 22.10.020[975] and inherently as part of the superior court's equitable authority.[976] The supreme court further held that the purpose behind the Alaska child support scheme was to ensure that parents met their child support obligations, and denying the superior court the power to grant the motion the state requested would have frustrated that purpose.[977] The court reversed the order of the superior court and remanded the matter for consideration of whether the circumstances warranted issuing the requested order.[978]

In *Weber v. State*,[979] the supreme court affirmed child support payments, but reversed as to a hearing officer's calculation of income and therefore remanded for further consideration.[980] The Child Support Enforcement Division (CSED) modified Weber's child support obligation from $158 to $452 per month.[981] A hearing officer based the obligation on an estimated annual income of $27,146.[982] The supreme court held that CSED did not err in modifying Weber's support obligation.[983] First, Weber was not below the poverty line.[984] Second, while the agency itself agreed not to initiate a modification, the current modification was initiated by Weber's ex-wife.[985] Third, Weber cannot challenge his current payment because he had paid support for his sons despite the fact that they lived with him in the past.[986] Fourth, CSED has authority to order post-majority support.[987] Finally, Weber was not denied due process; he says he was denied a copy of his file before the hearing but the record showed he did not request a copy until the hearing itself.[988] However, the court held that CSED's determination of income was not supported by substantial evidence.[989] Therefore, the court upheld the superior court decision in part, reversed in part, and remanded to CSED for further proceedings.[990]

---

[975] ALASKA STAT. § 22.10.020 (Michie 2004).
[976] 103 P.3d at 898–99.
[977] *Id.* at 900.
[978] *Id.*
[979] No. S-11082, 2004 Alas. Lexis 129 (Alaska Nov. 3, 2004).
[980] *Id.* at *1–2.
[981] *Id.* at *1.
[982] *Id.* at *4.
[983] *Id.* at *9.
[984] *Id.*
[985] *Id.* at *10–11.
[986] *Id.* at *15.
[987] *Id.* at *17.
[988] *Id.* at *18–19.
[989] *Id.* at *8.
[990] *Id.* at *20.

In *Adams v. Adams*,[991] the supreme court held that a party commits constructive frauds by changing a lease term without informing the other party to the lease.[992] Although it was a departure from prior negotiations, Don Adams, on behalf of Alaska Rubber, changed a right of first refusal to a purchase option in the final draft of a lease agreement, without providing notice to Michael Adams.[993] The supreme court held that, while Don Adams may not have intended to deceive Michael Adams, it was obligated to inform him of the change.[994] However, since Michael Adams had reasonable opportunity to read the lease before signing it, the lease was voidable, not void.[995] If Adams knew of the misrepresentation he would have lost the power to void the lease by agreeing to extend it, and the court remanded the case to determine whether Adams had actual knowledge that the lease contained the option to buy.[996]

In *Alaska Action Center, Inc. v. Municipality of Anchorage*,[997] the supreme court affirmed a municipal clerk's refusal to certify a petition that would have the effect of preserving much of the lower end of Girdwood valley as a park.[998] Anchorage owns several hundred acres of undeveloped land in Girdwood Valley.[999] Citizens of Girdwood proposed an initiative that would amend Anchorage's charter and designate 730 acres as a park.[1000] The municipal clerk refused to certify the petition.[1001] The court upheld the authority of the municipal clerk to reject the initiative on subject-matter grounds.[1002] The court held that the Girdwood initiative would make an improper appropriation,[1003] and that no section of the initiative could be certified.[1004]

In *Baskurk v.Beal*,[1005] the supreme court held that a bulk foreclosure sale of two adjoining parcels of property was voidable.[1006] At a foreclosure sale, Baskurt purchased two parcels

