THE YEAR IN REVIEW 2007

SELECTED CASES FROM THE ALASKA SUPREME COURT, THE ALASKA COURT OF APPEALS, THE UNITED STATES SUPREME COURT, AND THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

INTRODUCTION

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

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Alaska Supreme Court

Alaska Trademark Shellfish, LLC v. State, Department of Fish & Game

In *Alaska Trademark Shellfish, LLC v. State, Department of Fish & Game*,[1] the supreme court held that statements made by the Alaska Department of Fish and Game, or its personnel, were insufficient to allow Alaska Trademark Shellfish (ATS) to harvest geoducks by promissory estoppel.[2] ATS applied for state permits to allow it to engage in geoduck farming, believing that the permits would allow ATS to harvest wild geoducks on its farm sites.[3] However, the Department denied the permits because ATS refused to agree not to harvest the protected wild geoducks.[4] In a previous proceeding, the supreme court held that the Department lacked the statutory authority to grant any aquatic farmer the exclusive right to harvest wild stocks.[5] Here, the supreme court concluded that the record contained no evidence that would permit an inference that the Department actually promised ATS that it could harvest the wild geoducks.[6] The supreme court affirmed the superior court's judgment for the State, holding that statements made by the Department or its personnel were insufficient to allow ATS to harvest geoducks by promissory estoppel.[7]

Bickford v. State, Department of Education & Early Development

In *Bickford v. State, Department of Education & Early Development*,[8] the supreme court held that the Alaska Department of Education had not violated the Individuals with Disabilities Education Act (IDEA) when it rejected an ambiguous complaint and required the resubmission of a clarified version.[9] The mother of a learning-disabled child sent a complaint to the Department naming eight plaintiffs and listing twenty counts accusing the Anchorage School District of violating IDEA student-evaluation procedures.[10] The document appeared to be drafted as a civil court document and did not specify where it was meant to be filed.[11] The Department forwarded the complaint to the attorney general, and the assistant attorney general told the mother that she would have to clarify her complaint in order to resolve the procedural problems it presented.[12] The supreme court determined that the Department's dismissal of the original complaint was found to be proper because the complaint raised issues beyond the jurisdiction of the Department and was otherwise vague in its intended purpose.[13] The

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[1] 172 P.3d 764 (Alaska 2007).
[2] *Id.* at 765.
[3] *Id.*
[4] *Id.*
[5] *Id.*
[6] *Id.* at 766.
[7] *Id.* at 765.
[8] 155 P.3d 302 (Alaska 2007).
[9] *Id.* at 304.
[10] *Id*. at 305.
[11] *Id*.
[12] *Id*. at 306.
[13] *Id*. at 304.

supreme court affirmed the superior court, holding that the Department had not violated IDEA when it rejected an ambiguous complaint and required the resubmission of a clarified version.[14]

City of Kotzebue v. State, Department of Corrections

In *City of Kotzebue v. State, Department of Corrections*,[15] the supreme court held that: (1) the city was entitled to partial reimbursement for the cost of housing prisoners, (2) the city's claim for more expansive reimbursement of transportation costs was not ripe, and (3) the city must pay the state's attorneys' fees.[16] Believing that its contract with the state to operate a jail caused unreasonable financial burdens, the city did not renew its contract with the state to operate the jail.[17] Alaska state troopers failed to take custody of prisoners for a time after the contract had expired and the city was forced to open the prison, subsequently bringing suit to recover housing and transportation costs from the state for the time after which the contract expired.[18] On appeal, the city argued that the state was liable to the city for prisoner housing costs and was also responsible for all transportation of prisoners, and that because Kotzebue was a public-interest litigant, it was not required to pay the state's attorney's fees.[19] The supreme court held that (1) because the contract power of the Commissioner of the Alaska Department of Corrections was not coextensive with the Commissioner's power to designate a jail a "correctional facility" for purposes of the statute, the city was entitled to the housing costs it incurred between the time the contract lapsed and the time the jail was no longer an authorized "correctional facility;" (2) because the state lost on the issue of transportation costs and did not appeal the issue, and because the city's argument sought to regulate the department's conduct outside of the city, the claim for broader transportation costs was not ripe; and (3) because the city was seeking significant compensation from the state, it had an economic interest in the litigation that made it ineligible for public-interest litigant status.[20] The supreme court vacated and remanded the judgment of the superior court regarding housing costs but affirmed on all other grounds, holding that: (1) the city was entitled to partial reimbursement for the cost of housing prisoners; (2) the city's claim for more expansive reimbursement of transportation costs was not ripe; and (3) the city must pay the state's attorneys' fees.[21]

Copeland v. State. Commercial Fisheries Entry Commission

In *Copeland v. State, Commercial Fisheries Entry Commission*,[22] the supreme court held that, under Alaska's Commercial Fisheries Entry Commission's (CFEC) regulations, the "unavoidable circumstance" exception is limited to circumstances where fishermen are prevented from fishing due to circumstances beyond their control.[23] The

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[14] *Id*. at 313.
[15] 166 P.3d 37 (Alaska 2007).
[16] *Id.* at 45–47.
[17] *Id.* at 38–39.
[18] *Id.* at 39.
[19] *Id.* at 40, 45–46.
[20] *Id.* at 45–47.
[21] *Id.*
[22] 167 P.3d 682 (Alaska 2007).
[23] *Id.* at 684.

CFEC denied Copeland's application for a limited entry fishing permit.[24] On appeal, *inter alia*, Copeland claimed he qualified for the CFEC's "unavoidable circumstances" exception in 1970 because domestic issues kept him from fishing that year.[25] After reviewing the record, the supreme court found that Copeland simply made a business decision not to fish that year based on fishing forecasts, and that nothing about his decision met the unavoidable circumstance clause's requirements of uniqueness and unavoidability.[26] The supreme court upheld all other aspects of the superior court's decision.[27] The supreme court affirmed the superior court, holding that under CFEC regulations, the "unavoidable circumstance" exception is limited to circumstances where fishermen are prevented from fishing due to circumstances beyond their control.[28]

Eagle v. State, Department of Revenue

In *Eagle v. State, Department of Revenue*,[29] the supreme court held that the narrow scope of federal preemption of state law did not extend past the explicit intent of the federal law in question.[30] Eagle, a member of the United States Navy from 1986 to 2002, grew up in Alaska and made his last trip to Alaska in 1999.[31] The state awarded Eagle a Permanent Fund Division ("PFD") from 1986 to 1994, but refused to award Eagle a PFD in 1995 because he was no longer a resident, and he did not reapply until 2003.[32] The court reasoned that the Federal Soldiers' and Sailors' Civil Relief Act explicitly protected servicemembers' residency for tax and voting purposes, but did not establish residence for all purposes, and that Congress did not intend for the Act to do so.[33] The supreme court affirmed, holding that the narrow scope of federal preemption of state law did not extend past the explicit intent of the federal law in question.[34]

Griffiths v. Andy's Body & Frame, Inc.

In *Griffiths v. Andy's Body & Frame, Inc.*,[35] the supreme court held that the Workers' Compensation Board abused its discretion in dismissing as incomplete a claimant's petition for modification where the claimant followed all instructions set out by the Board in its previous decision.[36] Griffiths, an auto body repairman, developed carpal tunnel syndrome after working at Andy's Body & Frame, Inc. for five years but was denied reemployment benefits because his employer's medical examiner diagnosed no permanent partial impairment (PPI).[37] The Board determined that the employee can seek modification of the decision if the employee is diagnosed with PPI.[38] Griffiths

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[24] *Id.* at 683.
[25] *Id.* at 683–84.
[26] *Id.* at 684.
[27] *Id.* at 683.
[28] *Id.* at 684.
[29] 153 P.3d 976 (Alaska 2007).
[30] *Id*. at 982.
[31] *Id*. at 977.
[32] *Id*.
[33] *Id*. at 978–79.
[34] *Id.* at 982.
[35] 165 P.3d 619 (Alaska 2007).
[36] *Id.* at 624.
[37] *Id.* at 620–21.
[38] *Id.* at 621.

obtained a diagnosis of PPI and filed a petition for modification.[39] The Board then determined that the petition violated modification procedures by failing to include a statement of due diligence as to why the diagnosis could not have been produced for the previous hearing, and dismissed the petition.[40] Griffiths appealed, arguing that the Board's first decision did not indicate that a statement of due diligence was required.[41] Noting that Griffiths was representing himself at the time of the first order and that his interpretation of the order was reasonable under the circumstances, the supreme court held that the Board "violated Griffiths's reasonable procedural expectations" by dismissing his petition.[42] The supreme court vacated the Board's decision, holding that the board abused its discretion in dismissing as incomplete a claimant's petition for modification where the claimant followed all instructions set out by the board in its previous decision.[43]

May v. State, Commercial Fisheries Entry Commission

In *May v. State, Commercial Fisheries Entry Commission*,[44] the supreme court held that a commercial fisherman was ineligible to apply for a limited entry permit to the Southeast Alaska herring purse seine fishery.[45] In 1977, May applied to the Commercial Fisheries Entry Commission (CFEC) for a permit to enter the fishery, arguing that his prior fishing activity in the Annette Island Reserve (AIR) qualified him.[46] The CFEC denied his permit because prior fishing activity within AIR was not a basis for eligibility.[47] May's appeals and long periods of "delay and dormancy" kept his application open until December 2004, when May exhausted his appeals within the CFEC, and his application was denied.[48] May appealed to the superior court, alleging equal protection and due process violations and that the CFEC was collaterally estopped from finding him ineligible because of a prior decision.[49] The superior court affirmed the CFEC's final decision on all points.[50] May appealed to the supreme court, which held that, to the extent the CFEC's decision to deny May's application was inconsistent with a prior decision, the CFEC was not estopped because it explained its reasons for abandoning the prior decision and the prior decision was plainly erroneous.[51] The court also held that May's equal protection claim failed because he did not show intentional discrimination and that his due process claim was entirely without merit.[52] The supreme court affirmed the superior court, holding that a commercial fisherman was ineligible to apply for a limited entry permit to the Southeast Alaska herring purse seine fishery.[53]

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[39] *Id.* at 621–22.
[40] *Id.* at 623.
[41] *Id.*
[42] *Id.* at 624
[43] *Id.*
[44] 168 P.3d 873 (Alaska 2007).
[45] *Id.* at 887.
[46] *Id.* at 877.
[47] *Id.*
[48] *Id.* at 879.
[49] *Id.*
[50] *Id.*
[51] *Id.* at 882–83.
[52] *Id.* at 884–85.
[53] *Id.* at 887.

May v. State, Commercial Fisheries Entry Commission

In *May v. State*, *Commercial Fisheries Entry Commission*[54] the supreme court held that substantial evidence did not support the Commercial Fisheries Entry Commission's (CFEC) finding that May was ineligible for an entry permit for longline fishing, but that substantial evidence did support the CFEC's decision that he was ineligible for a pot fishery permit.[55] May's applications for entry permits in the longline and pot fisheries were denied, and, after appeals, the CFEC issued its final ruling which denied his applications and found that he lacked standing to challenge the number of permits that were issued.[56] May appealed to the superior court, which affirmed the CFEC's decision.[57] The supreme court held May's eligibility for a longline fishing permit was supported by substantial evidence, and he therefore also had standing to challenge the maximum number of longline fishing permits issued.[58] The supreme court further held that substantial evidence supported the CFEC's determination that he was ineligible for a pot fishing permit and therefore lacked standing to challenge the number of pot fishing permits issued.[59] The supreme court revered the superior court and remanded the case, holding that substantial evidence did not support the CFEC's finding that MAY was ineligible for an entry permit for longline fishing, but that substantial evidence did support the CFEC's decision that he was ineligible for a pot fishery permit.[60]

Pasternak v. State, Commercial Fisheries Entry Commission

In *Pasternak v. State, Commercial Fisheries Entry Commission*,[61] the supreme court held that the Commercial Fisheries Entry Commission (CFEC) properly set the maximum and optimum number of fishery permits at seventy-three,[62] and advice that Pasternak's equipment was inappropriate for the fishery did not constitute extraordinary circumstances.[63] Pasternak applied for a permit to a sablefish fishery from the CFEC and was denied because his point total was insufficient.[64] Pasternak then appealed to the district court, arguing that the CFEC set the number of available permits too low and that he should have been awarded points for extraordinary circumstances, but the district court upheld CFEC's decision.[65] The supreme court explained that Pasternak's first argument was foreclosed because seventy-three was an appropriate maximum and optimal number of entry permits.[66] Next, the court rejected Pasternak's argument that advice he received from other people that his equipment was not strong enough for sablefish in 1983 constituted extraordinary circumstances because Pasternak made no

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[54] 175 P.3d 1211 (Alaska 2007).
[55] *Id*. at 1222.
[56] *Id*. at 1213–15.
[57] *Id*. at 1215.
[58] *Id*. At 1216–21.
[59] *Id*. at 1221–22.
[60] *Id.* at 1222.
[61] 166 P.3d 904 (Alaska 2007).
[62] *Id.* at 908, 909.
[63] *Id.* at 910.
[64] *Id.* at 906.
[65] *Id.* at 906–07.
[66] *Id.* at 907–09.

attempt to fish that year and did not make all reasonably possible efforts to participate.[67] The supreme court of Alaska affirmed the district court, holding that the CFEC properly set the maximum and optimum number of fishery permits at seventy-three,[68] and advice that Pasternak's equipment was inappropriate for the fishery did not constitute extraordinary circumstances.[69]

Powercorp Alaska, LLC v. State, Alaska Industrial Development & Export Authority

In *Powercorp Alaska, LLC v. State, Alaska Industrial Development & Export Authority*,[70] the supreme court held that the Alaska Energy Authority did not violate its authority by requiring bidders to use a specific operating system.[71] The Alaska Energy Authority (Authority) had a program to provide electricity to rural communities.[72] The program included upgrading the switchgear system, and the Authority preferred the PLC operating system for the switchgear system.[73] Powercorp was unable to bid for upgrading the switchgear system because the Authority required all bidders to use the PLC system, whereas Powercorp used a different operating system.[74] Powercorp protested the invitation to bid because of the Authority's demand of the PLC system, and asked that the bidding be delayed until the PC operating system that it used could be evaluated and compared.[75] Powercorp's request was denied, and Powercorp appealed to an independent hearing officer, who ultimately found that the Authority did not abuse its discretion.[76] Powercorp then appealed to the superior court, which affirmed the decision.[77] On subsequent appeal, the supreme court held that the rational basis standard should be used in deferring to the agency's decision-making.[78] The supreme court found that the hearing officer carefully investigated the law and evidence when deciding both that the agency was allowed to prefer one operating system over another and that the Authority had a rational basis for its preference.[79] The supreme court affirmed the superior court's decision, holding that the Alaska Energy Authority did not violate its authority by requiring bidders to use a specific operating system.[80]

Pruitt v. City of Seward

In *Pruitt v. City of Seward*,[81] the supreme court held that the doctrines of exhaustion of administrative remedies and collateral estoppel did not bar a building owner from appealing the zoning commission's denial of a permit to build a canopy.[82]

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[67] *Id.* at 909–10.
[68] *Id.* at 908, 909.
[69] *Id.* at 910.
[70] 171 P.3d 159 (Alaska 2007).
[71] *Id.* at 161.
[72] *Id.* at 161–62.
[73] *Id.* at 162.
[74] *Id.*
[75] *Id.*
[76] *Id.* at 162–63.
[77] *Id.* at 163.
[78] *Id.* at 164.
[79] *Id.* at 165.
[80] *Id.* at 161.
[81] 152 P.3d 1130 (Alaska 2007).
[82] *Id*. at 1132–33.

After Pruitt built a canopy in violation of the city's decision denying him a variance, the city brought a successful enforcement action against Pruitt in superior court.[83] On appeal, Pruitt argued that the city's interpretation of section 15.10.140 of the Seward City Code is not supported by the text of the ordinance.[84] The city argued that Pruitt was barred from defending against the enforcement action by the doctrines of exhaustion of administrative remedies[85] and collateral estoppel.[86] The supreme court held that neither doctrine applied because the city did not give Pruitt notice that its decision was final[87] and because the city's decision denying the variance did not require it to resolve whether or not the canopy violated the zoning restrictions.[88] The supreme court further held that, because the city denied Pruitt an appeal and the zoning code is ambiguous, the superior court should have given Pruitt the opportunity to appeal the zoning commission's interpretation of §15.10.140 directly to the commission.[89] The supreme court vacated and remanded, holding that the doctrines of exhaustion of administrative remedies and collateral estoppel did not bar a building owner from appealing the zoning commission's denial of a permit to build a canopy.[90]

Pyramid Printing Co. v. State, Commission for Human Rights

In *Pyramid Printing Co. v. State, Commission for Human Rights*,[91] the supreme court held that the Alaska State Commission for Human Rights' award of backpay and vacation pay and order of sexual harassment training was appropriate in a sexual harassment case, but that the interest awarded was excessive.[92] Tiernan, a former employee at Pyramid Printing Company, quit her job with the company after repeated incidents of inappropriate behavior directed towards her by Pintar, the owner's son.[93] After leaving the company, Tiernan filed a claim for sexual harassment with the Alaska Department of Labor. During the hearing with the Department of Labor, the Pintars offered Tiernan her job back, but she rejected the offer of re-employment.[94] After the Department of Labor denied Tiernan's benefit claims because she left the job voluntarily and without good cause, she filed a claim with the Human RightS Commission.[95] The Commission awarded Tiernan damages with interest at 10.5% and also required Pyramid to adopt written policies on discrimination and provide annual training.[96] Pyramid appealed the decision.[97] Despite the fact that Tiernan was offered reemployment with the company, she was reasonable to believe that the intolerable conditions had not changed,

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[83] *Id*. at 1132.
[84] *Id*. at 1139.
[85] *Id*. at 1135.
[86] *Id*. at 1138.
[87] *Id*.
[88] *Id*. at 1138–39.
[89] *Id*. at 1139–41.
[90] *Id*. at 1141.
[91] 153 P.3d 994 (Alaska 2007).
[92] *Id*. at 996.
[93] *Id.*
[94] *Id.* at 997.
[95] *Id.*
[96] *Id*.
[97] *Id.*

and she was therefore not obligated to mitigate damages.[98] The supreme court affirmed in part and vacated and remanded in part, holding that the Alaska State Commission for Human Rights' award of backpay and vacation pay and order of sexual harassment training was appropriate in a sexual harassment case, but that the interest awarded was excessive.[99]

South Anchorage Concerned Coalition, Inc. v. Municipality of Anchorage Board of Adjustment

In *South Anchorage Concerned Coalition, Inc. v. Municipality of Anchorage Board of Adjustment*,[100] the supreme court held that the filing deadline set by section 21.30.050 of the Anchorage Municipal Code is discretionary and not mandatory.[101] Neighboring landowners, organized as the South Anchorage Concerned Coalition, Inc. (Coalition), challenged a residential development.[102] The plat was initially approved, and the Coalition's subsequent appeal was filed past the deadline set by section 21.30.050(B) of the Anchorage Municipal Code and thus automatically denied.[103] The record showed that both the Board of Adjustment and the clerk of court believed they had no discretion in hearing untimely appeals.[104] The supreme court held that the language of section 21.30.050(B) of the Anchorage Municipal Code was directory, as opposed to mandatory, and therefore substantial compliance is acceptable absent significant prejudice to the other party.[105] The court considered the serious, practical consequences of a mandatory time limit and the intention of the provision—to act as a guideline for the efficient conduct of public business.[106] The Board of Adjustment thus has discretion to relax the filing deadline when it hears matter on appeal.[107] The supreme court remanded the case to the Board of Adjustment and allowed the appeal to proceed, holding that the filing deadline set by section 21.30.050 of the Anchorage Municipal Code is discretionary and not mandatory.[108]

Smith v. University of Alaska, Fairbanks

In *Smith v. University of Alaska, Fairbanks*,[109] the supreme court held that in situations where causation is a medical issue, the Alaska Worker's Compensation Board (Board) must explain its decision adequately enough to permit review of its application of legal rules and consideration of relevant evidence.[110] Smith had a history of back problems when he injured himself working at the University of Alaska, Fairbanks power plant in 1999.[111] A month later, he aggravated his back to the point that he needed

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[98] *Id.* at 999.
[99] *Id.* at 1002–03.
[100] 172 P.3d 768 (Alaska 2007).
[101] *Id.* at 773.
[102] *Id.* at 770.
[103] *Id.*
[104] *Id.* at 770–71.
[105] *Id.* at 771–72.
[106] *Id.* at 772–73.
[107] *Id.* at 773.
[108] *Id.*
[109] 172 P.3d 782 (Alaska 2007).
[110] *Id*. at 793.
[111] *Id*. at 784.

emergency surgery, and later claimed his injury resulted from his work and filed for worker's compensation.[112] When the Board met, it heard evidence from lay people and physicians regarding the potential causes of Smith's injury.[113] Smith appealed after a number of Board and superior court decisions ultimately resulted in denying him worker's compensation.[114] The supreme court found that it was unable to determine (1) the extent to which the Board relied on the lay testimony[115] and (2) whether the Board relied on an incorrect legal rule regarding causation.[116] Without adequate findings from the Board, the supreme court was unable to render judicial review.[117] The supreme court remanded the case to the Board to clarify its findings, holding that in situations where causation is a medical issue, the Board must explain its decision adequately enough to permit review of its application of legal rules and consideration of relevant evidence.[118]

State, Department of Administration v. Bachner Co.

In *State, Department of Administration v. Bachner Co.*,[119] the supreme court held that none of the factors in section 36.30.585(b) of the Alaska Statutes should be given determinative weight in deciding a proper remedy.[120] Bachner and Bowers Investment Co. both protested their unsuccessful bids on a leasing contract with the Department, and, after losing there, appealed to the commissioner.[121] The hearing officer decided that there had been serious deficiencies in the bidding process and that the proper remedy would be for the state to reimburse the companies for their proposal preparation costs.[122] The companies appealed, arguing that the proper remedy should have been either a cancellation of the contract or rescoring.[123] The supreme court rejected these arguments and stressed the difficulty in deciding the proper remedy in such situations as well as the hearing officer's thorough analysis.[124] The court also explained that no factor in section 36.30.585(b) of the Alaska Statutes should be determinative and that it was proper for the hearing officer to consider the state's costs to the winning bidder if the bid was cancelled.[125] The supreme court affirmed the decision of the hearing officer, holding that none of the factors in section 36.30.585(b) of the Alaska Statutes should be given determinative weight in deciding a proper remedy.[126]

State, Division of Corps., Business & Professional Licensing v. Platt

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[112] *Id*. at 785.
[113] *Id*. at 785–86.
[114] *Id*. at 787.
[115] *Id*. at 789–90.
[116] *Id*. at 791–92.
[117] *Id.* at 793.
[118] *Id*.
[119] 167 P.3d 58 (Alaska 2007).
[120] *Id.* at 61–62.
[121] *Id.* at 59–60.
[122] *Id.*
[123] *Id.*
[124] *Id.* at 61–62.
[125] *Id.*
[126] *Id.*

In *State, Division of Corps., Business & Professional Licensing v. Platt*,[127] the supreme court held that the Board of Nursing may consider an applicant's set-aside conviction when weighing her application for certification as a nurse aide.[128] Platt was convicted of forgery, theft, and shoplifting between 1998 and 1999, for which she was given suspended sentencing.[129] In 2002, Platt applied to be a nurse aide.[130] Despite Platt's argument that she expected her convictions to be set aside, the Board considered the convictions, and relying heavily on the fact that Platt's victims were older persons, denied her application on the grounds that her forgery conviction was "substantially related to the qualifications, functions, or duties of a certified nurse aide."[131] Platt appealed, arguing that she should not be treated as if she remained convicted after her conviction had been set aside.[132] The supreme court held that an individual whose conviction has been set aside is a person who has been "convicted of a crime" under section 08.68.334(2) of the Alaska Statutes, and therefore it was proper to consider the convictions.[133] The supreme court reversed the decision of the superior court and affirmed the board's denial of Platt's application, holding that the Board of Nursing may consider an applicant's set-side conviction when weighing her application for certification as a nurse aide.[134]

State v. Jeffery

In *State v. Jeffery*,[135] the supreme court held that two appellate judges seeking retention in office had failed to file proper declarations of candidacy for retention by the August 1 deadline set in section 15.35.070 of the Alaska Statutes and that the penalty for such failure was mandatory vacation from office.[136] Both Judge Jeffery and Judge Nolan had completed the Alaska Judicial Council's questionnaires, sent in June and July, and had each emailed the council stating their intention to stand for retention in those same months.[137] Because they failed to submit declarations of candidacy by the filing date, the Alaska Division of Elections refused to place their names on the ballots.[138] The superior court reversed on the grounds of "substantial compliance" with the statute.[139] The supreme court held that the Judges' actions did not constitute a "declaration of candidacy" as required under the statute, and that such a declaration would require a personal, affirmative declaration of the judge to be a candidate.[140] The supreme court further held that, absent statutory ambiguity—of which the court found none—strict compliance with election filing deadlines was required.[141] In response to this holding, the

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[127] 169 P.3d 595 (Alaska 2007).
[128] *Id.* at 597.
[129] *Id.*
[130] *Id.*
[131] *Id.* at 597, 601.
[132] *Id.* at 598.
[133] *Id.* at 599.
[134] *Id.* at 597.
[135] 170 P.3d 226 (Alaska 2007).
[136] *Id.* at 237.
[137] *Id.* at 230–31.
[138] *Id.* at 229
[139] *Id*.
[140] *Id.* at 232.
[141] *Id.* at 237.

court ordered the statutorily mandated vacation of office for both judges.[142] The supreme court reversed the superior court, holding that two appellate judges seeking retention in office had failed to file proper declarations of candidacy for retention by the August 1 deadline set in section 15.35.070 of the Alaska Statutes and that the penalty for such failure was mandatory vacation from office.[143]

Thoeni v. Consumer Electronic Services

In *Thoeni v. Consumer Electronic Services*,[144] the supreme court held that substantial evidence did not support the conclusions of the Workers' Compensation Board that a claimant's refusal to attend an employer's independent medical examination (EIME) was unreasonable and that claimant's knee was medically stable.[145] Thoeni sought workers' compensation benefits for a knee injury, costochondritis, depression, and insomnia.[146] In part, the Workers' Compensation Board concluded that Thoeni forfeited some benefits due to her refusal to attend an EIME in Utah; and that Thoeni's knee was medically stable.[147] Thoeni appealed. The supreme court held that the Board abused its discretion in determining that Thoeni forfeited her benefits when she refused to travel a manifestly unreasonable distance to attend an EIME,[148] and that the Board's finding that Thoeni's knee was medically stable was not supported by substantial evidence because it was based on predictive testimony that proved to be inaccurate.[149] The supreme court reversed and remanded, holding that substantial evidence did not support the conclusions of the Workers' Compensation Board that a claimant's refusal to attend an EIME was unreasonable and that claimant's knee was medically stable.[150]

West v. Anchorage

In *West v. Anchorage*,[151] the supreme court held that classifying a dog that bit or pawed a baby as a "level three" animal was appropriate.[152] The dog in question either bit or pawed a baby who was in a carrier while in a store belonging to the dog's owner.[153] A doctor who later examined the baby reported several superficial red whelp-like scratch marks on the baby's face, but no puncture wounds or deep bruises.[154] An Animal Control Enforcement Supervisor classified the dog as "level three," defined by Anchorage Municipal Code as an animal that inflicts an aggressive bite or causes any physical injury to a human while under restraint.[155] An Administrative Hearing Officer affirmed, using a "preponderance of the evidence" standard.[156] The supreme court held that applying the

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[142] *Id.*
[143] *Id.*
[144] 151 P.3d 1249 (Alaska 2007).
[145] *Id*. at 1260.
[146] *Id*. at 1251.
[147] *Id*. at 1252.
[148] *Id*. at 1255.
[149] *Id*. at 1260.
[150] *Id.*
[151] 174 P.3d 224 (Alaska 2007).
[152] *Id.* at 225.
[153] *Id.*
[154] *Id.* at 226.
[155] *Id.*
[156] *Id.*

"preponderance of the evidence" test was appropriate: the hearing officer merely conducted an administrative hearing, rather than a criminal hearing, since animal control laws are remedial and not criminal in nature.[157] The supreme court further held that the hearing officer properly found that the dog inflicted a "physical injury" to a human under section 17.40.020(A)(3) of the Anchorage Municipal Code, because both the statute's plain meaning and statutory definition of "physical injury" support this interpretation.[158] Finally, the supreme court held that the Hearing Officer relied on sufficient evidence, since there was contested evidence that the baby felt pain and it is up to the hearing officer to make findings of fact.[159] The supreme court affirmed the hearing officer's decision, holding that classifying a dog who bit or pawed a baby as a "level three" animal was appropriate.[160]

BUSINESS LAW⏏

Alaska Supreme Court

Afognak Joint Venture v. Old Harbor Native Corp.

In *Afognak Joint Venture v. Old Harbor Native Corp.*,[161] the supreme court held that the withdrawing members of a joint venture and the remaining joint venture both had ownership of an oil spill claim at the time of partition and that mutual mistake warranted dividing the claims.[162] Following the Exxon Valdez oil spill, two corporations withdrew from a joint venture that owned land eligible to receive oil spill damages.[163] The partition agreement appointed the joint venture trustee with respect to the assets at issue and purported to allocate all the rights between the withdrawing corporations and the joint venture, but the oil spill claim was not addressed.[164] After the partition agreement was finalized, the joint venture received settlement funds from the oil spill claim and the two corporations sued for their share.[165] The supreme court held that the withdrawing corporations owned a portion of the oil spill claims: either the claims accrued before the partition and were part of the partition agreement or the claims accrued while the joint venture held them in trust and also owed the withdrawing corporations a fiduciary duty.[166] The court further held that since both parties were aware that oil spill claims existed and intended to divide up all their rights, their failure to explicitly address the claims in the partition agreement constituted a mistake of fact.[167] Therefore, dividing the

[157] *Id.* at 227–28.
[158] *Id.* at 228–29.
[159] *Id.* at 229–30.
[160] *Id.* at 225.
[161] 151 P.3d 451 (Alaska 2007).
[162] *Id.* at 460.
[163] *Id.* at 454.
[164] *Id.* at 454–55.
[165] *Id.* at 455.
[166] *Id.* at 457.
[167] *Id.* at 458.

claims was appropriate because courts may imply contract terms in order to conform a contract to the evident intent of the parties.[168] The supreme court affirmed the decision of the superior court, that the oil spill claims should be divided and remanded the case to determine the appropriate division, holding that the withdrawing members of a joint venture and the remaining joint venture both had ownership of an oil spill claim at the time of partition and that mutual mistake warranted dividing the claims.[169]

Alaska National Insurance Co. v. Northwest Cedar Structures

In *Alaska National Insurance Co. v. Northwest Cedar Structures*,[170] the supreme court held that in order to collect on a surety bond for a breached construction contract, the breached contract must be of the type contemplated by the relevant statute.[171] Northwest Cedar Structures breached its contract with Alaska National Insurance Co. by failing to pay premiums for workers' compensation.[172] The superior court found that Alaska National could not collect from the surety bond because the legislature did not intend such bonds to cover expenses like workers' compensation.[173] Alaska National appealed, arguing that the superior court erred by going against the plain meaning of section 08.18.071(a)(3) of the Alaska Statutes and relying instead on its own assumptions of legislative intent.[174] Section 08.18.071(a)(3) states that surety bonds must cover "breach of contract in the conduct of the contracting business," and Alaska National argued that the statute's language was "clear and unambiguous," so the surety bond ought to cover the failure to pay the workers' compensation premiums.[175] The supreme court found that the intent of the legislature was to restrict the coverage of surety bonds to contract breaches that were more intimately tied to the nature of construction contracts specifically,[176] and that workers' compensation qualified more as a generic "overhead expense" instead of a unique aspect of construction contracts.[177] The supreme court affirmed the superior court, holding that in order to collect on a surety bond for a breached construction contract, the breached contract must be of the type contemplated by the relevant statute.[178]

CIVIL PROCEDURE

Ninth Circuit Court of Appeals

[168] *Id.*
[169] *Id.* at 458–60.
[170] 153 P.3d 336 (Alaska 2007).
[171] *Id.* at 337.
[172] *Id.* at 338.
[173] *Id.*
[174] *Id.*
[175] *Id.*
[176] *Id.* at 342.
[177] *Id.* at 343.
[178] *Id.* at 337.

In re Exxon Valdez

In *In re Exxon Valdez*,[179] the Ninth Circuit held that state law applied in determining the prejudgment interest relating to tort claims arising under state law.[180] A seafood processing business brought suit against Exxon/Mobil Corp. for business losses sustained as a result of the Exxon Valdez oil spill.[181] With respect to the claims governed by Alaska state law, the parties had settled all their claims except whether state or federal law applied to determining the prejudgment interest, and the district court ruled that federal law applied.[182] Reasoning that prejudgment interest was substantively related to the business's claim and that federal law did not preempt state law in a case, as here, where the claims were for economic loss, the court invoked the *Erie* doctrine in holding that state law applied when assessing the amount of prejudgment interest related to the business's state law tort claims.[183] Reversing the district court, the Ninth Circuit remanded the case for a determination of the interest owed, holding that state law applied in determining the prejudgment interest relating to tort claims arising under state law.[184]

In re Exxon Valdez

In *In re Exxon Valdez*,[185] the Ninth Circuit Court of Appeals held that an award of punitive damages representing a ratio of punitives to harm of five to one, or $2.5 billion, was appropriate under current due process jurisprudence.[186] The *Exxon Valdez* oil tanker ran aground in Prince William Sound in 1989.[187] Exxon was found liable in tort for the reckless misconduct of placing a known, relapsed alcoholic in control of a massive oil tanker.[188] At issue in this litigation are the punitive damages awarded as compared with current Supreme Court jurisprudence regarding substantive due process limits on punitive damages.[189] The court analyzed the reprehensibility of Exxon's misconduct, which is the most important guidepost for punitive damages under *State Farm Mutual Auto Insurance Co. v. Campbell*,[190] and found several mitigating facts, such as Exxon's prompt efforts to both clean up the spill and compensate victims for their economic harm.[191] The court also noted that Exxon's actions were reckless but not intentional.[192] The court thus declared that the district court's award of $4.5 billion in punitive damages was unwarranted because it fell in the highest range of damages allowable under due process analysis.[193] Thus, the Ninth Circuit Court of Appeals vacated the judgment of the district court and

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[179] 484 F.3d 1098 (9th Cir. 2007).
[180] *Id.* at 1099.
[181] *Id.*
[182] *Id.* at 1100.
[183] *Id.* at 1101–02.
[184] *Id.* at 1099, 1103.
[185] 490 F.3d 1066 (9th Cir. 2007), *cert. granted*, 128 S.Ct 492 (2007), *and cert. denied*, 128 S.Ct. 499 (2007).
[186] *Id.* at 1095.
[187] *Id.* at 1074.
[188] *Id.*
[189] *Id.* at 1072.
[190] 538 U.S. 408 (2003).
[191] *Exxon Valdez,* 490 F.3d at 1073.
[192] *Id.*
[193] *Id.* at 1095.

instructed the court to further lower the damages award to the amount of $2.5 billion, holding that an award of punitive damages representing a ratio of punitives to harm of five to one was appropriate in the instant case.[194]

Alaska Supreme Court

Anchorage Baptist Temple v. Coonrod

In *Anchorage Baptist Temple v. Coonrod*,[195] the supreme court held that three churches had the right to intervene in a lawsuit challenging a state statute that exempts teachers' residences owned by religious institutions from property tax.[196] After the Alaska Legislature passed an amendment to create a property tax exemption for educators' residences owned by religious schools, two groups of citizen-taxpayers filed a lawsuit to challenge the constitutionality of the amendment as violating the Establishment Clause.[197] The superior court denied three churches the right to intervene, instead allowing them to participate only as amicus curiae.[198] On appeal, the supreme court applied a four-part test to determine if the churches could intervene. The four parts were that the motion was timely, that the applicant showed an interest in the subject matter of the action, that the applicant showed that the interest may be impaired because of the action, and that the applicant showed that the existing party did not adequately represent the interest.[199] The court found that the church's satisfied this test because their interest is direct and substantial, because they may raise an argument that no other party is likely to raise, and because the state's interests are adverse to the churches' interests.[200] The supreme court reversed the superior court, holding that three churches had the right to intervene in a lawsuit challenging a state statute that exempts teachers' residences owned by religious institutions from property tax.[201]

Bethel Family Clinic v. Bethel Wellness Associates

In *Bethel Family Clinic v. Bethel Wellness Associates*,[202] the supreme court held that real party in interest objections under Alaska Civil Rule 17(a) must be brought with reasonable promptness.[203] In April 2000, Bethel Wellness Associates (BWA) sued the Bethel Family Clinic for breach of contract.[204] Four years after filing the complaint, the Clinic filed a motion for summary judgment for failure to state a claim, arguing that the BWA was not a contracting party and, therefore, could not recover.[205] Based on widespread support in state case law, the superior court concluded that Civil Rule 17(a) objections should be raised with reasonable promptness, unless the original error was

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[194] *Id.*
[195] 166 P.3d 29 (Alaska 2007).
[196] *Id.* at 31.
[197] *Id.* at 31–32.
[198] *Id.* at 32.
[199] *Id.* at 33.
[200] *Id.* at 36.
[201] *Id.* at 31.
[202] 160 P.3d 142 (Alaska 2007).
[203] *Id.* at 143.
[204] *Id.*
[205] *Id.*

made by honest mistake.[206] The supreme court reasoned that allowing such delays would unfairly prejudice the opposing party, because the Clinic would have had four additional years to prepare a defense.[207] The supreme court affirmed, holding that real party in interest objections under Alaska Civil Rule 17(a) must be brought with reasonable promptness.[208]

Carr v. Carr

In *Carr v. Carr*,[209] the supreme court held that remarks made by a superior court judge during criminal sentencing did not establish judicial bias in divorce proceedings involving the same party where the record showed no clear error or abuse of discretion.[210] With Kelly Carr's approval, both his criminal trial for possession of child pornography and his divorce proceedings were assigned to the same judge.[211] After the criminal trial but before sentencing, the divorce proceedings resumed, with the court ultimately rejecting Kelly's position.[212] At Kelly's criminal sentencing, the judge described his own visceral reaction to the images of child pornography presented at trial.[213] On appeal, Kelly asserted that these remarks demonstrated the judge's bias against him during the divorce proceedings.[214] The Supreme Court affirmed the superior court judge's refusal to recuse himself, holding that the judge's remarks during criminal sentencing did not establish judicial bias in divorce proceedings involving the same party where the record showed no clear error or abuse of discretion.[215]

Denardo v. Cutler

In *Denardo v. Cutler*,[216] the supreme court of Alaska held a number of plaintiff's claims were meritless,[217] and in addition, signaled willingness to restrain the future filings of a vexatious litigant.[218] Denardo initially filed a lawsuit against his employer, Alaska Cleaners, alleging unlawful termination due to age discrimination.[219] On appeal, Denardo filed numerous additional claims against Alaska Cleaners, their attorneys, and the judges involved.[220] Cutler's briefs revealed that Denard had filed 37 cases, mostly meritless, since 1990.[221] The court quickly dismissed Denardo's meritless claims of abuse of process and violation of due process rights.[222] Turning to a suggestion by the superior court judge, the court looked favorably upon an injunction against Denardo's future

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[206] *Id*. at 144–45.
[207] *Id*. at 145.
[208] *Id*.
[209] 152 P.3d 450 (Alaska 2007).
[210] *Id.* at 452.
[211] *Id.* at 453.
[212] *Id.*
[213] *Id.*
[214] *Id.*
[215] *Id.* at 452.
[216] 167 P.3d 674 (Alaska 2007).
[217] *Id.*at 678–80.
[218] *Id.*at 680–81.
[219] *Id.*at 676.
[220] *Id.*at 677.
[221] *Id.*at 680.
[222] *Id.*at 678–80.

filings against judges, noting the serious harm caused to the judicial system and finding support from both case law and commentators.[223] However, because the request for injunctive relief was brought up on appeal, the court declined to reach the issue.[224] The supreme court affirmed the superior court's grant of summary judgment, holding that a number of claims were meritless and, in addition, signaled willingness to restrain the future filings of a vexatious litigant.[225]

Dickerson v. Goodman

In *Dickerson v. Goodman*,[226] the supreme court held that Dickerson's lack of understanding of English did not interfere with her right to file a counterclaim and that because she did not file a counterclaim in her original answer, she was barred from suing on this claim in a second suit.[227] The parties were involved in a car accident and Goodman filed suit for her injuries.[228] Dickerson answered the claim without asserting a counterclaim.[229] After Dickerson's motion for summary judgment was granted, Dickerson tried to intervene in the case in order to assert a counterclaim, but her motion to intervene was denied because she had always been a party and the deadline to file a counterclaim had expired.[230] In reaching its conclusion, the court noted that, in reviewing the denial of a relief from judgment, the moving party was required to have a good reason for not litigating the issue at the appropriate time.[231] Here, Dickerson had no valid reason since she was at all times represented by counsel, never indicated she did not understand English, and presented no evidence that she attempted to assert the claim at the appropriate time.[232] The supreme court affirmed the superior court, holding that Dickerson's lack of understanding of English did not interfere with her right to file a counterclaim and that because she did not file a counterclaim in her original answer, she was barred from suing on this claim in a second suit.[233]

Dobrova v. State, Department of Revenue

In *Dobrova v. State, Department of Revenue*,[234] the supreme court held that the superior court's denial of a motion to appeal an order by Child Support Services Division ("CSSD") was warranted given the information the superior court had at the time, but because of information now available the case should be remanded to determine whether the late appeal should be granted.[235] CSSD ordered Dobrova to pay child support after an original finding to pay was appealed and remanded.[236] Dobrova's counsel failed to file timely appeal from this order, instead filing a motion related to the original appeal to

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[223] *Id.*at 680–81.
[224] *Id.*at 681–82.
[225] *Id.*at 678–80.
[226] 161 P.3d 1205 (Alaska 2007).
[227] *Id.* at 1207–08.
[228] *Id.* at 1206.
[229] *Id.*
[230] *Id.* at 1206–07.
[231] *Id.* at 1207.
[232] *Id.* at 1207–08.
[233] *Id.*
[234] 171 P.3d 152 (Alaska 2007).
[235] *Id.* at 153.
[236] *Id.* at 153–54.

prevent CSSD from enforcing the original order, and the motion was denied.[237] Dobrova obtained new counsel and sought appeal of CSSD's order on remand, arguing good faith error in not filing an appeal before the deadline[238]. The superior court rejected the late appeal.[239] After this rejection, another superior court judge granted a motion to supplant the appellate record with information pertaining to the erroneous order filed by Dobrova's previous counsel.[240] The supreme court held that, because the superior court did not have evidence outside of the pleadings regarding the erroneously filed motion by Dobrova's previous counsel, and because the state had evidence that Dobrova's previous counsel was on notice of the CSSD's order on remand, the superior court did not abuse its discretion in rejecting the late appeal.[241] Furthermore, because the appeal was not properly commenced in the first place, the superior court was not required to state its reasoning for denying the late appeal.[242] However, given the information now contained in the record, the supreme court held that the merits of permitting the late appeal should be re-evaluated.[243] The supreme court remanded the case to the superior court, the supreme court held that the superior court's denial of a motion to appeal an order by CSSD was warranted given the information the superior court had at the time, but because of information now available the case should be remanded to determine whether the late appeal should be granted.[244]

Gilbert v. State Farm Insurance Co.

