THE YEAR IN REVIEW 2009

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

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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Disability Law Center of Alaska v. Anchorage School District

In *Disability Law Center of Alaska v. Anchorage School District*,[1] the Ninth Circuit held that the removal of an employee allegedly responsible for abuse does not defeat probable cause that the abuse occurred under the Development Disabilities Act ("DDA").[2] Following six separate complaints of mistreatment of disabled students, the Disability Law Center of Alaska requested information regarding the students.[3] The district provided most of the information but refused to provide guardian contact information for the students.[4] The district court held that the Law Center had no probable cause of continuing neglect because the alleged offenders were no longer employed by the school, and dismissed the case.[5] The Ninth Circuit reversed this decision, reasoning that because the DDA contemplates abuse that has occurred and that which may occur, the removal of the alleged offender from the school did not defeat the Law Center's showing of probable cause.[6] Further, it held that the Federal Educational Rights and Privacy Act did not prevent the disclosure of guardian contact information under the DDA.[7] The Ninth Circuit reversed the district court decision holding that the removal of an employee allegedly responsible for abuse does not defeat probable cause that the abuse occurred under the DDA.[8]

Alaska Supreme Court

Alaska Exchange Carriers Ass'n, Inc. v. Regulatory Commission of Alaska

In *Alaska Exchange Carriers Ass'n, Inc. v. Regulatory Commission of Alaska*,[9] the supreme court held that the Alaska Exchange Carriers Association ("AECA") had no statutory right to intervene in a regulatory proceeding and that the Regulatory Commission did not abuse its discretion in denying permissive intervention to the AECA.[10] After a local telephone company proposed moving its first point of switching for routing telephone traffic, AECA, an association of local telephone companies, sought to intervene in the ensuing regulatory proceeding.[11] The Regulatory Commission denied intervention and the superior court affirmed.[12] AECA appealed to the supreme court, arguing that it had an implied statutory right to intervene and a right to permissive intervention under 3 Alaska Adminstrative Code 48.110(a).[13] The court reasoned that AECA had no implicit statutory right to intervene because of its narrow administrative role.[14] Further, AECA failed to carry its burden in satisfying three of the permissive intervention factors under the statute.[15] The Regulatory Commission's findings with regard to these factors was subject to an abuse of discretion standard and the court was not persuaded to overturn the agency's findings that: (1) AECA's interest in the proceeding was insufficient, (2) AECA's institutional knowledge would not assist the proceeding, and (3) AECA's intervention may delay the proceeding.[16] Affirming the lower court's denial of

[1] 581 F.3d 936 (9th Cir. 2009).
[2] *Id.* at 939.
[3] *Id.* at 938.
[4] *Id.*
[5] *Id.*
[6] *Id.* at 939.
[7] *Id.* at 940.
[8] *Id.* at 939.
[9] 202 P.3d 458 (Alaska 2009).
[10] *Id.* at 459.
[11] *Id.*
[12] *Id.* at 460.
[13] *Id.* at 461.
[14] *Id.* at 463–64.
[15] *Id.* at 465.
[16] *Id.*

intervention, the supreme court held that AECA had no statutory right to intervene and the Regulatory Commission did not abuse its discretion in denying permissive intervention to the AECA.[17]

Alaska Public Offices Commission v. Stevens

In *Alaska Public Offices Commission v. Stevens*,[18] the supreme court held that the Alaska Public Offices Commission ("APOC") could not impose a civil penalty on a legislator for failure to report because the reporting requirements for the Legislative Financial Disclosure Statement ("LFD") were ambiguous.[19] Alaska State Senator Stevens was elected to serve on the board of directors for SEMCO Energy, Inc.[20] Stevens' contract provided that his compensation would be paid after his term expired in 2007 so that payment of his federal income tax could be deferred.[21] As a legislator, Stevens was required to report sources of income over $5000 on a LFD.[22] On his LFD for 2005, Stevens failed to disclose the deferred income.[23] APOC ordered a fine of $630 for this failure to report,[24] and Stevens sought judicial review.[25] The court reversed the order, and APOC appealed to the supreme court.[26] While concluding that APOC's interpretation of reporting requirements was not necessarily incorrect, the supreme court noted that APOC's LFD instruction manual did not discuss deferred compensation but spoke only in terms of income received.[27] Accordingly, the court determined that it was reasonable for Stevens to believe that he did not need to report money that he did not yet have in hand.[28] The court also reasoned that the 2007 amendments to the reporting-requirement statutes that specifically addressed deferred compensation demonstrated that the previous requirements were ambiguous.[29] Affirming the superior court's reversal of the APOC fine, the supreme court held that the APOC could not impose a civil penalty on a legislator for failure to report because the reporting requirements for the LFD were ambiguous.[30]

Allen v. State

In *Allen v. State*,[31] the supreme court held that the Department of Health and Social Services ("HSS") was entitled to reduce an individual's future monthly food stamp allotments in order to recoup overpaid benefits even when HSS's errors caused the overpayments.[32] Allen received an excess of food stamps for several months due to an error at the HSS.[33] When HSS discovered its error, it gave written notice to Allen that her future monthly food stamps would be reduced to make up for the overpayments.[34] Allen argued that the doctrine of equitable estoppel should prevent the HSS from reducing her food stamps because she reasonably relied on the assertion that she was entitled to the benefits.[35] HSS argued that the federal Food Stamp Act preempted equitable estoppel because it states that households are liable for overpayments.[36] Additionally, Allen claimed that HSS's notice to her was inadequate because it failed to provide three pieces of information that were required by statute.[37] On appeal, the supreme court affirmed the issue of equitable estoppel but reversed the finding of adequate notice.[38] The court reasoned that it

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[17] *Id.* at 459.
[18] 205 P.3d 321 (Alaska 2009).
[19] *Id.* at 322.
[20] *Id.*
[21] *Id.*
[22] *Id.* at 323 n.1.
[23] *Id.* at 322.
[24] *Id.* at 323.
[25] *Id.* at 324.
[26] *Id.*
[27] *Id.* at 325.
[28] *Id.*
[29] *Id.*
[30] *Id.* at 326.
[31] 203 P.3d 1155 (Alaska 2009).
[32] *Id.* at 1158.
[33] *Id.*
[34] *Id.*
[35] *Id.* at 1160.
[36] *Id.* at 1162.
[37] *Id.* at 1166.
[38] *Id.* at 1158.

could not find for Allen on the equitable estoppel issue without being in direct conflict with federal law.[39] However, the court held that HSS did not provide adequate notice since it did not comply with statutory requirements and this error violated Allen's due process right to notice.[40] Affirming in part and reversing in part the decision of the lower court, the supreme court held that HSS is entitled to reduce an individual's future monthly food stamp allotments in order to recoup overpaid benefits even when HSS's errors caused the overpayments.[41]

Bohlman v. Alaska Construction & Engineering, Inc.