---

[991] 89 P.3d 743 (Alaska 2004).
[992] *Id.* at 749.
[993] *Id.* at 746.
[994] *Id.* at 750.
[995] *Id.* at 751.
[996] *Id.*
[997] 84 P.3d 989 (Alaska 2004).
[998] *Id.* at 990.
[999] *Id.*
[1000] *Id.* at 991.
[1001] *Id.*
[1002] *Id.* at 993.
[1003] *Id.*
[1004] *Id.* at 995.
[1005] 101 P.3d 1041 (Alaska 2004).
[1006] *Id.* at 1046.

of land for one dollar more than what Beal, the defaulting debtor, owed on the property.[1007] The supreme court held that a foreclosure sale may be voidable when the price paid is "grossly inadequate when compared to the fair market value of the property on the date of the foreclosure sale" and when the trustee fails to take reasonable steps to protect the debtor's interests in the property.[1008] Here, the court found that the sale price, which was fifteen percent of the fair market value, was grossly inadequate.[1009] Further, the court found the trustee breached her fiduciary duties to Beal in selling both parcels in bulk because the sale of only one parcel would have satisfied Beal's debt.[1010]

In *Chickaloon-Moose Creek Native Association, Inc. v. Norton*,[1011] the Ninth Circuit held that the Department of Interior's decision to convey federal government lands to a regional corporation for reconveyance to Native villages was proper and that, pursuant to the terms of the Deficiency Agreement, those lands listed in Appendix A must be conveyed prior to those lands listed in Appendix C.[1012] In 1976, the Deficiency Agreement was adopted as a compromise intended to ameliorate problems with an earlier agreement to distribute land from the public domain to Native villages after all aboriginal title to land in Alaska was extinguished in 1971.[1013] The Deficiency Agreement was an attempt to resolve a dispute in which it was alleged that the Department of Interior distributed lands of much lower quality than those surrounding Native villages and rendered the latter ineligible for withdrawal.[1014] The court held that the language of the Deficiency Agreement was clear and unambiguous and precluded the conveyance of certain lands until those lands listed in Appendix A of the agreement were exhausted.[1015] The court also held that there was no mutual intent of the parties contrary to the language of the agreement.[1016]

In *Cline v. Cline*,[1017] the supreme court held that the superior court abused its discretion by awarding more than 50% of Cline's pension to Lopez, his ex-wife, and remanded the case to calculate the correct amount owed.[1018] In a 1992 divorce property

---

[1007] *Id.* at 1043.
[1008] *Id.* at 1046.
[1009] *Id.*
[1010] *Id.*
[1011] 360 F.3d 972 (9th Cir. 2004).
[1012] *Id.* at 974.
[1013] *Id.*
[1014] *Id.* at 976.
[1015] *Id.*
[1016] *Id.* at 980.
[1017] 90 P.3d 147 (Alaska 2004).
[1018] *Id.* at 148.

division, the trial judge awarded 18% of Cline's pension to Lopez and set $500 as the monthly payment amount.[1019] Ten years after settlement, Lopez sued for a revision.[1020] The court awarded her past benefits and interest but lowered the payment amount.[1021] Cline argued that this revision should apply retroactively because the initial amount was too high.[1022] The supreme court, basing its judgment on the Uniformed Services Former Spouses' Protection Act, [1023] which limits apportionment of military retirement benefits to 50%, held that the trial court abused its discretion by awarding Lopez 62% of Cline's pension.[1024] The supreme court reversed the disposition of income and set the payment amount at 50% of retirement benefits.[1025] The court also held that the imminent reduction of Mr. Cline's retirement income because of disability payments was a proper matter for reconsideration under federal law.[1026]

In *Dykstra v. Municipality of Anchorage,*[1027] the supreme court held that Dykstra's use of his property to accommodate his car collection of twenty or more cars violated the applicable zoning statute.[1028] Dykstra claimed that the use of his property to collect cars was permissible as an accessory use, or, in the alternative, that the zoning provisions were unconstitutionally vague.[1029] Noting that the issue was one of first impression in Alaska, the court relied on precedent from other jurisdictions to determine that an accessory use of property becomes impermissible when the property owner's use involves unreasonable or uncommon extremes.[1030] The court also held that the adopted approach to accessory use was flexible without being impermissibly vague, and therefore, was not unconstitutional.[1031] The court remanded the case for further findings based on the zoning board's failure to adopt specific findings and to give Dykstra reasonable notice of the steps necessary to remedy his violation.[1032]