In *Gilbert v. State Farm Insurance Co.*,[245] the supreme court held that findings of fact made by an arbitrator are unreviewable, even in the case of gross error, and that an arbitrator's award shall only be vacated if it was procured by fraud or other undue means.[246] Gilbert had been involved in an automobile accident and disagreed with State Farm, her insurance carrier, over the extent of her injuries.[247] In 2000, an arbitrator issued a memorandum and an award finding that Gilbert could not prove the accident caused her injuries and ruled State Farm the prevailing party.[248] Gilbert alleged fraud on the part of the arbitrator—essentially amounting to an allegation that his findings were made in gross error and were inconsistent with the evidence.[249] The court found that there was no evidence to support Gilbert's claims of fraud, or that she was treated unfairly by the arbitrator.[250] The supreme court affirmed the decision of the superior court to uphold the arbitrator's award, holding that findings of fact made by an arbitrator are unreviewable,

[237] *Id.* at 154.
[238] *Id.* at 154–55.
[239] *Id.*
[240] *Id.* at 156.
[241] *Id.* at 156–57.
[242] *Id.* at 157–58.
[243] *Id.* at 158–59.
[244] *Id.* at 153.
[245] 171 P.3d 136 (Alaska 2007).
[246] *Id*. at 138–41.
[247] *Id*. at 137.
[248] *Id*. at 137–38.
[249] *Id*. at 139.
[250] *Id*. at 140–41.

even in the case of gross error, and that an arbitrator's award shall only be vacated if it was procured by fraud or other undue means.[251]

Greywolf v. Carroll

In *Greywolf v. Carroll*,[252] the supreme court held that all acts falling squarely within discretionary jurisdiction granted by a court are protected by absolute quasi-judicial immunity.[253] Greywolf was involuntarily committed to a mental health unit by Carroll, her psychiatrist, who filed an ex parte order for detention with the superior court.[254] The court issued the order, specifying that Greywolf be evaluated by the "locum tenens" doctor at the hospital that housed the unit[255] Greywolf filed suit against Carroll claiming medical malpractice, citing his failure to provide her with an aftercare plan for follow-up treatment.[256] The superior court dismissed this claim, ruling that Carroll was protected by the doctrine of absolute quasi-judicial immunity because he had evaluated Greywolf pursuant to a court order.[257] Greywolf appealed, arguing that Carroll could not enjoy such immunity because his actions were not integral to the judicial process.[258] The supreme court noted that, at the time of his failure to provide an aftercare plan, Carroll was a locum tenens at the hospital and the ex parte order calling for evaluation was in effect.[259] The supreme court held that Greywolf's evaluation and discharge fell under Carroll's discretionary jurisdiction as a court-appointed psychiatrist.[260] The supreme court affirmed the superior court's decision, holding that all acts falling squarely within discretionary jurisdiction granted by a court are protected by absolute quasi-judicial immunity.[261]

Hicks v. Pleasants

In *Hicks v. Pleasants*,[262] the supreme court held that a trial court had the right to adjudicate the property rights of the parties following the entry of a default divorce, and, in doing so, it must properly apply the *Syndoulos* standard.[263] After Hicks failed to file an answer or appear in court in response to Pleasants' summons and complaint for divorce, the clerk of court entered a default against Hicks.[264] During a hearing, where both parties were unrepresented by counsel, Hicks and Pleasants disagreed about the value of various assets.[265] Following this hearing, Hicks, now represented by counsel, objected to the master's findings of fact and proposed property division and requested that the recommendation be set aside because the division was more than what Pleasant asked for

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[251] *Id*. at 138–41.
[252] 151 P.3d 1234 (Alaska 2007).
[253] *Id.* at 1248–49.
[254] *Id.* at 1237.
[255] *Id.* at 1240.
[256] *Id.* at 1246.
[257] *Id.*
[258] *Id.* at 1247.
[259] *Id.*
[260] *Id.* at 1247–48.
[261] *Id.* at 1248–49.
[262] 158 P.3d 817 (Alaska 2007).
[263] *Id.* at 819.
[264] *Id.*
[265] *Id*. at 820.

in her prayer for relief, making the division void under Alaska Civil Rule 54.[266] However, the court held that, although Pleasants' prayer for relief did not list each piece of marital property and debt, a general claim is enough to allow a court to adjudicate property rights.[267] The property division was consistent with Rule 54 because the basic language of Pleasants' prayer for relief was enough to put Hicks on notice and Hicks nevertheless decided to default.[268] However, the lower court erred in applying the *Syndoulos* standard of weighing conflicting evidence in favor of the non-defaulting party and, therefore, the property division order was vacated and remanded.[269] Thus, the supreme court held that a trial court had the right to adjudicate the property rights of the parties following the entry of a default divorce and must properly apply the *Syndoulos* standard.[270]

Jackman v. Jewel Lake Villa One

In *Jackman v. Jewel Lake Villa One*,[271] the supreme court held that for the purposes of Alaska Civil Rule 68, advance payments must be deducted from the total award of damages to determine a judgment's final value unless it can be shown that the payments were compensation based on the defendant's degree of fault and that, given this test, the jury award exceeded the offer of judgement.[272] Jackman injured herself in a fall at her apartment complex, the Jewel Lake Villa Apartments.[273] Jewel Lake's insurer paid $3,474 to cover Jackman's medical expenses.[274] However, Jackman nonetheless sued to recover additional damages.[275] Prior to trial, Jewel Lake sent Jackman a $1,400 offer of judgment, which she failed to accept.[276] At trial, the jury found Jackman's damages to total $7,147.23 and found that Jewel Lake was 51% responsible for these damages.[277] Jewel Lake moved for payment of their attorneys' fees under Alaska Civil Rule 68, which allows for payment of such fees by the offeree rejecting a pretrial offer of judgment if "the judgment finally rendered is at least five percent less favorable" to the rejector than the offer was.[278] The superior court granted this motion, reasoning that 51% of $7,147.23, less $3,474 (and then calculating in all relevant interest) was at least five percent less favorable than the offer of $1,400.[279] On appeal, the supreme court noted that the deduction of payments not made on the basis of a defendant's potential fault lowers both the defendant's and plaintiff's share of the award.[280] The supreme court further noted that there was no ground to assume that payments by Jewel Lake's insurer reflected only Jewel Lake's share of the fault.[281] The supreme court reversed the superior court's

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[266] *Id.*
[267] *Id.* at 821–22.
[268] *Id.* at 823.
[269] *Id.* at 827.
[270] *Id.*
[271] 170 P.3d 173 (Alaska 2007).
[272] *Id.* at 179.
[273] *Id.* at 174.
[274] *Id.*
[275] *Id.*
[276] *Id.*
[277] *Id.*
[278] *Id.* at 175–76.
[279] *Id.* at 176.
[280] *Id.* at 179.
[281] *Id.*

award of attorneys' fees, holding that, for the purposes of Alaska Civil Rule 68, advance payments must be deducted from the total award of damages to determine a judgment's final value unless it can be shown that the payments were compensation based on the defendant's degree of fault and that, given this test, the jury award exceeded the offer of judgment.[282]

Kuk v. Nalley

In *Kuk v. Nalley*,[283] the supreme court held that when a person is out of state and is at all times amenable to service of process, any extension of a statute of limitations otherwise provided under section 09.10.130 of the Alaska statutes does not apply.[284] More than two years after an auto accident, Kuk and his family sued for damages arising out of their injuries from the accident.[285] When Nalley moved for summary judgment on the basis that the two-year statute of limitations had passed, the Kuks filed a cross-motion arguing that, under section 09.10.130, the statute of limitations should be extended for the time that Nalley was out of the state for health and surgery reasons.[286] The court held that section 09.10.130 does not apply where substituted service is available during the absence.[287] Here, the court found that Nally had been amenable to service of process based on the means of service available under Alaska's Civil Rules and long-arm statute section 09.05.015 of the Alaska statutes.[288] The supreme court affirmed the decision of the superior court holding that when a person is out of state and is at all times amenable to service of process, any extension of a statute of limitations otherwise provided under section 09.10.130 does not apply.[289]

Lakloey, Inc. v. University of Alaska

In *Lakloey, Inc. v. University of Alaska*,[290] the supreme court held that an unsuccessful bidder had standing as an interested party to challenge a bid awarded by a government agency, and that the unsuccessful bidder was entitled to a hearing on the merits.[291] After Lakloey submitted a bid to the University of Alaska, the University awarded the bid to a bidder who had not acknowledged an amendment to the bid request.[292] The University denied Lakloey's protest to the bid award on the grounds that Lakloey was not the next-lowest bidder and therefore was not an interested party eligible to protest.[293] The University also argued that the amendment in question was not a material change to the bid request.[294] The supreme court held that Lakloey had a sufficient economic interest in ensuring that the University considered its bid honestly and fairly because Lakloey might have been the lowest bidder had the University applied

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[282] *Id.* at 179–80.
[283] 166 P.3d 47 (Alaska 2007).
[284] *Id*. at 54–55.
[285] *Id*. at 48.
[286] *Id*.
[287] *Id.* at 49.
[288] *Id*. at 50.
[289] *Id*. at 54–55.
[290] 157 P.3d 1041 (Alaska 2007).
[291] *Id.* at 1049.
[292] *Id.* at 1042–43.
[293] *Id.* at 1043.
[294] *Id.* at 1044.

the appropriate criteria.[295] The supreme court further held that whether the changes in the amendment were material was a factual question based on (1) whether the amendment's specifications exceeded those in the original request and (2) whether those changes gave the winning bidder an advantage over those bidders who conformed with the amendment.[296] The supreme court reversed the decision of the superior court and remanded to the University for further proceedings, holding that an unsuccessful bidder had standing as an interested party to challenge a bid awarded by a government agency, and that the unsuccessful bidder was entitled to a hearing on the merits.[297]

Larson v. Benediktsson

In *Larson v. Benediktsson*,[298] the supreme court held that an order denying summary judgment on the ground that material factual issues may not be reviewed after the court has conducted a trial.[299] About a year after agreeing to build two houses for Benediktsson, Larson sued for unpaid wages.[300] Benediktsson moved for summary judgment, alleging Larson was an unlicensed contractor and thus, under Alaska law, unable to claim wages for contract work.[301] Larson claimed he was hired as an employee.[302] Finding Larson's employment status to be a factual dispute, the court denied summary judgment and proceeded to trial.[303] The supreme court declined to review the denial of summary judgment because the denial was made on factual grounds.[304] Thus, the supreme court affirmed the superior court, holding that an order denying summary judgment on the ground that material factual issues may not be reviewed after the court has conducted a trial.[305]

Lexington Marketing Group, Inc. v. Goldbelt Eagle, LLC

In *Lexington Marketing Group, Inc. v. Goldbelt Eagle, LLC*,[306] the supreme court held that federal and state arbitration law prohibits courts from determining the validity of a contract when determining arbitrability.[307] Goldbelt contracted with Lexington for marketing services in October 2002, and in 2004 Lexington referred a business opportunity to Goldbelt but did not receive the commission as provided for in their contract.[308] The trial court denied Lexington's request that the court compel arbitration because the court found the contract unenforceable on public policy grounds and found no duty to arbitrate the claims related to an unenforceable contract.[309] Lexington argued on appeal that the trial court violated federal and state law by refusing to compel

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[295] *Id.* at 1047.
[296] *Id.* at 1049.
[297] *Id.*
[298] 152 P.3d 1159 (Alaska 2007).
[299] *Id.* at 1170.
[300] *Id.* at 1162.
[301] *Id.*
[302] *Id.*
[303] *Id.*
[304] *Id.* at 1170.
[305] *Id.*
[306] 157 P.3d 470 (Alaska 2007).
[307] *Id*. at 471.
[308] *Id*. at 471–72.
[309] *Id*. at 472.

arbitration.[310] The supreme court reasoned that the superior court had jurisdiction to decide arbitrability under federal and state law, but erred in adjudicating the validity of the underlying contract because federal and state law does not permit a court deciding arbitrability to decide validity.[311] Additionally, the court concluded that this dispute fell within the terms of the contract's arbitration clause.[312] In reversing the trial court's decision, the supreme court held that federal and state law prohibits courts from determining the validity of a contract when determining arbitrability.[313]

MacDonald v. Riggs

In *MacDonald v. Riggs,*[314] the supreme court held that the superior court correctly denied a party's motion for JNOV on a defamation counterclaim where there was sufficient evidence of defamation for a reasonable jury to find for the aggrieved party, where the defamatory statements were not time-barred because the counterclaim is related back to the date of the original complaint, and where the defamatory statements were slander per se, thus proof of actual damages was not required.[315] MacDonald brought charges of assault, battery, false imprisonment, and intentional infliction of emotional distress against Wilson and Riggs.[316] Although Wilson was ordered to pay damages, the jury found in favor of Riggs on the claims against him and awarded him damages for his defamation counterclaim.[317] MacDonald made motions for directed verdict and JNOV on the defamation counterclaim, both of which were denied.[318] MacDonald appealed.[319] The supreme court affirmed the superior court's denial of the motion for JNOV because there was sufficient evidence for a reasonable jury to find that MacDonald made defamatory statements, because statements were not time-barred by the statute of limitation, and because the statements were slander per se and thus did not require proof of damages.[320].

Maines v. Kenworth Alaska, Inc.

In *Maines v. Kenworth Alaska, Inc.*,[321] the supreme court held that excluding an affidavit from a late-disclosed automotive expert without first considering alternative sanctions was error.[322] Maines, a truck driver, alleged that a leak in the vehicle's air conditioning system caused him to develop respiratory problems, and he sued both the truck manufacturer and truck distributor for negligent manufacture and maintenance of the truck he drove.[323] In response to defendants' motions for summary judgment, Maines

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[310] *Id*.
[311] *Id*. at 473–77.
[312] *Id.* at 477.
[313] *Id.* at 478.
[314] 166 P.3d 12 (Alaska 2007).
[315] *Id.* at 14.
[316] *Id.* at 15.
[317] *Id.*
[318] *Id.*
[319] *Id.*
[320] *Id*. at 14.
[321] 155 P.3d 318 (Alaska 2007).
[322] *Id.* at 320.
[323] *Id.* at 320–22.

submitted two affidavits, one by an automotive expert.[324] Excluding both affidavits and granting defendants' motions for summary judgment, the superior court held that the automotive expert's affidavit was untimely filed and not based on sufficient facts.[325] The supreme court found that summary judgment was improper because the affidavit raised a genuine issue of material fact as to negligent manufacture of the truck.[326] The supreme court reversed and remanded, holding that excluding an affidavit from a late-disclosed automotive expert without first considering alternative sanctions was error.[327]

Martin v. Coastal Villages Region Fund

In *Martin v. Coastal Villages Region Fund* ("CVRF"),[328] the supreme court held that neither party had a superior equitable claim over the other, as such claims had not been adjudicated by a trial court.[329] The Martins brought suit in Juneau against a lessee fisherman who deserted his fishing vessel in a state of disrepair and won a default judgment for damages.[330] Concurrent to the desertion of the Martins' vessel, CVRF also sued the lessee in an Anchorage court to recover the profits of his venture and sought a preliminary injunction preventing the funds from being delivered to the Martins.[331] CVRF prevailed on its preliminary injunction, eventually settled with the lessee, and sought to have the funds released to CVRF.[332] The Anchorage court denied the Martins' motion to have the funds released to them based on their judgment, ruling that any claim by the Martins would be derivative of CVRF's claims, and the court ultimately granted CVRF's motion to consolidate the Juneau case.[333] The supreme court held that the Anchorage court did not err in granting CVRF's motion for a preliminary injunction, as CVRF was attempting to preserve the funds pending a final judgment.[334] Second, the supreme court reversed the Anchorage court's decision to award the funds to CVRF, whose position was indistinguishable from the Martins'.[335] The supreme court reversed and remanded to the third trial court, holding that neither party had a superior equitable claim over the other, as such claims had not been adjudicated by a third court.[336]

Matanuska Electric Ass'n v. Chugach Electric Ass'n

In *Matanuska Electric Ass'n v. Chugach Electric Ass'n*,[337] the supreme court held that collateral estoppel may apply to rulings by the Regulatory Commission of Alaska ("Commission").[338] The supreme court first heard Matanuska's claim of breach of

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[324] *Id.* at 321–22.
[325] *Id.* at 322, 324.
[326] *Id.*
[327] *Id.* at 329.
[328] 156 P.3d 1121 (Alaska 2007).
[329] *Id.* at 1129–30.
[330] *Id.* at 1124.
[331] *Id.* at 1123–24.
[332] *Id.* at 1124.
[333] *Id.* at 1124–26.
[334] *Id.* at 1126–27.
[335] *Id.* at 1129.
[336] *Id.* at 1129–30.
[337] 152 P.3d 460 (Alaska 2007).
[338] *Id.* at 462.

contract by Chugach in 2004, where the court remanded the issue to the superior court.[339] Matanuska claimed that Chugach had violated its obligation to act in good faith when it elected to enter into a rate lock for certain long-term debt, rather than debt defeasement.[340] In 2004, the supreme court concluded that the Commission waived its primary jurisdiction when it declined to resolve issues presented by Matanuska's claim.[341] However, the Commission subsequently issued a ruling on the issue presented, and the superior court granted summary judgment for Chugach based on the Commission's ruling.[342] The superior court then granted Chugach's motion for summary judgment, dismissing Matanuska's suit against Chugach for failure to conform to prudent utility practice under their agreement.[343] The supreme court affirmed the superior court's granting of summary judgment in favor of Chugach, holding that collateral estoppel may apply to rulings by the Regulatory Commission of Alaska.[344]

Pagenkopf v. Chatham Electric, Inc.

In *Pagenkopf v. Chatham Electric, Inc.*,[345] the supreme court held that: (1) attorneys' fees should not be awarded under Alaska Rule of Civil Procedure 68 if the pre-trial offer had apportionment problems, (2) prejudgment interest should be paid starting at the time when a defendant knows a claim could be filed, and (3) a jury instruction dealing with safety regulations did not erroneously shift the third party's negligence standard to negligence per se.[346] Pagenkopf was injured at Dilbeck's shop when a Chatham employee opened an overhead garage door, knocking Pagenkopf off a ladder.[347] Pagenkopf sued Chatham, who filed a third-party claim against Dilbeck.[348] Pagenkopf refused a $525,000 settlement offer from Chatham, with Dilbeck contributing $150,000 towards that amount, though the offer itself did not mention Dilbeck's contribution to the offer.[349] After apportioning twenty-eight percent fault to Chatham and fifty percent fault to Dilbeck, a jury awarded a net $545,064 to Pagenkopf.[350] The trial court ordered Pagenkopf to pay Chatham's attorneys' fees because Chatham's portion of liability was much less than its pretrial offer, and it ordered Dilbeck to pay prejudgment interest to Pagenkopf, but from the date when Dilbeck actually received service of the third-party suit, not when Dilbeck realized that he would be included in the suit.[351] The supreme court held that the attorneys' fees were improperly awarded under Rule 68 because Chatham's pretrial offer had apportionment difficulties that would have shifted the burden of proving Dilbeck's third-party liability onto Pagenkopf.[352] The supreme court further found that Pagenkopf was entitled to receive prejudgment interest from Dilbeck at

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[339] *Matanuska Electric Ass'n*, 152 P.3d at 463.
[340] *Id.* at 462.
[341] *Id.*
[342] *Id.* at 465.
[343] *Id.*
[344] *Id.* at 462.
[345] 165 P.3d 634 (Alaska 2007).
[346] *Id.* at 636.
[347] *Id.*
[348] *Id.*
[349] *Id.* at 636–37.
[350] *Id.* at 637.
[351] *Id.*
[352] *Id.* at 643.

the earlier date when Dilbeck believed a claim might be filed against him–not the later date when notice was served–because a potential defendant only needs to know that a claim might be brought to have to pay prejudgment interest, and Dilbeck's actions reveal that he did have reason to believe that a claim could be brought against him.[353] The supreme court also found that jury instructions that mentioned the violation of safety regulations did not lead to a negligence per se standard because the instruction merely said that the jury "may" find negligence based on the safety violation, not that the jury "shall" find negligence.[354] The supreme court reversed the superior court on the attorneys' fees and prejudgment interest, and affirmed the superior court on the jury instructions,[355] holding that: (1) attorneys' fees should not be awarded under Rule 68 if the pre-trial offer had apportionment problems, (2) prejudgment interest should be paid starting at the time when a defendant knows a claim could be filed, and (3) a jury instruction dealing with safety regulations did not erroneously shift the third party's negligence standard to negligence per se.[356]

Richard v. Boggs

In *Richard v. Boggs*,[357] the supreme court held that the superior court did not abuse its discretion in vacating a couple's property division agreement because the agreement was inequitable.[358] The original property division favored Richard, who received between sixty-eight and seventy-five percent, including the marital home, because the parties felt that such a division was in the best interest of their children and of open communication.[359] About one year later, Boggs filed a motion to reopen the property division agreement regarding the house because the justifications for the agreement had not come to pass.[360] The supreme court found that all of the factors that could potentially provide cause for reopening the agreement were present: the fundamental assumption of the dissolution agreement had been destroyed, the parties' property division was poorly considered and reached without benefit of counsel, and the asset in controversy was the parties' principal asset.[361] The supreme court affirmed the superior court's decision to grant Boggs' motion, holding that the superior court did not abuse its discretion in vacating the couple's property division agreement because the agreement was inequitable.[362]

Roberts v. State, Department of Revenue

In *Roberts v. State, Department of Revenue*,[363] the supreme court held that (1) assignment of a corporation's claims to its owner was an invalid attempt to circumvent the statutory requirement that counsel represent corporate parties in lawsuits, and (2) the

[353] *Id.* at 645.
[354] *Id.* at 646–48.
[355] *Id.* at 649.
[356] *Id.* at 636.
[357] 162 P.3d 629 (Alaska 2007).
[358] *Id*. at 633-34.
[359] *Id*. at 631.
[360] *Id.* at 631–32.
[361] *Id.* at 635.
[362] *Id*. at 633–36.
[363] 162 P.3d 1214 (Alaska 2007).

Department of Revenue did not err in allowing a nonprofit to use gaming proceeds to offer a public bicycle program.[364] Roberts owned the corporation Downtown Bicycle Rental.[365] Earth, a nonprofit organization, received a gaming permit and used the proceeds to fund a free bicycle rental program.[366] Roberts complained about Earth's use of the gaming proceeds to fund the free bicycle program.[367] The superior court dismissed without prejudice the complaint filed by Downtown Bicycle Rental because the corporation was not represented by counsel.[368] Following dismissal, the corporation assigned its claims to owner Roberts, and Roberts filed a new complaint naming the same defendants.[369] The supreme court held that Downtown Bicycle Rental's assignment of claims was invalid as an effort to evade the statutory requirement that counsel represent corporations.[370] The court found that the legislature did not want courts carving out exceptions to the rule.[371] The court also held that the Department's granting of the permit to Earth did not violate the gaming statute's "limitation on use of proceeds" provision[372] nor did it violate the statute's "satisfactory proof" provision.[373] The court found that the gaming statute allowed the proceeds to be used for a variety of purposes, and Earth's use of the proceeds was not prohibited.[374] The court also found that Earth provided enough information to satisfactorily prove that its use of the proceeds would not harm the public interest.[375] The supreme court affirmed the superior court's dismissal of claims, holding that (1) assignment of a corporation's claims to its owner was an invalid attempt to circumvent the statutory requirement that counsel represent corporations in lawsuits, and (2) the Department did not err in allowing a nonprofit to use gaming proceeds to offer a public bicycle program.[376]

South Anchorage Concerned Coalition, Inc. v. Municipality of Anchorage Board of Adjustment

In *South Anchorage Concerned Coalition, Inc. v. Municipality of Anchorage Board of Adjustment*,[377] the supreme court held that (1) the superior court was within its discretion to deny both de novo review and consideration of additional evidence,[378] and (2) the Platting Board's decision meets both standards of substantial evidence and rational basis review.[379] Neighboring landowners, organized as the South Anchorage Concerned Coalition, Inc. (The Coalition), challenged a new real estate development

[364] *Id.* at 1217.
[365] *Id.*
[366] *Id.*
[367] *Id.* at 1217–18.
[368] *Id.* at 1218.
[369] *Id.*
[370] *Id.* at 1220.
[371] *Id.* at 1220–21.
[372] *Id.* at 1221–22.
[373] *Id.* at 1223–24.
[374] *Id.* at 1222.
[375] *Id.* at 1224.
[376] I*d.* at 1217.
[377] 172 P.3d 774 (Alaska 2007).
[378] *Id.* at 778–81.
[379] *Id.* at 780–82.

citing potential damage to the area's water supply.[380] The Municipality of Anchorage's Platting Board, after much expert testimony on both sides, approved the subdivision.[381] The Coalition appealed.[382] The supreme court found that the superior court correctly denied de novo review in recognition of the fact that the Platting Board possessed the relevant expertise to determine whether the plat merited approval.[383] Because de novo review was denied, the superior court was also correct in refusing to admit a supplemental expert report which was produced more than a year after the conclusion of the administrative proceedings.[384] Finally, the supreme court, in an independent review of the agency's decision, found the Platting Board relied on "substantial evidence" and had a "rational basis" for its decision.[385] The supreme court affirmed the decisions of both the superior court and the Platting Board, holding that (1) the superior court was within its discretion to deny both de novo review and consideration of additional evidence,[386] and (2) the Platting Board's decision meets both standards of substantial evidence and rational basis review.[387]

State v. Native Village of Nunapitchuk, Murkowski v. Alaska AFL-CIO

In *State v. Native Village of Nunapitchuk* and *Murkowski v. Alaska AFL-CIO*,[388] the supreme court held that a statute modifying the public interest exception to the loser pays rule for attorneys' fees was constitutional.[389] Nunapitchuk first challenged the validity of House Bill (HB) 145 and received a favorable judgment from the trial court which held that the bill was unconstitutional because it improperly changed procedural rules and violated due process and equal protection.[390] In *Murkowski*, the AFL-CIO, in an attempt to receive attorneys' fees, argued that the public interest exception still applied because of the ruling in *Nunapitchuk*[391] that HB 145 limited the reach of the public interest exception to the general loser pays rule to rare constitutional issues.[392] In reaching the decision that the bill was constitutional, even though it was not passed by a supermajority, the court first explained that Rule 82 of Alaska Rules of Civil Procedure is a rule of practice and procedure as opposed to substance because the rule did not so much create a right as it explained how that right was to be enforced.[393] However, the court held that the public interest exception was substantive because it was created by the courts to further the substantive policy of encouraging certain types of lawsuits.[394] Moreover, the court held that HB 145 did not change Rule 82, but that courts should consider the policy behind the bill when weighing the equitable factors to determine

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[380] *Id.* at 775–76.
[381] *Id.* at 776–78.
[382] *Id.* at 775.
[383] *Id.* at 778–79.
[384] *Id.* at 779–80.
[385] *Id.* at 780–82.
[386] *Id.* at 778–81.
[387] *Id.* at 780–82.
[388] 156 P.3d 389 (Alaska 2007).
[389] *Id.* at 395.
[390] *Id.* at 393.
[391] *Id.*
[392] *Id.* at 395.
[393] *Id*. at 395–402.
[394] *Id*. at 403–04.

attorneys' fees.[395] Finally, the court held that HB 145 was not facially invalid because attorneys' fees remained within the discretion of the trial court.[396] In *Nunapitchuk* and *Murkowski*, the supreme court held that a statute modifying the public interest exception to the loser pays rule for attorneys' fees was constitutional.[397]

Turner v. Municipality of Anchorage

In *Turner v. Municipality of Anchorage*,[398] the supreme court held that: (1) an expert did not prejudice the plaintiff where he merely testified about causation of the injuries sustained;[399] (2) an instruction that the jury could compensate plaintiff for damages caused by medical negligence was not warranted;[400] (3) a concession that a defendant is liable for the accident does not resolve the issue that the injury caused all of the asserted damages;[401] (4) an offer of judgment is not ambiguous where it merely fails to mention the previous satisfaction of another lien;[402] and (5) with regards to an offset of damages for pre-trial payments, the defendant has the burden of showing that its prior payment and the jury award were for the same injury or expense.[403] Turner was rear-ended by a car owned by the Municipality of Anchorage, and she then underwent treatment for the next year, including extensive dental treatment.[404] Turner's insurance company received a $4,345.08 payment from the city's insurance company.[405] After rejecting a $45,000 settlement offer from the municipality, the case proceeded to trial and the jury awarded Turner total damages of $23,395, part of which the court allowed the city to offset with the earlier insurance payment.[406] The court rejected Turner's contentions that the settlement offer was void due to its failure to disclose the earlier payment because the offer released the city from all outstanding liability.[407] Moreover, regarding offsetting damages, the court held that the burden is on the defendant to prove that the prior payment and the jury award were for the same injury, which was satisfied here.[408] In affirming the decision of the lower court, the supreme court held that: (1) an expert did not prejudice the plaintiff where he merely testified about causation;[409] (2) an instruction that the jury could compensate plaintiff for damages caused by medical negligence was not warranted;[410] (3) a concession that a defendant is liable for the accident does not resolve the issue that the injury caused all of the asserted damages;[411] (4) an offer of judgment is not ambiguous where it merely fails to mention the previous

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[395] *Id.* at 405.
[396] *Id.* at 406.
[397] *Id.* at 395.
[398] 171 P.3d 180 (Alaska 2007).
[399] *Id.* at 184–85.
[400] *Id.* at 185.
[401] *Id.*
[402] *Id.* at 187.
[403] *Id.* at 191.
[404] *Id.* at 183.
[405] *Id.*
[406] *Id.*
[407] Id. at 186–87.
[408] *Id.* at 187–91.
[409] *Id.* at 184–85.
[410] *Id.* at 185.
[411] *Id.*

satisfaction of another lien;[412] and (5) with regards to an offset of damages for pre-trial payments, the defendant has the burden of showing that its prior payment and the jury award were for the same injury or expense.[413]

Weber v. State

In *Weber v. State*,[414] the supreme court held that a prisoner who had brought a complaint after the two-year statute of limitations was barred by *res judicata* from bringing up the dismissed claim for a fourth time and could not bring up a new claim because of judicial immunity and failure to state a claim.[415] Three years after claiming to have been stabbed in the eye by a fellow inmate, prisoner Weber filed a complaint suing for punitive and compensatory damages.[416] This complaint was dismissed because it was filed after the two-year statute of limitations under section 09.10.070(a)(2) of the Alaska Statutes.[417] Weber's second and third complaints, where Weber tried to argue for an extension of the statute of limitations due to his schizophrenia, were dismissed for failure to state a claim.[418] The court dismissed Weber's fourth complaint under *res judicata*, and dismissed a new claim seeking to add three defendants, including two superior court judges and the assistant attorney general, because of judicial immunity and failure to state a claim.[419] The supreme court affirmed the trial court's dismissal of the complaint holding that a prisoner who had brought a complaint after the two-year statute of limitations was barred by *res judicata* from bringing up the dismissed claim for a fourth time and could not bring up a new claim because of judicial immunity and failure to state a claim.[420]

Wilson v. MacDonald

In *Wilson v. MacDonald*,[421] the supreme court held that a no contest plea in a criminal case precludes relitigation of the same elements in a civil case.[422] Wilson assaulted MacDonald while attempting to impound her motorized wheelbarrow.[423] He pled no contest to the assault charge, and the superior court granted summary judgment against him in the civil case.[424] The supreme court found that he was collaterally estopped from denying an element in a subsequent civil action because his no contest plea was a serious criminal offense, the defendant had an opportunity for a full and fair trial, and the validity of his plea indicates he was aware of the relevant consequences of the no contest plea.[425] The supreme court affirmed the superior court's grant of summary

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[412] *Id.* at 187.
[413] *Id.* at 191.
[414] 166 P.3d 899 (Alaska 2007).
[415] *Id*. at 900.
[416] *Id*.
[417] *Id*.
[418] *Id*. at 900–01.
[419] *Id*. at 902–03.
[420] *Id*. at 900.
[421] 168 P.3d 887 (Alaska 2007).
[422] *Id*. at 890.
[423] *Id*. at 888.
[424] *Id*.
[425] *Id*. at 889.

judgment, holding that a no contest plea in a criminal case precludes relitigation of the same elements in a civil case.[426]

CONSTITUTIONAL LAW

United States Supreme Court

Morse v. Frederick

In *Morse v. Frederick*,[427] the United States Supreme Court held that a school principal did not violate a student's free speech rights by confiscating a banner which she reasonably believed promoted illegal drug use and suspending the student for bringing the banner to a school-approved event.[428] Frederick was suspended from school after he brought a banner reading "BONG HiTS 4 JESUS" to a school-approved event and displayed it after the principal requested he take it down.[429] Frederick argued that the suspension violated his First Amendment rights because the speech did not occur in school,[430] and because the message displayed was merely nonsense meant only to get him on television, not a promotion or celebration of drug use.[431] The Supreme Court held that bringing a banner to an event that occurred during normal school hours, was sanctioned by the principal, and was attended by other students, did constitute school speech.[432] The Supreme Court further held that schools may restrict student speech which they reasonably believe promotes illegal drug use, since deterring drug use among schoolchildren is an important, concrete school interest.[433] The Supreme Court reversed the decision of the Ninth Circuit, holding that a school principal did not violate a student's free speech rights by confiscating a banner which she reasonably believed promoted illegal drug use and suspending the student for bringing the banner to a school-approved event.[434]