In *Bohlman v. Alaska Construction & Engineering, Inc.*,[42] the supreme court held that the Alaska Workers' Compensation Board should have either corrected misinformation given by the employer or told the employee how to obtain the correct information.[43] Bohlman filed a claim for adjustment of his compensation and his employer, filed a notice controverting the claim on August 6, 2003.[44] Bohlman was told that he needed to file an affidavit of readiness for hearing within two years of his claim being controverted.[45] On July 20, 2005, Bohlman tried to amend his claim, but Alaska Construction & Engineering argued that the claims were barred and the deadline for amending the claim had passed.[46] The board did not inform Bohlman that the deadline was not until August 6, 2005.[47] Bohlman filed on August 31, 2005, and the claim was denied because it was submitted past the deadline.[48] The supreme court held that the board should have either corrected the claim that the deadline had already passed, or told Bolhman how to figure out the correct deadline.[49] The court reasoned that the board has this responsibility since it is an adjudicative body and this requirement is similar to the duty that a court owes to a pro se party.[50] The supreme court reversed the decision of the appeals commission, holding that the Alaska Workers' Compensation Board should have either corrected misinformation given by the employer or told the employee how to obtain the correct information.[51]

Boyd v. State

In *Boyd v. State*,[52] the court of appeals held that a road grader operating on the state highway system is a vehicle subject to permitting regulations.[53] Boyd was cited for operating an oversized vehicle without a permit.[54] On appeal, Boyd argued that the road grader he was driving was special mobile equipment rather than a commercial vehicle, and that the regulations applied only to commercial vehicles.[55] The court of appeals determined that the Department of Transportation and Public Facilities had broad authority to regulate vehicle operations on state highways.[56] Based on the plain language of the regulations, the court further determined that a road grader qualifies as a vehicle, and that the permitting regulations apply to all vehicles rather than the subset of commercial vehicles.[57] The court also noted that if the regulations applied only to commercial vehicles, a large number of vehicles would be left unregulated, defeating the point of the regulations.[58] Accordingly, the court of appeals affirmed the judgment of the district court and held that a road grader is a vehicle subject to permitting regulations.[59]

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[39] *Id.* at 1164.
[40] *Id.* at 1167.
[41] *Id.* at 1158.
[42] 205 P.3d 316 (Alaska 2009).
[43] *Id.* at 320.
[44] *Id.* at 317.
[45] *Id.*
[46] *Id.*
[47] *Id.*
[48] *Id.* at 317–18.
[49] *Id.* at 320.
[50] *Id.*
[51] *Id.* at 321.
[52] 210 P.3d 1229 (Alaska Ct. App. 2009).
[53] *Id.* at 1230.
[54] *Id.*
[55] *Id.* at 1231.
[56] *Id.*
[57] *Id.* at 1231–32.
[58] *Id.* at 1232.
[59] *Id.* at 1232–33.

Button v. Haines Borough

In *Button v. Haines Borough*,[60] the supreme court held that a borough manager was justified in denying an application for renewal of a commercial tour operator's license when the operator had been twice convicted of offenses stemming from his tours and had been the subject of several complaints from customers and competitors.[61] The plaintiff, Button, had been operating tours in Haines for five years when he submitted his annual application to renew his tour operator permit.[62] The reviewing clerk rejected his application because: (1) he had been recently convicted of two misdemeanors related to his business, (2) several complaints had been filed about his unsafe use of his catamaran, (3) he had pressured other boat captains for favors, and (4) he had impeded waterway traffic in using his boat.[63] The supreme court held that the admission of the prior convictions was not inadmissible hearsay because administrative officers are not bound by the Alaska Rules of Evidence and are instead required to consider only factual circumstances.[64] Button did not deny that he had in fact been convicted of the crimes.[65] While some of the other factual findings of the administrator were not supported by substantial evidence, the court reasoned that a statute allowing for the non-renewal of permits for violations of "applicable law" was broad enough to encompass non-renewal for violations that occurred outside of Haines Borough.[66] The court then held that the administrative process was procedurally sound and did not deny him due process, and that although the borough manager had advance knowledge of Button's convictions, there was no evidence that his having this knowledge biased the hearing.[67] The court further held that because of the great value that the state places on public safety, denying the permit removal of a tour boat operator who frequently violated safety rules was not an overly severe sanction.[68] Hence, the supreme court held that a borough manager was justified in denying an application for renewal of a commercial tour operator's license when the operator had twice been convicted of offenses stemming from his tours and been the subject of several complaints from customers and competitors.[69]

Copeland v. Ballard

In *Copeland v. Ballard*,[70] the supreme court held that a governmental agency may not dismiss litigants for failure to meet the deadline for payment of record costs in advance of the trial when the agency failed to provide clear and accurate explanations of the costs, the delay did not prejudice the agency, and the agency failed to explore alternatives to dismissal.[71] Copeland and Ott moved to intervene in an administrative action filed with the Department of Environment Conservation ("DEC").[72] The parties negotiated the preparation and certification of the administrative record which culminated in an order in January 2004 that Copeland and Ott must pay two-thirds of the record costs by February 13, 2004, or face dismissal.[73] Both Copeland and Ott were dismissed on March 2, 2004, for non-payment. They promptly requested reconsideration of dismissal and submitted a check for their two-thirds portion, but their check was returned and their dismissal approved.[74] Copeland and Ott appealed to the superior court and argued that their due process rights had been violated, but the superior court affirmed the dismissal.[75] On appeal, the supreme court reversed in part the superior court's decision and held that Title 18, Section 15.237(b) of the Alaska Administrative Code violated the due process clause of the Alaska Constitution because it restricted access to the record prior to certification, and DEC had failed to show a valid governmental interest for the restriction.[76] Although the statute did not violate the due process clause on its face, the court held that DEC nonetheless erred in