The supreme court also held that, in drafting and passing ARCA, the legislature did not create the railroad under the presumption that it would be immune from local zoning

---

[1019] *Id.* at 149.
[1020] *Id.*
[1021] *Id.*
[1022] *Id.* at 151.
[1023] 10 U.S.C. § 1408(e)(1) (2003).
[1024] 90 P.3d at 153.
[1025] *Id.* at 154.
[1026] *Id.* at 155.
[1027] 83 P.3d 7 (Alaska 2004).
[1028] *Id.* at 11.
[1029] *Id.*
[1030] *Id.* at 10.
[1031] *Id.* at 9–10.
[1032] *Id.* at 14–15.

ordinances.[1033] The supreme court concluded that a balancing-of-interests test was the appropriate tool to discern legislative intent when a law and its legislative history provided no clear indication of intent.[1034] Under this test, the governmental entity seeking immunity has the burden to prove that the balance of certain factors favors immunity.[1035] However, the supreme court further held that it was not appropriate for courts to apply this test unless the state had first made "a reasonable good faith attempt to comply with local zoning laws."[1036] Finally, the supreme court held that the railroad must apply for the conditional use permit and fail in that application before further proceedings on the issue of immunity could be heard.[1037]

In *Fyffe v. Wright*,[1038] the supreme court held that a landlord who disposes of a tenant's personal property without notice is entitled to present evidence to offset the damages award to the tenant in a later suit.[1039] Fyffe moved out of the home she rented from Wright, but left some of her belongings in a shed on the property.[1040] When she returned to claim the items, she learned that Wright had given them to charity.[1041] The superior court awarded damages to Fyffe, but offset the award by the amount she owed Wright for past rent and damage to the rental property.[1042] The supreme court affirmed to prevent injustice to Wright.[1043]

In *Glover v. Glover*,[1044] the supreme court held that a former tenant asserting adverse possession must give clear and distinct notice that his claim is hostile to the true owner of the property.[1045] Clara Glover sued to quiet title in a contested lot that had changed hands several times in the previous forty years.[1046] The superior court found that the former tenant acquired the lot through adverse possession—though initial occupancy was permissive, the lot was eventually sold and the tenant's possession became hostile.[1047] The supreme court held that neither transfer of property nor non-payment of rent automatically changes permissive occupancy to hostile possession, and remanded to

---

[1033] *Id.* at 48.
[1034] *Id.* at 52, 55.
[1035] *Id.* at 54.
[1036] *Id.* at 55.
[1037] *Id.* at 57–58.
[1038] 93 P.3d 444 (Alaska 2004).
[1039] *Id.* at 451–52.
[1040] *Id.* at 448–49.
[1041] *Id.* at 449.
[1042] *Id.* at 450.
[1043] *Id.* at 452.
[1044] 92 P.3d 387 (Alaska 2004).
[1045] *Id.* at 394.
[1046] *Id.* at 391.
[1047] *Id.*

determine whether the former tenant's claim was based on a distinct and positive assertion of ownership.[1048]

In *Native Village of Eklutna v Alaska Railroad Corp.*,[1049] the supreme court held that the Alaska Railroad Corporation Act ("ARCA")[1050] did not grant the Alaska Railroad Corporation immunity from local zoning laws.[1051] The Native Village of Eklutna sought a preliminary injunction to prohibit the railroad from carrying out blasting operations in a quarry owned by the railroad on land adjacent to the village.[1052] Eklutna argued that the railroad had not obtained the conditional use permit required to operate the quarry under a local zoning ordinance.[1053] The railroad maintained that it was not subject to the ordinance because ARCA and its legislative history showed that the legislature intended for the railroad to be immune from local zoning laws.[1054] The superior court's decision had found that the railroad possessed such immunity.[1055] In reversing, the supreme court held that ARCA and its legislative history provided no clear indication of the legislature's intent regarding the authority of local zoning laws over the railroad.[1056]