Ninth Circuit Court of Appeals

Alaska Right to Life Political Action Committee v. Feldman

In *Alaska Right to Life Political Action Committee v. Feldman*,[435] the Ninth Circuit held that a political action committee's constitutional challenge to three provisions of the Alaska Code of Judicial Conduct were not ripe and that the political action committee would not suffer hardship from being denied review under the ripeness

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[426] *Id*. at 890.
[427] 127 S.Ct. 2618 (2007).
[428] *Id.* at 2629.
[429] *Id.* at 2622–23.
[430] *Id*. at 2624.
[431] *Id*. at 2625.
[432] *Id*. at 2624.
[433] *Id.* at 2628.
[434] *Id.* at 2629.
[435] 504 F.3d 840 (9th Cir. 2007).

doctrine.[436] In October 2002, the Alaska Right to Life Political Action Committee (PAC) circulated a questionnaire to the twelve Alaska state court judges who were seeking retention votes soliciting their views on various political issues including abortion and assisted suicide.[437] Only four judges responded, and each declined to answer the questionnaire, explaining that their participation could require subsequent recusal and that the Alaska Code of Judicial Conduct prohibited judges from "pledging, promising, or committing to particular conduct in judicial office."[438] In October 2004, approximately one month prior to Alaska's general election, the PAC brought suit against the Alaska Commission on Judicial Conduct and others, challenging the constitutionality of three provisions of the Code of Judicial Conduct concerning a judge's ability to endorse a particular political view.[439] The district court ruled that the suit was justiciable, held for the PAC with respect to two provisions, but against it with respect to the third.[440] Both parties appealed.[441] The Ninth Circuit vacated the judgment and remanded the case with instructions to dismiss, holding that the factual record did not include evidence of some real threat of enforcement or evidence that withholding federal adjudication would impose hardship on the plaintiffs.[442] The Ninth Circuit held that a political action committee's constitutional challenge to three provisions of the Alaska Code of Judicial Conduct was not ripe and that the political action committee would not suffer hardship from being denied review under the ripeness doctrine.[443]

United States v. Braswell

In *United States v. Braswell*,[444] the Ninth Circuit held that a defendant's claim that his indictment violated his constitutional rights was procedurally barred when the defendant failed to raise the issue on direct appeal.[445] Braswell was convicted of various drug felonies.[446] After appealing his conviction and filing for various motions and habeas relief, Braswell raised a claim that his indictment failed to identify the drug in the crimes, so it was constitutionally defective.[447] The Ninth Circuit found that the defendant's claim was procedurally barred because he failed to raise the issue on direct appeal, and the defendant also was unable to show cause, prejudice, or argue that he was actually innocent.[448] The Ninth Circuit affirmed the district court, holding that a defendant's claim that his indictment violated his constitutional rights was procedurally barrred when the defendant failed to raise the issue on direct appeal.[449]

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[436] *Id.* at 844.
[437] *Id.* at 843.
[438] *Id.*
[439] *Id.*
[440] *Id.* at 843–44.
[441] *Id.* at 844.
[442] *Id.*
[443] *Id.*
[444] 501 F.3d 1147 (9th Cir. 2007).
[445] *Id.* at 1150.
[446] *Id.* at 1148.
[447] *Id.* at 1149.
[448] *Id.* at 1150.
[449] *Id.*

Winterrowd v. Nelson

In *Winterrowd v. Nelson*,[450] the Ninth Circuit held that an officer may not use excessive force solely because of a suspect's verbal refusal to comply with a request.[451] Winterrowd was pulled over by state troopers on suspicion that his license plates were invalid.[452] When Winterrowd was unable to produce valid registration, the troopers ordered him out of his vehicle in order to speak with him inside a patrol car.[453] Before bringing Winterrowd into a patrol car, the troopers attempted to perform a standard-procedure pat-down.[454] Upon being ordered to place his hands behind his back, Winterrowd explained that he could not do so because of a pre-existing shoulder injury.[455] Although other methods existed to search Winterrowd, the troopers insisted on patting him down while forcibly holding his arms behind his back, visibly causing Winterrowd a substantial amount of pain.[456] Winterrowd brought suit under 42 U.S.C. § 1983 in federal district court, alleging that the officers injured him through the use of excessive force.[457] The district court denied the troopers' motion for summary judgment on the grounds of qualified immunity, and they appealed to the Ninth Circuit.[458] The Ninth Circuit noted that it had previously held that officers are entitled to qualified immunity unless their behavior was unreasonable within the context in which it occurred.[459] The Ninth Circuit held that there were no reasonable grounds on which to fear that Winterrowd was dangerous and that, furthermore, a reasonable officer would have known the use of force in this situation was excessive.[460] The Ninth Circuit affirmed the district court's denial of the motion for summary judgment, holding that an officer may not use excessive force solely because of a suspect's verbal refusal to comply with a request.[461]

Alaska Supreme Court

Alaska Public Interest Research Group v. State

In *Alaska Public Interest Research Group v. State*,[462] the supreme court held that the legislature acted within its constitutional authority in creating the Alaska Workers' Compensation Appeals Commission ("Commission") and that the Commission did not unconstitutionally encroach on the judicial branch.[463] As part of the changes to the Alaska Workers' Compensation Act, the state legislature established the Commission in 2005 as the final authority in hearing appeals from decisions of the Workers' Compensation

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[450] 480 F.3d 1181 (9th Cir. 2007).
[451] *Id.* at 1186.
[452] *Id.* at 1182.
[453] *Id.*
[454] *Id.*
[455] *Id.* at 1182–83.
[456] *Id.* at 1183.
[457] *Id.*
[458] *Id.*
[459] *Id.* at 1186.
[460] *Id.* at 1184-86.
[461] *Id.* at 1186.
[462] 167 P.3d 27 (Alaska 2007).
[463] *Id*. at 52–53.

Board.[464] The complaint before the court alleged that the Commission was an "executive court" in violation of the state's separation-of-powers doctrine.[465] The court agreed with the State's argument that the Commission was only a quasi-judicial agency and was properly established,[466] but concluded that the Commission's decisions were only binding on the Alaska Workers' Compensation Board and the Commission.[467] The supreme court affirmed the judgment of the superior court and held that the legislature was acting within its proper constitutional authority in creating the Commission and that the Commission did not unconstitutionally encroach on the judicial branch.[468]

Alaskans for a Common Language v. Kritz

In *Alaskans for a Common Language v. Kritz*,[469] the supreme court held that a successful ballot initiative adopting English as Alaska's official language and requiring English be used in "all government functions and actions" violated the constitutionally protected speech of citizens, government officers, and government employees.[470] The Official English Initiative, a ballot initiative sponsored by the non-profit corporation Alaskans for a Common Language and approved by voters in 1998, adopted English as the state's official language and required its use in "all government functions and actions."[471] Citizens and public officials, who were either bilingual in English and Yup'ik, Inupiaq, or Spanish, or proficient only in their native languages, challenged the initiative.[472] The supreme court, applying strict scrutiny, held that the initiative violated the recipient speech rights of non-English speaking citizens and their right to petition the government as well as the speech rights of government officers and employees.[473] The supreme court further held that unconstitutional provisions could be severed from the initiative because, pursuant to the *Lynden Transport* test, (1) legal effect could be given to the severed statute and (2) voters intended for other portions of the initiative to stand if some portions were struck down.[474] Upholding the portion of the initiative requiring English be used in preparing official government documents, the Supreme Court did not rule on the constitutionality of the initiative's other provisions.[475] The supreme court affirmed the superior court's finding that the initiative violated constitutional rights, but reversed and remanded on the severability question, holding that an initiative adopting English as Alaska's official language and requiring English be used in "all government functions and actions" violated the constitutionally protected speech of citizens, government officers, and government employees.[476]

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[464] *Id*. at 33.
[465] *Id*. at 33–34.
[466] *Id*. at 34–35.
[467] *Id.* at 45.
[468] *Id*. at 52–53.
[469] 170 P.3d 183 (Alaska 2007).
[470] *Id.* at 194, 199–204.
[471] *Id.* at 187.
[472] *Id.*
[473] *Id.* at 199–204.
[474] *Id.* at 209–14.
[475] *Id.* at 209–15.
[476] *Id.* at 194, 199–204.

Public Employees' Retirement System v. Gallant

In *Public Employees' Retirement System v. Gallant*,[477] the supreme court held that requiring Alaska residency in order to receive a cost of living adjustment did not violate the state or federal equal protection clause.[478] The Public Employees' Retirement System (PERS) and the Teachers' Retirement System (TRS) paid a ten percent cost of living adjustment (COLA) to retirees who remained in Alaska.[479] Former public employees and teachers brought a class action against PERS and TRS, arguing that the purpose of the COLA was to equalize benefits among retirees who lived in different locations, and therefore employees who retired to high cost areas outside of Alaska were entitled to a COLA.[480] The supreme court held that the COLA did not violate equal protection because: (1) the purpose of the COLA was to encourage public employees to remain in Alaska, which was at least a legitimate purpose;[481] (2) the COLA bore a fair and substantial relationship to promoting that purpose, since the high cost of living in Alaska created a disincentive to remain in the state;[482] and (3) the COLA did not unacceptably infringe on retirees' rights to free migration, since the COLA was reasonably related to the cost-of-living differential between Alaska and most other areas of the United States, and since the COLA made up no more than ten percent of a retiree's income.[483] The supreme court reversed the judgment of the superior court and remanded for further proceedings, holding that the Alaska residency requirement for the COLA did not violate the state or federal equal protection clause.[484]

Sands v. Green

In *Sands v. Green*,[485] the supreme court held that section 09.10.140(c) of the Alaska Statutes deprives minors of their constitutionally protected due process right to access to the courts by limiting the statute of limitations in personal injury actions of persons under the age of eight to their tenth birthday.[486] Cody Sands was attacked a month before his eighth birthday by the Greens' dog in 1998, and the Sands filed a complaint in 2003 when Cody was twelve against the Greens in connection with Cody's injury.[487] The superior court dismissed the claim as time-barred because it came well after the statute of limitations had run when Cody turned ten; the Sands' appeal argued that Cody's procedural due process was violated.[488] To determine whether or not the statute violated due process, the supreme court applied a three-part balancing test and determined that (1) a minor's access to the courts is an important right under the due process clause of the Alaska Constitution; (2) the risk of an erroneous deprivation of the right is high; and (3) the state's interest is not weighty enough to surmount the interest.[489]

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[477] 153 P.3d 346 (Alaska 2006).
[478] *Id.* at 354–55.
[479] *Id.* at 348.
[480] *Id.*
[481] *Id.* at 352.
[482] *Id.* at 353.
[483] *Id.*
[484] *Id.* at 355.
[485] 156 P.3d 1130 (Alaska 2006).
[486] *Id.* at 1132–33.
[487] *Id*. at 1132.
[488] *Id*.
[489] *Id*. at 1133–36.

The supreme court reversed and remanded, holding that AS 09.10.140(c) deprives minors of their constitutionally protected due process right to access to the courts by limiting the statute of limitations in personal injury actions of persons under the age of eight to their tenth birthday.[490]

State, Department of Fish & Game v. Manning

In *State, Department of Fish & Game v. Manning*,[491] the supreme court held that a point system discriminating against urban hunters by using an "access to alternative sources of game" criterion was unconstitutional under the state constitution.[492] Section 16.05.258 of the Alaska Statutes, governing the allocation of game in subsistence areas, used a point system for ranking Tier II subsistence hunting permit applicants.[493] Manning, a hunter from an urban area within the state, was denied a Tier II subsistence permit for a caribou herd hunt.[494] Manning challenged three criteria of the point system as violating the equal access clauses of the state constitution, including the "access to alternative sources of game" criterion.[495] In determining whether the statute violated equal protection for urban hunters, the court found that it was an "important" interest to ensure that Alaskans who rely on hunting and fishing for subsistence can do so.[496] However, the court determined that the game ratio formula used in assessing the "access to alternative sources of game" criterion was fundamentally flawed and inaccurate at measuring an applicant's access to alternative food sources.[497] Therefore, this criterion was not closely related to the state's interest.[498] The supreme court affirmed the superior court's decision, holding that a point system discriminating against urban hunters by using an "access to alternative sources of game" criterion was unconstitutional under the state constitution.[499]

State v. Murtagh

In *State v. Murtagh*,[500] the supreme court held that portions of the Victims' Rights Act violated the due process rights of the accused.[501] The purpose of the act was to regulate pretrial interactions between criminal defense representatives and victims or witnesses.[502] First, the act required defense representatives to state their identity and connection to the defendant before interviewing a victim.[503] The defense representative was further required to advise the victim that he need not speak with the defense representative and that he may have a prosecuting attorney present if he chooses to have

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[490] *Id*. at 1137.
[491] 161 P.3d 1215 (Alaska 2007).
[492] *Id*. at 1216.
[493] *Id.*
[494] *Id.*
[495] *Id*.
[496] *Id*. at 1223.
[497] *Id.* at 1224.
[498] *Id*.
[499] *Id*. at 1216.
[500] 169 P.3d 602 (Alaska 2007).
[501] *Id.* at 623–24.
[502] *Id.* at 605.
[503] *Id.*

an interview.[504] Second, the act allowed a victim or witness in a sexual offense case to require written authorization before being contacted by a defense representative.[505] Third, the act required defense representatives to tell a victim or witness if they planned to electronically record the interview.[506] Criminal defense attorneys challenged these provisions on behalf of themselves, their present clients, and their future clients.[507] The court held that requiring defense representatives to give the mandated advice to victims and witnesses and to obtain written authorization before conducting an interview implied that the victim or witness should not cooperate with the interview, and thus interfered with defendants' right to a fair trial.[508] The court further held that, since undisclosed recording is lawful and valuable, and since countervailing interests do not outweigh the benefits of undisclosed recordings, the act's prohibition on undisclosed electronic recording by defense representatives unduly interfered with the right to prepare and present a defense.[509] The supreme court affirmed the superior court's decision, holding that portions of the Victims' Rights Act violated the due process rights of the accused.[510]

State v. Carpenter

In *State v. Carpenter*,[511] the supreme court found that Intentional Infliction of Emotional Distress ("IIED") claims are consistent with the First Amendment, punitive damages may be compared to statutory penalties even if the conduct is not the exact same as that contemplated in the statute, and plaintiff's costs, including contingent attorney fees, are calculated before the state is awarded its fifty percent share, as provided by section 09.17.020(j) of the Alaska statutes.[512] Carpenter brought a number of claims, including IIED, defamation, and spoliation, against a radio personality and his producer based on comments he made about her and directed to her on the radio personality's show.[513] The jury found for Carpenter on her spoliation claim and awarded her compensatory and punitive damages, half of which was awarded to the state under AS 09.17.020(j).[514] The supreme court reasoned that Carpenter's IIED claim was not appropriately considered by the jury because it was unclear whether or not the jury understood that it could consider the statements made by the radio personality regardless of their truth and because the First Amendment does not extend protection to speech intended to harass or cause others to harass.[515] The court found that punitive damages are not excessive when the statutory penalties are comparable, even if the events underlying the cause of action do not exactly meet the requirements of the statute.[516] The court also found AS 09.17.020(j) constitutional because it does not violate the separation of powers and because the statute's effect does not amount to an unconstitutional taking when the

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[504] *Id.*
[505] *Id.*
[506] *Id.*
[507] *Id.* at 604.
[508] *Id.* at 613, 617.
[509] *Id.* at 623.
[510] *Id.* at 623–24.
[511] 171 P.3d 41 (Alaska 2007).
[512] *Id*. at 47.
[513] *Id*. at 48–50.
[514] *Id*. at 50.
[515] *Id*. at 53–58.
[516] *Id*. at 65–69.

amount is calculated after pro rata costs to the plaintiff are considered.[517] Finally, the supreme court found that the statutory language in AS 09.17.020(j), AS 09.60.080, and their legislative histories direct a pro rata portion of Carpenter's attorneys' fees and costs to be deducted from the State's fifty percent share of the punitive damages award.[518] The supreme court reversed and remanded, holding that IIED claims are consistent with the First Amendment, punitive damages may be compared to statutory penalties even if the conduct is not the exact same as that contemplated in the statute, and plaintiff's costs, including contingent attorney fees, are calculated before the state is awarded its fifty percent share.[519]

State v. Planned Parenthood ("Planned Parenthood II")

In *State v. Planned Parenthood ("Planned Parenthood II")*,[520] the supreme court held the Alaska Parental Consent Act ("PCA") to be unconstitutional because a less restrictive means existed of advancing the interests it protected.[521] Planned Parenthood of Alaska filed a complaint for declaratory and injunctive relief, alleging that the PCA violated state constitutional rights to privacy.[522] The PCA prohibited doctors from performing abortions on "unmarried, unemancipated wom[e]n under [seventeen] years of age"[523] absent parental consent or judicial authorization.[524] On initial appeal to the Alaska Supreme Court, it was held that the privacy clause of the Alaska Constitution creates a right to reproductive privacy that can be limited "only when necessary to further a compelling state interest and only if not less restrictive means exist to advance that interest,"[525] and the case was remanded for determination of whether the PCA met these requirements.[526] The superior court found the PCA unconstitutional under the privacy clause of the Alaska Constitution and the State appealed to the supreme court.[527] In analyzing the constitutionality of the PCA, the supreme court acknowledged that the goals of the PCA, to shield minors from their own immaturity and to aid parents in carrying out parental responsibilities, were compelling ones.[528] However, the court went on to recognize that the stripping of the right to reproductive choice from minors was not the least restrictive means of advancing those interests, noting that a parental notification statute would be less restrictive.[529] Two justices dissented, arguing that the PCA is appropriately narrowly tailored and is the least restrictive means to accomplish the state's compelling interest.[530] The supreme court affirmed the decision of the superior court,

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[517] *Id*. at 70–73.
[518] *Id.* at 74.
[519] *Id*. at 81–82.
[520] 171 P.3d 577 (Alaska 2007).
[521] *Id.* at 580.
[522] *Id.*
[523] ALASKA STAT. § 18.16.020 (2006).
[524] *Planned Parenthood II*, 171 P.3d at 580.
[525] *State v. Planned Parenthood ("Planned Parenthood I")*, 35 P.3d 30, 41 (Alaska 2001).
[526] *Planned Parenthood II*, 171 P.3d at 580.
[527] *Id.* at 580–81.
[528] *Id.* at 582.
[529] *Id.* at 584.
[530] *Id.* at 585–98.

holding the PCA to be unconstitutional because a less restrictive means existed of advancing the interests it protected.[531]

Wetherhorn v. Alaska Psychiatric Institute

In *Wetherhorn v. Alaska Psychiatric Institute*,[532] the supreme court held that section 47.30.710(b) of the Alaska Statutes, allowing involuntary hospitalization of mentally-ill persons found to be gravely disabled or to present a likelihood of serious harm to themselves or others, is constitutional if construed to require that persons involuntarily hospitalized be so incapacitated that they may not "survive safely in freedom"[533] and that granting a petition for the involuntary administration of psychotropic medication in a non-emergency situation prior to a visitor's report being prepared was plain error.[534] Wetherhorn was involuntarily committed to the Alaska Psychiatric Institute for thirty days based on two doctors' claim that she was gravely disabled and likely to harm herself or others.[535] Wetherhorn argued that the definition of "gravely disabled" under subsection B of Alaska Statute 47.30.915(7) reflected a standard too low to justify the restriction of liberty imposed by involuntary commitment.[536] The superior court also granted a petition to administer psychotropic drugs to Wetherhorn without her consent and in a non-emergency situation, despite no visitor's report being presented as statutorily required.[537] The supreme court held that the definition of "gravely disabled" under section 47.30.915(7)(B) of the Alaska Statutes is constitutional if construed to demand that persons involuntarily hospitalized be so incapacitated that they may not survive safely outside of a controlled environment[538] and that granting a petition for the involuntary administration of psychotropic drugs in a non-emergency situation prior to a visitor's report being prepared was plain error.[539]

Alaska Court of Appeals

Holden v. State

In *Holden v. State*,[540] the court of appeals held that an indigent defendant has a limited right to a court-appointed attorney when filing for post-conviction relief that appears to be untimely in order to investigate whether the defendant may qualify for an exception or tolling of the statute of limitations.[541] Holden was an indigent prisoner who filed for post-conviction relief almost six years after his convictions became final.[542] However, any petition for post-conviction relief must be filed within one year under section 12.72.020(a)(3)(A) of the Alaska Statutes.[543] The superior court dismissed the

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[531] *Id.* at 585.
[532] 156 P.3d 371 (Alaska 2007).
[533] *Id.* at 373.
[534] *Id.*
[535] *Id.* at 374.
[536] *Id.* at 376.
[537] *Id.* at 375.
[538] *Id.* at 378.
[539] *Id.* at 382.
[540] 172 P.3d 815 (Alaska Ct. App. 2007).
[541] *Id.* at 816.
[542] *Id.*
[543] *Id.*

petition and the request for a court-appointed attorney.[544] The court held that Holden had a crucial need for an attorney to determine whether he applied for an exception to or tolling of the statute of limitations for post-conviction relief.[545] Therefore, Holden had a limited due-process right to a court-appointed attorney.[546] The court of appeals reversed and remanded, holding that an indigent defendant has a limited right to a court-appointed attorney when filing for post-conviction relief that appears to be untimely in order to investigate whether the defendant may qualify for an exception or tolling of the statute of limitations.[547]

Klemz v. State

In *Klemz v. State,*[548] the court of appeals held that a probation officer's questioning of a suspected drunk driver was interrogation for *Miranda* purposes and the defendant was entitled to a new trial because administering *Miranda* warnings midstream did not make the statements made after the warning admissible.[549] Klemz was on felony probation for driving under the influence.[550] While waiting to meet with Foster, his probation officer, another probation officer smelled alcohol on Klemz and reported this discovery to Foster.[551] Klemz submitted to a breathalyzer, which indicated a blood alcohol level of .221.[552] Foster arrested him for violating his probation, but did not advise Klemz of his *Miranda* rights.[553] When Foster asked Klemz how he had gotten to the probation office, Klemz admitted that he had driven himself.[554] Foster then called the police.[555] A police officer arrived shortly thereafter, advised Klemz of his *Miranda* rights and Klemz once again admitted that he had driven to the office.[556] At trial, Klemz moved to suppress the incriminating statements, but the superior court held that they were admissible because Foster's questions had a secondary administrative purpose.[557] The court of appeals reversed the superior court, holding that the probation officer's questioning of Klemz as to how he arrived at his appointment was interrogation for *Miranda* purposes because it was reasonably likely to elicit a self-incriminating statement and that Klemz was entitled to a new trial because the incriminating statements made after he was advised of his *Miranda* rights stemmed from the earlier *Miranda* violation.[558] The court of appeals reversed the superior court, holding that a probation officer's questioning of an alleged drunk driver was interrogation for *Miranda* purposes

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[544] *Id.*
[545] *Id.* at 817.
[546] *Id.* at 818.
[547] *Id.* at 819.
[548] 171 P.3d 1169 (Alaska Ct. App. 2007).
[549] *Id.* at 1173–76.
[550] *Id.* at 1170.
[551] *Id.*
[552] *Id.*
[553] *Id.*
[554] *Id.* at 1171.
[555] *Id.*
[556] *Id.*
[557] *Id.* at 1171–72.
[558] *Id.* at 1172, 1176.

and the defendant was entitled to a new trial because administering *Miranda* warnings midstream did not make the statements made after the warning admissible.[559]

Malloy v. State

In *Malloy v. State*,[560] the court of appeals held that the legislature can deny discretionary parole to a defendant convicted of first-degree murder if a judge finds evidence of physical torture of the victim.[561] Malloy was tried for restraining a woman in a motel room for a more than a week, inflicting physical and sexual assaults, keeping the victim sedated, and killing the victim.[562] A jury convicted Malloy of first-degree murder, and the trial judge found that the State had proved substantial physical torture by clear and convincing evidence, which triggered a mandatory minimum sentence of 99 years.[563] Malloy appealed her sentence on constitutional grounds, asserting that she had been denied a trial by jury on the torture issue.[564] The court held that *Apprendi v. New Jersey* and *Blakely v. Washington* prohibit an increase in a maximum sentence, but allow for a sentence already within the range of discretionary sentences, even without a jury trial on aggravating factors.[565] However, the appeals court also agreed with the State's concession of error that applying section 33.20.01(a) of the Alaska statutes, which denies good time credit to all prisoners convicted of certain first-degree murders, is a violation of the ex post facto clause of the federal Constitution.[566] The court of appeals upheld the sentence, holding that the legislature can deny discretionary parole to a defendant convicted of first-degree murder if a judge finds evidence of physical torture of the victim.[567]

CONTRACT LAW

Alaska Supreme Court

Estate of Polushkin v. Maw

In *Estate of Polushkin v. Maw*,[568] the supreme court held that ambiguous contract addendums allowing sellers to retain the right to future claims are not enforceable without sufficient extrinsic evidence as to the meaning of the addendum.[569] In 1989, Maw sold Polushkin his Upper Cook Inlet salmon drift fishery permit, but added, at the time of signing, an ambiguously-worded addendum to the contract, which Maw argued was

[559] *Id.* at 1173–76.
[560] 153 P.3d 1003 (Alaska Ct. App. 2007).
[561] *Id.* at 1012.
[562] *Id.* at 1006.
[563] *Id.*
[564] *Id.* at 1005.
[565] *Id.* at 1009–10.
[566] *Id.* at 1011.
[567] *Id.* at 1012.
[568] 170 P.3d 162 (Alaska 2007).
[569] *Id*. at 173.

meant to specify that Maw would retain all rights and ownership to claims resulting from the Glacier Bay and Exxon Valdez oil spills.[570] Polushkin's estate brought an action for declaratory judgment that Maw was not entitled to the claims arising after the date of the sale, and the superior court granted summary judgment in Maw's favor.[571] On appeal, the supreme court reasoned that it was unreasonable to assign future claims to the seller when they were completely unrelated to him, that ambiguous contractual provisions should be read in the most reasonable manner possible, and that there was insufficient extrinsic evidence to support Maw's interpretation.[572] The supreme court reversed the superior court's ruling and granted summary judgment to Polushkin's estate, holding that ambiguous contract addendums allowing sellers to retain the right to future claims are not enforceable without sufficient extrinsic evidence as to the meaning of the addendum.[573]

Kenai Chrysler Center, Inc. v. Denison

In *Kenai Chrysler Center, Inc. v. Denison*,[574] the supreme court held that an automobile dealership which sold a car to a developmentally disabled person under guardianship of his parents was not entitled to restitution after the voiding of the automobile purchase agreement.[575] After Kenai sold a new car to Denison's disabled son, the Denison's sought to return the car.[576] Kenai refused to void the contract and demanded restitution despite the public notice of Denison's ward status provided by the guardianship proceedings.[577] The supreme court determined that in order for the dealership to obtain restitution, it must have been unaware of Mr. Denison's status as a ward; furthermore, because the guardianship proceedings provided public notice, they were not entitled to any restitution.[578] The supreme court affirmed the superior court, holding that an automobile dealership which sold a car to a developmentally disabled person under guardianship of his parents was not entitled to restitution after the voiding of the automobile purchase agreement.[579]

Romero v. Cox

In *Romero v. Cox*,[580] the supreme court held that in order to pursue a claim for specific performance the buyer must be able and willing to perform on the contract.[581] Romero signed a contract to purchase land and a mobile home from Cox and moved onto the property though he never paid Cox the full down payment stipulated in the contract.[582] Cox sued, and the superior court granted summary judgment on Cox's specific performance claim and required Romero to deposit the remainder of the down

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[570] *Id*. at 164.
[571] *Id*. at 166–67.
[572] *Id*. at 172–73.
[573] *Id*. at 173.
[574] 167 P.3d 1240 (Alaska 2007).
[575] *Id.* at 1245–46.
[576] *Id.*
[577] *Id.* at 1244, 1248.
[578] *Id.*
[579] *Id.* at 1262.
[580] 166 P.3d 4 (Alaska 2007).
[581] *Id.* at 9–12.
[582] *Id.* at 6.

payment in trust if Romero wanted to bring a claim for specific performance.[583] Of the issues that were properly briefed, the supreme court held (1) the superior court properly construed the agreement between the parties as a voided contract, and because the contract was void, Cox was entitled to the fair rental value of the property during the time of Romero's occupation and had the ability to evict Romero; (2) buyers must be willing and able to act on a contract in order to bring an action for specific performance; and (3) all the factual findings of the court were warranted, but because the superior court's decision did not mention Romero's claim regarding the disappearance of some of his property, the superior court must decide that issue.[584] The supreme court affirmed the factual findings of the superior court, remanded the case to the superior court for determination of an undecided issue raised at trial, and held that in order to pursue a claim for specific performance the buyer must be able and willing to perform on the contract.[585]

Uncle Joe's, Inc. v. L.M. Berry & Co.

In *Uncle Joe's Inc., v. L.M. Berry & Co.*,[586] the supreme court held that exculpatory clauses in tariffs should be strictly construed against the utility,[587] and therefore the publishing company that had written it could be found negligent.[588] L.M. Berry and Company contracted with Alaska Communications Systems (ACS) to publish Anchorage telephone directories but omitted information for Uncle Joe's Pizzeria.[589] Uncle Joe's brought a negligence suit against Berry, who claimed limited liability under the provisions of an exculpatory tariff filed by ACS.[590] The tariff explicitly applied only to ACS, not to companies that contracted with ACS as well.[591] The court reasoned that the same justifications for disfavoring and strictly construing contractual exculpatory clauses apply to exculpatory clauses in tariffs.[592] Therefore, the supreme court reversed the superior court's judgment dismissing Uncle Joe's claim and vacated the award of costs and attorney fees to Berry, holding that exculpatory clauses in tariffs should be strictly construed against the utility, and therefore, the publishing company that had written it could be found negligent.[593]

CRIMINAL LAW

Ninth Circuit Court of Appeals

[583] *Id.* at 6–7
[584] *Id.* at 9–12.
[585] *Id.*
[586] 156 P.3d 1113 (Alaska 2007).
[587] *Id.* at 1119.
[588] *Id.* at 1120.
[589] *Id*. at 1114.
[590] *Id*. at 1115.
[591] *Id*. at 1117.
[592] *Id*. at 1117–18.
[593] *Id*. at 1121.

United States v. Hicks

In *United States v. Hicks*,[594] the Ninth Circuit held that, in light of *United States v. Booker*,[595] the Sentencing Guidelines are always advisory, including when a defendant is resentenced pursuant to 18 U.S.C. § 3582(c).[596] Hicks was convicted and sentenced in 1993 for conspiring to distribute crack cocaine, maintaining a place for drug trafficking, and using and carrying a firearm during and in relating to a drug trafficking crime.[597] Hicks was sentenced based on the Sentencing Guidelines, which mandated adding additional points for his firearm conviction.[598] However, Congress subsequently passed § 3582(c), which stated that sentence enhancements were not to be applied to sentences enhanced due to firearm offenses committed in conjunction with the underlying offense and explicitly applied retroactively.[599] Additionally, the Ninth Circuit found that Hicks was entitled to a new sentencing hearing because, under *Booker*, the Guidelines were no longer mandatory in any context.[600] Finally, the Ninth Circuit held that policy statements did not preclude the application of *Booker* to § 3582(c)(2).[601] The Ninth Circuit vacated Hick's sentence in light of *Booker*, since Hicks was being resentenced pursuant to § 3582(c), and remanded to the district court to determine the proper sentence.[602]

United States v. Sargent

In *United States v. Sargent*,[603] the Ninth Circuit held that the government failed to establish that postal statements had a face value exceeding $1000, which was a necessary element of the defendant postal worker's convictions.[604] Sargent, a disgruntled postal worker, stole hundreds of postal statements, which did not allow the United States Postal Service ("USPS") to be paid for bulk mailings.[605] A Postal Inspector discovered the irregularity, and Sargent was arrested.[606] Sargent was convicted of one count of theft of public property under 18 U.S.C. § 641 and seven counts of theft of postal service property under 18 U.S.C. § 1707.[607] In determining what "face value" meant in § 641, the Ninth Circuit adopted the meaning of "value indicated on the face of a financial instrument."[608] Because the postal statements were not "financial instruments" and because the "thing of value" was the postal statements, and not the USPS's services, the Ninth Circuit held that the government could not prove that the postal statements had a value exceeding $1000.[609] The Ninth Circuit reversed the district court, holding that the

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[594] 472 F.3d 1167 (Alaska 2007).
[595] 543 U.S. 220 (2005).
[596] Hicks, 472 F.3d at 1168.
[597] *Id.* at 1168.
[598] *Id.*
[599] *Id.* at 1169.
[600] *Id.* at 1171–72.
[601] *Id.* at 1172–73.
[602] *Id.* at 1168.
[603] 504 F.3d 767 (9th Cir. 2007).
[604] *Id.* at 771.
[605] *Id.* at 768–69.
[606] *Id.* at 769.
[607] *Id.* at 768.
[608] *Id.* at 769–70.
[609] *Id.* at 770–71.

government failed to establish that postal statements had a face value exceeding $1000, which was a necessary element of the defendant postal worker's convictions.[610]

Alaska Supreme Court

Gabrielle v. State, Department of Public Safety

In *Gabrielle v. State, Department of Public Safety*,[611] the supreme court adopted the superior court's holding[612] that (1) a pardoned felon was neither entitled to receive a concealed firearm permit nor have such a permit renewed because pardoned felons are not "eligible to own or possess" a firearm under Alaska law,[613] and (2) federal law does not prevent a pardoned felon from possessing a firearm if the pardon did not include a prohibition against firearm possession.[614] An Alaska state trooper revoked Gabrielle's concealed firearm permit and did not renew the permit because of Gabrielle's prior felony convictions, even though Gabrielle had been pardoned for the felonies.[615] Gabrielle appealed to the Department of Public Safety, which upheld the trooper's decision.[616] Gabrielle then appealed to the superior court.[617] The supreme court adopted the superior court's rationale. Under Alaska's statutory scheme, a pardoned felon would only be able to raise an affirmative defense against a third degree charge of firearm possession if, at the time of possession, the pardoned felon was on his or her land or was lawfully hunting.[618] Therefore, issuing a concealed handgun permit to a pardoned felon would have no purpose because the pardoned felon could not use the permit as an affirmative defense to firearm possession.[619] Thus, Gabrielle was not considered "eligible to own or possess" a firearm, and his request for a permit was properly denied because eligibility is a requirement for the permit.[620] The supreme court affirmed the superior court and adopted its opinion[621] that (1) a pardoned felon was neither entitled to receive a concealed firearm permit nor have such a permit renewed because pardoned felons are not "eligible to own or possess" a firearm under Alaska law,[622] and (2) federal law does not prevent a pardoned felon from possessing a firearm if the pardon did not include a prohibition against firearm possession.[623]

Heavyrunner v. State

In *Heavyrunner v. State*,[624] the supreme court held that a defendant's challenge to a sentence's excessiveness is ripe as soon as it is imposed and that a mandatory minimum

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[610] *Id.* at 771.
[611] 158 P.3d 813 (Alaska 2007) (per curiam).
[612] *Id.* at 814.
[613] *Id.* at 816.
[614] *Id.* at 816–17.
[615] *Id.* at 814.
[616] *Id.*
[617] *Id.*
[618] *Id.* at 815.
[619] *Id.* at 816.
[620] *Id.*
[621] *Id.* at 814.
[622] *Id.* at 816.
[623] *Id.* at 816–17.
[624] 172 P.3d 819 (Alaska 2007).

sentence differs from a presumptive sentence.[625] Pursuant to a plea agreement, Heavyrunner pled no contest to kidnapping and second-degree assault for enticing a woman to get into his vehicle, abducting her, binding her with duct tape, assaulting her, and then abandoning her.[626] The superior court sentenced Heavyrunner to thirty-five years for the kidnapping offense, with twenty-seven years suspended, and a consecutive two years served for the second-degree assault.[627] As a preliminary matter, the supreme court determined that, contrary to the State's assertion, a defendant's challenge to a suspended prison term was ripe for review when imposed because the court is required to consider the sentence in its entirety.[628] Additionally, the supreme court concluded that the superior court's wording of the sentence as "presumptive" was confusing and erroneous because a presumptive term is one intended for a typical offender; rather, the portion of the sentence imposed that had to be served before the consideration of parole was a "mandatory minimum term."[629] The supreme court amended the superior court's judgment, holding that a defendant's challenge to a sentence's excessiveness is ripe as soon as it is imposed and that a mandatory minimum sentence differs from a presumptive sentence.[630]

McGee v. State

In *McGee v. State*,[631] the supreme court held that in a case for criminal mischief the State bore the burden of proving beyond a reasonable doubt that McGee lacked any reasonable ground to believe that his actions were justifiable self-defense.[632] Upon returning to his mother's trailer home, McGee noticed a large gash in his mother's head and found a man, Alexander, asleep in the back of the trailer.[633] McGee claims that after a scuffle with Alexander, McGee fled from the trailer as Alexander shouted "[threateningly]."[634] McGee claims to have smashed out the windows so that Alexander would not be able to drive the truck into McGee.[635] The court noted that an element of the statutory definition of criminal mischief requires the defendant to have acted with "no reasonable right or [] reasonable ground to believe [he] has such a right."[636] Therefore, the court found that it was the State's burden to prove this beyond a reasonable doubt, and since McGee made a showing of necessity (e.g. self-defense) that the State had failed to rebut, the State did not meet its burden.[637] The supreme court reversed the conviction and remanded for further proceedings, holding that in a case for criminal mischief the State bore the burden of proving beyond a reasonable doubt that McGee lacked any reasonable ground to believe that his actions were justifiable self-defense.[638]

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[625] *Id.* at 821–22.
[626] *Id.* at 820.
[627] *Id.*
[628] *Id.* at 820–21.
[629] *Id.* at 821–22.
[630] *Id.* at 821–23.
[631] 162 P.3d 1251 (Alaska 2007).
[632] *Id.* at 1252.
[633] *Id.*
[634] *Id.*
[635] *Id.*
[636] *Id.* at 1253.
[637] *Id.* at 1261.
[638] *Id.* at 1252.

Rathke v. Corrections Corp. of Am., Inc.