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[60] 208 P.3d 194 (Alaska 2009).
[61] *Id.* at 199.
[62] *Id.*
[63] *Id.* at 199–200.
[64] *Id.* at 201.
[65] *Id.*
[66] *Id.* at 204–05.
[67] *Id.* at 208–09.
[68] *Id.* at 209.
[69] *Id.* at 199.
[70] 210 P.3d 1197 (Alaska 2009).
[71] *Id*. at 1205.
[72] *Id*. at 1200.
[73] *Id*.
[74] *Id*. at 1201.
[75] *Id*.
[76] *Id*. at 1204.

its failure to explain how it applied the pro rata cost-sharing method to the three consolidated appeals.[77] Finally, the court held that the agency abused its discretion in dismissing Copeland and Ott because it failed to explore alternatives to dismissal and could easily have reinstated them after their payment was received.[78] The supreme court affirmed in part and reversed in part the decision of the lower court by holding that a governmental agency may not dismiss litigants for failure to meet a deadline for payment of record costs in advance of the trial when the agency failed to provide clear and accurate explanations of the costs, the delay does not prejudice the agency, and the agency failed to explore alternatives to dismissal.[79]

Kuzmin v. Commercial Fisheries Entry Commission

In *Kuzmin v. Commercial Fisheries Entry Commission*,[80] the supreme court held that the Commercial Fisheries Entry Commission ("CFEC") did not abuse its discretion in denying a person's limited entry crab permit application when the person did not demonstrate that he was in joint control of his fishing operation.[81] Kuzmin, a crab fisher, applied for an entry permit to the Kodiak bairdi Tanner crab pot fishery, claiming that he qualified because he had nineteen points for consistent participation based on the pounds of crab that he had harvested in past years.[82] The CFEC denied his application, reasoning that Kuzmin had not shown by a preponderance of the evidence that he was in joint control of the fishing operation; thus, he had not earned the partnership participation points that he had claimed and had instead acquired only thirteen points.[83] Kuzmin appealed, claiming that the CFEC's decision was arbitrary, capricious, an abuse of discretion, and not supported by evidence.[84] The superior court found for the CFEC because substantial evidence supported the conclusion that Kuzmin was participating in the crab fishing as a crewmember and not a partner.[85] On appeal, the supreme court found that Kuzmin failed to show by substantial evidence that he was in joint control of the operation because neither Kuzmin nor the owner of the fishing boat testified that Kuzmin was in joint control of the operation, the owner referred to Kuzmin as a deckhand, and Kuzmin did not do the majority of the work on board.[86] The court further found that the trial court did not err in using joint control as the standard for determining partnership status.[87] Affirming the decision of the lower court, the supreme court held that the CFEC did not abuse its discretion in denying a person's limited entry crab permit application when the person did not demonstrate that he was in joint control of his fishing operation.[88]

Municipality of Anchorage v. Regulatory Commission of Alaska

In *Municipality of Anchorage v. Regulatory Commission of Alaska*,[89] the supreme court held that a regulatory commission must have a reasonable basis for denying a municipality's request to increase rates.[90] In response to a new ordinance, the Municipality attempted to raise rates to erase a deficit.[91] The Regulatory Commission of Alaska ("RCA") denied the request to increase rates and the superior court affirmed the denial.[92] Reversing the superior court's decision, the supreme court held that there was no reasonable basis for RCA's ruling.[93] The court, applying a deferential reasonable basis standard to RCA's conclusions of law, found that RCA unreasonably believed itself to be bound by precedent, failed to consider applicable law, and denied the request

[77] *Id*. at 1205.
[78] *Id*. at 1206.
[79] *Id*. at 1205.
[80] 223 P.3d 86 (Alaska 2009).
[81] *Id.* at 87.
[82] *Id.* at 87–88.
[83] *Id.* at 88.
[84] *Id.* at 89.
[85] *Id.* at 88.
[86] *Id.* at 90.
[87] *Id.* at 93.
[88] *Id.* at 87.
[89] 215 P.3d 327 (Alaska 2009).
[90] *Id*. at 332.
[91] *Id*. at 329.
[92] *Id*. at 329–30.
[93] *Id*. at 328.

without sufficient factual findings.[94] Reversing the decision of the lower court, the supreme court held that a regulatory commission must have a reasonable basis for denying a municipality's request to increase rates.[95]

Rubey v. Alaska Commission on Postsecondary Education

In *Rubey v. Alaska Commission on Postsecondary Education*,[96] the supreme court held that a student loan borrower did not have a statutory or regulatory right to medical cancellation of student loans, and the Alaska Commission on Postsecondary Education ("ACPE") has a discretionary right to eliminate eligibility for medical cancellation of student loans.[97] ACPE denied Rubey's request, based on a permanent disability, for cancellation of loans.[98] Rubey appealed, arguing that he had an implied statutory right to medical cancellation, that applicable regulations provided a right to cancellation, and that ACPE's exclusion of medical cancellation provisions in promissory notes was outside the scope of its authority.[99] The supreme court reasoned that no implied statutory right exists because such cancellation rights are explicitly given in other contexts.[100] Further, no regulation governed because there was no term in the promissory note granting a cancellation right.[101] The ACPE did not act outside the scope of its authority because it has broad discretion to exercise business judgment and no statutory directive existed providing for medical cancellations.[102] The supreme court thus affirmed the superior court, and held that a student loan borrower did not have a statutory or regulatory right to medical cancellation of student loans and the ACPE has a discretionary right to eliminate eligibility for medical cancellation of student loans.[103]