In *Norville v. Carr-Gottstein Foods Co.*,[1057] the supreme court reversed a grant of summary judgment for the defendants and remanded for determination as to whether a landlord's refusal to consent to a tenant's sublease was unreasonable.[1058] Norville refused to permit Safeway (who had bought out Carr-Gottstein Foods Co.) to sublease a portion of their supermarket to a bank without awarding him 75% of the sublease rent.[1059] Safeway accepted Norville's terms but initiated legal proceedings that Norville's conditions were unreasonable and in violation of their original lease.[1060] The court rejected Safeway's first argument that Norville could not object to the sublease because the use of said space would be permitted to the tenant under the lease.[1061] Instead, the court found that a refusal of a sublease is permitted if such refusal is commercially reasonable.[1062] The court reversed and

---

[1048] *Id.* at 395.
[1049] 87 P.3d 41 (Alaska 2004).
[1050] ALASKA STAT. §§ 42.40.010–.990 (Michie 2004).
[1051] 87 P.3d at 45.
[1052] *Id.* at 43.
[1053] *Id.*
[1054] *Id.* at 45.
[1055] *Id.* at 57.
[1056] *Id.*
[1057] 84 P.3d 996 (Alaska 2004).
[1058] *Id.* at 998.
[1059] *Id.*
[1060] *Id.* at 999.
[1061] *Id.* at 1001.
[1062] *Id.*

remanded the case to determine whether Norville's reasons were genuine and reasonable under the circumstances at hand.[1063]

In *Rush v. Department of Natural Resources*,[1064] the supreme court affirmed the Department of Natural Resources (DNR) decision that, under Alaska Statute section 38.05.090, the auction purchaser of formerly leased land must pay the lessee the value of the buildings and fixtures the lessee owned on the property.[1065] A non-profit organization attempted to buy the land it leased and on which it managed a hatchery.[1066] DNR decided to sell the land at auction.[1067] If the non-profit was not the auction winner, the buyer was required to purchase the non-profit's buildings.[1068] Rush, a neighbor, challenged this ruling, arguing that amendments to Section 38.05.090 no longer required this purchase.[1069] The supreme court found that the amended version of the statute was not intended to be applied retroactively and could not be applied if it had a retroactive effect.[1070] The court held that applying the amended version rather than the statute as it stood at the time the lease commenced would have an impermissible retroactive effect because it substantively altered the disposition of proceeds from the property's sale.[1071] The court held that the former version of the statute should be applied.[1072]

In *Soules v. Ramstack*,[1073] the supreme court held the Estate of Pauline King responsible for a special assessment fee for the condominium that the estate sold to Ramstack.[1074] The condo association informed all homeowners, including King's estate, that a special assessment fee had been levied and also advised homeowners attempting to sell their units to deposit the fee upon closing.[1075] Soules, representing King's estate, argued that Ramstack should pay the fee because the estate sold the condo before the fee was due, and Ramstack would be unjustly enriched if the estate paid the fee.[1076] The court held that debts can exist before they are due and the fee was an existing obligation at the time of the condo's sale.[1077] The court rejected Soules' unjust

---

[1063] *Id.* at 1002.
[1064] 98 P.3d 551 (Alaska 2004).
[1065] *Id.* at 552.
[1066] *Id.* at 553.
[1067] *Id.* at 554.
[1068] *Id.*
[1069] *Id.* at 555.
[1070] *Id.* at 557.
[1071] *Id.* at 555.
[1072] *Id.* at 556.
[1073] 95 P.3d 933 (Alaska 2004).
[1074] *Id.* at 934.
[1075] *Id.* at 935.
[1076] *Id.* at 936.
[1077] *Id.*

enrichment claim because Ramstack paid fair value for the condo and the estate would be required merely to fulfill a prior contractual obligation.[1078]