In *Rathke v. Corrections Corp. of Am., Inc.*,[639] the supreme court held that a state prisoner has the right to enforce the state's contract with Corrections Corporation America (CCA).[640] Rathke, an inmate at the Florence Correctional Center (Florence), was placed in disciplinary segregation for thirty days based on a false-positive drug test.[641] Rathke was not afforded any administrative hearing before his segregation, despite his clean drug record during his seventeen-year tenure in prison.[642] The court found that Rathke had colorable constitutional claims based on his allegations of violations by CCA of his constitutional rights as an inmate.[643] Moreover, the court held that Alaska prisoners are the intended third-party beneficiaries of the state's contract with CCA.[644] However, Rathke did not have a contract claim against individual CCA employees because employees are not generally liable for breach of contract by their employer.[645] Finally, Rathke did not have a claim as a third-party beneficiary against the drug testing firm, as this was a separate contract between the state and the firm.[646] The supreme court affirmed in part, vacated in part and remanded the superior court's decision, holding that a state prisoner has the right to enforce the state's contract with CCA.[647]

State v. Garrison

In *State v. Garrison*,[648] the supreme court held that a person charged with drunk driving is not permitted to raise an affirmative defense of necessity without objective evidence that the harm prevented outweighed the harm risked.[649] A friend was driving Garrison car when it broke down on the side of the road, subsequently causing her friend to leave the scene.[650] Garrison then started and drove the car, when he was arrested for drunk driving.[651] At trial she asserted the affirmative defense of necessity, and after a hung jury the state moved to prevent her from raising the defense.[652] The superior court issued an order allowing the necessity defense and denied the state's motion, and the court of appeals affirmed.[653] The state appealed, arguing that the proportionality prong of the necessity defense, that harm prevented is greater than potential harm inflicted, is a matter of law for the court to decide.[654] The supreme court concluded that Garrison failed to present objective evidence that the harm she prevented outweighed the harm she was risking, noting that the proportionality prong is determed by an objective standard and

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[639] 153 P.3d 303 (Alaska 2007).
[640] *Id.* at 306.
[641] *Id.*
[642] *Id.*
[643] *Id.* at 309.
[644] *Id.* at 311.
[645] *Id.* at 312.
[646] *Id.*
[647] *Id.* at 306.
[648] 171 P.3d 91 (Alaska 2007).
[649] *Id.* at 92–93.
[650] *Id.* at 93.
[651] *Id.*
[652] *Id.* at 93–94.
[653] *Id.* at 94.
[654] *Id.* at 94–96.

passing on the opportunity to rule on whether the proportionality prong of the necessity defense is for the court or for the jury.[655] The supreme court vacated the order issued by the superior court, holding that a person charged with drunk driving is not permitted to raise an affirmative defense of necessity without objective evidence that the harm prevented outweighed the harm risked.[656]

State v. Gonzales

In *State v. Gonzales*,[657] the supreme court held that the State's ten-year delay in bringing an indictment against Gonzales was justified because of his flight from the state as well as the child-victim's mental health needs.[658] A vehicle stop of Gonzales' car for a traffic violation by an Alaska state trooper uncovered sexually explicit drawings and led to Gonzales being investigated for child molestation.[659] Gonzales fled the state at the beginning of the investigation and did not return for nearly ten years.[660] Additionally, as a result of the investigation, the child-victim was treated for sexual abuse, including a six-month hospitalization.[661] The superior court concluded that this delay was unreasonable, and, combined with lost recordings of interviews conducted by the authorities, ordered dismissal of the State's case against Gonzales, and the court of appeals affirmed this judgment.[662] The supreme court held that the superior court improperly shifted the burden to the State to proffer reasons for the delay and to justify why the delay was necessary.[663] The supreme court reversed the appellate court decision and remanded to the superior court the issue of what sanctions, if any, should be applied to the State's case against Gonzales because of the lost evidence, holding that the State's ten-year delay in bringing an indictment against Gonzales was justified because of his flight from the state as well as the child-victim's mental health needs.[664]

Alaska Court of Appeals

Allen v. Municipality of Anchorage

In *Allen v. Municipality of Anchorage*,[665] the court of appeals held that it had jurisdiction over all sentence appeals from a district court except those challenging as excessive a term of imprisonment of 120 days or less.[666] Allen pleaded no contest to two counts of cruelty to animals for maintaining animals in an inhumane manner and received, after suspensions, a thirty day sentence and a ten-year probationary period during which the only animal she was allowed to care for was her son's dog.[667] Allen

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[655] *Id.* at 94, 96–98
[656] *Id.* at 92–93, 98.
[657] 156 P.3d 407 (Alaska 2007).
[658] *Id.* at 409.
[659] *Id.*
[660] *Id.* at 409–10.
[661] *Id.* at 410.
[662] *Id.*
[663] *Id.* at 412.
[664] *Id.* at 417.
[665] 168 P.3d 890 (Alaska Ct. App. 2007).
[666] *Id*. at 895.
[667] *Id*. at 891–92.

appealed the probation condition.[668] Based on the legislative history and the potential administrative difficulties, the court of appeals found that its statutory jurisdictional limit applied only to appeals challenging as excessive any sentence for 120 days or less.[669] After finding that it had jurisdiction, the court affirmed the probation condition because it was reasonably related to Allen's rehabilitation.[670] Overruling *Haggren v. State*[671] by finding that the court of appeals does have jurisdiction over appeals to consider penalty provisions other than terms of imprisonment, the court of appeals held that it had jurisdiction over all sentence appeals from a district court except those challenging as excessive a term of imprisonment of 120 days or less.[672]

Allen v. State

In *Allen v. State*,[673] the court of appeals held that a prima facie case of attorney incompetence for failure to present witnesses must either present statements from those witnesses or explain to the court why such statements are unobtainable.[674] Allen filed a petition for post-conviction relief appealing his conviction of second-degree murder on the grounds that his attorneys failed to present the testimonies of two witnesses who would have provided important defense testimony.[675] The petition included an affidavit by an investigator who, after interviewing each witness, affirmed what their testimony would have been.[676] The superior court dismissed Allen's petition on the grounds that it failed to present a prima facie case.[677] Allen appealed this decision, asserting that the superior court should have granted him a hearing on the defense claims associated with his witnesses before it dismissed his petition.[678] The court of appeals noted that there were several unpublished Alaska decisions which state that similar petitions must contain either statements from the witnesses *or* a suitable explanation of why such statements could not be obtained, and that Allen's petition contained neither.[679] The court of appeals affirmed the superior court's decision, holding that a prima facie case of attorney incompetence for failure to present witnesses must either present statements from those witnesses or explain to the court why such statements are unobtainable.[680]

Douglas v. State

In *Douglas v. State*,[681] the court of appeals held that a defendant's prior sexual assaults were relevant, that the judge did not abuse his discretion by barring the defendant from the courtroom even during his testimony, and that the defendant's physical assault on his attorney during an attorney-client conference did not require the attorney's

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[668] *Id*. at 892.
[669] *Id.* at 894–95.
[670] *Id*. at 895.
[671] 829 P.2d 842 (Alaska Ct. App. 1992).
[672] *Allen*, 168 P.3d at 893–96.
[673] 153 P.3d 1019 (Alaska Ct. App. 2007).
[674] *Id.* at 1026, 1028.
[675] *Id.* at 1020–21.
[676] *Id.* at 1021.
[677] *Id.*
[678] *Id.*
[679] *Id.* at 1025–28.
[680] *Id.* at 1025, 1028.
[681] 166 P.3d 61 (Alaska Ct. App. 2007).

disqualification.[682] Douglas was convicted of two counts of first-degree sexual assault and two counts of fourth-degree assault for twice brutally beating his girlfriend and for having non-consensual sex with her both times.[683] While Douglas was in jail awaiting his trial for those charges he contacted his girlfriend by phone, despite a no contact order, and attempted to persuade her to give exculpatory testimony, which gave rise to this appeal.[684] The court of appeals found that while defendants normally do have a right to testify in person, rather than by telephone, the superior court properly barred Douglas from the courtroom because of his intemperate, disruptive, and uncontrolled behavior.[685] Moreover, the appeals court concluded that evidence of Douglas' prior sexual assaults was properly admitted because defense counsel never objected to its admissibility as hearsay and because, arguably, the doctrine of collateral estoppel barred Douglas from claiming that he was innocent of previously convicted conduct.[686] Finally, the appeals court found that Douglas' physical assault on his court-appointed defense attorney at an attorney-client conference at the jail did not require defense counsel to withdraw from further representation of Douglas; the court concluded that it was not the assault itself that prevented meaningful communication between Douglas and his attorney, but rather it was Douglas' own litigation agenda that prevented him from effectively communicating with any attorney in order to contribute to his defense.[687] The court of appeals affirmed the superior court's judgment, holding that a defendant's prior sexual assaults were relevant, that the judge did not abuse his discretion by barring the defendant from the courtroom even during his testimony, and that the defendant's physical assault on his attorney during an attorney-client conference did not require the attorney's disqualification.[688]

Dow v. State

In *Dow v. State*,[689] the court of appeals held that *Cooksey* pleas must be presented to the court in clear writing that explicitly states the issues preserved for appeal.[690] Dow was arrested based on evidence found during a warrantless police search of his basement.[691] The dispositive issue in his case was whether there was adequate consent to the search.[692] Dow entered a *Cooksey* plea, a plea of no contest in exchange for the right to appeal a dispositive issue, in which the superior court noted that the general issue of consent was appealable. However, neither the lawyers nor the judge clearly articulated the specific arguments the plea reserved for appeal. When Dow appealed his conviction, the State contended that the plea agreement did not preserve the issues he raised.[693] The court of appeals, noting widespread confusion on the issue of *Cooksey* pleas, held that

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[682] *Id.* at 63–64.
[683] *Id.* at 63.
[684] *Id.*
[685] *Id.* at 64–65.
[686] *Id.* at 69–70.
[687] *Id.* at 74, 84–85.
[688] *Id.* at 63–64.
[689] 155 P.3d 352 (Alaska Ct. App. 2007).
[690] *Id.* at 355.
[691] *Id.* at 353.
[692] *Id.* at 353–54.
[693] *Id.* at 354.

Cooksey pleas must be entered into in writing and signed by both the prosecutor and the defense attorney, and that: (1) both parties must agree on which issues are dispositive; (2) the agreement must state the reasons why the issues are dispositive; and (3) the agreement must explicitly refer to the facts of the case and state the legal theories relied on by the parties.[694] The court of appeals remanded the case to the superior court for clarification of the scope of the dispositive issue, holding that *Cooksey* pleas must be presented to the court in clear writing that explicitly states the dispositive issues preserved for appeal.[695]

Edwards v. State

In *Edwards v. State*,[696] the court of appeals held that there was sufficient evidence to support Edwards' conviction, that Edwards' trial was not flawed by procedural and evidentiary errors and that Edwards' sentence was not in violation of his Sixth Amendment rights.[697] A child was left in Edwards' care by the mother when she went to work.[698] About two hours later, Edwards' downstairs neighbor heard a loud noise, and roughly forty-five minutes after that, Edwards brought the child to the hospital.[699] The court held that, based on the evidence presented, it was reasonable to find that Edwards was the person who injured the child.[700] The court also found that, in excluding potentially exculpatory evidence, the superior court properly applied Alaska Evidence Rule 403, which limits a defendant's right to present evidence based on considerations of relevance.[701] Moreover, the court rejected Edwards' claim of verdict inconsistency because (1) Edwards did not object to the jury instructions;[702] (2) Edwards' attorney made precisely the opposite argument regarding the inconsistency of other charges against Edwards;[703] and (3) taken as a whole, the jury instructions did not reveal a bias in the jury's ultimate verdict.[704] The court also noted that this possibility of verdict inconsistency could have been avoided had the superior court given the standard jury instructions.[705] The court of appeals affirmed the conviction and sentence imposed by the district court, holding that there was sufficient evidence to support Edwards' conviction, that Edwards' trial was not flawed by procedural and evidentiary errors, and that Edwards' sentence was not in violation of his Sixth Amendment rights.[706]

Garland v. State

In *Garland v. State*,[707] the court of appeals held that in order to secure review of the admissibility of portions of a pre-sentence report, an individual charged with a crime

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[694] *Id.* at 355.
[695] *Id.* at 354–55.
[696] 158 P.3d 847 (Alaska 2007).
[697] *Id.* at 849.
[698] *Id.* at 849–50.
[699] *Id.*
[700] *Id.* at 850.
[701] *Id.* at 852.
[702] *Id.* at 856.
[703] *Id.* at 857.
[704] *Id.*
[705] *Id.* at 858.
[706] *Id.* at 849.
[707] 172 P.3d 827 (Alaska Ct. App. 2007).

must take the stand and dispute the report's allegations.[708] Garland was charged with sexual assault of a minor and pled no contest.[709] The state prepared a pre-sentence report which included information about a prior sexual assault in California for which Garland was the suspected perpetrator.[710] Garland argued that because he pled no contest, the pre-sentence report was irrelevant to his sentence.[711] The superior court rejected Garland's argument, which he renewed on appeal.[712] Relying on Rule 32.1(f)(5) of the Alaska Criminal Rules, the court of appeals held that because sentencing courts can only rule on the admissibility (and relevance) of elements of presentence reports if they are "disputed assertion[s]" and because Garland neither disputed the assertion at trial nor argued that the law did not require that he take the stand, there was no need to remove the part of the presentence report referring to the previous event.[713] Affirming the superior court, the court of appeals held that in order to secure review of the admissibility of portions of a pre-sentence report, an individual charged with a crime must take the stand and dispute the report's allegations.[714]

Grandstaff v. State

In *Grandstaff v. State*,[715] the court of appeals held that inculpatory statements made by a defendant during a peer review investigation are not protected by privilege in criminal cases and that none of the issues raised by the defendant in his appeal warranted reversing his conviction or reducing his sentence.[716] Grandstaff was convicted of sexually assaulting medical patients, issuing prescriptions to those patients without any medical purpose, and stealing Medicaid funds.[717] On appeal, Grandstaff challenged many of the trial court's rulings, including its decision to admit statements he made during a peer review investigation.[718] The court noted that both the legislative history and a consistent reading of Section 18.23.030(a) of the Alaska statutes as a whole indicate that statements made during peer review investigations are meant to be privileged only in civil cases. The court of appeals affirmed, holding that inculpatory statements made by a defendant during a peer review investigation are not protected by privilege in criminal cases and that none of the issues raised by the defendant in his appeal warranted reversing his conviction or reducing his sentence.[719]

Lampley v. Municipality of Anchorage

In *Lampley v. Municipality of Anchorage*,[720] the court of appeals held that the defendant was entitled to a new trial on the charge of driving with a suspended license and that sentences for driving under the influence and breath test refusal should have

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[708] *Id.* at 829.
[709] *Id.* at 827–28.
[710] *Id.* at 828.
[711] *Id.*
[712] *Id.*
[713] *Id.* at 828–29.
[714] *Id.* at 829.
[715] 171 P.3d 1176 (Alaska Ct. App. 2007).
[716] *Id.* at 1182, 1193–97.
[717] *Id.* at 1182.
[718] *Id.* at 1185–213.
[719] *Id.* at 1182.
[720] 159 P.3d 515 (Alaska Ct. App. 2007).

been imposed concurrently.[721] The defendant was convicted for driving under the influence, breath test refusal, and driving with a suspended license.[722] On appeal, defendant argued that the culpable mental state for driving with a suspended license was negligence, not recklessness as the jury had been instructed.[723] Defendant further argued that when the court increased his sentence after discovery of his third-offender status, the double-jeopardy clause had been violated.[724] In ruling for the defendant on the above-mentioned claims, the court first determined that while the state statute carried a culpable mental state of negligence and the local statute required recklessness, the two statutes were not fundamentally inconsistent as to render the local statute unlawful.[725] As a result, the recklessness standard mandated by the local statute under which the defendant was charged applied.[726] The court further determined that since defendant's sentences for driving under the influence and breath test refusal could have been implemented concurrently and that not doing so violated prior precedent by correcting an illegally lenient sentence further than the extent necessary to correct the illegality.[727] The court of appeals reversed in part and affirmed in part, holding that the defendant was entitled to a new trial on the charge of driving with a suspended license and that sentences for driving under the influence and breath test refusal should have been imposed concurrently.[728]

Linscott v. State

In *Linscott v. State*,[729] the court of appeals held that (1) denial of a jury trial for an aggravating factor is harmless where the composite sentence for multiple crimes could have been achieved without finding the aggravator[730] and (2) an appellant may not raise new theories in support of a mitigating factor on appeal.[731] Linscott was convicted of first-degree burglary, second-degree theft, and contributing to the delinquency of a minor.[732] The underlying events occurred while Linscott was on probation.[733] On appeal, Linscott claimed that, under *Blakely v. Washington*, his right to a jury trial on an aggravating factor, his parole status, was improperly denied.[734] The court ruled that the alleged *Blakely* error was harmless beyond a reasonable doubt because the trial court could have imposed the same composite sentence (for all three crimes) without using the aggravating factor to add to the burglary charge's presumptive sentence.[735] Linscott further argued that the trial court had improperly failed to find a mitigating factor, "conduct among the least serious" of first-degree burglary.[736] The court of appeals denied

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[721] *Id.* at 530.
[722] *Id.* at 519.
[723] *Id.* at 523.
[724] *Id.* at 528.
[725] *Id.* at 523–26.
[726] *Id.* at 526.
[727] *Id.* at 528.
[728] *Id.* at 530.
[729] 157 P.3d 1056 (Alaska Ct. App. 2007).
[730] *Id.* at 1057–58.
[731] *Id.* at 1059.
[732] *Id.* at 1057.
[733] *Id.*
[734] *Id.* at 1057.
[735] *Id.* at 1057–58.
[736] *Id.* at 1057.

this argument, ruling that when an appellant has failed to prove mitigating factors in the lower court, the appellant may not present new theories on appeal supporting the mitigating factors.[737] The court of appeals affirmed the judgment of the superior court, holding that (1) denial of a jury trial for an aggravating factor is harmless where the composite sentence for multiple crimes could have been achieved without finding the aggravator[738] and (2) an appellant may not raise new theories in support of a mitigating factor on appeal.[739]

Lockuk v. State

In *Lockuk v. State*,[740] the court of appeals held (1) that the sentencing court was not required to submit to the jury aggravating factors resting solely on prior criminal convictions;[741] (2) that the sentencing court's failure to obtain a felony offender's express concession of prior convictions and waiver of right to a jury trial on aggravating factors was not plain error;[742] and (3) that plain error analysis was appropriate.[743] Lockuk appealed his sentence of five years imprisonment with one year suspended for felony assault arguing that the State was required to prove aggravating factors, including prior convictions, to a jury beyond a reasonable doubt.[744] The court of appeals held that, under Alaska law and consistent with *Blakely v. Washington*, a judge could find aggravating factors based on prior convictions when the state relied simply on the convictions themselves and the defendant did not dispute them.[745] The court also held that plain error analysis was appropriate because Lockuk did not raise his claims during sentencing,[746] and Lockuk's claims fail under plain error analysis because reasonable judges could differ as to what the law required.[747] The court of appeals affirmed the sentence, holding (1) that the sentencing court was not required to submit to the jury aggravating factors resting solely on prior criminal convictions; (2) that the sentencing court's failure to obtain a felony offender's express concession of prior convictions and waiver of right to a jury trial on aggravating was not plain error; and (3) that plain error analysis was appropriate.[748]

Love v. State

In *Love v. State*,[749] the court of appeals held that a criminal defendant may withdraw a guilty plea if he does not receive competent legal advice on an issue when that issue is central to his decision to accept the plea bargain.[750] While on parole, Love was arrested for heroin possession and taken into custody for both violation of parole and

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[737] *Id.* at 1059.
[738] *Id.* at 1057–58.
[739] *Id.* at 1059.
[740] 153 P.3d 1012 (Alaska Ct. App. 2007).
[741] *Id*. at 1015.
[742] *Id*. at 1016–17.
[743] *Id*. at 1018.
[744] *Id*. at 1014.
[745] *Id.* at 1015.
[746] *Id*. at 1018.
[747] *Id*. at 1016.
[748] *Id*. at 1018.
[749] 173 P.3d 433 (Alaska Ct. App. 2007).
[750] *Id.* at 437.

heroin possession.[751] After serving two years in prison for parole revocation, Love reached a plea agreement with the state stipulating that he would serve two years for the heroin possession charge.[752] Love believed the two years he previously served would be credited toward the new sentence and he would be released immediately; for that reason, he agreed to the plea bargain.[753] The court of appeals found that Love's attorney erred by failing to tell Love that his belief about his previous time served was incorrect because the attorney told him that there was a possibility that his belief was correct.[754] The court found that the attorney's failure to correct Love's mistaken assumption constituted incompetent legal advice.[755] The court of appeals reversed and remanded, holding that a criminal defendant may withdraw his plea when he does not receive competent legal advice on an issue and that issue is central to his decision to accept the plea bargain.[756]

Matthew v. State

In *Matthew v. State*,[757] the court of appeals held that a de novo standard of review applies when determining whether conditions of release are restrictive enough to count as credit toward prison time and that a convicted individual whose prison sentence has been delayed may not count electronic monitoring toward time served when the conditions of the monitoring do not approximate incarceration.[758] Matthew was sentenced to a two-year prison term but was granted a delay of confinement subject to electronic monitoring.[759] The superior court ruling permitted him to be either at home or at work and to travel between the two.[760] Matthew subsequently filed a motion to have the time spent under electronic monitoring count toward his prison sentence; this motion was denied.[761] On appeal, Matthew argued his electronic monitoring was no different from electronic monitoring done by the Department of Corrections, which counts toward time served.[762] The court of appeals held (1) this question was one of law, and thus a de novo standard was appropriate, and (2) in order for time outside of prison to count toward time served, the restrictions on an individual's actions outside of prison must approximate those of actual incarceration.[763] The court of appeals affirmed the decision of the superior court, holding that a de novo standard of review applies when determining whether conditions of release are restrictive enough to count as credit toward prison time, and that a convicted individual whose prison sentence has been delayed may not count electronic monitoring toward time served when the conditions of the monitoring do not approximate incarceration.[764]

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[751] *Id.* at 434.
[752] *Id.*
[753] *Id.*
[754] *Id.* at 436.
[755] *Id.* at 436–37.
[756] *Id.*
[757] 152 P.3d 469 (Alaska Ct. App. 2006).
[758] *Id.* at 472–73.
[759] *Id.* at 470
[760] *Id.* at 472.
[761] *Id.* at 471.
[762] *Id.* at 473.
[763] *Id.* at 472–73.
[764] *Id.*

Moberg v. Municipality of Anchorage

In *Moberg v. Municipality of Anchorage*,[765] the court of appeals held that defendants must show prejudice from preaccusation delay to suppress a hospital-administered blood test[766] and that state-mandated testing procedures[767] do not apply to blood tests conducted by hospitals and clinics for medical purposes.[768] Moberg was hospitalized after a motorcycle accident.[769] A blood test taken during the course of treatment revealed that Moberg was intoxicated.[770] More than three months later, the government obtained Moberg's hospital records and subsequently charged him with driving under the influence.[771] In the context of hospital-administered blood tests, the court of appeals applied the more general preaccusation delay rule that defendants must show that their ability to defend the case was prejudiced on account of delay and not the more narrow rule governing mandatory breath tests that failure to preserve evidence results in automatic suppression.[772] The court also held that both the legislative intent and plain language of title 13, section 63.110 of the Alaska Administrative Code, a regulation establishing mandatory testing procedures, do not support extension to blood tests conducted by a hospital for medical purposes.[773] The court of appeals affirmed the judgment of the district court, holding that defendants must show prejudice form preaccusation delay to suppress a hospital-administered blood test and that state-mandated testing procedures do not apply to blood tests conducted by hospitals and clinics for medical purposes.[774]

Morgan v. State

In *Morgan v. State*,[775] the court of appeals held the stop for failure to signal did not sufficiently depart from reasonable police practices, and as a result, Morgan's Fourth Amendment rights had not been violated.[776] After failing to signal a turn upon leaving a restaurant parking lot, Morgan was pulled over and, after failing field sobriety tests, was arrested for driving under the influence.[777] The court denied Morgan's argument that his original stop for failure to signal out of the parking lot was contrary to police practice, which would have violated Morgan's Fourth Amendment rights.[778] The court, citing prior precedent, restated the proposition that in order to challenge a pretext stop, the defendant must prove that the officer departed from reasonable police practices.[779] The court affirmed, holding that the stop for failure to signal did not sufficiently depart from

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[765] 152 P.3d 1170 (Alaska Ct. App. 2007).
[766] *Id.* at 1173–74.
[767] *See* ALASKA ADMIN. CODE tit. 13, § 63.110 (2007).
[768] *Moberg*, 152 P.3d at 1176–79.
[769] *Id.* at 1172.
[770] *Id.*
[771] *Id.*
[772] *Id.* at 1173–74.
[773] *Id.* at 1176–79.
[774] *Id*.
[775] 162 P.3d 636 (Alaska App. 2007).
[776] *Id.* at 639.
[777] *Id.* at 637.
[778] *Id.* at 639.
[779] *See id.* at 638 (citing *Nease v. State*, 105 P.3d 1145, 1148 (Alaska App. 2005)).

reasonable police practices, and as a result, Morgan's Fourth Amendment rights had not been violated.[780]

Osborne v. State

In *Osborne v. State,*[781] the court of appeals held that Osborne was not entitled to further DNA testing on certain physical evidence because he failed to satisfy the court's three-part test: (1) that his conviction rested primarily on eyewitness testimony, (2) that there was a demonstrated doubt concerning this identification, and (3) that the scientific testing of physical evidence would likely be conclusive of his guilt.[782] Plaintiff and an accomplice were convicted of kidnapping, first degree assault, and first degree sexual assault after attacking a woman in Anchorage.[783] The woman identified the two men in two separate lineups, and, among other evidence discovered at the scene, the police found a used condom with sperm that matched the plaintiff's DNA type at a level shared by one sixth of the African American population.[784] In a petition for post-conviction relief Osborne claimed that he received inadequate representation because his lawyer did not seek further DNA testing and also claimed that he had a right, as a matter of due process, to pursue DNA testing of the condom that may rule him out as the source of the sperm.[785] The court of appeals affirmed the superior court's decision holding that Osborne was not entitled to further DNA testing certain physical evidence because he failed to satisfy the court's three-part test: (1) that his conviction rested primarily on eyewitness testimony, (2) that there was a demonstrated doubt concerning this identification, and (3) that the scientific testing of physical evidence would likely be conclusive on the issue of whether he perpetrated the crime.[786]

Pastos v. State

In *Pastos v. State*,[787] the court of appeals held that the cashing of a check may constitute "contact" in violation of a probation order with a no-contact provision.[788] Pastos pleaded no-contest to unlawful contact with his ex-girlfriend.[789] The court suspended most of Pastos' sentence, contingent on the condition that Pastos have no contact with his ex-girlfriend.[790] Hours later, Pastos cashed a check that his ex-girlfriend had written him three years earlier.[791] The trial court concluded that this was a purposeful act by Pastos intended to adversely affect his ex-girlfriend, contravening the court's probation order.[792] The court of appeals agreed with the trial court that, here, "contact" encompassed both direct and indirect communication.[793] Furthermore, the court of

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[780] *Id.* at 639.
[781] 163 P.3d 973 (Alaska Ct. App. 2007).
[782] *Id.* at 974–75.
[783] *Id.* at 974.
[784] *Id.* at 976–77.
[785] *Id.*
[786] *Id.* at 982.
[787] 157 P.3d 1066 (Alaska Ct. App. 2007).
[788] *Id.* at 1067.
[789] *Id.*
[790] *Id.*
[791] *Id.* at 1067–68.
[792] *Id.* at 1069.
[793] *Id.* at 1070–71.

appeals held that the trial court's conclusion was a reasonable one and was not clearly erroneous; Pastos knew that his act of cashing the check would instill emotional distress and fear in the victim.[794] The court of appeals affirmed the judgment of the district court, holding that the cashing of a check may constitute "contact" in violation of probation order with a no-contact provision.[795]

Spencer v. State

In *Spencer v. State,*[796] the court of appeals held that (1) the trial judge did not abuse his discretion to determine whether witnesses are competent to testify despite the fact that the witness consumed alcohol prior to testifying; (2) there was sufficient evidence to support convictions of kidnapping and first-degree assault under an accomplice-liability theory; and (3) the trial judge did not erroneously instruct the jury on accomplice liability.[797] Spencer and another man, Williams, were convicted of kidnapping and first-degree assault for restraining and beating Ahsoak after Ahsoak accidentally knocked Spencer's girlfriend to the floor.[798] Before testifying, Ahsoak had consumed four beers, and the defense moved to strike Ahsoak's testimony as incompetent.[799] The trial judge denied the defense's request (stating that he did not believe Ahsoak was incompetent) but delayed the remainder of Ahsoak's testimony until the following day and permitted defense counsel to cross examine Ahsoak on his intoxication.[800] On appeal, the court of appeals (1) rejected a *per se* rule that witnesses who have consumed alcohol are incompetent to testify, instead vesting discretion in the trial judge to make the decision (and held that the trial judge, here, did not abuse that discretion); (2) reviewed the sufficiency of the evidence under a standard of plain error in the light most favorable to the verdict; and (3) held that because the mental state elements of kidnapping and first-degree assault were included in the jury instructions regarding those specific crimes, their absence from the jury instruction regarding accomplice liability was not plain error.[801] Affirming the decision of the superior court, the court of appeals held that (1) the trial judge did not abuse his discretion to determine whether witnesses are competent to testify despite the fact that the witness consumed alcohol prior to testifying; (2) there was sufficient evidence to support convictions of kidnapping and first-degree assault under an accomplice-liability theory; and (3) the trial judge did not erroneously instruct the jury on accomplice liability.[802]

Valentine v. State

In *Valentine v. State*,[803] the court of appeals held that changes to section 28.35.030 of the Alaska Statutes, which prohibits driving under the influence, were not in

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[794] *Id.*
[795] *Id.* at 1071.
[796] 164 P.3d 649 (Alaska Ct. App. 2007)
[797] *Id.* at 653–55.
[798] *Id.*at 650–52.
[799] *Id.* at 652.
[800] *Id.*
[801] *Id.* at 653–55.
[802] *Id.*
[803] 155 P.3d 331 (Alaska Ct. App. 2007).

conflict with the Alaska Constitution.[804] Valentine was convicted of driving under the influence under AS 28.35.030 after failing three field sobriety tests, and then registering over the permissible alcohol level in a police-administered breath test and an independent blood test.[805] Valentine appealed his conviction, arguing that amendments to the statute which allowed conviction based on blood alcohol levels at the time of the test, rather than at the time of driving, violated the Alaska Constitution.[806] The court dismissed all of Valentines claims, holding that: (1) the amended statute was not void for vagueness, because the statute gave adequate notice of what conduct is prohibited;[807] (2) the amended statute was not unconstitutionally overbroad because the legislature intended to criminalize driving after ingesting enough alcohol to reach a certain blood alcohol level, even if that amount had not yet been absorbed into the bloodstream;[808] (3) the amended statute did not impose criminal liability absent mens rea, because the State must still prove that the defendant knowingly drank and drove;[809] (4) the amended statute did not deny due process by creating impermissible presumptions because the law does not require a presumption that a motorist was intoxicated while driving;[810] (5) the amended statute does not infringe the rule-making power of the Alaska Supreme Court because the legislature may define the parameters of relevant evidence;[811] (6) the amended law did not violate the constitutional right to an independent test because that right did not guarantee an exculpatory test result;[812] and (7) the amended statute did not violate equal protection because the law rationally relates to a compelling interest of the legislature.[813] The court of appeals affirmed the conviction, holding that changes to AS 28.35.030, the law prohibiting driving under the influence, were not in conflict with the Alaska Constitution.[814]

Wooley v. State

In *Wooley v. State*,[815] the court of appeals held that the date of sentencing alone determines the beginning of the five-year time period in which third-degree theft is elevated to second-degree theft.[816] On February 12, 2002, Wooley stole property worth less than $500, which normally constitutes third-degree theft under Alaska law.[817] However, Wooley had pleaded guilty to two prior counts of second-degree theft on December 20, 1996 and January 24, 1997 and was sentenced for both crimes on March 28, 1997.[818] Section 11.46.130(a)(6) of the Alaska Statutes elevates third-degree theft to second-degree for repeat offenders, specifically those convicted and sentenced for other

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[804] *Id.* at 335.
[805] *Id.*
[806] *Id.*
[807] *Id.* at 339–40.
[808] *Id.* at 341.
[809] *Id.* at 341–43.
[810] *Id.* at 343–46.
[811] *Id.* at 346.
[812] *Id.* at 346–47.
[813] *Id.* at 347–48.
[814] *Id.* at 348.
[815] 157 P.3d 1064 (Alaska Ct. App. 2007).
[816] *Id.* at 1066.
[817] *Id.* at 1064.
[818] *Id.* at 1065.

thefts "within the preceding five years."[819] In accordance with this provision, the State charged Wooley with second-degree theft, to which he pled no contest.[820] The court of appeals identified an ambiguity in the statute concerning whether the five years begins to run from sentencing or from the finding of guilt.[821] The court of appeals identified a longstanding principle in Alaska law that statutes imposing enhanced punishment for repeat offenders hinge on the date of sentencing.[822] The court of appeals affirmed the superior court's decision, holding that the date of sentencing alone determines the beginning of the five-year time period in which third-degree theft is elevated to second-degree theft.[823]

CRIMINAL PROCEDURE

Ninth Circuit Court of Appeals

United States v. Rendon-Duarte

In *United States v. Rendon-Duarte*,[824] the Ninth Circuit held that a conviction under section 11.41.220(a)(1)(A) of the Alaska Statutes qualified as a crime of violence under United States Sentencing Guidelines Manual § 4B1.2(a)(1).[825] Rendon-Duarte was convicted of being a felon in possession of two firearms.[826] His sentence took into account the fact that he had previously sustained a felony conviction for a crime of violence.[827] The court disagreed with Rendon-Duarte's argument that the sentencing guidelines require an element of use of force[828] and held that Rendon-Duarte's conviction for reckless conduct was enough to find a crime of violence because it presented a serious potential risk of physical injury to another.[829] The Ninth circuit affirmed, holding that a conviction under AS 11.41.220(a)(1)(A) qualified as a crime of violence under United States Sentencing Guidelines Manual § 4B1.2(a)(1).[830]

Alaska Supreme Court

Baker v. State

In *Baker v. State*,[831] the supreme court held that forced savings accounts should not be considered when calculating a filing fee for indigent prisoners in lawsuits against

[819] *Id.* at 1064 (quoting ALASKA STAT. § 11.46.130(a)(6)).
[820] *Id.*
[821] *Id.* at 1065–1066.
[822] *Id.*
[823] *Id.* at 1066.
[824] 490 F.3d 1142 (9th Cir. 2007).
[825] *Id*. at 1149.
[826] *Id*. at 1145.
[827] *Id*.
[828] *Id*. at 1146–47.
[829] *Id.* at 1147–49.
[830] *Id*.
[831] 158 P.3d 836 (Alaska 2007).

the state.[832] The case arises from the calculation of the filing fee for Baker's post-conviction relief pursued against the state.[833] Under section 09.19.010(d) of the Alaska Statutes, an indigent prisoner's filing fee is calculated using a percentage of an average month's deposits made to the prisoner's account.[834] However, since the passage of section 09.19.010(d) of the Alaska Statutes, a second, "forced savings" account has been created with the primary purpose of providing the prisoner with money upon his release.[835] The question before the supreme court was whether the forced savings account should be included in the calculation of the filing fee.[836] The court held that including the forced savings account was inconsistent with the purpose of the minimum filing fee, which was put in place to prevent frivolous and recreational lawsuits by prisoners.[837] Money from the forced savings account provides little immediate disincentive, as prisoners are not immediately able to spend that money.[838] Additionally, long-term prisoners, who have the most incentive for recreational lawsuits are exempted from forced savings.[839] The supreme court ordered the filing fee to be calculated without consideration of the forced savings account and remanded, holding that forced savings accounts should not be considered when calculating a filing fee for indigent prisoners in lawsuits against the state.[840]

Bluel v. State

In *Bluel v. State*,[841] the supreme court held that a driver's refusal to take an optional drunk driving blood test could not later be used against the driver for impeachment purposes under Alaska Rule of Evidence 403 because its prejudicial potential could outweigh its probative value.[842] A state trooper pulled Bluel over, and Bluel failed the mandatory sobriety test and declined to take an independent chemical test.[843] At trial, Bluel testified that he was surprised that his blood alcohol content was so high.[844] The prosecution then introduced evidence that Bluel declined to take an optional, independent test in order to impeach his claim.[845] Bluel appealed his subsequent conviction of drunk driving, arguing that the evidence of his refusal to take the optional independent test should not have been introduced because it violated constitutional rights,[846] and the court of appeals upheld the trial court's decision.[847] The supreme court stated that the probative value of introducing Bluel's refusal to take the independent test

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[832] *Id.* at 841.
[833] *Id.* at 837.
[834] *Id.*
[835] *Id.* at 837–38.
[836] *Id.*
[837] *Id.* at 842–43.
[838] *Id.* at 843.
[839] *Id.* at 844.
[840] *Id.* at 845.
[841] 153 P.3d 982 (Alaska 2007)
[842] *Id.* at 984.
[843] *Id.*
[844] *Id.*
[845] *Id.*
[846] *Id.*
[847] *Id.* at 984–85.

was tempered because he was entitled to decline the test,[848] and the prejudicial effect was potentially high because there was a distinct possibility that the jury could interpret Bluel's refusal to take the independent test as a sign of guilt.[849] The supreme court reversed the court of appeals, vacated the district court's conviction, and remanded the case to district court for a new trial,[850] holding that a driver's refusal to take an optional drunk driving blood test could not later be used against the driver for impeachment purposes under Alaska Rule of Evidence 403 because its prejudicial potential could outweigh its probative value.[851]

Cameron v. State

In *Cameron v. State*,[852] the supreme court held that the Alaska Rules of Criminal Procedure require a prosecutor to inform a grand jury of the accused's request to testify.[853] Neil Cameron was charged with third degree assault for pointing his shotgun at and threatening two tow truck operators who were attempting to repossess his truck.[854] Cameron requested to testify before the grand jury as to his state of mind, but the prosecutor declined, and Cameron was indicted.[855] The court, reviewing the question de novo, emphasized the grand jury's important role of protecting the accused from unjust prosecution and the prosecutor's vital duty to serve as a non-adversarial legal advisor to the grand jury.[856] Cameron was clearly and unconditionally willing to testify, and because the grand jury's questions indicated a strong desire to hear Cameron's testimony, the prosecutor should have made this information available to the grand jury.[857] The supreme court reversed the judgment of the court of appeals, holding that the Alaska Rules of Criminal Procedure require a prosecutor to inform a grand jury of the accused's request to testify.[858]

Clark v. State, Department of Corrections

In *Clark v. State, Department of Corrections*,[859] the supreme court held that the public interest exception did not apply to an appeal of a prison transfer because the mootness doctrine would not repeatedly circumvent later review of the issue.[860] Clark, a prisoner, began serving his sentence in Alaska but was later considered for transfer to an Arizona facility.[861] Clark appealed the transfer because it would interfere with his rehabilitation, particularly his ability to visit with his family.[862] The appeal was denied by the superior court, but the court of appeals ordered that Clark be resentenced, making, in

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[848] *Id.*at 987–89.
[849] *Id.* at 989.
[850] *Id.* at 992–93.
[851] *Id.* at 984.
[852] 171 P.3d 1154 (Alaska 2007).
[853] *Id.* at 1155.
[854] *Id.*
[855] *Id.*
[856] *Id.* at 1156–57.
[857] *Id.* at 1158–59.
[858] *Id.* at 1155.
[859] 156 P.3d 384 (Alaska 2007).
[860] *Id.* at 388.
[861] *Id.* at 385.
[862] *Id.* at 386.

the state's view, the appeal moot.[863] The supreme court agreed with the state regarding mootness because the decision on appeal would no longer be the operative decision regarding Clark's transfer.[864] The court found that Clark satisfied two of the three required prongs of the public interest exception, whether the disputed issue is capable of repetition and is a matter of public interest.[865] However, the claim failed because the mootness doctrine will not repeatedly circumvent review of this issue because all prisoners retain their right to appeal a transfer.[866] Dismissing the appeal, the supreme court held the public interest exception did not apply to an appeal of a prison transfer because the application of the mootness doctrine would not repeatedly circumvent later review of the issue.[867]

Hartman v. State, Department of Administration

In *Hartman v. State, Department of Administration*,[868] the supreme court held that an investigatory stop was legal where the officer reasonably believed that the car contained a suspect[869] but that a state administrative hearing officer has a duty to inform a pro se litigant of the correct procedures for the action he is clearly attempting to accomplish.[870] After driving into a ditch, Hartman got into a friend's car that was later stopped by a police officer.[871] In the course of the subsequent administrative hearing, Hartman attempted to gain access to a recording of his arrest (which was never brought into evidence), and his license was revoked.[872] The supreme court reasoned that Hartman, having already crashed one car, had continuing access to another car and therefore continued to pose an imminent public danger.[873] However, the court also reasoned that as a pro se litigant, Hartman "obviously attempted" to obtain the potentially exculpatory evidence.[874] The court found that the hearing officer erred in neglecting to instruct Hartman as to the proper procedure for obtaining the recording and in issuing a decision without listening to the recording herself.[875] The supreme court reversed the superior court, holding that an investigatory stop was legal where the officer reasonably believed that the car contained a suspect[876] but that a state administrative hearing officer has a duty to inform a pro se litigant of the correct procedures for the action he is clearly attempting to accomplish.[877]

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[863] *Id.*
[864] *Id*. at 387.
[865] *Id* at 387–88.
[866] *Id.* at 388.
[867] *Id.*
[868] 152 P.3d 1118 (Alaska 2007).
[869] *Id*. at 1123–24.
[870] *Id*. at 1125.
[871] *Id*. at 1120.
[872] *Id* at 1120–21.
[873] *Id*. at 1123–24.
[874] *Id.* at 1124–25.
[875] *Id*. at 1125.
[876] *Id*. at 1123–24.
[877] *Id*. at 1125.