Squires v. Alaska Board of Architects, Engineers, & Land Surveyors

In *Squires v. Alaska Board of Architects, Engineers, & Land Surveyors*,[104] the supreme court held that an agency may impose experience verification requirements when determining an applicant's eligibility for a waiver of a required examination to become an engineer.[105] Squires, who had never been a registered engineer in any jurisdiction, applied for a fundamental exam waiver in December 2003.[106] The Board denied his waiver application, reasoning that he was unable to demonstrate the requisite twenty years of professional experience.[107] Squires appealed to the superior court, which upheld the Board's decision.[108] On appeal, Squires argued that the experience verification requirements were invalid because they violated the Administrator Procedure Act ("APA").[109] He also argued that imposing the experience verification requirements denied him due process and equal protection under the law.[110] The supreme court affirmed the superior court decision, reasoning that the agency's experience verification requirement was not a regulation and so did not have to be promulgated in accordance with the APA.[111] This was because it: (1) was not unforeseeable, (2) was in effect for at least six years before Squires' waiver application, and (3) was a reasonable interpretation of the phrase "satisfactory evidence" found in the statute.[112] The court held that the significant interest of the Board and the government in ensuring that all registered engineers are duly qualified was not outweighed by Squires' due process claims.[113] Finally, the court denied the equal protection claim because Squires was not similarly situated to licensed Canadian engineers seeking registration by comity,

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[94] *Id*. at 332.
[95] *Id*.
[96] 217 P.3d 413 (Alaska 2009).
[97] *Id.* at 418.
[98] *Id.* at 414.
[99] *Id.* at 415–16.
[100] *Id.* at 416.
[101] *Id.* at 417.
[102] *Id.* at 417–18.
[103] *Id.* at 418.
[104] 205 P.3d 326 (Alaska 2009).
[105] *Id.* at 330.
[106] *Id.* at 331.
[107] *Id.*
[108] *Id.* at 332.
[109] *Id.*
[110] *Id.*
[111] *Id.* at 335.
[112] *Id.*
[113] *Id.* at 338–39.

since they had already been registered for at least five years in their own country.[114] Therefore, the supreme court affirmed the decision of the court of appeals that an agency may impose experience verification requirements when determining an applicant's eligibility for a waiver of a required examination to become an engineer.[115]

BUSINESS LAW

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Alaska Supreme Court

Askinuk Corp. v. Lower Yukon School District

In *Askinuk Corp. v. Lower Yukon School District*,[116] the supreme court held that a lease providing land to a school district for one dollar per year was valid and enforceable.[117] Askinuk Corp. leased twenty acres to the Lower Yukon School District to build a school at the rate of one dollar per year for the first ten years.[118] This rate would remain in effect after ten years if the parties were unable to reach mutual agreement on a different rate.[119] Roughly fifteen months later, Askinuk sued for the lease to be invalidated or reformed.[120] The superior court granted summary judgment to the school district, and Askinuk appealed.[121] On appeal, the supreme court determined that the Askinuk chairman's signature did in fact bind the corporation because it held the chairman out as having "apparent authority" to do so and because it was reasonable for the school district to believe that the chairman had the authority to bind Askinuk.[122] The court next found that Askinuk's failure to follow its own internal requirements and present the lease to its shareholders for their assent could not serve as the basis for avoiding a contract with a third party.[123] The court then held that the implied construction of a school was sufficient to provide the bargained-for consideration in leasing the land and that the renegotiation provision was not illusory because it was made in good faith.[124] The court then went on to reason that the lease was not unconscionable because bargaining power was equal and because the terms were not coerced or supremely one-sided.[125] Finally, the court reasoned that the lease should not be reformed on grounds of mistake when Askinuk had not shown that the school district knew that the corporation's shareholders were mistaken about the terms of the lease.[126] Therefore, the supreme court affirmed the superior court's decision and held that a lease which provided land to a school district for one dollar per year was both valid and enforceable.[127]

Egner v. Talbot's, Inc.

In *Egner v. Talbots, Inc.*,[128] the supreme court held that when an alleged shareholder was told she had no claim to a corporation's stock, she was put on inquiry notice that her status as a shareholder was disputed, triggering the statute of limitations.[129] Egner alleged that she owned shares in Talbot's, Inc., but the corporation claimed Egner never owned stock.[130] Egner admitted that by 1986 she knew that two others were claiming sole ownership of the

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[114] *Id.* at 339.
[115] *Id.* at 342.
[116] 214 P.3d 259 (Alaska 2009).
[117] *Id.* at 261.
[118] *Id.* at 262.
[119] *Id.* at 262–63.
[120] Id. at 263.
[121] *Id.* at 264.
[122] *Id.* at 264–65.
[123] *Id.* at 265–67.
[124] *Id.* at 267–68.
[125] *Id.* at 268–69.
[126] *Id.* at 270–71.
[127] *Id.* at 271.
[128] 214 P.3d 272 (Alaska 2009).
[129] *Id.* at 281.
[130] *Id.* at 274.

company and had excluded Egner from the business.[131] The statute of limitations for contract causes of action was six years.[132] Egner initiated suit in 2006.[133] Under the discovery rule, a cause of action begins when a person has enough information to alert them to begin an inquiry into her rights for a potential cause of action.[134] Because Egner was on inquiry notice by 1986, Talbot's was entitled to judgment as a matter of law because of the statute of limitations.[135] Furthermore, denial of an alleged shareholder's claim to stock ownership establishes a permanent violation, which prohibits the shareholder from recovering on the continuing violations doctrine.[136] Affirming the decision of the lower court, the supreme court held that when an alleged shareholder was told she had no claim to a corporation's stock, she was put on inquiry notice that her status as a shareholder was disputed, triggering the statute of limitations for her claim.[137]

Frost v. Spencer

In *Frost v. Spencer*,[138] the supreme court held that due process was violated when a trial court decided it would apply domestic relations law rather than partnership law—as agreed by the parties—to a dissolution of a business's assets.[139] After a business relationship failed between Spencer and Frost, who were sporadically romantically involved, Spencer sued for division of partnership property under the law of domestic relations.[140] After trial, the court decided that it would use partnership law instead of domestic relations law and split the assets equally.[141] Frost appealed, arguing that deciding the case based on partnership law despite the expectation that it would be decided on domestic relations law was a violation of her due process rights.[142] The supreme court decided the case on abuse of discretion rather than due process grounds because of a preference for constitutional avoidance.[143] Since procedural fairness required sufficient notice and an opportunity to present appropriate evidence, it violated due process for the court to unexpectedly change the legal framework from that which was agreed upon.[144] Because different facts would be relevant in the termination of a partnership rather than a domestic relationship, Frost should have been given an opportunity to make an appropriate evidentiary presentation.[145] In vacating the ruling of the trial court,[146] the supreme court held that due process was violated when a trial court decided it would apply domestic relations law rather than partnership law—as agreed by the parties—to a dissolution of a business's assets.[147]

Kazan v. Dough Boys, Inc.