In *Zok v. Estate of Collins*,[1079] the supreme court held that a fraudulent conveyance claim should have been further investigated before the court ordered an estate closed.[1080] Zok sued his attorney, Collins, for malpractice.[1081] Before Zok could file suit, however, Collins transferred parcels of real property to the Collins Family Trust.[1082] After Collins died a year later, probate proceedings were opened by his personal representative.[1083] Zok filed a written objection to the closing of the estate without consideration of his claim.[1084] However, the probate court did not address this claim or provide Zok with a hearing on this issue.[1085] On appeal, Zok argued that he was not given notice that his fraudulent conveyance claims would be tried at the probate hearing and that it was error to close the estate before the claims were resolved.[1086] The court held that Zok was not given proper notice.[1087] Furthermore, the court held that Zok's fraudulent conveyance claim should have been adjudicated before the estate was closed.[1088]

XIII. TORT LAW

In *Allstate Insurance Co. v. Teel*,[1089] the supreme court held that the phrase "insured person" in an insurance policy provision covered an individual claiming negligent infliction of emotional distress from the death of an occupant in an insured automobile.[1090] Teel's son died from injuries resulting from a drunk driving accident.[1091] After collecting $50,000, the limit under the drunk driver's policy, Teel was denied a claim for negligent infliction of emotional distress under the her own policy's Uninsured/Underinsured Motorists (UM/UIM) provisions.[1092] Teel sued her insurance agency, Allstate, arguing that she was legally

---

[1078] *Id.* at 940.
[1079] 84 P.3d 1005 (Alaska 2004).
[1080] *Id.* at 1010.
[1081] *Id.* at 1006.
[1082] *Id.*
[1083] *Id.*
[1084] *Id.* at 1006–07.
[1085] *Id.* at 1008.
[1086] *Id.*
[1087] *Id.*
[1088] *Id*. at 1009.
[1089] 100 P.3d 2 (Alaska 2004).
[1090] *Id*. at 3.
[1091] *Id*.
[1092] *Id*.

entitled to recover under the UM/UIM provisions of her policy and that Allstate employees had fraudulently persuaded her to accept the limits of her own policy's UM/UIM provisions at arbitration.[1093] Allstate claimed that Teel was not an "insured person" under the UM/UIM provisions because her injuries were not derivative and that the coverage under the policy had already been exhausted.[1094] The supreme court held that Teel was an "insured person" under the policy, upholding the superior court's ruling that the UM/UIM provisions cover not only derivative injuries, but also injuries that are legally caused by and are the foreseeable result of injury to the insured or a close relative of the insured.[1095]

In *Bryson v. Banner Health System*,[1096] the supreme court held that the Family Recovery Center owed a patient a limited but actionable duty of care to protect her from foreseeable harm in the course of her treatment.[1097] Bryson was attacked by a fellow patient at the Center, a substance abuse outpatient treatment facility.[1098] After the attack, Bryson filed suit against the Center alleging negligence on the part of the facility for failure to warn and protect her from the other patient, whom the Center knew to be dangerous.[1099] The Center asserted that federal regulations precluded it from divulging the confidential treatment records or criminal history of patients, and thus, that it had no duty to warn its patients.[1100] Considering the parties' motions for summary judgment, the superior court held that the Center could have taken actions to warn or protect Bryson during her treatment without violating its statutory duty of confidentiality, and thus there remained a triable issue of fact regarding the relation-specific duty.[1101] On interlocutory review, Bryson argued that the duty of the Center should not be limited to the patient-treatment context, and the Center argued that the lower court erred in finding an actionable duty.[1102] The supreme court held that when the Center undertook to treat Bryson it formed a "special relationship" that gave rise to a reasonable duty of care.[1103] The supreme court further agreed with the superior court that the Center could have