Jeffries v. State

In *Jeffries v. State*,[878] the supreme court held that an intoxicated driver may be guilty of extreme indifference murder if a reasonable juror could find indifference to the value of human life when considering all four *Neitzel* factors.[879] A jury convicted Jeffries of second-degree murder after he caused a fatal traffic accident while intoxicated.[880] Jeffries appealed, arguing that second-degree murder should be reserved for intoxicated drivers who operate vehicles in a particularly dangerous way.[881] Although the supreme court agreed that second-degree murder is rarely appropriate in motor vehicle homicides,[882] it held that intoxication was not necessarily an excuse to extreme indifference,[883] and that the question of whether a defendant manifested extreme indifference is primarily one for the jury.[884] Applying the four *Neitzel* factors, the court held that (1) driving while intoxicated creates no social utility, except in rare circumstances, which were absent in Jeffries's case since he was merely driving home;[885] (2) driving while intoxicated creates a very high risk of death, especially here since Jeffries's error in judgment which caused the accident was severe and since he was highly intoxicated;[886] (3) Jeffries had a heightened awareness of the risk of driving while intoxicated since he had been convicted of it before and had been ordered to refrain from drinking altogether;[887] and (4) Jeffries took no precautions to minimize the risk of driving while intoxicated, as evidenced by his failure to participate in substance abuse programs.[888] Further, the supreme court held that it was not error for the superior court to admit evidence of Jeffries's failure to comply with orders to complete substance abuse programs and to refrain from consuming alcohol.[889] The supreme court affirmed the decision of the superior court, holding that an intoxicated driver may be guilty of extreme indifference murder if a reasonable juror could find indifference to the value of human life when considering all four *Neitzel* factors.[890]

State v. Koen

In *State v. Koen*,[891] the supreme court held that a search warrant not explicitly stating that the listed address is the defendant's residence will still establish probable cause if it can be reasonably inferred that the address is the defendant's residence.[892] The police received reports that Koen possessed child pornography on his computer at a residence on Greentimbers Drive, and, after obtaining a search warrant, found computer

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[878] 169 P.3d 913 (Alaska 2007).
[879] *Id.* at 924.
[880] *Id.* at 914.
[881] *Id.* at 915.
[882] *Id.* at 923.
[883] *Id.* at 920.
[884] *Id.* at 917.
[885] *Id.* at 920–21.
[886] *Id.* at 921.
[887] *Id.* at 922–23.
[888] *Id.* at 923.
[889] *Id.* at 924.
[890] *Id.*
[891] 152 P.3d 1148 (Alaska 2007) (per curiam).
[892] *Id.* at 1152–53.

evidence of child pornography.[893] The search warrant was accompanied by an affidavit that did not indicate that the house to be searched was Koen's residence.[894] The trial court found no probable cause because the search warrant, by not explicitly stating the address was Koen's residence, failed to establish a link between the place to be searched and the alleged crimes and the decision was affirmed on appeal.[895] The court of appeals affirmed.[896] In reversing, the supreme court reasoned that the affidavit and supporting evidence provided a substantial basis for the magistrate to conclude that the address listed was Koen's residence.[897] Also, probable cause requires only that the outcome offered by the state be probable and does not require that the evidence rules out all possible explanations.[898] Thus, the supreme court reversed and remanded, holding that probable cause exists if it can be reasonably inferred that the address is the defendant's residence, even if the search warrant does not explicitly state that the listed address is the defendant's residence.[899]

Alaska Court of Appeals

Abyo v. State

In *Abyo v. State*,[900] the court of appeals held that the trial court erred in refusing to hold an evidentiary hearing on whether an officer had probable cause to arrest, that allowing documents verifying calibration of a breath test to be introduced even though the author of the documents was not available for cross-examination did not violate the confrontation clause, and that the trial court did not err in finding sufficient evidence for a jury to convict.[901] Abyo was convicted of driving after a trial in which the arresting officer testified that Abyo failed multiple field sobriety tests and a breath test.[902] The state then played a video of the traffic stop, showing that Abyo had failed only one of the field sobriety tests.[903] The officer then amended her testimony.[904] Abyo appealed the court's earlier refusal of his motion for an evidentiary hearing, arguing that the officer's testimony and evidence from a breath test should have been excluded and that his motion for judgment of acquittal should have been granted due to lack of evidence.[905] First, the court held that denying Abyo's motion to hold an evidentiary hearing on the officer's testimony was error since Abyo stated that the video contradicted Officer Anthony's statements supporting probable cause for arrest.[906] Second, the court held that reports verifying calibration of a breath test machine were non-testimonial since they are mandated by administrative rules, are created regardless of whether the machine is used,

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[893] *Id.* at 1149–50.
[894] *Id.* at 1150.
[895] *Id.*
[896] *Id.*
[897] *Id.* at 1152.
[898] I*d.*
[899] *Id.* at 1152–53.
[900] 166 P.3d 55 (Alaska Ct. App. 2007).
[901] *Id.* at 56.
[902] *Id.*
[903] *Id.* at 57.
[904] *Id.*
[905] *Id.* at 56.
[906] *Id.* at 58.

and are not created in anticipation of a particular case.[907] Third, the court held that denying Abyo's motion for judgment of acquittal was proper since aspects of the arresting officer's testimony showing probable cause were still credible since they were neither contradicted nor retracted and a valid breath test showed probable cause.[908] The court remanded to the district court, holding that the trial court erred in refusing to hold an evidentiary hearing on whether an officer had probable cause to arrest, that allowing documents verifying calibration of a breath test to be introduced even though the author of the documents was not available for cross-examination did not violate the confrontation clause, and that it did not err in finding sufficient evidence for a jury to convict.[909]

Active v. State

In *Active v. State*,[910] the court of appeals held that the superior court did not err in (1) admitting evidence of a witness's prior inconsistent statement, (2) admitting evidence of a prior conviction for sexual assault when sexual assault was one of the crimes alleged, or (3) applying aggravating factors to increase a sentence when those aggravating factors were based on prior convictions.[911] Active was charged with burglary, sexual assault, and physical assault.[912] Although there was evidence to suggest the crimes had occurred, the victim later claimed her prior statements about the crimes were lies.[913] The superior court allowed into evidence Active's 11-year-old prior conviction for a similar sexual assault and also permitted the prosecutor to enter the victim's prior statement.[914] The superior court convicted Active and identified several aggravating factors it used to extend Active's sentence.[915] Active appealed, claiming the superior court improperly allowed the State to introduce evidence of both his prior conviction and the prior inconsistent statement of the witness, and that the superior court improperly applied aggravating factors to increase his sentence without a jury present.[916] The court of appeals held that (1) the victim's prior inconsistent statements were properly admitted because they conveyed the victim's demeanor and because the superior court could reasonably conclude that the witness would continue to deny any previous statement upon which the charges were based; (2) although evidence of a prior conviction of sexual assault was prejudicial against Active, the superior court did not err in admitting the prior conviction because the judge had properly applied the *Bingaman* balancing test[917] in light of the fact that the defendant has served most of the intervening time in prison; and (3) Active had no constitutional right that the aggravating factors playing a role in his increased sentence be put to a jury when those aggravating factors were prior convictions.[918] The court of

[907] *Id.* at 60.
[908] *Id.*
[909] *Id.* at 56.
[910] 153 P.3d 355 (Alaska Ct. App. 2007).
[911] *Id.* at 363–67.
[912] *Id.* at 356.
[913] *Id.* at 358.
[914] *Id.* at 356.
[915] *Id.* at 365.
[916] *Id.* at 356, 365–66.
[917] Bingaman v. State, 76 P.3d 398 (Alaska Ct. App. 2003).
[918] *Active*, 153 P.3d at 363–67.

appeals affirmed the decision of the superior court, holding that the superior court did not err in (1) admitting evidence of a witness's prior inconsistent statement, (2) admitting evidence of a prior conviction for sexual assault when sexual assault was one of the crimes alleged, or (3) applying aggravating factors to increase a sentence when those aggravating factors were based on prior convictions.[919]

Anderson v. State

In *Anderson v. State*,[920] the court of appeals held that admission of a witness's hearsay statement to police did not violate a criminal defendant's right of confrontation because the statement was not testimonial in nature.[921] When Alaska police officers found an injured person in an apartment, one officer asked what had happened and whether the injured person was alright.[922] The injured person responded that he was hurt and that Anderson had hit him with a pipe.[923] The officer again asked the victim about his condition, the victim replied that he was hurt, and the officer assured the victim that help would be coming.[924] At Anderson's trial for assault, the prosecution introduced the victim's statement to police even though the victim did not testify.[925] Anderson objected to the introduction of that statement as a violation of his right to confrontation, but the superior court upheld the admission of the statement.[926] The court of appeals relied on *Crawford v. Washington*,[927] which held that the Confrontation Clause did not permit admission of a witness's "testimonial" statements if the witness was not going to testify at trial.[928] The court of appeals also relied on *Davis v. Washington*,[929] which defined "testimonial" statements as ones that are made to help explain past events to police, not statements made to police to help them assist in emergency situations.[930] The court of appeals held that here, the victim's statements were not testimonial because the victim was trying to describe his injuries to the officer so the officer could help him.[931] Affirming the superior court, the court of appeals held that admission of a witness's hearsay statement to police does not violate a criminal defendant's right of confrontation if the statement was not testimonial in nature.[932]

Artemie v. State

In *Artemie v. State*,[933] the court of appeals held that a trial judge acted within his discretion in finding manifest necessity for a mistrial because there was no probability

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[919] *Id.*
[920] 163 P.3d 1000 (Alaska Ct. App. 2007).
[921] *Id.* at 1005.
[922] *Id.* at 1004.
[923] *Id.*
[924] *Id.*
[925] *Id.* at 1001.
[926] *Id.*
[927] 541 U.S. 36 (2004).
[928] *Anderson*, 163 P.3d at 1002.
[929] 547 U.S. 813 (2006).
[930] *Anderson*, 163 P.3d at 1002.
[931] *Id.* at 1005.
[932] *Id.*
[933] 158 P.3d 860 (Alaska Ct. App. 2007).

that the jury would reach a unanimous verdict.[934] Artemie was tried for sexual assault and assault.[935] During deliberations at trial, the jury returned three times telling the judge that it was unable to reach a unanimous verdict.[936] The trial judge instructed the jury to continue deliberating twice, but on the third notice, the judge asked the jury if the instructions were understood and whether additional instructions would assist.[937] The jury said that they would not, and the judge declared a mistrial.[938] On appeal, Artemie argued that double-jeopardy barred a second trial because the trail judge abused his discretion by declaring a mistrial before establishing that there was a manifest necessity.[939] However, the court of appeals held that the trial court had acted within his discretion and that there was no minimum amount of deliberation required to declare a mistrial.[940] The court of appeals affirmed, holding that a trial judge acted within his discretion in finding manifest necessity for a mistrial because there was no probability that the jury would reach a unanimous verdict.[941]

Benson v. State

In *Benson v. State*,[942] the court of appeals held that under Rule 39.1(e) of the Alaska Rules of Criminal Procedure, a criminal defendant who claims to be indigent in order to obtain court-appointed counsel is entitled to testify under oath as to his indigence or sign a written statement showing indigence.[943] Benson was charged with using a gun to threaten his girlfriend while he was drunk and subsequently scaring her two children.[944] Benson was initially appointed counsel, but after $11,500 in bail money was returned to Benson from prior plea agreements, the superior court ruled that Benson had too much money to be eligible for a court-appointed attorney.[945] Later, Benson's son posted $50,000 bail.[946] Benson stated that he did not want to represent himself but could not afford counsel, and that he wanted a court-appointed attorney.[947] The superior court denied court-appointed counsel to Benson because of the $11,500 in returned bail money and the fact that Benson's son managed to come up with $50,000 bail.[948] Benson was convicted of fourth degree assault and two counts of violating his conditions of release, and he appealed.[949] The court of appeals held that because Rule 39.1(e) of the Alaska Rules of Criminal Procedure requires the court to determine a defendant's financial state, the superior court was required to place Benson under oath and question him about his

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[934] *Id.* at 861.
[935] *Id.*
[936] *Id.* at 861–62.
[937] *Id.* at 862.
[938] *Id.*
[939] *Id.* at 861.
[940] *Id.* at 862–63.
[941] *Id.* at 863.
[942] 160 P.3d 161 (Alaska Ct. App. 2007).
[943] *Id.* at 162.
[944] *Id.*
[945] *Id.*
[946] *Id.*
[947] *Id.* at 163.
[948] *Id.*
[949] *Id.*

finances.[950] The court of appeals remanded the case to the superior court, holding that under Rule 39.1(e) of the Alaska Rules of Criminal Procedure, a criminal defendant who claims to be indigent in order to obtain court-appointed counsel is entitled to testify under oath as to his indigence or sign a written statement showing indigence.[951]

Bush v. State

In *Bush v. State*,[952] the court of appeals held that a retrial for a prior offense after the conviction had been set aside would not violate a repeat offender's right to a speedy trial, nor the prohibition against double jeopardy.[953] Bush sought to have a prior DWI conviction set aside, arguing that he had not knowingly and intelligently waived his right to counsel.[954] The superior court set aside the conviction without prejudice.[955] Bush appealed the superior court's decision that the state was entitled to retry him, arguing that a retrial would violate both his right to a speedy trial and the prohibition against double jeopardy.[956] The court of appeals held that Bush's right to a speedy trial was not violated where Bush changed his plea within the 120-day time for trial mandated by Alaska Criminal Rule 45(g)[957] and that retrial would not violate the double jeopardy clause because jeopardy does not attach to a defendant whose conviction is set aside at the defendant's request due to a procedural error.[958] The court of appeals affirmed, holding that a retrial for a prior offense after the conviction had been set aside would not violate a repeat offender's right to a speedy trial, nor the prohibition against double jeopardy.[959]

Charliaga v. State

In *Charliaga v. State*,[960] the court of appeals held that despite the defendant's assertion that a prior confession was false, a pre-sentence report could still contain the testimony obtained in the confession if the judge determines the prior recounting of the events to be truthful;[961] however, additional hearsay not obtained directly from the defendant could not appear in the pre-sentence report.[962] Charliaga pleaded no contest to sexual abuse.[963] In preparation for the sentencing, the Department of Corrections submitted a pre-sentence report containing an allegation that Charliaga had committed similar sexual abuse seven years before his present offense.[964] Charliaga filed an objection to this information, claiming that he was innocent of the earlier offense.[965] He testified that although he had told a State Trooper that he had committed the offense, he

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[950] *Id.* at 163–64.
[951] *Id.* at 162.
[952] 157 P.3d 1059 (Alaska Ct. App. 2007).
[953] *Id*. at 1061–62.
[954] *Id*. at 1061.
[955] *Id*.
[956] *Id*.
[957] ALASKA R. CRIM. P. 45(g) (2006).
[958] *Id*. at 1061–62.
[959] *Id.* at 1063.
[960] 157 P.3d 1053 (Alaska Ct. App. 2007).
[961] *Id.* at 1055.
[962] *Id.*
[963] *Id.* at 1053.
[964] *Id.* at 1054.
[965] *Id.*

had only confessed because the trooper was already convinced of his guilt.[966] The superior court judge declined to remove the information, having concluded that Charliaga was not telling the truth, and Charliaga appealed on the grounds that the information was inadmissible hearsay.[967] Although under Alaska law the State cannot rely on only hearsay allegations of a defendant's prior misconduct if the defendant takes the stand to deny the misconduct and submits to cross-examination, the court of appeals noted that Charliaga admitted that he confessed this crime to the trooper.[968] The court of appeals thus held that certain disputed portions of information were true and that the State need not introduce any additional evidence to support them.[969] However, the court of appeals further noted that there was additional information in the pre-sentence report that came not from Charliaga but from information his alleged abuse victim gave to the trooper and to her mother.[970] Because Charliaga denied this information on the stand and the state made no effort to prove that the victim was unavailable as a witness, the court of appeals held that this additional information was inadmissible hearsay.[971] The court of appeals remanded the case to the superior court, holding that despite the defendant's assertion that a prior confession was false, a pre-sentence report could still contain the testimony obtained in the confession if the judge determines the prior recounting of the events to be truthful;[972] however, additional hearsay not obtained directly from the defendant could not appear in the pre-sentence report.[973]

Coffman v. State

In *Coffman v. State*,[974] the court of appeals held that an attorney had the authority to decide whether to pursue an excessive sentence claim, regardless of the defendant's desire to do so, and that it had not been proven that such a decision was incompetent.[975] Coffman, who received a combined thirty years for second-degree murder and first-degree burglary, sought post-conviction relief based on her attorney's failure to pursue an excessive sentence claim.[976] The court found that a claim of excessive sentence is simply another issue to be raised in a criminal appeal, rather than its own distinct type of appeal,[977] noting that an appellate attorney has discretion to decide which issues to raise on appeal and to abandon issues he or she feels are unlikely to succeed.[978] Furthermore, the court held that the attorney's decision to exclude from the appellate brief the claim that the sentence was excessive was not incompetent because Coffman failed to make a prima facie showing that the excessive sentence claim had a significantly better likelihood of success than any other issues pursued on appeal.[979] The court of appeals

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[966] *Id.*
[967] *Id.*
[968] *Id.*
[969] *Id.*
[970] *Id.* at 1055.
[971] *Id.*
[972] *Id.* at 1055–56.
[973] *Id.*
[974] 172 P.3d 804 (Alaska Ct. App. 2007).
[975] *Id*. at 807.
[976] *Id*. at 806.
[977] *Id*. at 808.
[978] *Id*. at 807, 811.
[979] *Id*. at 813–15.

affirmed the superior court's decision, holding that an attorney had the authority to decide whether to pursue an excessive sentence claim, regardless of the defendant's desire to do so, and that it had not been proven that such a decision was incompetent.[980]

Cooper v. State

In *Cooper v. State*,[981] the court of appeals held that there is no plain error where the trial court fails to obtain defendant's personal waiver of the right to jury trial with regards to an aggravating factor where (1) the defense attorney concedes the factor or (2) the factor is not in dispute.[982] Cooper was convicted of robbery and assault, and the state alleged one aggravating factor—that Cooper was on parole when the crimes were committed.[983] Cooper's attorney conceded the aggravator in the pre-sentencing brief and again at the sentencing hearing, but Cooper himself never affirmatively waived the right to jury trial on the aggravator.[984] While it is arguable that *Blakely v. Washington* requires courts to directly address defendants in these situations, the trial court took a different, equally reasonable position and thus did not commit plain error.[985] Furthermore, because Cooper's parole status was not disputed, failure to present the issue to a jury is harmless and does not necessitate reversal.[986] The court of appeals affirmed the judgment of the superior court, holding that there is no plain error where the trial court fails to obtain defendant's personal waiver of the right to jury trial with regards to an aggravating factor where (1) the defense attorney concedes the factor or (2) the factor is not in dispute.[987]

Eaklor v. State

In *Eaklor v. State*,[988] the court of appeals held that jurors may reasonably interpret a victim's general description of pain as encompassing both physical and emotional elements[989] and that a trial judge may instruct the jury on the meaning of a statutory phrase.[990] During an argument, Eaklor punched a man in the face, causing a red, swollen eye and a bleeding scratch below the eye.[991] Eaklor was charged with fourth-degree assault.[992] The court of appeals held that jurors could reasonably interpret the victim's testimony describing "some sort of pain" as encompassing both physical and emotional pain, thus meeting the physical pain element of the assault charge.[993] Furthermore, because the meaning of a statute is a matter of law, the trial court was within its authority when it instructed the jury regarding the meaning of the statutory phrase "impairment of physical condition."[994] The court of appeals affirmed the judgment of the district court,

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[980] *Id*. at 807.
[981] 153 P.3d 371 (Alaska Ct. App. 2007).
[982] *Id.* at 373.
[983] *Id.* at 372.
[984] *Id.*
[985] *Id.* at 372–73.
[986] *Id.* at 373.
[987] *Id.*
[988] 153 P.3d 367 (Alaska Ct. App. 2007).
[989] *Id.* at 368.
[990] *Id.* at 369–70.
[991] *Id.* at 368.
[992] *Id.*
[993] *Id.*
[994] *Id.* at 369–70.

holding that jurors may reasonably interpret a victim's general description of pain as encompassing both physical and emotional elements[995] and that a trial judge may instruct the jury on the meaning of a statutory phrase.[996]

Eide v. State

In *Eide v. State*,[997] the court of appeals held that sufficient evidence supported a verdict for first-degree vehicle theft and driving with a revoked driver's license but not a verdict for resisting arrest.[998] A jury convicted Eide of vehicle theft, driving with a revoked license, and resisting arrest.[999] The superior court entered a judgment of acquittal on the resisting arrest conviction after determining that it was not supported by sufficient evidence.[1000] Eide appealed, contending his convictions for vehicle theft and driving with a revoked license were not supported by sufficient evidence.[1001] The State cross-appealed, arguing that the superior court judge improperly set aside the jury verdict for resisting arrest.[1002] The court of appeals affirmed, holding that Eide's convictions for vehicle theft and driving with a revoked license were supported by sufficient evidencewhen viewing the facts and inferences in the light most favorable to the verdict[1003] and that the superior court judge properly set aside the resisting arrest conviction because Eide's conduct was "'mere non-submission'" and thus did not fall within the conduct prohibited by the resisting arrest statute.[1004] The court of appeals affirmed the superior court, holding that sufficient evidence supported a verdict for first-degree vehicle theft and driving with a revoked driver's license, but not a verdict for resisting arrest.[1005]

Friedmann v. State

In *Friedmann v. State*,[1006] the court of appeals of Alaska held that the dismissal of a jury in the middle of a jury trial under Alaska Criminal Rule 27(d)(3) must be treated as the equivalent of a declaration of a mistrial for double jeopardy purposes.[1007] Friedmann was standing trial for several counts of controlled substance misconduct.[1008] The superior court dismissed the jury in the middle of the trial and the defendant, through his attorney, consented to such action.[1009] The court of appeals first searched for a clear legislative intent behind Rule 27(d)(3), and finding none, interpreted the statute in accordance with double jeopardy clause jurisprudence.[1010] Despite equating a Rule 27(d)(3) dismissal with

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[995] *Id.* at 368.
[996] *Id.* at 369–70.
[997] 168 P.3d 499 (Alaska Ct. App. 2007).
[998] *Id.* at 499–500.
[999] *Id.* at 499.
[1000] *Id.*
[1001] *Id.* at 500.
[1002] *Id.*
[1003] *Id.* at 501.
[1004] *Id.* at 502.
[1005] *Id.* at 500.
[1006] 172 P.3d 831 (Ct. App. Alaska 2007).
[1007] *Id.* at 833.
[1008] *Id.*
[1009] *Id.* at 835.
[1010] *Id.* at 836.

a mistrial, the court reasoned that because Friedmann had consented to the dismissal of the jury there was no violation of the double jeopardy clause and thus Friedmann could be brought back to stand trial.[1011] The court affirmed the judgment of the superior court, holding that the dismissal of a jury in the middle of a jury trial under Alaska Criminal Rule 27(d)(3) must be treated as the equivalent of a declaration of a mistrial for double jeopardy purposes.[1012]

Gladden v. State

In *Gladden v. State*,[1013] the court of appeals held that a man convicted of driving with a suspended license had knowingly and intelligently waived his right to counsel and that the trial court's failure to obtain a separate waiver of counsel at the sentencing hearing did not constitute plain error.[1014] Gladden appealed his conviction for driving with a suspended license, asserting that his right to counsel had been violated.[1015] The court of appeals held that Gladden had knowingly and intelligently waived his right to counsel when he insisted on an attorney who would sign his contract even though he conceded that he knew no attorney would sign it.[1016] The court of appeals also held that the trial court's failure to obtain a separate waiver of counsel at sentencing was not plain error since the weight of authority in other jurisdictions is that a valid waiver remains in effect, barring a change in circumstances warranting reconsideration, or unless the defendant revokes it.[1017] The court of appeals affirmed Gladden's conviction, holding that he had knowingly and intelligently waived his right to counsel and that the trial court's failure to obtain a separate waiver of counsel at the sentencing hearing did not constitute plain error.[1018]

Gomez v. State

In *Gomez v. State*,[1019] the court of appeals held that the trial court was required to hold a hearing on a bond-insurer's request for remission of forfeiture after a criminal defendant was rearrested with the assistance of the bond insurer.[1020] Gomez secured the bail bond of Haynes, guaranteeing his appearance in court.[1021] When Haynes did not appear at sentencing, the bond was forfeited.[1022] Haynes was later rearrested with the assistance of Gomez, who twice requested a hearing for remission to the trial court and was twice denied.[1023] The court analyzed Alaska Criminal Rule 41(h)[1024] and explained that since the bail bond agency assisted in the recapture of the defendant, it was entitled

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[1011] *Id.* at 837.
[1012] *Id.* at 833.
[1013] 153 P.3d 1028 (Alaska Ct. App. 2007).
[1014] *Id*. at 1032.
[1015] *Id*. at 1030.
[1016] *Id*.
[1017] *Id*. at 1032.
[1018] *Id*.
[1019] 172 P.3d 824 (Alaska Ct. App. 2007).
[1020] *Id.* at 827.
[1021] *Id.* at 824.
[1022] *Id.* at 826.
[1023] *Id.*
[1024] *Id.* at 824–25.

to a hearing regarding remission of the bond forfeiture.[1025] The court of appeals reversed the superior court, holding that the trial court was required to hold a hearing on a bond-insurer's request for remission of forfeiture after a criminal defendant was rearrested with the assistance of the bond insurer.[1026]

Harvey v. Antrim

In *Harvey v. Antrim*,[1027] the court of appeals held that the Alaska courts had personal jurisdiction over the warden named in a prisoner's habeas petition even though the warden and prisoner were both outside the state at the time of the petition.[1028] Harvey had a criminal judgment entered against him by the superior court and was serving his sentence at a private prison in Arizona.[1029] He filed a petition for writ of habeas corpus challenging certain procedures in his prosecution and sentencing.[1030] The court denied Harvey's argument that the Alaska courts lacked authority to entertain litigation regarding his restraint, determining that the court needed jurisdiction over the custodian whose actions was being challenged.[1031] The court determined that the courts of Alaska, via control of the Alaska Commissioner of Corrections, possessed personal jurisdiction over the Arizona warden who possessed direct control over Harvey.[1032] The court of appeals denied Harvey's application for relief, holding that the Alaska courts had personal jurisdiction over the warden named in a prisoner's habeas petition even though the warden and prisoner were both outside the state at the time of the petition.[1033]

Hodges v. State

In *Hodges v. State*,[1034] the court of appeals held that assessing the total amount of restitution against an offender without regard to his ability to pay did not deprive him of due process of law, nor did it defeat the sentencing goal of reformation under the Alaska Constitution.[1035] Hodges conceded that he should pay restitution for his conviction of second-degree theft but challenged the State's post-sentencing request for restitution on the ground that he should be allowed to demonstrate that he lacked the financial ability to pay the sum requested.[1036] The court of appeals upheld the sentencing court's assessment of the amount of restitution, holding that the defendant's due process rights and the sentencing goal of reformation were both preserved because the sentencing judge had considered the defendant's ability to pay when setting forth the terms of repayment in accordance with section 12.55.045(c) of the Alaska Statutes.[1037] The court of appeals held that assessing the total amount of restitution against an offender without regard to his

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[1025] *Id.* at 826–27.
[1026] *Id.* at 827.
[1027] 160 P.3d 673 (Alaska Ct. App. 2007).
[1028] *Id.* at 677.
[1029] *Id.* at 673–74.
[1030] *Id.* at 674.
[1031] *Id.* at 675.
[1032] *Id.* at 676.
[1033] *Id.* at 678.
[1034] 158 P.3d 864 (Alaska Ct. App. 2007).
[1035] *Id.* at 864.
[1036] *Id*. at 865.
[1037] *Id*. at 864–65.

ability to pay did not deprive him of due process of law, nor did it defeat the sentencing goal of reformation under the Alaska Constitution.[1038]

Huntington v. State

In *Huntington v. State*,[1039] the court of appeals held that police did not have an affirmative duty to remind a detainee of a previous request to make a phone call.[1040] The court additionally held that evidence of racist comments is not always sufficient to order a mistrial.[1041] After being pulled over for driving under the influence, Huntington expressed a desire to contact an attorney, which the police informed him he could do this upon arrival at the police station.[1042] At no point after his arrival did Huntington renew his request.[1043] At trial, evidence further suggested that Huntington had said on the night of his detaining that he was "upset with the white people."[1044] The court determined that section 125.25.150(b) of the Alaska statutes does not obligate the police to expressly offer a telephone call to an arrestee and that the statute only obliges the police to not unreasonably interfere with an arrestee's efforts to call an attorney.[1045] The court also determined that the evidence of Huntington's racially insensitive remarks was probative as to his condition on the night of his arrest and that a mistrial was not required.[1046] The court of appeals affirmed, holding police did not have an affirmative duty to remind a detainee of a previous request to make a phone call.[1047]

Labrake v. State

In *Labrake v. State*,[1048] the court of appeals held that a convicted sex offender had failed to establish a prima facie showing of ineffective counsel, except with respect to Labrake's second appellate attorney who failed to reinstate Labrake's sentence appeal.[1049] In 1999, Labrake was indicted on two counts of second-degree sexual abuse of a minor.[1050] After receiving a sentence of 5 years, Labrake obtained a new attorney who died while Labrake's appeal was in the briefing stage and who was subsequently replaced by a second appellate attorney.[1051] In his petition for post-conviction relief, Labrake claimed that his original attorney had failed to represent him competently.[1052] The court found Labrake's claim to be without merit and asserted that any difference in opinion or animosity between Labrake and his trial attorney was not enough to establish ineffective counsel.[1053] The court dismissed all of Labrake's other claims based on ineffective

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[1038] *Id.* at 864.
[1039] 151 P.3d 523 (Alaska Ct. App. 2007).
[1040] *Id.* at 525–26.
[1041] *Id.* at 526–27.
[1042] *Id.*
[1043] *Id.*
[1044] *Id.* at 526.
[1045] *Id.* at 525.
[1046] *Id.* at 526–27.
[1047] *Id.* at 525–27.
[1048] 152 P.3d 474 (Alaska Ct. App. 2007).
[1049] *Id*. at 489.
[1050] *Id*. at 476.
[1051] *Id*. at 478.
[1052] *Id*. at 479–80.
[1053] *Id*. at 484.

counsel, with the exception of his claim against his second appellate attorney, who had failed to ask the court to reinstate Labrake's appeal.[1054] The court of appeals affirmed the superior court's dismissal of Labrake's petition for post-conviction relief because Labrake failed to establish a prima facie showing for his claims of ineffective counsel, except with respect to his second appellate lawyer's failure to reinstate Labrake's sentence appeal.[1055]

Lambert v. State

In *Lambert v. State*,[1056] the court of appeals held that the three special conditions of probation imposed on a probationer were valid under the test laid out in *Roman v. State*,[1057] but that one general condition of probation involving searches for contraband was overly broad.[1058] Lambert was sentenced to sixty months imprisonment with thirty months suspended and probation for his role in a third-degree assault.[1059] After sentencing, Lambert sought to have the court remove one general and three special conditions of probation on the grounds that they violated the requirement from *Roman* that there be a direct relationship between the probation condition and the crime for which the probationer was convicted.[1060] The superior court denied Lambert's motion.[1061] Lambert appealed.[1062] The court of appeals held that the three special conditions of probation imposed on Lambert met the *Roman* test since they were reasonably related to his rehabilitation and were not unduly restrictive insofar as they furthered Lambert's substance abuse treatment.[1063] The court of appeals also held that the general condition which subjected Lambert to searches for contraband was unsupported by case-specific findings.[1064] The court of appeals affirmed in part and reversed in part, holding that the three special conditions of probation imposed on a probationer were valid under the test laid out in *Roman v. State*, but that one general condition of probation involving searches for contraband was overly broad.[1065]

Latham v. Municipality of Anchorage

In *Latham v. Municipality of Anchorage*,[1066] the court of appeals held that a court has the power to appoint an attorney for an indigent defendant when a municipality's usual procedures fail to procure representation.[1067] Latham was convicted and sentenced to jail for violating two city ordinances, and his appeal to the superior court was affirmed.[1068] At no time was Latham represented by counsel because none of the

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[1054] *Id*. at 488–89.
[1055] *Id*. at 489.
[1056] 172 P.3d 838 (Ct. App. Alaska 2007).
[1057] 570 P.2d 1235 (Alaska 1977).
[1058] *Lambert*, 172 P.3d at 839.
[1059] *Id.*
[1060] *Id.*
[1061] *Id.*
[1062] *Id.*
[1063] *Id.* at 841–42.
[1064] *Id.* at 842.
[1065] *Id.* at 839.
[1066] 165 P.3d 663 (Alaska 2007).
[1067] *Id.* at 666.
[1068] *Id.* at 663–64.

attorneys with which the city contracts for indigent defense were willing or able to take the case.[1069] The court first held that since Latham was sentenced to jail, he was convicted of a serious crime and therefore was entitled to counsel.[1070] The court then determined that, if Latham had been prosecuted by the state, the Office of Public Advocacy would have had the power to petition the court to appoint an attorney.[1071] The court concluded that, since the municipality's usual method of procurement of attorneys was inadequate, the court should have exercised its common law authority to appoint an attorney.[1072] The court of appeals remanded to the superior court, holding that a court has the power to appoint an attorney for an indigent defendant when a municipality's usual procedures fail to procure representation.[1073]

McLaughlin v. State

In *McLaughlin v. State*,[1074] the court of appeals held that a defendant who is represented by counsel may not file a pro se petition for review.[1075] McLaughlin was convicted of driving under the influence.[1076] After his attorney refused to seek interlocutory appellate review of the superior court's decision denying a new trial, McLaughlin attempted to file a pro se petition for review.[1077] The court held that the final decision of whether to seek interlocutory review of a trial court's un-appealable order is reserved for the attorney, since all tactical decisions are left to the attorney except those specifically outlined in the Alaska Rules of Professional Conduct.[1078] Although the rules leave the decision of whether to take an appeal up to the client, the rule does not include interlocutory appeals, which are more precisely identified as petitions for review.[1079] The court of appeals rejected McLaughlin's pro se petition for review, holding that a defendant who is represented by counsel may not file a pro se petition for review.[1080]

Middleton II v. State

In *Middleton II v. State*,[1081] the court of appeals held that the jury's verdict on a kidnapping charge were not inconsistent, and the trial judge was not required to include third-degree theft as a lesser-included offense of robbery in his jury instructions.[1082] Middleton was charged with robbery and kidnapping for robbing a pizza deliveryman at gunpoint and trying to force him to deliver one more pizza and give him the money.[1083] The judge refused to instruct the jury that third-degree theft was a lesser-included offense