In *Kazan v. Dough Boys, Inc.*,[148] the supreme court held that it was an error to rescind a settlement agreement with respect to one party and not the other.[149] Kazan had a lien on the property of Dough Boys, Inc.[150] When Dough Boys tried to sell the property to Sagaya Corporation, the lien inhibited closing.[151] The sale agreement thus provided that Sagaya would pay Kazan $60,000 in return for certain releases of claims by Kazan.[152] At trial in

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[131] *Id.* at 278.
[132] *Id.*
[133] *Id.*
[134] *Id.*
[135] *Id.* at 279.
[136] *Id.* at 283.
[137] *Id.* at 281.
[138] 218 P.3d 678 (Alaska 2009).
[139] *Id.* at 681–83.
[140] *Id.* at 679–80.
[141] *Id.* at 681.
[142] *Id.* at 681–82.
[143] *Id.* at 682.
[144] *Id.* at 682–83.
[145] *Id.* at 683–84.
[146] *Id.* at 685.
[147] *Id.* at 681–83.
[148] 201 P.3d 508 (Alaska 2009).
[149] *Id*. at 510.
[150] *Id*. at 510–11.
[151] *Id*. at 511.
[152] *Id*.

2006, Dough Boys sought and received damages for the $60,000 paid to Kazan.[153] On appeal, the supreme court found that the trial court erred by only rescinding part of the settlement agreement.[154] A number of policy reasons support the enforcement of settlement agreements, and in absence of evidence that an agreement is unconscionable or has another basis for invalidation, settlement agreements will be upheld.[155] Reversing the decision of the lower court, the supreme court held that it was error to rescind a settlement agreement with respect to one party and not the other.[156]

Mat-Su Valley Medical Center, LLC v. Advanced Pain Centers of Alaska, Inc.

In *Mat-Su Valley Medical Center, LLC v. Advanced Pain Centers of Alaska, Inc.*,[157] the supreme court held that a health care provider had standing to enjoin the construction of a competitor's facility and that the provider's appeal of the State's certificate of need determination was not untimely.[158] Advanced Pain Centers of Alaska, Inc. applied to the State for a determination of whether a certificate of need ("CON") was necessary to construct an ambulatory surgery center.[159] Alaska law requires a CON if construction exceeds a certain threshold.[160] The State determined that no CON would be needed.[161] Mat-Su Valley Medical Center, LLC ("Mat-Su"), a competitor of Advanced Pain Centers, then sued Advanced Pain Centers and the State alleging Advanced Pain Centers misrepresented the construction.[162] The superior court granted summary judgment for Advanced Pain Centers and the State because Mat-Su lacked standing and failed to make a timely appeal of the State's decision to approve the CON.[163] On appeal, Mat-Su argued that it had standing because the CON statute ought to be interpreted as providing standing for the public to sue for violations of the statute itself—not only for violations of pre-existing CONs—and that the State's CON determination was invalid because Advanced Pain's estimate lacked the required supporting information.[164] The supreme court adopted Mat-Su's reading of the standing provision because it was more consistent with precedent, because it was more textually accurate, and because an interpretation in which only the State had standing to challenge its own failure to require a CON would create a hole in enforcement.[165] Next, the court observed that the thirty-day administrative appeal period begins to run only after the state agency has issued a decision that clearly asserts that it is a final decision and that affected parties have thirty days to challenge.[166] The court determined that here the State never provided that clear assertion, and therefore the thirty-day period never started to run.[167] The court thus reversed and remanded the case, holding that a health care provider had standing to enjoin the construction of a competitor's facility and that the provider's appeal of the State's certificate of need determination was not untimely.[168]

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[153] *Id*. at 512.
[154] *Id*. at 513.
[155] *Id*. at 515.
[156] *Id*. at 510.
[157] 218 P.3d 698 (Alaska 2009).
[158] *Id.* at 700.
[159] *Id.*
[160] *Id.*
[161] *Id.*
[162] *Id.*
[163] *Id*.
[164] *Id.* at 701, 707.
[165] *Id.* at 702–04.
[166] *Id.* at 706.
[167] *Id.* at 707.
[168] *Id.* at 708.

Ninth Circuit Court of Appeals

Exxon Valdez v. Exxon Mobil Corp.

In *Exxon Valdez v. Exxon Mobil Corp.*,[169] the Ninth Circuit held that, in the suit arising from the Exxon Valdez wreck: (1) the post-judgment interest award ran from the date of the original judgment,[170] and (2) each party had to bear its own appellate costs.[171] The case appeared before the Ninth Circuit on remand, following a Supreme Court decision that, under maritime law, set the maximum ratio of punitive to compensatory damages at one to one.[172] Issues related to interest and appellate costs were left to the discretion of the court of appeals.[173] The court held that interest is ordinarily computed from the date of an original judgment's initial entry when both the evidentiary and legal bases for an award are sound.[174] The court concluded that plaintiffs' entitlement to punitive damages was meaningfully ascertained on the date the original district court judgment was entered.[175] With respect to appellate costs, the court reasoned that neither side was a clear winner, because although the award was substantially reduced by ninety percent, it was still the fourth largest punitive damages award ever granted.[176] The court exercised its discretion by requiring each party to bear its own appellate costs, noting that it had consistently ordered the same outcome on appeals where punitive awards were upheld but reduced.[177] Remanding the case to the district court for entry of final judgment, the Ninth Circuit held that, in the suit arising from the Exxon Valdez wreck: (1) the post-judgment interest award ran from the date of the original judgment,[178] and (2) each party had to bear its own appellate costs.[179]