[1093] *Id.*
[1094] *Id.* at 4.
[1095] *Id.* at 5.
[1096] 89 P.3d 800 (Alaska 2004).
[1097] *Id.* at 801.
[1098] *Id.* at 802.
[1099] *Id.*
[1100] *Id.*
[1101] *Id.* at 803.
[1102] *Id.*
[1103] *Id.* at 805.

taken steps to warn or protect Bryson notwithstanding a statutory duty of confidentiality.[1104]

In *City of Bethel v. Peters*,[1105] the supreme court held that Alaska Rule of Evidence 407 does not preclude admission of a redacted post-accident report.[1106] Peters fell in a city-owned senior center and brought a successful suit for negligence against the city.[1107] At trial, a report prepared by the city's director of senior services following the accident was entered into evidence.[1108] This report noted that following Peters's accident, safety bars were installed in the shower area to prevent falls.[1109] However, the portion of the report detailing what corrective actions were taken was redacted.[1110] The supreme court held that while Rule 407 bars the admission of evidence showing remedial corrective measures, the redacted report was not excludable on these grounds.[1111]

In *Ledgends, Inc. v. Kerr*,[1112] the supreme court, in a per curiam decision, affirmed the superior court's decision rejecting Ledgends's affirmative defense based upon a release signed by Kerr.[1113] Kerr sued a health club after injuring her knee as a result of a fall from a climbing wall, alleging negligence by the club for failing to keep the premises in a "reasonably safe condition."[1114] The key issue at trial involved a release signed by Kerr prior to climbing the wall.[1115] The superior court found the release ambiguous as to its scope, and, employing a narrow reading, declined to interpret it as a release from all negligence by the club.[1116] The supreme court issued a brief per curium opinion which expressly adopted the reasoning of the superior court and affirmed its decision.[1117]

In *Parker v. Tomera*,[1118] the supreme court held that a plaintiff is required to support a medical malpractice claim with expert testimony[1119] and that a court is not required to appoint an expert advisory panel in all medical malpractice cases.[1120] Parker

---

[1104] *Id.* at 806.
[1105] 97 P.3d 822 (Alaska 2004).
[1106] *Id.* at 824.
[1107] *Id.*
[1108] *Id.* at 825.
[1109] *Id.* at 824–25.
[1110] *Id.* at 825.
[1111] *Id.* at 827.
[1112] 91 P.3d 960 (Alaska 2004) (per curiam).
[1113] *Id.* at 961.
[1114] *Id*. at 960–61.
[1115] *Id*. at 961.
[1116] *Id.* at 963.
[1117] *Id*. at 961.
[1118] 89 P.3d 761 (Alaska 2004).
[1119] *Id*. at 763.
[1120] *Id*. at 767–68.

visited a urologist, Tomera, to have his urinary problems evaluated.[1121] Tomera and his staff performed a procedure known as a Parson's Test in an attempt to diagnose Parker's ailment.[1122] Parker brought suit against Tomera alleging that he experienced sexual dysfunction as a result of this procedure.[1123] The statute[1124] that governs medical malpractice claims places the burden of proof on the plaintiff.[1125] Because his injury was technical in nature, the supreme court held that Parker was required to support his claim with expert testimony.[1126] Parker's failure to provide an expert made summary judgment on his medical malpractice claim appropriate.[1127] Further, the supreme court held that the superior court's decision not to appoint an expert advisory panel was not in error because the specific circumstances of the case made it impossible to find three neutral panel members.[1128]

[1121] *Id*. at 763.
[1122] *Id*.
[1123] *Id*. at 764.
[1124] ALASKA STAT. § 09.55.540 (Michie 2002).
[1125] 89 P.3d at 766.
[1126] *Id*.
[1127] *Id*. at 765.
[1128] *Id*. at 768.