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[1069] *Id.* at 664.
[1070] *Id.*
[1071] *Id.* at 665.
[1072] *Id.* at 666.
[1073] *Id.*
[1074] 173 P.3d 1014 (Alaska Ct. App. 2007).
[1075] *Id.* at 1015.
[1076] *Id.* at 1014.
[1077] *Id.*
[1078] *Id.* at 1015.
[1079] *Id.*
[1080] *Id.* at 1017.
[1081] 164 P.3d 659 (Alaska Ct. App. 2007).
[1082] *Id.* at 662–64.
[1083] *Id.* at 660.

of robbery, and while the jury found Middleton guilty of kidnapping and robbery, with no jury instruction explaining what "merely incidental" meant in a legal sense, it returned a special verdict stating the relationship of the restraint to the robbery was "merely incidental."[1084] Middleton appealed, arguing that the jury verdicts pertaining to the kidnapping charge were inconsistent and that the judge should have instructed the jury that third-degree theft is a lesser included offense to robbery.[1085] The court of appeals held (1) the jury's misunderstanding of the legal definition of "merely incidental" was consistent with its kidnapping verdict because the jury found the defendant guilty of kidnapping pursuant to its instruction and a follow-up question resolved the inconsistency in favor of the kidnapping verdict, and (2) the trial judge did not commit harmful error in refusing to instruct the jury on a lesser-included offense of third-degree theft because the two are separate crimes with different elements and, this reasoning aside, the error was harmless because the kidnapping verdict clearly indicated the jury did not believe the defendant's third degree theft argument.[1086] The court of appeals affirmed the sentence, holding that the jury's verdict on a kidnapping charge was not inconsistent and that the trial judge was not required to include third-degree theft as a lesser-included offense of robbery in his jury instructions.[1087]

Mooney v. State

In *Mooney v. State*,[1088] the court of appeals held that 1) when a prosecutor and defense attorney are operating under a mutual mistake regarding the terms of a plea agreement that is rejected, there is no right to specific performance on the grounds that the defense attorney was mistaken; and 2) when ruling on whether a new trial should be granted in light of new evidence, if that evidence bears heavily on the defendant's case, a new trial ought to be granted.[1089] Mooney was convicted of sexual assault and sentenced as a third-felony offender, having elected to go to trial rather than sign a plea agreement.[1090] The foregone agreement was premised on the assumption that his presumptive sentence would be based on his status as a second-felony offender.[1091] On appeal, Mooney argued that he was entitled to specific performance of the plea agreement and that he was entitled to a new trial in light of new witness testimony.[1092] The court of appeals 1) noted that Mooney may have been erroneously sentenced because only one of his prior felonies should have counted toward the presumptive sentence; 2) held that, even assuming he was properly sentenced as a third-felony offender, the plea agreement was illegal and voidable because both parties were operating under a mutual mistake, and thus Mooney was not entitled to specific performance; and 3) held that Mooney was entitled to a new trial because post-conviction witness testimony goes to the core question of the defendant's guilt.[1093] The court of appeals remanded the case to the

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[1084] *Id.* at 661–65.
[1085] *Id.* at 660.
[1086] *Id.* at 662–64.
[1087] *Id.*
[1088] 167 P.3d 81 (Alaska 2007).
[1089] *Id.* at 82–83.
[1090] *Id.* at 82.
[1091] *Id.* at 83.
[1092] *Id.* at 82.
[1093] *Id.* at 84–90.

superior court, holding that 1) when a prosecutor and defense attorney are operating under a mutual mistake regarding the terms of a plea agreement that is rejected, there is no right to specific performance on the grounds that the defense attorney was mistaken; and 2) when ruling on whether a new trial should be granted in light of new evidence, if that evidence bears heavily on the defendant's case, a new trial ought to be granted.[1094]

Ortiz v. State

In *Ortiz v. State*,[1095] the court of appeals held that the ex post facto clause is violated by retrospective application of a restitution statute which makes restitution mandatory and which does not take into account a defendant's ability to pay.[1096] Ortiz committed a robbery in 2003, for which he was later convicted and ordered to pay restitution.[1097] At the restitution hearing, the superior court applied the newer version of a sentencing statute amended in 2004[1098] to find Ortiz liable for a substantial sum of money.[1099] Whereas the pre-amended version of the statute would have given the superior court discretion to grant or withhold restitution, and would have further given discretion to account for the defendant's ability to pay when setting the amount of restitution, the amended version allowed for neither.[1100] Ortiz argued that application of the amended statute violated the ex post facto clause of the United States Constitution since the statute had been amended after his crime was committed.[1101] The superior court nonetheless found that it was obligated to apply the amended version and Ortiz appealed.[1102] The court of appeals, noting that it had previously held the *ex post facto* clause to forbid retrospective application of laws that increase the punishment for criminal acts, held that some quantum of punishment had been increased by the application of the amended statute.[1103] The court of appeals vacated the decision of the superior court and directed the superior court to reevaluate the restitution using the pre-amended statute, holding that the ex post facto clause is violated by retrospective application of a restitution statute which makes restitution mandatory and which does not take into account a defendant's ability to pay.[1104]

Roberts v. State

In *Roberts v. State*,[1105] the court of appeals held that an appellant who had already sought post-conviction relief was barred from pursuing a second application even when a flaw in the jury's deliberative process became known.[1106] Six months after the court had affirmed Roberts's convictions, it was reported that two jurors in his case had carried out

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[1094] *Id.* at 82–83.
[1095] 173 P.3d 430 (Alaska Ct. App. 2007).
[1096] *Id.* at 433.
[1097] *Id.* at 430–31.
[1098] ALASKA STAT. § 12.55.045 (2006).
[1099] *Ortiz*, 173 P.3d at 431.
[1100] *Id.*
[1101] *Id.*
[1102] *Id.*
[1103] *Id.* at 431–33.
[1104] *Id.* at 433.
[1105] 164 P.3d 664 (Alaska Ct. App. 2007).
[1106] *Id*. at 665–66.

an impermissible group experiment during their deliberations.[1107] Pease, Roberts' co-defendant, was allowed to litigate an application for post-conviction relief; however, Roberts, who had already litigated a previous application for post-conviction relief, was denied the right to pursue a second application.[1108] The court found that because it had recently held that the jury experiment at issue would not undermine or change the results of either Roberts's or Pease's trial, the other issues in the case need not have been decided.[1109] The court of appeals affirmed the superior court's dismissal of the application for post-conviction relief, holding that an appellant who had already sought post-conviction relief was barred from pursuing a second application even when a flaw in the jury's deliberative process became known.[1110]

Samples v. Municipality of Anchorage

In *Samples v. Municipality of Anchorage*,[1111] the court of appeals held that (1) defendants are not entitled to a jury trial for speeding tickets if they are not at risk of losing their driver's license, (2) an officer's testimony is sufficient evidence to prove a speeding violation, and (3) a defendant must show plain error for issues that are not preserved for appeal.[1112] Using a laser speedmeter, an Anchorage police officer measured Samples traveling at more than 20 miles an hour over the posted speed limit and charged him with speeding.[1113] The magistrate judge ruled that Samples was not entitled to a jury trial.[1114] The court of appeals held that the right to a jury trial does not extend to minor infractions like speeding, unless the conviction would result in the defendant losing an important license or includes an excessive fine that would imply criminality.[1115] The court of appeals held that the mere possibility of losing a license does not meet this requirement.[1116] The court of appeals also held that an officer's testimony is sufficient for a speeding conviction.[1117] Finally, the court of appeals held that when a defendant fails to preserve issues for appeal, plain error must be shown and that the magistrate judge did not commit plain error.[1118] The court of appeals affirmed the magistrate judge, holding that: (1) defendants are not entitled to a jury trial for speeding tickets if they are not at risk of losing their driver's license, (2) an officer's testimony is sufficient evidence to prove a speeding violation, and (3) a defendant must show plain error for issues that are not preserved for appeal.[1119]

State v. Beltz

[1107] *Id*. at 665.
[1108] *Id*.
[1109] *Id*. at 666.
[1110] *Id*. at 665–66.
[1111] 163 P.3d 967 (Alaska Ct. App. 2007).
[1112] *Id.* at 969.
[1113] *Id.*
[1114] *Id.*
[1115] *Id.* at 970.
[1116] *Id.* at 971.
[1117] *Id.* at 973.
[1118] *Id.* at 969.
[1119] *Id.*

In *State v. Beltz*,[1120] the court of appeals held that when individuals do not have a reasonable expectation of privacy regarding their garbage, evidence obtained by searching their garbage should not be suppressed.[1121] Based on a tip that Beltz bought many items used to make methamphetamines, two officers drove by Beltz's home and took some trash bags without a warrant.[1122] One of the officers later returned to Beltz's residence with a trash collector to take more of Beltz's garbage.[1123] The officers inspected the trash on police premises and found many items used to make methamphetamines.[1124] With a warrant, Beltz's home was searched and he admitted that he knew the items were being used to make methamphetamines.[1125] Beltz was then indicted on four second-degree drug charges, and he moved to suppress the evidence that was taken from his trash.[1126] The superior court granted Beltz's motion, and the State filed a petition for review.[1127] The court of appeals reasoned that the United States Constitution does not grant a reasonable expectation of privacy in one's garbage because trash is readily accessible by third parties.[1128] Furthermore, employing the two-part test articulated in *Smith v. State*,[1129] (1) whether the individual actually expected to have privacy in the trash, and (2) whether society should recognize that expectation as reasonable, the court of appeals held that under the Alaska Constitution, Beltz had no reasonable expectation of privacy in his trash because Beltz put the trash at the end of his driveway where it could be accessed by anybody.[1130] The court of appeals reversed the superior court, holding that when individuals do not have a reasonable expectation of privacy regarding their garbage, evidence obtained by searching their garbage should not be suppressed.[1131]

State v. Kameroff

In *State v. Kameroff*,[1132] the court of appeals held that double jeopardy does not prevent the State from proceeding on felony charges when a criminal defendant pleads no contest to lesser-included offenses in order to avoid more serious charges.[1133] Kameroff pled no contest to two misdemeanor charges related to an incident for which the State had filed felony sexual assault charges, charges that were later dismissed.[1134] The judge who accepted his plea further ruled that double jeopardy barred the State from prosecuting Kameroff on felony charges stemming from the same incident with the same victim.[1135] The State petitioned for review.[1136] The court of appeals held that under, Kameroff could

[1120] 160 P.3d 154 (Alaska Ct. App. 2007).
[1121] *Id.* at 155.
[1122] *Id.*
[1123] *Id.*
[1124] *Id.* at 156.
[1125] *Id.*
[1126] *Id.*
[1127] *Id.*
[1128] *Id.* at 156–57.
[1129] 510 P.2d 793 (Alaska 1973).
[1130] *Beltz*, 160 P.3d at 158–60.
[1131] *Id.* at 155.
[1132] 171 P.3d 1160 (Alaska Ct. App. 2007).
[1133] *Id.* at 1163.
[1134] *Id.* at 1161.
[1135] *Id.*
[1136] *Id.*

not use double jeopardy as a sword to prevent the State from proceeding with the more serious charges, since Kameroff was aware that the State was actively proceeding on felony charges against him at the time he pled no contest to lesser-included offenses, and since the State objected to the plea as an attempt to avoid the felony charges.[1137] The court of appeals reversed the decision of the superior court, holding that double jeopardy does not prevent the State from proceeding on felony charges when a criminal defendant pleads no contest to lesser-included offenses in order to avoid more serious charges.[1138]

State v. Pease

In *State v. Pease*,[1139] the court of appeals held that a jury may conduct common-sense experiments to test factual assertions made by experts.[1140] Pease and Roberts were convicted of robbing and murdering a teenage boy and assaulting an adult.[1141] During deliberations, the jury left the courthouse and conducted an experiment to test the validity of expert testimony.[1142] Specifically, the jury tested the distance at which one could recognize another person.[1143] The court, overruling the rule announced in *Gorz v. State*,[1144] allowed the experiment under the principle that juries are permitted to use common experiences and illustrations during deliberations.[1145] While the court found the act of leaving the jury room without court permission was misconduct, this misconduct was not serious and did not deprive Pease of a fair trial.[1146] The court of appeals reversed the superior court's grant of post-conviction relief,[1147] holding that a jury may conduct common-sense experiments to test factual assertions made by experts.[1148]

Sweezey v. State

In *Sweezey v. State*,[1149] the court of appeals (1) held that in situations where the presumptive range of imprisonment for a criminal convict includes an option for no prison time, an appeal for non-consideration of potential mitigating factors is moot and (2) upheld the option of a defendant to reject probation.[1150] Sweezey pled no contest to charges of fourth-degree misconduct involving a controlled substance in the superior court.[1151] At that time, she chose to refuse probation; however, the superior court judge rejected this refusal and sentenced Sweezey to three years of probation and required her to serve 60 days imprisonment as a condition of her probation.[1152] Sweezey appealed her sentence, asserting that the superior court's failure to consider a mitigating factor (the

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[1137] *Id.* at 1163.
[1138] *Id.*
[1139] 163 P.3d 985 (Alaska Ct. App. 2007).
[1140] *Id.* at 991–93.
[1141] *Id.* at 986.
[1142] *Id.* at 987–88.
[1143] *Id.* at 988.
[1144] 749 P.2d 1349 (Alaska Ct. App. 1988).
[1145] *Pease,* 163 P.3d at 991–93.
[1146] *Id.* at 994–95.
[1147] *Id.* at 995.
[1148] *Id.* at 991–93.
[1149] 167 P.3d 79 (Alaska Ct. App. 2007).
[1150] *Id.* at 79–80.
[1151] *Id.* at 79.
[1152] *Id.*

small amount of cocaine she possessed) and failure to honor her refusal of probation was improper.[1153] The court of appeals determined that the presumptive range of imprisonment for Sweezey's crime was zero to two years, and that since the superior court could have imposed no prison time absent proof of the mitigating factor, her argument was moot.[1154] The court further determined that as the supreme court has allowed for the refusal of probation by defendants, it was bound by those decisions and must allow for such a refusal here.[1155] Therefore, the court of appeals vacated Sweezey's sentence and remanded the case for resentencing, (1) holding that, in situations where the presumptive range of imprisonment for a criminal convict includes an option for no prison time, an appeal for non-consideration of potential mitigating factors is moot and (2) upheld the option of a defendant to reject probation.[1156]

Wacker v. State

In *Wacker v. State*,[1157] the court of appeals held that: (1) a prosecutor does not improperly shift the burden of proof when rhetorically asking who had access to a beneficial witness for the defendant, and (2) evidence of drunk driving propensity is character evidence, not evidence of a habit, and is therefore inadmissible.[1158] Wacker and her sister, Boone, got into a car accident while driving home from a night out drinking.[1159] Although a witness claimed that Wacker was driving, Wacker claimed that Boone was behind the wheel.[1160] Wacker tried to get Boone to testify that she was driving, but Boone never appeared in court, although the two communicated frequently.[1161] The superior court refused to allow Wacker to introduce evidence that Boone would regularly drive drunk, and the prosecutor made a comment during the closing argument that underscored the regular contact between Wacker and Boone.[1162] The court of appeals reasoned that the prosecutor's comment did not shift the burden of proof to the defendant to show why Boone did not testify because the prosecutor was merely trying to provide evidence of an alternative explanation of why Boone failed to appear.[1163] The court of appeals also explained that driving drunk is too volitional an act to be considered admissible habit evidence under Alaska Evidence Rule 406, thus evidence of Boone's propensity to drive drunk was barred as character evidence under Alaska Evidence Rule 404.[1164] The court of appeals affirmed the superior court, holding that: (1) a prosecutor does not improperly shift the burden of proof when rhetorically asking who had access to a beneficial witness for the defendant, and (2) evidence of drunk driving propensity is character evidence, not evidence of a habit, and is therefore inadmissible.[1165]

[1153] *Id.* at 79–80.
[1154] *Id.* at 80.
[1155] *Id.*
[1156] *Id.* at 81.
[1157] 171 P.3d 1164 (Alaska Ct. App. 2007).
[1158] *Id.* at 1165.
[1159] *Id.*
[1160] *Id.* at 1166.
[1161] *Id.*
[1162] *Id.* at 1167.
[1163] *Id.* at 1168.
[1164] *Id.* at 1169.
[1165] *Id.* at 1165.

Woodbury v. State

In *Woodbury v. State*,[1166] the court of appeals held that under *Blakely v. Washington*,[1167] in a jury trial, the State is not required to prove an offender's parole status as an aggravating factor where the offender stipulates to such facts during sentencing.[1168] During a change of plea and sentencing appearance, Woodbury stipulated that he was on parole at the time of his DUI arrest, leading to an increased sentence.[1169] Woodbury, although never disputing the fact, subsequently appealed claiming that under *Blakely* he was entitled to a jury trial on any issue of fact that may raise the potential maximum sentence.[1170] The court of appeals held that there was no plain error for three individually sufficient reasons: (1) *Blakely* is reasonably interpreted as allowing reliance upon facts expressly stipulated during sentencing,[1171] (2) a *Blakely* error is harmless if the facts are not in dispute,[1172] and (3) selective rescission, as opposed to total rescission, of a plea bargain would create injustice.[1173] The court of appeals affirmed the superior court's judgment, holding that under *Blakely*, in a jury trial, the State is not required to prove an offender's parole status as an aggravating factor where the offender stipulates to such facts during sentencing.[1174]

ELECTION LAW

Alaska Supreme Court

Edgmon v. State, Office of Lieutenant Governor

In *Edgmon v. State, Office of Lieutenant Governor*,[1175] the supreme court held that section 15.15.360 of the Alaska Statutes should be interpreted to give effect to the voter's intent when deciding whether there is an overvote.[1176] Edgmon was involved in a close primary election and challenged the results of the runoff on the basis that several ballots were wrongly determined to be overvoted and therefore excluded.[1177] The supreme court reasoned that a bright-line rule should not be applied and that the court should instead seek to determine the voter's intent as mandated by section 15.15.360 of the Alaska Statutes and similar precedent.[1178] To determine voter's intent, the court looked at the different marks, compared the alleged overvotes to other votes on the ballot, and found

[1166] 151 P.3d 528 (Alaska Ct. App. 2007).
[1167] 542 U.S. 296 (2004).
[1168] *Woodbury*, 151 P.3d at 532.
[1169] *Id* at 530.
[1170] *Id.*
[1171] *Id.* at 531.
[1172] *Id.*
[1173] *Id.* at 532.
[1174] *Woodbury*, 151 P.3d at 532.
[1175] 152 P.3d 1154 (Alaska 2007).
[1176] *Id*. at 1157.
[1177] *Id.* at 1155–56.
[1178] *Id*. at 1157.

that the challenged ballots were not overvotes.[1179] The supreme court reversed the determination of the State Division of Elections, holding that section 15.15.360 of the Alaska Statutes should be interpreted to give effect to the voter's intent when deciding whether there is an overvote.[1180]

EMPLOYMENT LAW

Alaska Supreme Court

Air Logistics of Alaska, Inc. v. Throop

In *Air Logistics of Alaska, Inc. v. Throop*,[1181] the supreme court held that a helicopter company was liable under the Alaska Wage and Hour Act (AWHA) for overtime hours paid to helicopter pilots, but that a contract claim predicated on AWHA violations must be pursued within the AWHA statute of limitations, not the statute of limitations for contract claims.[1182] Throop, a former employee, filed a class action complaint against Air Logistics for breach of contract for failing to include any add-ons in the regular rate of pay when calculating the overtime wage.[1183] The superior court granted summary judgment in favor of Throop, and Air Logistics appealed.[1184] The supreme court held that summary judgment was appropriate on the issue of compensable hours since the employees were required to work in isolated and inaccessible locations and because their employment agreement was reasonable.[1185] The court further held that summary judgment should have been granted for Air Logistics on Throop's contract claim since it would be inappropriate and against legislative intent if the AWHA overtime provision was governed by the standard contract statute of limitations rather than the AWHA's statute of limitations provision.[1186] Finally, the court held that the superior court's decision not to award liquidated damages was supported by persuasive evidence showing that Air Logistics acted in good faith.[1187] In part affirming and in part reversing the decision of the superior court, the supreme court held that a helicopter company was liable under AWHA for overtime hours paid to helicopter pilots, but that a contract claim predicated on AWHA violations must be pursued within the AWHA statute of limitations, not the statute of limitations for contract claims.[1188]

AT&T Alascom, Inc. v. Orchitt

[1179] *Id.* at 1157–58.
[1180] *Id.* at 1157.
[1181] 2007 Alas. LEXIS 174 (Alaska Dec. 14, 2007).
[1182] *Id.* at *1–2.
[1183] *Id.* at *4–5.
[1184] *Id.* at *7–9.
[1185] *Id.* at *19–24.
[1186] *Id.* at *26–27.
[1187] *Id.* at *46.
[1188] *Id.* at *1–2.

In *AT&T Alascom, Inc. v. Orchitt*,[1189] the supreme court held that (1) substantial medical evidence supported the Workers' Compensation Board's determination that the claimant was entitled to medical and temporary total disability;[1190] (2) the employer cannot claim that the Workers' Compensation Board erred in denying its right to cross-examine experts;[1191] and (3) the employer was not entitled to a pre-hearing follow-up employer's medical examination.[1192] The Workers' Compensation Board awarded Orchitt temporary total disability and medical benefits for injuries he sustained while working for AT&T Alascom.[1193] AT&T Alascom appealed to the superior court, alleging that it was deprived of due process and that the Board's decision was not supported by competent scientific evidence.[1194] The supreme court upheld the lower court, reasoning that an opinion by a qualified expert, even if contradicted by other experts, constituted substantial evidence supporting the Board's determination;[1195] AT&T Alascom cannot claim that the Board erred in denying its right to cross-examine experts because AT&T Alascom waived without qualification its right to cross-examine the experts;[1196] and it was within the Board's discretion not to allow AT&T Alascom a pre-hearing follow-up employer's medical examination so close to the date of the hearing.[1197] The supreme court affirmed the superior court, holding that (1) substantial medical evidence supported the Workers' Compensation Board's determination that the claimant was entitled to medical and temporary total disability;[1198] (2) the employer cannot claim that the Workers' Compensation Board erred in denying its right to cross-examine experts;[1199] and (3) the employer was not entitled to a pre-hearing follow-up employer's medical examination.[1200]

Harnish Group, Inc. v. Moore

In *Harnish Group, Inc. v. Moore*,[1201] the supreme court held that the Alaska Workers' Compensation Board erred in awarding an employee the statutory minimum amount of attorneys' fees under section 23.30.145(a) of the Alaska Statutes and that the proper award was reasonable attorneys' fees under subsection 145(b).[1202] Moore, an employee of the NC Machinery Company, had injured his back at work and consequently received compensation benefits and participated in a reemployment plan.[1203] When this reemployment plan did not work out, the employer changed Moore's benefits to permanent total disability (PTD) but subsequently signed a second reemployment

[1189] 161 P.3d 1232 (Alaska 2007).
[1190] *Id*. at 1243.
[1191] *Id*. at 1244.
[1192] *Id*.
[1193] *Id*. at 1235.
[1194] *Id*.
[1195] *Id*. at 1243.
[1196] *Id*. at 1244.
[1197] *Id*.
[1198] *Id*. at 1243.
[1199] *Id*. at 1244.
[1200] *Id*.
[1201] 160 P.3d 146 (Alaska 2007).
[1202] *Id.* at 151–54.
[1203] *Id*. at 147.

plan.[1204] Moore's attorney filed a claim seeking PTD benefits since the date of the injury, interest on those benefits, and attorney's fees and costs.[1205] NC Machinery admitted its liability for the PTD benefits but argued that it should not have to pay the statutory minimum amount of attorney's fees under subsection 145(a) because it did not controvert the claim.[1206] The Board awarded Moore the statutory minimum under subsection 145(a) and the superior court affirmed.[1207] The supreme court found that NC Machinery's initial resistance to paying PTD benefits did not constitute a controversion in fact because Moore's claims had not been filed when the initial resistance occurred.[1208] However, the court found that Moore was entitled to reasonable attorneys' fees under subsection 145(b) because the employer had delayed or otherwise resisted a payment of compensation, and the employee had retained an attorney in the successful prosecution of the claim.[1209] Reversing the superior court, the supreme court held that the Alaska Workers' Compensation Board erred in awarding an employee the statutory minimum amount of attorneys' fees under section 23.30.145(a) of the Alaska Statutes and that the proper award was reasonable attorneys' fees under subsection 145(b).[1210]

Jurgens v. City of North Pole

In *Jurgens v. City of North Pole*,[1211] the supreme court held that preponderance of the evidence was the appropriate standard in determining that sexual harassment in the workplace had occurred because the possible harm was approximately equal to each party.[1212] Police Officer Jurgens's employment was terminated after a review board found that he had made sexual advances and explicit comments to a number of police dispatchers.[1213] The court applied *Romulus v. Anchorage School District*[1214] and found, using the preponderance of the evidence standard, that the review board's findings were supported by substantial evidence and that the board did not err in terminating his employment.[1215] The supreme court affirmed, holding that preponderance of the evidence was the appropriate standard in determining that sexual harassment in the workplace had occurred because the possible harm was approximately equal to each party.[1216]

Miller v. Safeway, Inc.

In *Miller v. Safeway, Inc.*,[1217] the supreme court held that neither a company's grooming policy nor its actions with respect to enforcing that policy breached the implied covenant of good faith and fair dealing.[1218] Miller was an at-will employee of Safeway

[1204] *Id*. at 148–49.
[1205] *Id*. at 147.
[1206] *Id.* at 151.
[1207] *Id.* at 147.
[1208] *Id*. at 152.
[1209] *Id*. at 153.
[1210] *Id*. at 151–54.
[1211] 153 P.3d 321 (Alaska 2007).
[1212] *Id*. at 327–33.
[1213] *Id*. at 325.
[1214] 910 P.2d 610 (Alaska 1996).
[1215] *Jurgens*, 153 P.3d at 328–33.
[1216] *Id.* at 327–33.
[1217] 170 P.3d 655 (Alaska 2007).
[1218] *Id.* at 662.

who was terminated for failing to bring his hairstyle, upon request, into conformance with the company's grooming policy, although his hair—which he kept long for religious reasons—had gone unchallenged for his nearly three years at Safeway.[1219] Miller filed suit against Safeway, alleging breach of the implied covenant of good faith and fair dealing.[1220] The superior court granted summary judgment to Safeway and Miller appealed.[1221] The supreme court first held that Safeway's grooming policy did not objectively violate the implied covenant by violating public policy, reasoning that employer grooming policies have generally been upheld as constitutional, and that it would not be appropriate to upset such decisions with the much narrower judicially-created doctrine of the implied covenant of good faith and fair dealing.[1222] The supreme court next held that Safeway's actions in terminating Miller did not objectively breach the implied covenant because Safeway followed the same procedures with Miller as they did with all other employees and because no unfair religious discrimination occurred because Miller never disclosed his religious reasons for keeping his hair long and because Safeway was under no obligation to ask.[1223] Finally, the supreme court held that Safeway did not subjectively violate the implied covenant because there was no evidence to show that Miller was terminated for any reason other than failing to comply with the grooming policy.[1224] The supreme court affirmed the superior court's grant of summary judgment, holding that neither Safeway's grooming policy nor its actions with respect to enforcing that policy breached the implied covenant of good faith and fair dealing.[1225]

Villaflores v. Alaska State Commission on Human Rights

In *Villaflores v. Alaska State Commission on Human Rights*,[1226] the supreme court held that a prima facie case of employment discrimination had not been established because the employer had hired an individual in the same protected class as the complainant.[1227] Villaflores applied for a job with the state government but was not hired and subsequently filed a suit with the Alaska State Commission on Human Rights.[1228] The Commission held that no discrimination existed because the employer had hired a person of the same protected class (Asian and over-forty) and that Villaflores did not meet the minimum qualifications for the job.[1229] On appeal, the court affirmed the decision because Villaflores had failed to make a prima facie case for employment discrimination.[1230] The court noted that any argument regarding discrimination based on a great difference between qualifications was not applicable because Villaflores had failed to make out the prima facie case.[1231] The supreme court affirmed the superior court, holding that a prima facie case for employment discrimination had not been established

[1219] *Id.* at 658.
[1220] *Id.*
[1221] *Id.*
[1222] *Id.* at 660–61.
[1223] *Id.* at 661–62.
[1224] *Id.* at 662.
[1225] *Id.*
[1226] 170 P.3d 663 (Alaska 2007).
[1227] *Id.* at 664.
[1228] *Id.*
[1229] *Id.* at 664–65.
[1230] *Id.* at 665–66.
[1231] *Id.* at 666.

because the employer had hired an individual in the same protected class as the complainant.[1232]

Willard v. Khotol Services Corp.

In *Willard v. Khotol Services Corp.*,[1233] the supreme court held that: (1) factual disputes about an employer's retaliatory discharge of an employee are sufficient to preserve the employee's implied covenant of good faith and fair dealing claim;[1234] (2) as at-will employees, probationary workers can be fired without cause;[1235] (3) an employee must justifiably rely on a misrepresentation for a misrepresentation claim to succeed;[1236] and (4) the National Labor Relations Act (NLRA) preemption does not prevent an employee from introducing evidence of union-organizing activities, as long as that evidence is used to support a claim that is separate and independent from the employer's alleged anti-union bias.[1237] Khotol issued Willard an employee manual which described the probationary period, outlined "disciplinary procedures," and said that employees could be terminated at any time for various violations.[1238] While at Khotol, Willard tried to unionize the employees, complained about safety concerns, and felt that his supervisors personally disliked him.[1239] Khotol fired Willard for "insubordination" six weeks after he started working.[1240] Willard raised several claims challenging his termination, and the superior court granted summary judgment for Khotol on all of them, from which Willard appealed.[1241] The supreme court held that a claim of breach of an implied covenant of good faith and fair dealing can be subjective or objective and that if an employee can raise factual issues over whether the employer terminated him for retaliatory reasons, the claim should survive summary judgment.[1242] The supreme court also held that a probationary employee cannot bring a wrongful discharge or breach of contract claim if the employee manual explicitly states that probationary employment was at-will.[1243] The supreme court further held that acceptance of the job before the employee learned of the misrepresentations makes it impossible for the employee to have justifiably relied on the misrepresentation.[1244] Finally, the supreme court held that the NLRA would not preempt an employee from presenting evidence of an employer's anti-union sentiment, as long as the evidence would be used to support a claim that was independent from the anti-union allegation and the claim would not be identical to any potential federal claim under the NLRA.[1245] The supreme court reversed in part and

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[1232] *Id.* at 664.
[1233] 171 P.3d 108 (Alaska 2007).
[1234] *See id.* at 116.
[1235] *Id.* at 117.
[1236] *Id.* at 119.
[1237] *Id.* at 123.
[1238] *Id.* at 111–12.
[1239] *Id.* at 112.
[1240] *Id.*
[1241] *Id.* at 113.
[1242] *Id.* at 113–16.
[1243] *Id.* at 117–18.
[1244] *Id.* at 118–19.
[1245] *Id.* at 119–23.

remanded to the superior court regarding the implied covenant claim and the decision to admit anti-union bias evidence.[1246]

ENVIRONMENTAL LAW

Ninth Circuit Court of Appeals

Hale v. Norton

In *Hale v. Norton*,[1247] the Ninth Circuit held that the National Park Service was reasonable in requiring an environmental assessment before it would allow bulldozers to cross National Park Land.[1248] The Hales' property is surrounded by a national park, and they use an abandoned road to gain access to their property.[1249] After their property burned down in 2003, the Hales used a bulldozer to travel over the abandoned road without first getting permission from the Park Service.[1250] The Hales asked the Park Service for a permanent permit, but the Park Service responded by saying that it would need to do a more complete environmental analysis under the National Environmental Policy Act before it could properly determine whether to grant the permit.[1251] The Park Service said it could prepare an environmental assessment and decide the issue in nine weeks, but the Hales failed to give the necessary information to the Park Service.[1252] Instead, the Hales filed suit, seeking an injunction that would force the Park Service to grant them "adequate and feasible access" to their land.[1253] The district court ruled that it lacked subject-matter jurisdiction, and the Hales appealed.[1254] The Ninth Circuit held that although the Alaska National Interest Lands Conservation Act ("ANILCA") gives access rights to property owners, it also permits the government to curb those rights for reasonable regulatory purposes.[1255] The Ninth Circuit found that the gathering of information from the Hales for the National Environmental Policy Act did not necessarily contravene ANILCA's requirement that landowners be given "adequate and feasible access" to their land "subject to reasonable regulations."[1256] The Ninth Circuit held that the Hales' use of the bulldozer could lead to potentially harmful environmental effects, so the Park Service was justified in requesting an environmental assessment under the National Environmental Policy Act.[1257] The Ninth Circuit affirmed the district court,

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[1246] *Id.*
[1247] 476 F.3d 694 (9th Cir. 2007).
[1248] *Id.* at 700.
[1249] *Id.* at 696.
[1250] *Id.*
[1251] *Id.*
[1252] *Id.* at 697.
[1253] *Id.*
[1254] *Id.*
[1255] *Id.* at 699.
[1256] *Id.* at 700.
[1257] *Id.*

holding that the National Park Service was reasonable in requiring an environmental assessment before it would allow bulldozers to cross National Park Land.[1258]

Southeast Alaska Conservation Council v. United States Army Corps of Engineers

In *Southeast Alaska Conservation Council v. United States Army Corps of Engineers*,[1259] the Ninth Circuit held that the Environmental Protection Agency's (EPA) performance standard for froth-flotation mill operations, not the regulatory definition of "fill material," controlled the issuance of a permit to discharge wastewater into a lake.[1260] The Southeast Alaska Conservation Council, with the Sierra Club and the Lynn Canal Conservation, brought suit against the Army Corps of Engineers and the Forest Service challenging the issuance of a permit to allow Coeur Alaska, Inc. to discharge wastewater from its gold mining operation into Lower Slate Lake.[1261] The district court granted summary judgment in favor of the defendants, holding that the EPA's performance standard prohibiting discharges from froth-flotation mills, promulgated under § 301(e) and § 306(e) of the Clean Water Act,[1262] did not control since the permit was issued under § 404, which permitted the discharge of "fill material."[1263] The Ninth Circuit held that the EPA's performance standard applies, since no exceptions to a performance standard are allowed and § 404 only applies to discharge not subject to performance standards.[1264] The Ninth Circuit reversed, holding that the EPA's performance standard for froth-flotation mill operations, not the regulatory definition of "fill material," controlled the issuance of a permit to discharge wastewater into Lower Slate Lake.[1265]

ETHICS AND PROFESSIONAL RESPONSIBILITY

Alaska Supreme Court

Compton v. Kittleson

In *Compton v. Kittleson*,[1266] the supreme court held that a "hybrid" fee agreement that uses a client's decision to settle as a trigger to convert contingent-fee representation into an hourly-fee scheme is prohibited by Alaska law because it burdens the client's right to settle a case.[1267] Attorney Kittleson entered into a fee agreement with the Nelvises for their case against a car dealer that would compensate Kittleson on a contingency-fee basis.[1268] However, if the Nelvises dropped the case or settled for an

[1258] *Id.* at 701.
[1259] 486 F.3d 638 (9th Cir. 2007).
[1260] *Id*. at 655.
[1261] *Id*. at 643.
[1262] 33 U.S.C. §§ 1251–1387 (2007).
[1263] 486 F.3d at 643.
[1264] *Id*. at 655.
[1265] *Id*.
[1266] 171 P.3d 172 (Alaska 2007).
[1267] *Id.* at 173.
[1268] *Id*. at 174.

amount that would award Kittleson less than $175 per hour, then the Nelvises would have to compensate Kittleson for the difference between the contingency rate and the $175 per hour amount.[1269] The Nelvises lost the case at trial, and because of their prior rejection of the settlement offer pursuant to Kittleson's advice, the trial court ordered the Nelvises to pay the defendant's attorneys' fees.[1270] The Nelvises filed bankruptcy, and the Bankruptcy Trustee sued Kittleson for malpractice based on the impropriety of the hybrid agreement.[1271] The supreme court concluded that, while not categorically prohibited, this particular hybrid agreement infringed on the client's exclusive right to accept or reject settlement offers, embodied in Alaska's Rules of Professional Conduct.[1272] The supreme court reversed the superior court's decision, holding that a "hybrid" fee agreement that uses a client's decision to settle as a trigger to convert contingent-fee representation into an hourly-fee scheme is prohibited by Alaska law because it burdens the client's right to settle a case.[1273]

In re Landry

In *In re Landry*,[1274] the supreme court accepted a stipulation that a state district court judge violated judicial protocol and publicly censured him by requiring the publication of its order in the Pacific Reporter.[1275] The judge's violations included the issuance of pre-signed bail orders to prosecutors for out-of-custody arraignments, poor tracking of timing in criminal cases leading to numerous dismissals, improper ex parte communications, hearing a case he should have disqualified himself from, and making sexual remarks to female employees.[1276] The stipulation was agreed to by the judge and the Alaska Commission on Judicial Conduct,[1277] and it recommended, among other things, that the judge be publicly censured for his violations and that he not seek further judicial office in Alaska.[1278] The supreme court accepted the stipulation that a state district court judge violated judicial protocol and publicly censured him by requiring the publication of its order in the Pacific Reporter.[1279]

FAMILY LAW

Alaska Supreme Court

Alyssa B. v. State, Department of Health & Social Services

[1269] *Id.*
[1270] *Id.*
[1271] *Id.*
[1272] *Id.* at 176–177.
[1273] *Id.* at 180.
[1274] 157 P.3d 1049 (Alaska 2007).
[1275] *Id.* at 1052–53.
[1276] *Id.* at 1051.
[1277] *Id.*
[1278] *Id.* at 1052.
[1279] *Id.* at 1052–53.