Alaska Supreme Court

Adkins v. Stansel

In *Adkins v. Stansel*,[180] the supreme court held that a prisoner who filed a pro se complaint alleging that a warden intentionally violated the prisoner's constitutional right to rehabilitation should be given the opportunity to proceed past the pleading stage.[181] Adkins, a prisoner in Arizona, felt that his constitutional right to rehabilitation had been violated because the warden refused to let his cousin visit him in prison.[182] The trial court granted the prison's motion to dismiss at the pleading stage.[183] On appeal, the supreme court held that it was error to dismiss Adkins's claim at the pleading stage, particularly because he was a pro se litigant who should be held to a lower standard than attorneys.[184] The court reasoned that since Adkins's complaint alleged that the denial of visitation was intentional and that it was part of a pattern of conduct, it was error for the superior court to conclude at the pleading stage that the denial of visitation was a mere mistake.[185] The court further reasoned that the superior court may reach the same conclusion upon a summary judgment motion after hearing evidence from the warden that proves he made

[169] 568 F.3d 1077 (9th Cir. 2009).
[170] *Id.* at 1080.
[171] *Id.* at 1081.
[172] *Id.* at 1079.
[173] *Id.*
[174] *Id.*
[175] *Id.*
[176] *Id.* at 1081.
[177] *Id.*
[178] *Id.* at 1080.
[179] *Id.* at 1082.
[180] 204 P.3d 1031 (Alaska 2009).
[181] *Id.* at 1036.
[182] *Id.* at 1032.
[183] *Id.* at 1033.
[184] *Id.* at 1035–36.
[185] *Id.* at 1036.

a mere mistake.[186] Reversing the decision of the lower court, the supreme court held that a prisoner who filed a pro se complaint alleging that a warden intentionally violated the prisoner's constitutional right to rehabilitation should be given the opportunity to proceed past the pleading stage.[187]

Alexander v. State, Department of Corrections

In *Alexander v. State, Department of Corrections*,[188] the supreme court held that a former federal prisoner was properly denied economic damages when the prisoner failed to provide a basis for such damages, but that the prisoner was entitled to prejudgment interest and reimbursement of litigation costs.[189] Alexander, a formal federal prisoner, filed seven requests with the Department of Corrections ("DOC") for medical attention.[190] After the requests, the DOC examined Alexander's hand, applied a splint, and ordered x-rays that later showed a fracture.[191] Alexander received no additional medical care, and he filed suit alleging that the State negligently failed to provide him with proper medical attention for his hand.[192] The district court granted a directed verdict for the State, disallowed Alexander's economic loss claims, and denied him reimbursement of prejudgment interest and litigation costs.[193] The supreme court held that the law does not permit a plaintiff to recover for losses that are purely speculative, and that the plaintiff bears the burden of providing some reasonable basis upon which the jury could determine the extent of a loss.[194] Because Alexander presented no evidence of his previous medical expenses or wages before the loss, the district court was correct in disallowing claims of economic loss.[195] In respect to the prejudgment interest claim, the court explained that prejudgment interest is only to be denied in order to prevent an injustice and remanded the issue of prejudgment interest.[196] The supreme court reasoned that the district court has a requirement to instruct pro se litigants how to proceed, and the district court's failure to do so was an abuse of discretion.[197] Affirming in part and remanding for a determination of interest and costs, the supreme court held that a former federal prisoner was properly denied economic damages when the prisoner failed to provide a basis for such damages, but that the prisoner was entitled to prejudgment interest and reimbursement of litigation costs.[198]

Beal v. Beal

In *Beal v. Beal*,[199] the supreme court held that when a case that has already been decided by the supreme court is appealed again, the "law of the case" doctrine controls so that no issues are reconsidered unless there are exceptional circumstances presenting clear error.[200] In 1999, Annette and David Beal divorced and the superior court made several judgments.[201] In 2004, the Beals both appealed numerous issues to the supreme court, who affirmed, reversed, and remanded various parts of the judgment (case hereinafter "*Beal I*").[202] The remanded issues returned to the superior court, which issued several findings of fact and final judgments.[203] The supreme court held that there was no error in any judgment which was consistent with *Beal I*.[204] Conversely, the superior court exceeded its authority on remand by using an appreciation value for David's pre-marital artwork because this issue was rejected in *Beal I*.[205] The superior court also exceeded its authority when it recalculated the interim support judgment because

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[186] *Id.*
[187] *Id.*
[188] 221 P.3d 321 (Alaska 2009).
[189] *Id.* at 323.
[190] *Id.*
[191] *Id*.
[192] *Id*.
[193] *Id.* at 324.
[194] *Id.*
[195] *Id.* at 325.
[196] *Id.* at 326.
[197] *Id.* at 326–27.
[198] *Id.* at 323.
[199] 209 P.3d 1012 (Alaska 2009).
[200] *Id.* at 1016–17.
[201] *Id.* at 1015.
[202] *Id.* at 1015–16.
[203] *Id.* at 1016.
[204] *Id.* at 1017–20.
[205] *Id.* at 1020.

the judgment was affirmed in *Beal I*.[206] Lastly, the superior court did not abuse its discretion by deducting David's post-separation mortgage payments from the interim support judgment or by awarding David further mortgage reduction credit because these issues had been remanded in *Beal I*.[207] All of these judgments were consistent with the rulings from *Beal I*.[208] Using the "law of the case" doctrine, the supreme court held that when a case that has already been decided by the supreme court is appealed again, no issues are reconsidered unless there are exceptional circumstances presenting clear error.[209]

Douglas v. Alaska

In *Douglas v. Alaska*,[210] the supreme court held that a trial court does not abuse its discretion by: (1) excluding a disruptive defendant from the courtroom,[211] (2) refusing to allow a defendant to reclaim the right to be present at trial to testify in person whenever he promises to behave,[212] or (3) requiring a disruptive defendant to testify via speakerphone.[213] The trail court excluded Douglas from the courtroom because he repeatedly and egregiously disrupted pretrial hearings from the first day of trial, though the court did allow Douglas to participate via speakerphone.[214] The trial court then denied his request to testify in person, finding that his promise to behave was not credible.[215] On appeal, he argued that the trial court was required to allow him to be present at trial after he stated he would behave appropriately.[216] The supreme court affirmed the lower court's decision, holding that the right to be present at trial was not absolute.[217] The court reasoned that Douglas's behavior was egregious enough to justify excluding him from trial.[218] The court further reasoned that a defendant reclaims the right to be present at trial by proving his willingness to behave appropriately and that past behavior, rather than a naked promise to behave, should be used to determine a defendant's credibility.[219] The court found that the trial court did not abuse its discretion in refusing to allow Douglas to return to the courtroom because Douglas had repeatedly demonstrated an unwillingness to behave while in the courtroom.[220] The supreme court also reasoned that the trial court did not abuse its discretion by requiring Douglas to testify via speakerphone because this option still protected his constitutional rights.[221] Affirming the decision of the lower court, the supreme court held that the trial court did not abuse its discretion by excluding a disruptive defendant from the courtroom,[222] by refusing to allow him to reclaim the right to be present at trial to testify in person merely because he promised to behave,[223] or by requiring him to testify via speakerphone.[224]

E.P. v. Alaska Psychiatric Institute

In *E.P. v. Alaska Psychiatric Institute*,[225] the supreme court held that when a mentally ill individual is considered a threat to himself or others, a court does not need to find that treatment will improve his condition before ordering involuntarily confinement.[226] E.P. suffered damage to the frontal lobe of his brain due to substance abuse, which damaged his judgment and insight abilities.[227] E.P. voluntarily committed himself at the Alaska

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[206] *Id.* at 1021.
[207] *Id.* at 1022–25.
[208] *See id.* at 1017.
[209] *Id.* at 1016–17.
[210] 214 P.3d 312 (Alaska 2009).
[211] *Id.* at 321.
[212] *Id.* at 323.
[213] *Id.* at 327–28.
[214] *Id.* at 314–17.
[215] *Id.* at 317–18.
[216] *Id.*
[217] *Id.* at 319.
[218] *Id.* at 320–21.
[219] *Id.* at 322–24.
[220] *Id.* at 324–25.
[221] *Id.* at 327–28.
[222] *Id.* at 321.
[223] *Id.* at 323.
[224] *Id.* at 327–28.
[225] 205 P.3d 1101 (Alaska 2009).
[226] *Id*. at 1102.
[227] *Id*. at 1103–04.

Psychiatric Institute in March 2007, continuing his voluntary stay until August 2007.[228] In August 2007, E.P. indicated his desire to leave and resume his drug abuse.[229] The superior court ordered him to be involuntarily committed because it found E.P. to be mentally ill from the brain damage and a danger to himself and others.[230] On appeal, the supreme court affirmed the decision, reasoning that while the statutory requirement that involuntary treatment of the gravely disabled is only allowed when treatment would improve the patient's condition, E.P. had not been confined based on grave disability, but instead on the grounds that he posed a danger to himself.[231] This was supported by his stated intent to resume drug use.[232] Affirming the lower court, the supreme court held that when a patient's mental illness is a threat to himself or others, the State need not demonstrate that treatment will improve a patient's condition before seeking involuntary confinement.[233]

Haeg v. Cole

In *Haeg v. Cole*,[234] the supreme court held that before an arbitrator can grant an award, the party must submit a claim for that award.[235] Haeg filed a fee arbitration proceeding, arguing that Cole, his lawyer, gave him defective services.[236] Haeg sought reimbursement for the fees that he had paid, though he had not paid Cole in full for the services.[237] Though Cole made no claim for the outstanding payments, the arbitration panel awarded him the fees.[238] The supreme court remanded the case to the superior court to delete the affirmative award for Cole.[239] The court reasoned that Cole did not present a claim for those fees, and the Revised Uniform Arbitration Act requires a court to correct an award on a claim that was not submitted.[240] The supreme court modified the arbitration, holding that before an arbitrator can grant an award, there must be a claim for that award.[241]

Hidden Heights Assisted Living, Inc. v. State, Department of Health and Social Services

In *Hidden Heights Assisted Living, Inc. v. State, Department of Health and Social Services*,[242] the supreme court held that it is an abuse of discretion to prevent the presentation of documentary evidence when an evidentiary hearing is granted.[243] Following the second appeal of an audit, which found that Hidden Heights had received excess Medicaid payments of more than $50,000, the Department of Health and Social Services ("DHSS") offered Hidden Heights either a reduced settlement or an evidentiary hearing in superior court.[244] A hearing examiner did not admit some of Hidden Heights' exhibits into evidence, and Hidden Heights contested the ruling.[245] The superior court found that even though some of the evidence should have been admitted, it would not have changed the verdict.[246] The supreme court held that because DHSS offered the evidentiary hearing, it was required to hear Hidden Heights' evidence.[247] This included all of the evidence presented, even exhibits not admitted into evidence by the hearing examiner.[248] Thus, the supreme court remanded the case to the lower court, holding that if an evidentiary hearing is held, all documentary evidence may be presented, not only evidence submitted by the hearing examiner.[249]

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[228] *Id*. at 1104.
[229] *Id*.
[230] *Id*.
[231] *Id*. at 1109.
[232] *Id*. at 1110.
[233] *Id*. at 1112.
[234] 200 P.3d 317 (Alaska 2009).
[235] *Id.* at 318.
[236] *Id.*
[237] *Id.*
[238] *Id.*
[239] *Id.* at 318–19.
[240] *Id.*
[241] *Id.*
[242] 222 P.3d 258 (Alaska 2009).
[243] *Id.* at 269.
[244] *Id.* at 265.
[245] *Id.* at 267.
[246] *Id.*
[247] *Id.* at 269.
[248] *Id.* at 269–71.
[249] *Id.* at 269.