In *Alyssa B. v. State, Department of Health & Social Services*,[1280] the supreme court held that under certain circumstances, having a trial to terminate parental rights without the parent present does not violate due process.[1281] After the Department of Health & Social Services petitioned to terminate the mother's parental rights, the court had to delay the actual trial sixteen months because the mother kept refusing court-appointed attorneys.[1282] The mother failed to appear at the termination trial and objected to the trial proceeding without her there.[1283] At trial, two experts testified that her daughter would be best served staying with foster parents, and one of them testified that the mother had psychological issues.[1284] The supreme court found that holding the termination trial without the mother there did not violate her due process rights because she had ample notice and was purposefully delaying the trial, and that it was in the best interests of her daughter to have this trial as soon as possible.[1285] The supreme court also found that the mother's parental rights were not terminated due to her mental illness because there was adequate evidence to show that her parental rights were terminated due to abandonment of her daughter.[1286] The supreme court affirmed the superior court's termination of parental rights, holding that under certain circumstances, having a trial to terminate parental rights without the parent present does not violate due process.[1287]

Burke v. State, Department of Health and Social Services

In *Burke v. State, Department of Health and Social Services*,[1288] the supreme court held that there was sufficient evidence to support the assertion that Burke's youngest child was a "child in need of aid," that the Office of Children's Services' ("OCS") efforts to reunite Burke and his youngest child were reasonable, and that post-termination visitation was properly denied.[1289] Burke's youngest child, Jesse, was born in October 2002, roughly nine months after his older three siblings were removed from their parents' custody because of abuse by their mother, Sondra, and Burke's neglect.[1290] In May 2004, citing Sondra's substantial improvement in her parenting skills, OCS placed the older three children back in their parents' home.[1291] However, in December 2004 OCS removed all children from their parents' home after they received reports that Sondra was again abusing the children. The supreme court agreed with the superior court that Jesse was subject to actual, substantial risk of harm, that Jesse suffered from mental injuries, that Jesse had been neglected, and that Sondra suffered from mental illness, which placed Jesse at risk of physical harm or mental injury.[1292] The supreme court also found that the superior court did not err in concluding that OCS's reunification efforts were reasonable because of OCS's deep involvement with the family for four years,

[1280] 165 P.3d 605 (Alaska 2007).
[1281] *Id.* at 609.
[1282] *Id.*
[1283] *Id.*
[1284] *Id.*
[1285] *Id.* at 615.
[1286] *Id.* at 618.
[1287] *Id.* at 609.
[1288] 162 P.3d 1239 (Alaska 2007).
[1289] *Id.* at 1248.
[1290] *Id.* at 1241.
[1291] *Id.* at 1242.
[1292] *Id.* at 1243.

during which time OCS reasonably concluded that Burke's involvement as a parent was lacking.[1293] Finally, the supreme court held that the superior court did not err in declining to order post-termination visitation because there is no presumption of visitation where parental rights are terminated for adequate grounds, which existed here.[1294] The supreme court affirmed the superior court's decision, holding that there was sufficient evidence to support the assertion that Burke's youngest child was a "child in need of aid," that OCS's efforts to reunite Burke and his youngest child were reasonable, and that post-termination visitation was properly denied.[1295]

Fowler v. State, Department of Revenue

In *Fowler v. State*, *Department of Revenue*,[1296] the supreme court held that a father's due process rights were not violated when an Idaho court entered a default paternity judgment against him, and so upheld registration of the judgment for enforcement in Alaska.[1297] Fowler had a default judgment entered against him for failure to pay a filing fee in a paternity suit in an Idaho court.[1298] After he relocated to Alaska, Fowler challenged registration of the judgment in Alaska on the ground that the Idaho court violated his due process rights by entering the judgment, and the superior court denied him relief.[1299] The supreme court adopted in full the superior court's reasoning by ruling that Fowler's due process rights were not violated since he was given notice of the reason his answer to the paternity suit had not been accepted and he knew the date and time of a hearing on his opposition to the default judgment but did not attend.[1300] The supreme court affirmed, holding that a father's due process rights were not violated when an Idaho court entered a default paternity judgment against him, and so upheld registration of the judgment for enforcement in Alaska.[1301]

Harvey v. Cook

In *Harvey v. Cook*,[1302] the supreme court held that (1) a grandparent seeking visitation rights had not met the requirements for intervention by right, (2) there was no abuse of discretion by the trial court when it denied the grandparent permissive intervention, (3) a past child support claim is abandoned if it is not pursued in the superior court, and (4) there was insufficient evidence presented to the superior court upon which to render a judgment of child support fees.[1303] Harvey and Cook had a child together before Cook's military service required him to move to Arizona, where he married and had a second child.[1304] During custody proceedings, the superior court denied the child's maternal grandmothers attempt to intervene as a matter of right to seek

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[1293] *Id.* at 1247.
[1294] *Id.* at 1248.
[1295] *Id.*
[1296] 168 P.3d 870 (Alaska 2007).
[1297] *Id.* at 873.
[1298] *Id.* at 870.
[1299] *Id.*
[1300] *Id.* at 870, 873.
[1301] *Id.* at 873.
[1302] 172 P.3d 794 (Alaska 2007).
[1303] *Id*. at 799, 804.
[1304] *Id*. at 796.

grandparental visitation rights.[1305] The superior court awarded custody to Cook and ordered Harvey to pay child support.[1306] The supreme court held that the superior court did not err in declining to allow the grandmother to intervene because the court properly weighed the relevant factors and decided intervention would not be appropriate.[1307] The court found that Harvey's past child support claims were waived when she failed to offer evidence in support of her claim during the trial[1308] and ruled that the superior court erred by setting Harvey's child support obligation without sufficient evidence of her income.[1309] Affirming the denial of the grandmother's attempt to intervene and remanding the child support determination for more evidence, the supreme court held that (1) a grandparent seeking visitation rights had not met the requirements for intervention by right, (2) there was no abuse of discretion by the trial court when it denied the grandparent permissive intervention, (3) a past child support claim is abandoned if it is not pursued in the superior court, and (4) there was insufficient evidence presented to the superior court upon which to render a judgment of child support fees.[1310]

Hopper v. Hopper

In *Hopper v. Hopper*,[1311] the supreme court held that: (1) rendering a dissolution agreement invalid is not an abuse of discretion;[1312] (2) real property constitutes marital property if a spouse purchases the property from a prior ex-spouse during the marriage to a subsequent spouse;[1313] (3) pre-marital savings accounts are marital property if marital assets are commingled therein;[1314] (4) an account with only Social Security deposits is not marital property;[1315] (5) attorneys' fees should be awarded during dissolution agreement modifications only if a spouse acts improperly during litigation;[1316] (6) awarding prejudgment interest was not an abuse of discretion;[1317] and (7) terminating spousal support was not an abuse of discretion.[1318] James and Loretta Hopper married in 1994 and filed for marital dissolution in 2002.[1319] In 2004, Loretta moved to set aside the dissolution, claiming that she was "cognitively impaired" at the time and that portions of the marital property were excluded from the dissolution agreement.[1320] The trial court ruled for Loretta on all issues except the termination of spousal support, and both James and Loretta appealed.[1321] The supreme court held that if a dissolution agreement omits large portions of marital property, then it is valid to set aside the dissolution

[1305] *Id*. at 799.
[1306] *Id*. at 797.
[1307] *Id*. at 799–802.
[1308] *Id*. at 802–03.
[1309] *Id*. at 803–04.
[1310] *Id*. at 799, 804.
[1311] 171 P.3d 124 (Alaska 2007).
[1312] *Id.* at 130.
[1313] *Id.* at 131–32.
[1314] *Id.* at 132.
[1315] *Id.* at 133.
[1316] *Id.* at 133–34.
[1317] *Id.* at 134.
[1318] *Id.* at 135.
[1319] *Id.* at 126–27.
[1320] *Id.* at 127.
[1321] *Id.* at 128.

agreement.[1322] The supreme court also held that as long as a spouse purchases real property during the marriage, even if that spouse had previously owned that real property before the marriage and was merely repurchasing it from a previous ex-spouse, that real property still counts as marital property.[1323] The supreme court further held that pre-marital accounts become marital property if marital assets are integrated into those accounts, and the burden of proof rests on the spouse who claims that they are *not* marital property to show the source of the assets in the accounts if that spouse wants to dispute the presumption.[1324] The supreme court also held that accounts containing only Social Security deposits are not marital property because federal law disallows states from dividing Social Security benefits, and the spouse who argues that the account contains more than just Social Security deposits has the burden of proof.[1325] The supreme court also held that during a dissolution modification, attorneys' fees should be awarded only if a spouse acts improperly during litigation and that improper behavior during the drafting of the dissolution agreement does not merit an award of attorneys' fees.[1326] The supreme court further held that if no injustice would be done to the spouse who is paying prejudgment interest, then a judge can properly award the prejudgment interest.[1327] The supreme court finally held that a judge can terminate spousal support if the marital property is properly divided and the marital support is no longer necessary.[1328] The supreme court reversed the trial court on the issues of the Social Security account and the award of attorneys' fees and affirmed the trial court on the other issues.[1329]

Huestess v. Kelley-Huestess

In *Huestess v. Kelley-Huestess*,[1330] the supreme court held that (1) an order dividing the property of a divorced couple be vacated because only a portion of a marital house was transmuted into marital property and because the house was valued at the time of separation and not the time of trial and (2) an award of child support for the period before the couple was married violated the due process rights of the husband.[1331] Bonnie Kelley and Allen Huestess were married nearly eight years after they had a child together, who Huestess did not financially support when the child was born.[1332] Before the couple was married, Kelley purchased a house and four years later Huestess began living with Kelley and began giving her his paycheck for "general use."[1333] After Kelley received a settlement of over $120,000 for an automobile/motorcycle accident, the couple refinanced the house and then filed for divorce about a year after the refinancing.[1334] The superior court determined that the house was two-thirds the property of Kelley and one-third marital property, valued the house at the time of trial instead of separation, and

[1322] *Id.* at 130.
[1323] *Id.* at 131–32.
[1324] *Id.* at 132.
[1325] *Id.* at 133.
[1326] *Id.* at 133–34.
[1327] *Id.* at 134.
[1328] *Id.* at 135.
[1329] *Id.* at 135–36.
[1330] 158 P.3d 827 (Alaska 2007).
[1331] *Id.* at 829.
[1332] *Id.*
[1333] *Id.*
[1334] *Id.* at 830.

ordered Huestess to pay child support for the years before he and Kelley were married.[1335] The supreme court held that the partial transmutation was unjustified, and that the value of the house should have been determined at the time of trial, not separation; therefore the court held that the property division should be vacated.[1336] Furthermore, because Kelley introduced testimony as to Huestess' child support late in the trial, awarding back child support violated Huestess' due process rights.[1337] The supreme court vacated and remanded the decision of the superior court, holding that (1) an order dividing the property of a divorced couple be vacated because only a portion of a marital house was transmuted into marital property and because the house was valued at the time of separation and not the time of trial and (2) an award of child support for the period before the couple was married violated the due process rights of the husband.[1338]

In re Change of Name for A.C.S.

In *In re Change of Name for A.C.S.*,[1339] the supreme court held that the superior court erred by allocating the burden of proof to the father in an initial naming dispute where neither parent should have borne the burden of proof.[1340] Gieser sued Starling before their child was born requesting the declaration of Alaska's jurisdiction, the addition of Gieser's name to the child's name, custody, visitation, and child support.[1341] Starling left the state before giving birth and named the baby without including Gieser's last name.[1342] Gieser sued for custody and received sole legal custody and equal physical custody.[1343] Gieser then filed this petition to change the child's name to "Gieser-Starling."[1344] The trial judge denied the petition, holding that Gieser failed to carry his burden of proof that the name change was in the best interests of the child.[1345] The supreme court held that this was an initial naming dispute, in which the parents disagreed even before the birth of the child without any acquiescence by Gieser.[1346] Thus, the burden of proof should not have fallen on Gieser.[1347] Moreover, the placement of the burden was an important factor in the superior court's decision.[1348] The supreme court then laid out the appropriate factors in considering a name dispute without making a ruling thereon.[1349] The supreme court reversed and remanded, holding that the superior court erred by allocating the burden of proof to the father in an initial naming dispute where neither parent should have borne the burden of proof.[1350]

[1335] *Id.*
[1336] *Id.* at 832–33.
[1337] *Id.* at 835.
[1338] *Id.* at 829.
[1339] 171 P.3d 1148 (Alaska 2007).
[1340] *Id.* at 1151.
[1341] *Id.* at 1149.
[1342] *Id.*
[1343] *Id.*
[1344] *Id.* at 1150.
[1345] *Id.*
[1346] *Id.* at 1151.
[1347] *Id.*
[1348] *Id.* at 1151–52.
[1349] *Id.* at 1152–54.
[1350] *Id.* at 1154.

Josephine B. v. State, Department of Health and Social Services

In *Josephine B. v. State of Alaska, Department of Health and Social Services*,[1351] the supreme court held that it is not necessary to establish gross parental misconduct in order to find that a child suffered a mental injury under the Child in Need of Aid (CINA) statute.[1352] Josephine B. and her husband Jacob were twice accused of physically abusing Josephine's three children, but insufficient evidence was found to indicate such abuse.[1353] In 2006, Josephine's oldest daughter, Ashley, contacted a social worker and reported that her parents were engaging in extreme military disciplinary techniques.[1354] As a result, the Department of Health and Social Services filed emergency petitions for adjudication of the three children as children in need of aid under the CINA statute.[1355] The superior court issued an order adjudicating Ashley as a child in need of aid because she had suffered mental injury.[1356] Josephine B. appealed this adjudication, arguing that the superior court used an incorrect standard of mental injury for CINA purposes because such a standard did not establish gross parental misconduct.[1357] The supreme court affirmed the decision of the superior court, holding that it was not necessary to establish gross parental misconduct in order to find that a child suffered a mental injury under the CINA statute.[1358]

Katz v. Murphy

In *Katz v. Murphy*,[1359] the supreme court held that an ex parte warrant taking a child away from a parent without notifying that parent violates Alaska's Uniform Child Custody and Jurisdiction Enforcement Act ("UCCJEA"), but consenting to the registration of another state's custody order bars that parent from challenging the custody order on jurisdictional or lack of notice grounds.[1360] After Katz and Murphy divorced, a Georgia court gave Katz, the mother, custody of their son.[1361] Later, Katz moved to Alaska with their son while Murphy settled in South Carolina.[1362] After a South Carolina court ordered custody transferred to Murphy, the Alaska superior court expedited registration and enforcement of that custody order because Murphy feared that Katz would flee with their son.[1363] Katz was not notified until after Murphy had taken custody of their son, but at a later superior court hearing, Katz's attorney consented to registering the South Carolina custody order.[1364] The supreme court held that under the UCCJEA, expedited registration and enforcement of a custody order requires the parent losing

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[1351] 174 P.3d 217 (Alaska 2007).
[1352] *Id.* at 222.
[1353] *Id.* at 218.
[1354] *Id.*
[1355] *Id.* at 219.
[1356] *Id.*
[1357] *Id.* at 219–20.
[1358] *Id.* at 222.
[1359] 165 P.3d 649 (Alaska 2007).
[1360] *Id.* at 650.
[1361] *Id.*
[1362] *Id.*
[1363] *Id.* at 651–52.
[1364] *Id.* at 652.

custody to be immediately notified to have an opportunity to challenge.[1365] The supreme court found that Murphy only mailed notice to Katz after already taking their son, and that he could not adequately demonstrate that Katz would immediately flee with their son, so the superior court erred in expediting registration and enforcement of the South Carolina custody order.[1366] However, the supreme court further held that Katz ultimately waived her right to challenge the South Carolina custody order on lack of notice and jurisdictional grounds because her attorney consented to registering the order, and new issues cannot be raised on appeal absent plain error.[1367] Even though the ex parte removal was in error, the supreme court affirmed the superior court's registration of the South Carolina custody order,[1368] holding that an ex parte warrant taking a child away from a parent without notifying that parent violates the UCCJEA, but a parent's consent to the registration of another state's custody order bars challenging the custody order on jurisdictional or lack of notice grounds.[1369]

McDonald v. Trihub

In *McDonald v. Trihub*,[1370] the supreme court held that the superior court's determinations of child support obligations were appropriate, even though they contradicted the findings of a prior administrative hearing.[1371] Yvonne Trihub and Curtis McDonald had a child together in 1992 but were never married.[1372] Determination of McDonald's child support obligations and arrears went forward in two parallel proceedings.[1373] First, McDonald requested administrative review of a child support order, arguing that the order overestimated his income and failed to base his obligations on shared custody.[1374] Second, McDonald filed a complaint for joint custody in superior court, and Trihub filed a counterclaim on child support arrears.[1375] After the administrative judge reduced McDonald's child support obligations in its proceeding, the superior court issued a separate order for a larger amount of child support based on a different finding of custody.[1376] McDonald appealed the superior court's decision, arguing *inter alia* that the court was bound by the administrative decision and that the court's order was an impermissible retroactive modification.[1377] The supreme court held that McDonald had both waived his right to assert collateral estoppel and waived his statutory right to claim that the administrative tribunal had exclusive jurisdiction.[1378] Further, because neither party had exercised its right to appeal the administrative order and because the time for filing an appeal had not yet lapsed, the supreme court held that there was no valid support order in effect at the time of the superior court order;

[1365] *Id.* at 659.
[1366] *Id.* at 659–60.
[1367] *Id.* at 661–62.
[1368] *Id.* at 663.
[1369] *Id.* at 650.
[1370] 173 P.3d 416 (Alaska 2007).
[1371] *Id.* at 429.
[1372] *Id.* at 419.
[1373] *Id.*
[1374] *Id.*
[1375] *Id.*
[1376] *Id.*
[1377] *Id.* at 420.
[1378] *Id.* at 421–22.

therefore, the superior court order was not an impermissible retroactive modification.[1379] Next, the supreme court held that the superior court's determinations of physical custody and income were appropriate, since there was evidence supporting both determinations.[1380] Finally, the supreme court held that awarding Trihub attorneys' fees was not error, since McDonald conceded that the proceedings were not a divorce and thus the prevailing party is entitled to fees.[1381] The supreme court affirmed the decision of the superior court, holding that its determinations of child support obligations were appropriate, even though they contradicted the findings of a prior administrative hearing.[1382]

Mellard v. Mellard

In *Mellard v. Mellard*,[1383] the supreme court held that the failure of the superior court to account for the value of the wife's retirement account in dividing up the assets in a divorce proceeding constituted reversible error.[1384] After trial, the court awarded each party its individual retirement accounts and valued the husband's account at $346,319, but failed to place a value on the wife's account.[1385] The wife was awarded her survivorship benefit in the husband's estate, and the husband was ordered to pay an additional sum to balance out the larger reward he received.[1386] The supreme court regarded the missing value of the wife's retirement account as an "evidentiary void" and the assignment of a value of zero constituted reversible error.[1387] Therefore, the supreme court reversed and remanded the matter for reevaluation of the property division[1388], holding that the failure of the superior court to account for the value of the wife's retirement account in dividing up the assets in a divorce proceeding constituted reversible error.[1389]

Miller v. Clough

In *Miller v. Clough*,[1390] the supreme court held that the potential wealth of a voluntarily underemployed collector of child support under Civil Rule 90.3(a)(4) need not be recalculated merely on account of marriage to a wealthy spouse[1391] and also held that when the parties to a dispute each win on non-overlapping claims, it is not manifestly unreasonable to determine that, for the purposes of Civil Rule 82, neither party was the prevailing party.[1392] In 2002, the superior court ordered Miller to pay child support to Clough, his former wife.[1393] In determining the award, the superior court found that

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[1379] *Id.* at 423.
[1380] *Id.* at 423–29.
[1381] *Id.* at 429.
[1382] *Id.* at 429–30.
[1383] 168 P.3d 483 (Alaska 2007).
[1384] *Id.* at 484.
[1385] *Id.*
[1386] *Id.*
[1387] *Id.* at 485.
[1388] *Id.* at 489.
[1389] *Id.* at 484.
[1390] 165 P.3d 594 (Alaska 2007).
[1391] *Id.* at 601.
[1392] *Id.* at 605.
[1393] *Id.* at 596.

Clough was voluntarily underemployed and, under Civil Rule 90.3(a)(4), imputed potential annual earnings to her for the purposes of calculation.[1394] In 2005, Miller moved in the superior court for a modification of his child support obligations on the grounds that his daughter with Clough now lived with him and that Clough's potential earnings for child support calculations should be increased because she had since married a wealthy man.[1395] The superior court ruled that Clough's remarriage alone was not enough to justify reexamining her potential income,[1396] and that support calculations should be recalculated in light of the parties' daughter's move to Miller's home.[1397] After this, Clough moved for an award of attorneys' fees, arguing that Miller had filed at least seven motions to reduce his child-support obligation, all of which had been struck or denied, and that she was thus the prevailing party.[1398] The superior court denied this claim, noting that both parties had prevailed in certain aspects of the dispute.[1399] Miller appealed the court's refusal to reevaluate Clough's potential income, arguing that Civil Rule 90.3(a)(4) allows for the re-imputation of potential income in the case of a voluntarily underemployed collector of child support who has become married.[1400] Clough appealed the court's refusal to grant her attorneys' fees, arguing that she had won on all of the substantive issues whereas Miller had only obtained a temporary reduction of his child-support obligation and that, under Civil Rule 82, she was the prevailing party.[1401] Addressing Miller's argument, the supreme court noted that, for the purposes of Civil Rule 90.3(a)(4), the totality of circumstances should be considered to determine *whether* to calculate potential income but not necessarily *in* the calculation of the income.[1402] The supreme court held that Clough's husband's wealth alone did not serve as evidence of increased earning potential.[1403] Addressing Clough's argument, the supreme court held that because Miller's minimal victory was part of a factually distinct legal motion, it was reasonable for the superior court to determine that neither party was the prevailing party.[1404] The supreme court affirmed the rulings of the superior court, holding that the potential wealth of a voluntarily underemployed collector of child support need not be recalculated merely on account of marriage to a wealthy spouse; and that when the parties to a dispute each win on non-overlapping claims, it is not manifestly unreasonable to determine that neither party was the prevailing party.[1405]

Puddicombe v. Dreka

In *Puddicombe v. Dreka*,[1406] the supreme court held that the desirability of keeping a child with her siblings need not be the decisive factor in a custody suit, and that the superior court must specifically consider the relevant domestic violence provisions in

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[1394] *Id.*
[1395] *Id.*
[1396] *Id.* at 596–97.
[1397] *Id.* at 598.
[1398] *Id.* at 599.
[1399] *Id.*
[1400] *Id.*
[1401] *Id.* at 604–05.
[1402] *Id.* at 600.
[1403] *Id.* at 601.
[1404] *Id.* at 605.
[1405] *Id.*
[1406] 167 P.3d 73 (Alaska 2007).

section 25.24.150(g)-(i) of the Alaska Statutes and the domestic violence exception in section 25.24.150(c)(6) of the Alaska Statutes.[1407] Puddicombe, the child's mother, appealed a decision by the superior court that awarded primary and sole legal custody to the child's father following her relocation to Arizona.[1408] The superior court considered the location of the child's half-siblings, in Arizona, but concluded that this factor should not be decisive because the child's current stable and satisfactory environment in Alaska was in her best interest.[1409] The superior court also addressed the alleged domestic violence by both parties, but the supreme court concluded that the superior court had failed to make specific findings of fact of the relevant child-custody factors, as required by section 25.24.150(c), including whether or not there existed a continuing threat to the health and safety of either parent or the child.[1410] The supreme court vacated the custody award by the superior court, holding that the desirability of keeping a child with her siblings need not be the decisive factor in a custody suit, and that the superior court must specifically consider the relevant domestic violence provisions in section 25.24.150(g)-(i) of the Alaska Statutes and the domestic violence exception in section 25.24.150(c)(6) of the Alaska Statutes.[1411]

Rosen v. Rosen

In *Rosen v. Rosen*,[1412] the supreme court held that (1) upholding child support agreements that comport with section 90.3 of the Alaska Rules of Civil Procedure, is generally not an abuse of discretion;[1413] (2) where clerical error prevents a decree from being signed, retroactively enforcing the original agreement is not an impermissible, retroactive modification;[1414] (3) a lower court may properly deny a motion for modification where the current agreement meets the minimum requirements of section 90.3 at the time such motion is filed;[1415] and (4) where an agreement requires consent of one party to elective medical procedures, refusal of consent must be reasonable and is subject to the duties of good faith and fair dealing.[1416] Bettina and Carl Rosen were divorced in 1991 and reached a child custody, child support, spousal support, and property agreement.[1417] Bettina filed susequent motions to modify the agreement and to recover medical expenses.[1418] The superior court properly found that both the original decree and the partial modification met the minimum requirements of section 90.3 and were thus valid.[1419] When the superior court signed the agreement in March 2005 and declared it effective as of January 2001, it was not an improper retroactive modification because the court would have originally signed the document were it not for clerical

[1407] *Id.* at 78.
[1408] *Id.* at 75.
[1409] *Id.* at 78.
[1410] *Id.* at 76–77.
[1411] *Id.* at 78.
[1412] 167 P.3d 692 (Alaska 2007).
[1413] *Id.* at 696.
[1414] *Id.* at 697.
[1415] *Id.* at 698–99.
[1416] *Id.* at 700.
[1417] *Id.* at 694.
[1418] *Id.* at 694–95.
[1419] *Id.* at 696.

error.[1420] The superior court properly determined no modification was required because in 2004, at the time of Bettina's motion to modify, the income cap had not yet been raised to $100,000 and therefore Carl's payments met the requirements of section 90.3.[1421] Citing the implied contractual duty of good faith and fair dealing, the supreme court vacated the judgment of the lower court and found that if Carl had unreasonably withheld consent for their child's orthodontic expenses he must reimburse all of Bettina's costs.[1422] The supreme court thus affirmed in part and vacated in part the decision of the superior court.[1423]

Shepherd v. Haralovich

In *Shepherd v. Haralovich*,[1424] the supreme court held that considering income-producing capabilities of proceeds from the sale of an asset is appropriate in determining child support payments, but that failing to deduct federal income tax liability when determining gross income is error.[1425] Shepherd appealed an order from the superior court denying her motion to reconsider determination of her gross income, which the court had readjusted due to rental income.[1426] Shepherd claimed that the court had imputed rental income to her erroneously, arguing that rental income can only be imputed when a parent is voluntarily underemployed or unemployed.[1427] The supreme court held that the lower courts had not imputed rental income to Shepherd, but rather, reasonable investment income from some portion of the net proceeds from the sale of rental property.[1428] The court further held that this imputation was appropriate, since section 90.3(a)(4) of the Alaska Rules of Civil Procedure and also precedential cases expressly provide that income may be imputed for assets, regardless of a parent's employment status.[1429] Finally, the court held that it was error to assume that Shepherd would have no income tax liability in 2004 based on her 2002 tax returns, since Shepherd implicitly argued in her brief that her zero tax liability in 2002 was a one-time event and explicitly stated as much in her statement of the case.[1430] The supreme court affirmed the superior court's imputation of income to Shepherd and remanded to the trial court to recalculate Shepherd's gross income to account for federal income tax liability, holding that considering income-producing capabilities of proceeds from the sale of an asset is appropriate in determining child support payments, but that failing to deduct federal income tax liability when determining gross income is error.[1431]

[1420] *Id.* at 697.
[1421] *Id.* at 698–99.
[1422] *Id.* at 700.
[1423] *Id.*
[1424] 170 P.3d 643 (Alaska 2007).
[1425] *Id.* at 644.
[1426] *Id.* at 645.
[1427] *Id.* at 646.
[1428] *Id.*
[1429] *Id.* at 647–48.
[1430] *Id.* at 649–50.
[1431] *Id.* at 650.

State, Department of Health and Human Services v. Doherty

In *State, Department of Health and Human Services v. Doherty*,[1432] the supreme court held that (1) a superior court must apply the proper two-part federal test for qualified immunity to a social worker and (2) a social worker may re-litigate the factual issues in a prior child in need of aid case because the social worker was neither a party to, nor in privity with a party to, the prior suit.[1433] On August 18, 2001, Kelly Sullivan Doherty and her daughter, Shannon Doherty, were treated at Fairbanks Memorial Hospital for domestic violence injuries.[1434] Kelly refused to identify the abuser, and in 2003, Eldridge, a social worker employed by the Department of Health and Social Services, Office of Children's Services, filed a petition to terminate Kelly's parental rights of Shannon and removed Shannon from Kelly's care.[1435] The supreme court found that the superior court erred by applying Alaska's three-part test to determine if Eldridge had qualified immunity, rather than the required federal two-part test for state officers.[1436] Furthermore, the supreme court found that the termination of the parental rights hearing was insufficient to estop Eldridge from re-litigating factual issues adjudicated during that hearing because government employees, in their individual capacities, are generally not in privity with the government nor are they bound by adverse determinations against the government.[1437] The supreme court vacated and remanded the superior court, holding that (1) a superior court must apply the proper two-part federal test for qualified immunity to a social worker and (2_ a social worker may re-litigate the factual issues in a prior child in need of aid case because the social worker was neither a party to, nor in privity with a party to, the prior suit.[1438]

Terry S. v. State, Department of Health and Social Services

In *Terry S. v. State, Department of Health and Social Services*,[1439] the supreme court held that the superior court did not err in (1) rejecting a father's peremptory disqualification of the superior court judge, (2) deciding by clear and convincing evidence that the father's continued custody of his children would cause them emotional or physical damage, (3) requiring the father to undergo sex-offender treatment before being allowed to visit his children, or (4) failing to apply a "reasonable doubt" standard to its findings.[1440] The Office of Children's Services (OCS) placed Terry's children with their maternal grandmother after the death of their mother and initiated Child in Need of Aid (CINA) proceedings.[1441] After a number of proceedings in front of the same judge, the court determined by clear and convincing evidence that Terry had sexually abused one of his daughters and that his children faced harm in his custody, so the judge placed the children in the custody of their maternal grandmother, conditioning Terry's visitation

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[1432] 167 P.3d 64 (Alaska 2007).
[1433] *Id.* at 66.
[1434] *Id.* at 66–67.
[1435] *Id.* at 67.
[1436] *Id.* at 69–70.
[1437] *Id.* at 71–72.
[1438] *Id.* at 66.
[1439] 168 P.3d 489 (Alaska 2007).
[1440] *Id.* at 491.
[1441] *Id.*

rights upon his successful participation in sex offender treatment.[1442] Terry appealed.[1443] The supreme court held that (1) the subsequent guardianship proceeding did not "reinvigorate" Terry's right to peremptorily disqualify the judge, since it did not "give rise to a separate and distinct guardianship case,"[1444] (2) the superior court's finding that Terry's continued custody would result in serious emotional or physical damage to the children was supported by sufficient evidence,[1445] (3) conditioning Terry's visitation rights upon successful participation in sex offender treatment was justified because of the strong interest in protecting the children,[1446] and (4) the limitations on visitation were not a termination of visitation rights and thus did not require evidence beyond a reasonable doubt.[1447] Affirming the superior court, the supreme court held that the superior court did not err in (1) rejecting a father's peremptory disqualification of the superior court judge, (2) deciding by clear and convincing evidence that the father's continued custody of his children would cause them emotional or physical damage, (3) requiring the father to undergo sex-offender treatment before being allowed to visit his children, or (4) failing to apply a "reasonable doubt" standard to its findings.[1448]

Thomas v. Thomas

In *Thomas v. Thomas*, [1449] the supreme court held that (1) gold coins belonging to a wife in a divorce proceeding had not been transmuted into marital property because the wife had not shown any intention to do so, and (2) that the failure of the superior court to indicate which factors guided its custody disposition made the issue unreviewable.[1450] Gail, the wife, had purchased $50,000 worth of gold coins prior to the divorce and had taken no steps to indicate an intention to convert the coins to marital property.[1451] In a separate issue, the superior court had awarded Kevin primary physical custody and sole legal custody of the children, but the court failed to indicate which factors it had used in making this determination.[1452] On appeal, Gail challenged the court's custody decision, and Kevin challenged the determination that the gold coins were separate property and that Gail was not required to pay child support.[1453] Noting that the superior court was required to consider the nine factors articulated in section 25.24150(c) of the Alaska Statutes, the supreme court concluded that the superior court erred in not considering some of them.[1454] Furthermore, the court reasoned that the gold coins had not been transmuted into marital property because there was no affirmative action by Gail suggesting an intent to transmute the coins.[1455] The supreme court remanded the case to the superior court, holding that (1) gold coins belonging to a wife in a divorce proceeding

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[1442] *Id.* at 491–93.
[1443] *Id.* at 493.
[1444] *Id.* at 495.
[1445] *Id.* at 497.
[1446] *Id.* at 498.
[1447] *Id.*
[1448] *Id.* at 491.
[1449] 171 P.3d 98 (Alaska 2007).
[1450] *Id.* at 102–08.
[1451] *Id.* at 107–08.
[1452] *Id.* at 101–06.
[1453] *Id.*
[1454] *Id.* at 103, 106.
[1455] *Id.* at 108.

had not been transmuted into marital property because the wife had not shown any intention to do so, and (2) that the failure of the superior court to indicate which factors guided its custody disposition made the issue unreviewable.[1456]

Ward v. Urling

In *Ward v. Urling*,[1457] the supreme court held that Urling was not unreasonably underemployed, that it was appropriate not to impute income to her in a child support calculation, and that Urling's tax return was unnecessary to determine the calculation.[1458] Ward petitioned the court to reconsider a child-support calculation nine years after a support order, claiming that his wife's changed financial and marital status amounted to a material change in circumstance.[1459] The supreme court noted that Civil Rule 90.3(h)(1) allowed a child support award to be modified only upon a showing of a material change in circumstance, which is presumed where there is a fifteen percent difference between support calculated under the rule and the outstanding support order.[1460] However, Ward was unable to produce a preponderance of evidence showing either a legal or factual change that amounted to such a material change in circumstances.[1461] The supreme court also affirmed the superior court's awarding of attorney's fees, concluding that the amount of fees awarded was not manifestly unreasonable nor an abuse of discretion because Urling's attorney provided representation at two separate evidentiary hearings with seven total witnesses.[1462] The supreme court affirmed the superior court's ruling, holding that that Urling was not unreasonably underemployed, that it was appropriate not to impute income to her in a child support calculation, and that Urling's tax return was unnecessary to determine the calculation.[1463]

HEALTH LAW

Alaska Supreme Court

Wetherhorn v. Alaska Psychiatric Inst.

In *Wetherhorn v. Alaska Psychiatric Institute*,[1464] the supreme court held that the appellant was not entitled to attorneys' fees in her civil commitment proceeding despite its dismissal without prejudice.[1465] Alaska Psychiatric Institute had petitioned for the continued commitment of Wetherhorn but chose to file a dismissal of its petition without

[1456] *Id.* at 106–08.
[1457] 167 P.3d 48 (Alaska 2007).
[1458] *Id.* at 54, 56–57.
[1459] *Id.* at 50–51
[1460] *Id.* at 52.
[1461] *Id.* at 52–53.
[1462] *Id.* at 57.
[1463] *Id.* at 54, 56–57.
[1464] 167 P.3d 701 (Alaska 2007).
[1465] *Id.*

prejudice.[1466] After this was granted, Wetherhorn moved for attorneys' fees under Civil Rule 82.[1467] The supreme court agreed with the superior court in ruling that Civil Rule 82 did not apply in civil commitment hearings since the parties were not truly adverse and that if attorneys' fees were at risk, the state may be reluctant in performing "protective litigation" for those in need of commitment.[1468] The supreme court affirmed the superior court's decision, holding that e appellant was not entitled to attorneys' fees in her civil commitment proceeding despite its dismissal without prejudice.[1469]

INSURANCE LAW

Alaska Supreme Court

Allstate Insurance Co. v. Falgoust

In *Allstate Insurance Co. v. Falgoust*,[1470] the supreme court held that a household exclusion clause in an insurance policy extends to the foster children of the named insured.[1471] The Falgousts' foster children brought tort claims against the Falgousts.[1472] In a hearing before the superior court, the Falgousts' insurance provider asked for a declaratory judgment that the household exclusion clause, which excludes from liability coverage claims brought against a named insured by any "insured person," applied to the claims of the Falgousts' foster children.[1473] The superior court refused to grant the declaratory judgment action.[1474] Interpreting the policy such that ambiguities are resolved favorably for the insured, the supreme court held that (1) the terms "dependant in your care" and "resident" in the insurance policy were unambiguous; (2) foster children are "dependent persons;" (3) and the foster children here were residents.[1475] For these reasons, the household exclusion in the insurance policy blocked the insurance provider from having any obligation to the insured.[1476] The supreme court reversed the superior court, holding that a household exclusion clause in an insurance policy extends to the foster children of the named insured.[1477]

Ayres v. United Services Automobile Ass'n

In *Ayers v. United Services Automobile Ass'n*,[1478] the supreme court held that written waiver of uninsured/underinsured motorist ("UIM") coverage is not required

[1466] *Id.* at 702.
[1467] *Id.*
[1468] *Id.* at 703.
[1469] *Id.* at 704.
[1470] 160 P.3d 134 (Alaska 2007)
[1471] *Id.* at 140–41.
[1472] *Id.* at 135.
[1473] *Id.* at 136
[1474] *Id* at 137.
[1475] *Id.* at 138–41.
[1476] *Id.*
[1477] *Id.* at 140–42.
[1478] No. S-12018, 2007 Alas. LEXIS 59 (Alaska May 25, 2007).

unless the insured opts for no UIM coverage or UIM coverage below statutory minimums.[1479] Ayers' insurance company refused to pay her above the amount of her UIM coverage after she had extinguished the liability coverage of the driver at fault in a car accident.[1480] Her UIM coverage was less than her liability coverage.[1481] Ayers argued that under section 21.89.020 of the Alaska statutes, written waiver was required before her insurance company could issue a policy in which the UIM coverage was less than the liability coverage.[1482] The supreme court held that so long as UIM coverage is above the statutory minimum established in sections 28.20.440 and 28.22.101of the Alaska statutes, written waiver is not required, and noted that in previous cases it held that waiver was necessary only when the insured opts for no UIM coverage.[1483] The supreme court held written waiver of UIM coverage is not required unless the insured opts for no UIM coverage or UIM coverage below statutory minimums.[1484]

Gibson v. Geico General Insurance Co.

In *Gibson v. Geico General Insurance Co.*,[1485] the supreme court held that in a trial where the sole issue was the insured's damages, the insured was not entitled to depose insurance adjustors or to advise the jury that she was insured against underinsured drivers.[1486] Gibson brought suit against Geico, her insurance carrier, to recover underinsured motorist benefits after being struck by another driver whose policy limit was $50,000.[1487] The jury awarded Gibson a $68,611 judgment and the superior court offset the $50,000 insurance award.[1488] Gibson appealed, raising a number of procedural issues.[1489] The supreme court held that Gibson was not entitled to depose Geico claim adjusters because the probative value of information they could offer as to Gibson's injuries was small, given the availability of medical records and other testimony.[1490] Nor was Gibson entitled to introduce evidence that she carried an underinsured motorist policy with Geico, since referring to Geico as Gibson's insurance company was sufficient to alert the jury of the parties' positions.[1491] The supreme court further held that damages were proper since it was appropriate to deduct the $50,000 Gibson had already received from her total damages, interest was calculated only on the amount for which Geico was liable,[1492] and Gibson failed to produce receipts that supported her claim for damages.[1493] The supreme court affirmed the judgment of the superior court, holding that in a trial where the sole issue was the insured's damages, the insured was not entitled to depose

[1479] *Id.* at *1, *21.
[1480] *Id.* at *1–2.
[1481] *Id.*
[1482] *Id.* at *2–3.
[1483] *Id.* at *11–14, *21.
[1484] *Id.* at *1, *21.
[1485] 153 P.3d 312 (Alaska 2007).
[1486] *Id.* at 321.
[1487] *Id.* at 314.
[1488] *Id.* at 315–16.
[1489] *Id.* at 316–21.
[1490] *Id.* at 316–17.
[1491] *Id.* at 318.
[1492] *Id.* at 319.
[1493] *Id.* at 320–21.

insurance adjustors or to advise the jury that she was insured against underinsured drivers.[1494]

Nelson v. Progressive Casualty Insurance Co.

In *Nelson v. Progressive Casualty Insurance Co.*,[1495] the supreme court held that named driver exclusions apply in negligent entrustment cases and that such exclusions are a valid exception to mandatory minimum liability protection.[1496] Nelson, while walking a crosswalk, was struck by a car driven by Ulisese, an uninsured and unlicensed driver using his parents' car.[1497] Nelson filed a claim against Progressive, the Uliseses' insurance company, which Progressive denied because the Uliseses had excluded their son from their coverage through the policy's "Named Driver Exclusion."[1498] Nelson then filed suit against Progressive.[1499] In finding for Progressive, the court explained that Nelson could not proceed against Progressive under a negligent entrustment claim because negligent entrustment requires the younger Ulisese to be negligent, and his negligence was explicitly excluded from coverage.[1500] In addressing Nelson's challenge to the validity of the exclusion, the court reasoned that the exclusion was consistent with the general policy of insuring every driver because it allows policyholders to avoid excessive premiums and encourages the excluded driver to obtain his own insurance.[1501] Therefore, the supreme court affirmed, holding that named driver exclusions apply in negligent entrustment cases and that such exclusions are a valid exception to mandatory minimum liability protection.[1502]

Premera Blue Cross v. State

In *Premera Blue Cross v. State*,[1503] the supreme court held that a retaliatory tax imposed on out-of-state insurers in Alaska pursuant to section 21.09.270(a) of the Alaska Statutes did not violate Alaska's equal protection and substantive due process clauses because the purposes of retaliatory tax statutes in general, and of section 21.09.270 in particular, were furthered by such an application.[1504] Section 21.09.270(a) of the Alaska Statutes imposes a retaliatory tax on out-of-state insurers in Alaska to the extent that the taxes, licenses, and fees imposed on Alaska insurers by other states exceeded those under the statute.[1505] Blue Cross, a Washington-based insurance company, refused to pay a portion of the retaliatory tax required under section 21.09.270(a) in 1997 and requested a refund for the excess retaliatory taxes it paid in 1995 and 1996.[1506] Blue Cross argued that the tax violated both the equal protection and substantive due process clauses of the

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[1494] *Id.* at 321.
[1495] 162 P.3d 1228 (Alaska 2007).
[1496] *See id.* at 1239.
[1497] *Id.* at 1230.
[1498] *Id.*
[1499] *Id.* at 1230–31.
[1500] *Id.* at 1233–34.
[1501] *Id.* at 1237.
[1502] *Id.* at 1239.
[1503] 171 P.3d 1110 (Alaska 2007).
[1504] *Id*. at 1125.
[1505] *Id.* at 1114.
[1506] *Id.* at 1113.

Alaska Constitution.[1507] The supreme court held that this particular application of the tax was in line with the constitutionally sound purpose of retaliatory tax statutes, which is to deter other states from enacting discriminatory taxes of their own.[1508] Additionally, the general purpose of section 21.09.270, to equalize taxes across states, was fairly and substantially furthered.[1509] The supreme court affirmed the superior court's judgment holding that a retaliatory tax imposed on out-of-state insurers in Alaska pursuant to section 21.09.270(a) of the Alaska Statutes did not violate Alaska's equal protection and substantive due process clauses because the purposes of retaliatory tax statutes in general, and of section 21.09.270 in particular, were furthered by such an application.[1510]

State, Department of Commerce v. Progressive Casualty Insurance Co.

In *State, Department of Commerce v. Progressive Casualty Insurance Co.*,[1511] the supreme court held that section 21.36.460(d)(1) of the Alaska statutes prevents using credit scores "frozen" at the beginning of a policy as the basis for underwriting at the policy's renewal,[1512] and, furthermore, that section 21.36.460 of the Alaska Statutes is not preempted by the Federal Fair Credit Reporting Act ("FCRA").[1513] Progressive Casualty Insurance Company and two other Progressive companies (collectively "Progressive") petitioned the Alaska Division of Insurance to allow them to use policyholders' credit scores as they existed at policy initiation to make underwriting risk determinations at policy renewal.[1514] The Division rejected Progressive's request on the grounds that this would violate section 21.36.460(d)(1) of the Alaska Statutes, which prohibits underwriting based in whole or in part on a consumer's credit history.[1515] Progressive appealed to the superior court, which overturned the Division's decision, and the Division appealed to the supreme court.[1516] Progressive argued that its plan fell outside the range of what is covered by section 21.36.460(d)(1) of the Alaska Statutes and that the encompassing statute is preempted by the FCRA.[1517] The supreme court held that the plan fell under the plain-language meaning of the provision and that the legislative history of the statute supported the Division's interpretation.[1518] The supreme court further held that the FCRA did not preempt section 21.36.460 of the Alaska Statutes because they had the common objective of consumer protection.[1519] The supreme court reversed the order of the superior court, holding that section 21.36.460(d)(1) of the Alaska Statutes prevents using credit scores "frozen" at the beginning of a policy as the basis for underwriting at

[1507] *Id*. at 1118–19.
[1508] *Id*. at 1122–24.
[1509] *Id*.
[1510] *Id.* at 1125.
[1511] 165 P.3d 624 (Alaska 2007).
[1512] *Id.* at 628–31.
[1513] *Id.* at 633.
[1514] *Id.* at 627.
[1515] *Id.*
[1516] *Id.*
[1517] *Id.* at 628, 631.
[1518] *Id.* at 628–31.
[1519] *Id.* at 633.

the policy's renewal,[1520] and, furthermore, that section 21.36.460 of the Alaska Statutes is not preempted by the FCRA.[1521]

State Farm Mutual Automobile Insurance Co. v. Lestenkof

In *State Farm Mutual Automobile Insurance Co. v. Lestenkof*,[1522] the supreme court held that when an automobile insurance policyholder is not underinsured with respect to court-awarded attorneys' fees, the insurer does not have to pay additional attorneys fees pursuant to Alaska Civil Rule 82.[1523] Lestenkof sued Odden for wrongful death after her husband died of injuries sustained from a car accident, where he was a passenger in Odden's car.[1524] Odden's insurance policy, issued by State Farm, included liability coverage of up to $50,000 of bodily injury per person and $100,000 per accident, with equivalent uninsured/underinsured motorist coverage (UIM).[1525] The policy did not have a valid limitation on Alaska Civil Rule 82 attorneys' fees.[1526] Lestenkof and State Farm settled the case, but State Farm appealed the superior court's award of unlimited attorneys' fees, as part of the UIM coverage, to Lestenkof.[1527] The supreme court reversed, holding that when an automobile insurance policyholder is not underinsured with respect to court-awarded attorneys' fees, the insurer does not have to pay additional attorneys fees pursuant to Alaska Civil Rule 82.[1528]

PROPERTY LAW

Ninth Circuit Court of Appeals

United States v. 191.07 Acres of Land

In *United States v. 191.07 Acres of Land*,[1529] the Ninth Circuit held that the owner of gold mining claims acquired by the government through inverse condemnation was not entitled to a jury trial on the issue of just compensation.[1530] When Congress expanded the boundaries of Denali Park in 1980, the National Park Service acquired surface jurisdiction over Martinek's eleven gold mining claims comprising 191.07 acres.[1531] Though all mining operations in the park were halted from 1985 to 1991, restricting Martinek's ability to mine his claims, the United States did not initiate condemnation proceedings of the claims until 1998.[1532] Martinek requested a jury trial, but the district

[1520] *Id.* at 628–31.
[1521] *Id.* at 633.
[1522] 155 P.3d 313 (Alaska 2007).
[1523] *Id.* at 314.
[1524] *Id.* at 314–15.
[1525] *Id.* at 314.
[1526] *Id.*
[1527] *Id.* at 316.
[1528] *Id.* at 318.
[1529] 482 F.3d 1132 (9th Cir. 2007).
[1530] *Id.* at 1136–37.
[1531] *Id.* at 1134.
[1532] *Id.*

court held that, because both parties had stipulated to a taking date earlier than the declaration of taking, the mining claims were acquired through inverse condemnation and Martinek was not entitled to a jury trial.[1533] The Ninth Circuit affirmed, holding that the owner of gold mining claims acquired by the government through inverse condemnation was not entitled to a jury trial on the issue of just compensation.[1534]

Alaska Supreme Court

Allen v. Vaughn

In *Allen v. Vaughn*,[1535] the supreme court held that inexplicit language of a property settlement agreement would not be interpreted as a forfeiture provision because equity does not favor forfeiture.[1536] Following a divorce settlement, Allen and Vaughn entered a new property agreement wherein each would receive one parcel of land and buy out the other's interest in that parcel.[1537] As their hand-written agreement provided, "[i]f the note is not satisfied, . . . Vaughn will maintain an interest of 50% in [Allen's] . . . property."[1538] After Allen failed to pay what he owed, the two disputed the meaning of the contract provision; Vaughn asserted that Allen had forfeited 50% of his interest in the property, while Allen asserted that Vaughn retained an interest in the property until he paid her in full.[1539] The court analyzed the agreement under general contract principles and stated that forfeiture is a disfavored remedy.[1540] The supreme court reversed and remanded, holding that inexplicit language of a property settlement agreement would not be interpreted as a forfeiture provision because equity does not favor forfeiture.[1541]

Denardo v. Corneloup

In *Denardo v. Corneloup*,[1542] the supreme court held that a landlord is not liable to one tenant for the second-hand smoke of another tenant under battery, trespass, or nuisance theories.[1543] Denardo and Corneloup rented adjacent apartments in a building owned by Foreman Properties.[1544] Denardo began complaining to Corneloup that he could smell Corneloup's cigarette smoke and soon filed suit against Corneloup under theories of battery, trespass, and nuisance.[1545] Denardo amended his complaint to add Foreman as a defendant after Denardo evicted him.[1546] The superior court granted summary judgment for the defendants on all claims.[1547] On appeal, the court reasoned that, though blowing smoke in someone's face could be considered battery, neither

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[1533] *Id.* at 1135.
[1534] *Id.* at 1136–37.
[1535] 161 P.3d 1209 (Alaska 2007).
[1536] *Id.* at 1210.
[1537] *Id.*
[1538] *Id.*
[1539] *Id.* at 1210–12.
[1540] *Id.* at 1214–15.
[1541] *Id.* at 1215.
[1542] 163 P.3d 956 (Alaska 2007).
[1543] *Id.* at 957.
[1544] *Id.* at 958.
[1545] *Id.*
[1546] *Id.*
[1547] *Id.* at 959.

defendant acted with the requisite level of intent.[1548] The court rejected the trespass claim against Foreman because a landlord does not control a tenant and rejected the nuisance claim against Corneloup because smoking is not considered a private nuisance.[1549] Also, smoking is not an ultrahazardous activity subject to strict liability since the dangers of second-hand smoke can be avoided with due care.[1550] The supreme court affirmed the superior court, holding that a landlord is not liable to one tenant for the second-hand smoke of another tenant under battery, trespass, or nuisance theories.[1551]

Vezey v. Green

In *Vezey v. Green*,[1552] the supreme court held that there was insufficient evidence to support a finding of adverse possession for all 300 feet to the west of Green's cabin, since Green only produced evidence of her exercise of dominion and control over the land forty feet west of her cabin.[1553] Green's grandmother gave a piece of the family's land to Green in 1982, and sometime between 1982 and the mid-1990's Green built a cabin on the property, clearing the area around the cabin.[1554] Vezey purchased a two-thirds interest in a parcel of land that included Green's property, and after Vezey's purchase, Green brought suit to establish her right to a portion of the land by several means, including adverse possession.[1555] The superior court determined that Green had acquired the entire 300 feet to the west of her property by adverse possession and Vezey challenged this finding.[1556] The supreme court affirmed the superior court's denial of Vezey's Rule 60(b) motion, found that the motion was barred by the statute of limitations,[1557] and concluded that a longstanding public trail created an easement on both Green and Vezey's properties.[1558] Finally, the court affirmed that Green had a fee simple title to the land forty fee to the west of her property.[1559] The supreme court affirmed in part and reversed in part, holding that there was insufficient evidence to support a finding of adverse possession for all 300 feet to the west of Green's cabin, since Green only produced evidence of her exercise of dominion and control over the land forty feet west of her cabin.[1560]

Walker v. Walker

In *Walker v. Walker*,[1561] the supreme court held that the superior court's failure to make findings to justify the inequitable distribution of property between a husband and wife or to reallocate the property equally amounted to an abuse of discretion.[1562] John

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[1548] *Id.* at 960.
[1549] *Id.* at 961.
[1550] *Id.* at 962.
[1551] *Id.* at 967.
[1552] 171 P.3d 1125 (Alaska 2007).
[1553] *Id.* at 1132.
[1554] *Id.* at 1127.
[1555] *Id.*
[1556] *Id.* at 1128.
[1557] *Id.* at 1129.
[1558] *Id.* at 1133.
[1559] *Id.*
[1560] *Id.*
[1561] 151 P.3d 444 (Alaska 2007).
[1562] *Id.* at 451.

Walker filed for divorce from Susan Walker in 2002.[1563] The superior court initially divided the marital property so that the parties received approximately $140,000 each.[1564] However, during a status hearing, the superior court discovered that it had incorrectly valued an asset it allotted to John, and that the correct figure reduced the value of John's share by $46,396.86.[1565] In spite of the error, the superior court did not change the distribution to correct the inequality.[1566] John appealed, arguing that the superior court erred in awarding more than fifty percent of the martial estate to Susan without making findings to support the award.[1567] The supreme court vacated the property division and remanded, holding that the superior court's failure to make findings to justify the inequitable distribution of property between a husband and wife or to reallocate the property equally amounted to an abuse of discretion.[1568]

Ware v. Ware

In *Ware v. Ware*,[1569] the supreme court held that when property is transferred *inter vivos* from parent to child, there is a presumption that the transfer was a gift and that elderly people are not presumptively incompetent.[1570] A mother and sole trustee of the family homestead conveyed the homestead to one of her sons.[1571] A daughter brought suit against her brother, arguing the homestead had been conveyed under circumstances of undue influence and that her brother had been unjustly enriched.[1572] The superior court granted summary judgment to the son, dismissed the daughter's claims with prejudice and ordered the daughter to pay her brother's attorneys' fees in excess of the statutory minimum.[1573] The supreme court concluded that the transfer was properly a gift from parent to child, because there was no evidence of undue influence (either premised on coercion or the existence of a confidential relationship between mother and son), and the mother had the mental capacity to make the gift.[1574] The unjust enrichment claim was improper because no benefit was alleged to have accrued from the daughter to the brother.[1575] Finally, the superior court's reasons for awarding attorneys' fees above the statutory minimum were legitimate.[1576] The supreme court affirmed, holding that when property is transferred *inter vivos* from parent to child, there is a presumption that the transfer was a gift and that elderly people are not presumptively incompetent.[1577]

[1563] *Id.* at 446.
[1564] *Id.* at 450–51.
[1565] *Id.* at 451.
[1566] *Id.*
[1567] *Id.*
[1568] *Id.*
[1569] 161 P.3d 1188 (Alaska 2007).
[1570] *Id.* at 1192–93, 1196.
[1571] *Id.* at 1191.
[1572] *Id.*
[1573] *Id* at 1191–92.
[1574] *Id.* at 1192–96.
[1575] *Id.* at 1197.
[1576] *Id* at 1200.
[1577] *Id.*

Ninth Circuit Court of Appeals

Bolt v. United States

In *Bolt v. United States*,[1578] the Ninth Circuit held that clearing snow and ice from parking lots constituted a matter of routine maintenance, with no discretionary component, and therefore the discretionary function exception of the Federal Torts Claim Act ("FTCA") did not apply.[1579] Bolt suffered permanent injuries as a result of her slip and fall on snow and ice in a parking lot of the U.S. Army apartment complex where she lived.[1580] Bolt brought a negligence claim against the United States under the FTCA.[1581] In determining whether the discretionary function exception to the FTCA applied, the Ninth Circuit concluded that it was immaterial whether the Army's "Snow Removal Policy" is more specific than the analogous state law duty.[1582] Rather, using the two-part *Gaubert* test,[1583] the court concluded, first, that the Army failed its burden of proving an issue of discretion because its Snow Removal Policy expressly imposes a specific and mandatory annual duty to clear snow and ice from Family Housing Parking Areas.[1584] Second, the Ninth Circuit found that even if the Army had some discretion in deciding when to clear the snow, this was not the type of decision-making that the discretionary function exception was meant to protect.[1585] Finally, the Ninth Circuit concluded that summary judgment was not appropriate because, regardless of the local municipality's similar duty, the FTCA creates no exceptions for government conduct similar to that undertaken by municipalities.[1586] The Ninth Circuit reversed the district court's grant of summary judgment, holding that clearing snow and ice from parking lots constituted a matter of routine maintenance, with no discretionary component, and therefore the discretionary function exception of the FTCA did not apply.[1587]

Alaska Supreme Court

Brandner v. Hudson

In *Brandner v. Hudson*,[1588] the supreme court held that (1) the superior court's admission of evidence of domestic violence at a bench trial was, if anything, harmless error; and (2) the superior court's ruling regarding compensatory and punitive damages was warranted.[1589] At the hospital where they both worked, Brandner pulled Hudson by

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[1578] 509 F.3d 1028 (9th Cir. 2007).
[1579] *Id.* at 1035–36.
[1580] *Id.* at 1030.
[1581] *Id.*
[1582] *Id.* at 1032.
[1583] United States v. Gaubert, 499 U.S. 315 (1991).
[1584] *Bolt*, 509 F.3d at 1033.
[1585] *Id.* at 1033–1034.
[1586] *Id.* at 1035.
[1587] *Id.* at 1035–36.
[1588] 171 P.3d 83 (Alaska 2007)
[1589] *Id.* at 85.

the arm and thrust her into her chair, twisting her knee in the process.[1590] Hudson brought suit for negligence and assault, and the trial judge awarded compensatory and punitive damages.[1591] Brandner appealed, arguing that evidence of his record of domestic violence was improperly admitted and challenged the court's assessment of damages.[1592] First, the supreme court held that admission of Brandner's record of domestic violence was, if anything, harmless error because it was not abuse of discretion for the trial judge to rule that the probative value of the evidence as to determining Hudson's state of mind outwieghed the possible prejudice to Brandney where a judge was the trier of fact.[1593] Second, the damage award for emotional distress was warranted because whether a victim's reaction to an incident is unusual is not relevant to damages.[1594] Third, punitive damages were appropriate because there was clear and convincing evidence that Brandner's conduct was sufficiently outrageous and reckless.[1595] Affirming the superior court, the supreme court held that (1) the superior court's admission of evidence of domestic violence at a bench trial was, if anything, harmless error; and (2) the superior court's ruling regarding compensatory and punitive damages was warranted.[1596]

Christiansen v. Christiansen

In *Christiansen v. Christiansen*,[1597] the supreme court held that admiralty jurisdiction did not displace Alaska's social-host immunity provision where a vessel owner acted merely as an unlicensed social-host.[1598] Almeria Christiansen brought a wrongful death action against Kenny Christiansen when her husband fell off a dock and drowned after drinking on Kenny's boat.[1599] Almeria appealed the superior court's decision to apply Alaska's social-host immunity provision and grant Kenny partial summary judgment, arguing that federal maritime law imposed a duty on Kenny to supervise and control drinking on the boat that should not be limited by state law.[1600] The supreme court held that admiralty jurisdiction did not displace the state law because (1) no controlling federal rule existed imposing liability on unlicensed social-hosts or abrogating common law social-host immunity, therefore applying the social-host immunity provision did not materially prejudice a characteristic feature of maritime law;[1601] and because (2) there was no strong federal interest in dictating the availability of actionable wrongful death claims, therefore applying social-host immunity did not impair the essential uniformity and harmony of maritime law.[1602] The supreme court affirmed the grant of summary judgment, holding that admiralty jurisdiction did not displace

[1590] *Id* at 85–86.
[1591] *Id.* at 86.
[1592] *Id.*
[1593] *Id.* at 87.
[1594] *Id.* at 88–89.
[1595] *Id.* at 89–90.
[1596] *Id.* at 85.
[1597] 152 P.3d 1144 (Alaska 2006).
[1598] *Id*. at 1148.
[1599] *Id.* at 1145.
[1600] *Id.*
[1601] *Id.* at 1147.
[1602] *Id.* at 1148.

Alaska's social-host immunity provision where a vessel owner acted merely as an unlicensed social-host.[1603]

Deptula v. Simpson

In *Deptula v. Simpson*,[1604] the supreme court held that sellers of a home and their listing agent who failed to disclose that the previous homeowner had died and decomposed in the house did not breach any duty to homebuyers who waived their statutory right to disclosure.[1605] The Deptulas sold their mother's home to the Williams through a realtor and executed a waiver agreement that released them from making statutorily mandated disclosures about the house.[1606] The Williams brought suit against the sellers and their listing agent after discovering that decomposition of the previous owner's body had caused structural damage to the kitchen subfloor.[1607] The supreme court held that the Williams' claims against the agent were not properly before the court, since the Williams had voluntarily dismissed the claims by asking for a final judgment against her under Rule 54(b) of the Alaska Rules of Civil Procedure.[1608] The supreme court further held that the sellers owed no statutory duty of disclosure to the Williams, since the Williams had voluntarily and knowingly waived their statutory right to disclosure, under section 34.70.110 of the Alaska statutes.[1609] Finally, the supreme court held that the Deptulas did not owe the Williams any common law duty of disclosure because the sellers did not give partial or misleading statements to the Williams when they honestly stated that they were not familiar with the condition of the house, and the sellers had no special relationship with the buyers since they were involved in an arms-length commercial transaction and signed a contract containing an "as-is" clause.[1610] The supreme court affirmed the decision of the superior court, holding that sellers of a home and their listing agent who failed to disclose that the previous homeowner had died and decomposed in the house did not breach any duty to homebuyers who waived their statutory right to disclosure.[1611]

Diblik v. Marcy

In *Diblik v. Marcy*,[1612] the supreme court held that a seller is not liable for misstatements made in a disclosure statement related to the sale of a home when the seller did not know or have reason to know his statements were false and that even if a seller makes misstatements in an addendum to a disclosure statement, the seller is not liable for those misstatements unless they are material.[1613] Prior to the sale of his house to Diblik, Marcy had some work done on the septic system and an engineer concluded the

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[1603] *Id.*
[1604] 164 P.3d 640 (Alaska 2007).
[1605] *Id.* at 646.
[1606] *Id.* at 642.
[1607] *Id.* at 641.
[1608] *Id.* at 644.
[1609] *Id.* at 645.
[1610] *Id.* at 646.
[1611] *Id.*
[1612] 166 P.3d 23 (Alaska 2007).
[1613] *Id.* at 26–29.

system was functioning properly.[1614] Diblik was provided with copies of the engineer's report and informed of some of the work done, however holes in the tank were discovered after he moved in.[1615] The superior court found that Marcy was not liable to Diblik on grounds of fraudulent or negligent misrepresentation.[1616] Reviewing the superior court's decision for clear error, the supreme court held that (1) because Marcy relied on the report produced by the engineer, his belief that the problems were fixed nullified any argument that the disclosure statement had been fraudulently or negligently completed;[1617] (2) for these same reasons and because Diblik both received the engineer's report and discussed the repairs with the engineer, there was sufficient disclosure to satisfy the statutory requirement;[1618] and (3) while Marcy admitted the statements made in the addendum were false, the statements were immaterial because a reasonable seller would have attached no significance to the repairs once the septic tank was certified by the engineer.[1619] Affirming the superior court, the supreme court held that a seller is not liable for misstatements made in a disclosure statement related to the sale of a home when the seller did not know his statements were false and that even if a seller makes misstatements in an addendum to a disclosure statement, the seller is not liable for those misstatements unless they are material.[1620]

Diggins v. Jackson

In *Diggins v. Jackson*,[1621] the supreme court held that a non-settling defendant may offset his liability with the plaintiff's settlement award only in proportion to settling defendant's comparative fault, even where proportional offset will result in the plaintiff's double recovery.[1622] After flipping his bike and fracturing his neck while riding on a bicycle path that was undergoing repairs, Jackson sued three contractors involved in repairing the path and settled with two of them for a total of $106,190.60.[1623] In Jackson's suit against Diggins Concrete, the third contractor, the jury found that Jackson's damages totaled $94,943.40 and allocated ten percent of the fault to Diggins and seventy percent of the fault to Jackson.[1624] Denying Diggins' request to offset Jackson's damages by the full amount of the pre-trial settlement, the superior court entered a judgment requiring Diggins to pay Jackson $9,494.34.[1625] Following *Petrolane Inc. v. Robles*,[1626] the supreme court held that a non-settling defendant may offset against his liability the plaintiff's settlement award only in proportion to setting defendant's comparative fault, even where proportional offset results in the plaintiff's double recovery.[1627]

[1614] *Id.* at 25.
[1615] *Id.*
[1616] *Id.*
[1617] *Id.* at 26–27.
[1618] *Id.* at 27.
[1619] *Id.* at 29.
[1620] *Id.* at 26–29.
[1621] 164 P.3d 647 (Alaska 2007).
[1622] *Id.* at 648–49.
[1623] *Id.*
[1624] *Id.*
[1625] *Id.* at 647–48.
[1626] 154 P.3d 1014 (Alaska 2007).
[1627] *Diggins,* 164 P.3d at 648–49.

Groom v. State, Department of Transportation

In *Groom v. State, Department of Transportation*,[1628] the supreme court held that the Alaska Workers' Compensation Board violated due process when it failed to give adequate notice that it would reconsider a prior factual finding and that the board applied the incorrect legal standard in determining whether the state had rebutted a presumption of compensability.[1629] Groom worked for the Department of Transportation and was injured when he allegedly fell on ice while inspecting a truck.[1630] The board determined the injury was compensable.[1631] Groom filed additional workers' compensation claims following the hearing, culminating in a claim that the slip-and-fall caused either total or partial compensable disability.[1632] Following a later hearing addressing this claim, the board overturned its decision that the injury was compensable.[1633] Groom appealed, arguing that the board failed to give adequate notice that the finding of injury might be modified in the later hearing, and that the state failed to rebut the presumption of compensability.[1634] The court held that notice to Groom was defective since (1) the board failed to identify the injury's compensability as an issue for the later hearing, (2) the board never clarified whether subsequent workers' compensation claims were distinct from the original slip-and-fall claim, and (3) the state affirmatively represented that it would not argue the issue.[1635] This defective notice violated due process since Groom showed that he did not prepare specific evidence because he was unaware that the slip-and-fall was at issue.[1636] The court further held that the board should have considered whether the state presented sufficient evidence that Groom suffered no compensable, work-related partial disability in order to determine whether the state had overcome the presumption of compensability.[1637] Since the board only considered whether the state had presented evidence to refute the existence of a permanent total disability, and since the state did not present evidence that Groom's accident was not work-related, the state did not rebut the presumption.[1638] The supreme court reversed the decision of the superior court, holding that the board violated due process when it failed to give adequate notice that it would reconsider a prior factual finding and that it applied the incorrect legal standard in determining whether the state had rebutted a presumption of compensability.[1639]

Olivit v. City and Borough of Juneau

In *Olivit v. City and Borough of Juneau*,[1640] the supreme court held that summary judgment dismissal was proper because the underlying newspaper story about Olivit did

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[1628] 169 P.3d 626 (Alaska 2007).
[1629] *Id.* at 640.
[1630] *Id.* at 628.
[1631] *Id.* at 629.
[1632] *Id.* at 630–31.
[1633] *Id.* at 633.
[1634] *Id.*
[1635] *Id.* at 635–36.
[1636] *Id.* at 636.
[1637] *Id.* at 638.
[1638] *Id.* at 638–39.
[1639] *Id*. at 640.
[1640] 171 P.3d 1137 (Alaska 2007).

not amount to defamation.[1641] In 2004, the Juneau Empire published an article with a headline stating, "City faces fifth lawsuit by man who claims harassment" in response to a lawsuit by Olivit against the city for harassment.[1642] Six months later Olivit sued the newspaper, the reporter, and Juneau claiming that the defendants were retaliating against him by publishing the story.[1643] The court found insufficient evidence of defamation because Olivit's repeated lawsuits adversely affected the city, Olivit's criminal charges and guilty pleas were matters of public interest, and none of the allegedly false information, even if false, was sufficient to establish defamation in any case.[1644] The supreme court affirmed the superior court's grant of summary judgment dismissal, holding that the underlying newspaper story about Olivit did not amount to defamation.[1645]

Parnell v. Peak Oilfield Service Co.

In *Parnell v. Peak Oilfield Service Co.*,[1646] the supreme court held that when multiple persons together create a hazard, each actor's conduct substantially contributed to the hazard, and each actor realized the resulting danger of serious harm to others, then each person involved has created a hazard.[1647] Early one morning, one of Peak Oilfield's employees struck a moose at almost the exact same time that an unknown driver struck the same moose.[1648] The employee continued on his way, and the moose's carcass remained lying in the road.[1649] Shortly after the collision, a car in which Parnell was the passenger struck the moose and flipped over, resulting in serious injuries to Parnell.[1650] The jury was confused about duty and breach, but the trial court refused to grant Parnell's request for an instruction to clarify that more than one person could have created the hazard.[1651] The jury then found for Peak Oilfield.[1652] The supreme court reversed the trial court's decision and held that the trial court should have given Parnell's proffered instruction.[1653] The court noted that but-for causation is not a strict prerequisite to imposing a duty.[1654] Thus, the supreme court reversed and remanded, holding that when multiple persons together create a hazard, each actor's conduct substantially contributed to the hazard, and each actor realized the resulting danger of serious harm to others, then each person involved has created a hazard.[1655]

[1641] *Id.* at 1141.
[1642] *Id.* at 1140.
[1643] *Id.* at 1140–41.
[1644] *Id*. at 1144–46.
[1645] *Id.* at 1141.
[1646] 174 P.3d 757 (Alaska 2007).
[1647] *Id.* at 759.
[1648] *Id.*
[1649] *Id.*
[1650] *Id.* at 760.
[1651] *Id.* at 761.
[1652] *Id.* at 760–61.
[1653] *Id.* at 765.
[1654] *Id.*
[1655] *Id.* at 769–70.

Petrolane Inc. v. Robles

In *Petrolane Inc. v. Robles*,[1656] the supreme court held that (1) the proportionate share rule applies to offsetting damage amounts owed by non-settling defendants; (2) failure to make an offer of proof does not amount to waiver of legal arguments; and (3) when a prior jury has determined that two defendants are liable, the jury in the adjudication of a third defendant's liability may properly be instructed to assume the first two defendants are liable for at least a portion of the damages when assigning comparative liability among the three.[1657] Robles, the operator of a gas station, and a customer were injured when a propane tank Robles was filling for the customer exploded.[1658] The customer brought suit against Robles; Shoreside, the propane supplier; and Petrolane, the wholesaler.[1659] Shoreside and Petrolane settled with the customer prior to the first trial, at which Petrolane and Robles were found liable for the customer's damages.[1660] Robles, who was also injured, brought suit against Shoreside and Petrolane, and Petrolane was found liable for Robles's damages.[1661] The amount of the settlement exceeded the total damages awarded to the customer.[1662] A second trial was held to determine the liability of Shoreside, at which the jury found only Robles and Petrolane liable for the customer's damages, and the court determined that because the settlement amount was greater than the customer's total award, Robles owed nothing to the customer.[1663] On appeal, Petrolane argued that (1) Robles was only entitled to an offset proportional to Petrolane's share of the damages, and (2) a jury instruction in the second trial, asserting that Petrolane and Robles were liable, was prejudicial.[1664] In responding to the first argument, Robles argued that Petrolane waived its right to make this argument for failing to make an offer of proof.[1665] The supreme court held: (1) pursuant to the proportionate share rule, non-settling defendants may only offset what they owe an injured party by the proportionate share owed by the settling defendant(s); (2) while offers of proof are required to challenge rulings on the admission of evidence, they are not required to preserve legal arguments on appeal; and, (3) because the liability of Robles and Petrolane had been established by a jury and affirmed by the supreme court, and the second jury had been instructed not to infer anything from pre-established liability of two of the defendants, Petrolane had not been prejudiced by the jury instruction.[1666] The supreme court affirmed in part reversed in part and remanded the case on the issue of offset, holding that (1) the proportionate share rule applies to offsetting damage amounts owed by non-settling defendants; (2) failure to make an offer of proof does not amount to waiver of legal arguments; and (3) when a prior jury has determined that two defendants are liable, the jury in the adjudication of a third defendant's liability

[1656] 154 P.3d 1014 (Alaska 2007).
[1657] *Id.* at 1024–28.
[1658] *Id.* at 1017.
[1659] *Id.*
[1660] *Id.*
[1661] *Id.*
[1662] *Id.*
[1663] *Id.* at 1017–18.
[1664] *Id.* at 1018, 1025.
[1665] *Id.* at 1024.
[1666] *Id.* at 1019–21, 1025–27

may properly be instructed to assume the first two defendants are liable for at least a portion of the damages when assigning comparative liability among the three.[1667]

Prentzel v. State, Department of Public Safety

In *Prentzel v. State, Department of Public Safety*,[1668] the supreme court held that (1) arresting and supervising officers are entitled to qualified immunity to state tort and federal section 1983 claims,[1669] (2) the superior court properly denied leave to amend on the eve of trial and other motions,[1670] and (3) a court may only grant either Rule 68 or Rule 82 fees.[1671] Prentzel was arrested for allegedly violating the conditions of his release on a DWI charge.[1672] However, Prentzel was not subject to those conditions because he had earlier pleaded no contest to the charges, a change that was not yet recognized by the state's records.[1673] Prentzel then filed suit against the State, alleging false arrest/imprisonment, trespass to chattels, conversion, negligence, and section 1983 civil rights violations.[1674] The supreme court began by holding that the arresting officers were entitled to qualified immunity to the false imprisonment claim because arrest is within their authority and the arrest here, though wrong, lacked malice.[1675] The officers were also entitled to qualified immunity to the section 1983 claim because they had reasonable grounds to believe that Prentzel was engaged in unlawful conduct that was punishable by arrest.[1676] Next, the court held that the supervising officers were also entitled to qualified immunity to the section 1983 claims because no evidence was presented of their personal involvement in the arrest, and that they were entitled to qualified immunity for the state negligence claims because no evidence was presented that there was a systemic problem with delayed record-keeping resulting in wrongful arrests.[1677] The court then upheld the superior court's decision to disallow Prentzel any more amendments or motions because no injustice appeared to have been committed, and Prentzel was given notice of all deadlines.[1678] The court, though, vacated the decision to award post-offer judgment of attorneys' fees to the State because the court incorrectly awarded both Rule 68 and Rule 82 fees when it should have only awarded the greater fee.[1679] The supreme court affirmed the decision of the superior court regarding everything but attorneys' fees, holding that (1) the arresting and supervising officers were entitled to qualified immunity to state tort and federal section 1983 civil rights claims,[1680] (2) the superior court properly denied

[1667] *Id.* at 1020–21, 1025, 1028.
[1668] 169 P.3d 573 (Alaska 2007).
[1669] *Id.* at 585–86, 588–90.
[1670] *Id.* at 591–94.
[1671] *Id.* at 594–95.
[1672] *Id.* at 578.
[1673] *Id.*
[1674] *Id.*
[1675] *Id.* at 585–86.
[1676] *Id.* at 588.
[1677] *Id.* at 589, 590.
[1678] *Id.* at 591–94.
[1679] *Id.* at 594–95.
[1680] *Id.* at 585–86, 588–90.

leave to amend on the eve of trial and other motions,[1681] and (3) a court may only grant either Rule 68 or Rule 82 fees.[1682]

Winschel v. Brown

In *Winschel v. Brown*,[1683] the supreme court held that where there is sufficient evidence to raise issues of material fact regarding duty and injury, granting summary judgment is improper.[1684] Winschel injured his head after he collided with a pole that Brown struck down earlier that day when Brown lost control of his vehicle.[1685] The superior court granted summary judgment to Brown on the grounds that Brown owed no duty to Winschel, that Winschel's conduct was a superseding cause for the accident, and that Winschel could not recover because it would be against public policy, as he was illegally using a motorized vehicle on a bike path.[1686] Winschel appealed, and the supreme court held that Winschel was reasonable in asserting that Brown had a duty to use reasonable care when driving,[1687] that the superior court applied a standard that was too narrow to assess foreseeability,[1688] that the involvement of the police and the Alaska Department of Transportation did not sever a causal connection between Brown and Winschel's injury,[1689] and that Winschel's conduct did not per se bar him from recovery.[1690] The supreme court reversed the superior court, holding that where there is sufficient evidence to raise issues of material fact regarding duty and injury, granting summary judgment is improper.[1691]

[1681] *Id.* at 591–94.
[1682] *Id.* at 594–95.
[1683] 171 P.3d 142 (Alaska 2007).
[1684] *Id.* at 144.
[1685] *Id.* at 145.
[1686] *Id.*
[1687] *Id.* at 146–47.
[1688] *Id.* at 147.
[1689] *Id.* at 149.
[1690] *Id.* at 150–51.
[1691] *Id.* at 144.