Keller v. French

In *Keller v. French*,[250] the supreme court held that plaintiffs did not have standing to file suit under the fair and just treatment clause of the Alaska Constitution when there were other potential litigants who were more directly affected by the case and when the plaintiffs did not have a sufficient personal stake in the outcome.[251] The Alaska Legislative Council initiated an investigation into Governor Palin's dismissal of the Public Safety Commissioner in order to examine potential abuses of power or improper actions of the executive branch.[252] Five state legislators filed suit asking for declaratory and injunctive relief.[253] The plaintiffs claimed that the investigation violated the fair and just treatment clause, which protects individuals' rights in the course of legislative and executive investigations.[254] The superior court dismissed the claim, finding that the plaintiffs raised nonjusticiable political questions.[255] On appeal, the supreme court affirmed the decision of the trial court, holding that the plaintiffs lacked both citizen-taxpayer and interest-injury standing.[256] The court reasoned that the plaintiffs lacked citizen-taxpayer standing because other parties, such as the governor and the people who were subpoenaed for the investigation, were more directly affected by the investigation and were therefore more appropriately situated to bring suit.[257] The court further reasoned the plaintiffs lacked interest-injury standing because they did not demonstrate that they had a sufficient personal stake in the outcome or an interest that was adversely affected by the investigation.[258] Affirming the decision of the lower court, the supreme court held that plaintiffs did not have standing to file suit under the fair and just treatment clause of the Alaska Constitution when there were other potential litigants who were more directly affected by the case and the plaintiffs did not have a sufficient personal stake in the outcome.[259]

Krone v. State

In *Krone v. State*,[260] the supreme court held that a pro-bono litigant who prevailed on the merits in a class-action civil suit regarding constitutional rights was entitled to an award of full reasonable attorneys' fees under Section 9.60.010(c)(1) of the Alaska Statutes, the calculation of which is not limited to the simple mathematical formula mandated by Section 9.60.010(c)(1).[261] The Northern Justice Program represented, pro bono, a putative class of disabled low income individuals terminated from Alaska's Medicaid Home and Community-Based Services Waiver Program (the "Program"), which provided long-term health care services to individuals.[262] The superior court held that federal and state constitutional due process rights had been violated when care was terminated without showing that the patient's medical conditions had materially improved.[263] The class was awarded attorneys' fees.[264] On appeal, the supreme court affirmed the superior court's finding that the class was entitled to an award of full reasonable attorneys' fees, but vacated the court's award amount and remanded for further consideration of that amount.[265] The supreme court reasoned that the fee-shifting provisions of Section 9.60.010(c)–(e) do not require strict adherence to the formula used by the superior court in calculating full reasonable attorney's fees.[266] The supreme court reasoned further that it was unclear from the record whether the superior court felt constrained to use the simple mathematical formula and thus may have overlooked many important factors that should have been taken into account.[267] Affirming in part and vacating in part, the supreme court thus held that a pro-bono litigant who prevailed on the merits in a class-action civil suit regarding constitutional rights was entitled to an award of full

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[250] 205 P.3d 299 (Alaska 2009).
[251] *Id.* at 303, 305.
[252] *Id.* at 300.
[253] *Id.* at 301.
[254] *Id.*
[255] *Id.*
[256] *Id.* at 303, 305.
[257] *Id.* at 303–04.
[258] *Id.* at 304–05.
[259] *Id.* at 303, 305.
[260] 222 P.3d 250 (Alaska 2009).
[261] *Id.* at 251.
[262] *Id.*
[263] *Id.* at 252.
[264] *Id.*
[265] *Id.* at 257–58.
[266] *Id.*
[267] *Id.* at 258.

reasonable attorney's fees under Section 9.60.010(c)(1), the calculation of which is not limited to the simple mathematical formula mandated by Section 9.60.010(c)(1).[268]

Lockhart v. Draper

In *Lockhart v. Draper*,[269] the supreme court held that punitive damages were proper when the reward was not based solely on unanswered requests for admissions and when the lower court had held a two-day hearing on punitive damages.[270] The court also held that prejudgment interest could not be imposed on punitive damages.[271] The Drapers filed suit to recover a retainer they had paid Lockhart, when Lockhart refused to return the money after they discovered he was not an attorney.[272] Lockhart transferred his only property of value, a duplex, to his brother for what the trial court found to be inadequate consideration.[273] The trial court correctly found that Lockhart acted in total disregard for the Drapers' rights, and his actions were sufficiently egregious to justify an award of punitive damages.[274] Upholding the trial court, the supreme court held that the trial court did not rely solely on unanswered requests for admissions when finding punitive damages liability, as the court held a two-day hearing on punitive damages.[275] Affirming the lower court, the supreme court held that punitive damages were proper when the reward was not based solely on unanswered requests for admissions and when the lower court had held a two-day hearing on punitive damages.[276]

McLaughlin v. Okumura

In *McLaughlin v. Okumura*,[277] the supreme court held that a creditor can renew efforts to execute a fraud judgment against another person even though more than five years of inactivity had passed if the creditor had just and sufficient reasons for doing so.[278] In 1993, Okumura obtained a judgment of over one million dollars against the McLaughlins for fraud.[279] Okumura attempted to locate the McLaughlins but failed because he had lost track of their physical address.[280] In 2006, Okumura was notified that the McLaughlins received a settlement in a malpractice case, so he renewed his efforts to collect on the judgment from 1993.[281] The McLaughlins argued that Okumura had failed to show good cause for delaying the execution of his judgment against them by more than five years.[282] The superior court found for Okumura on all issues and the McLaughlins appealed.[283] On appeal, the supreme court held that the superior court did not err when it granted Okumura a new writ of execution to collect on his 1993 judgment against the McLaughlins because Okumura's reasons for his delay in executing the judgment were "just and sufficient."[284] Affirming the superior court, the supreme court held that a creditor can renew efforts to execute a fraud judgment against another person even though more than five years of inactivity had passed if the creditor has just and sufficient reasons for doing so.[285]

Neese v. Lithia Chrysler Jeep of Anchorage, Inc.

In *Neese v. Lithia Chrysler Jeep of Anchorage, Inc.*,[286] the supreme court held that consumers bringing a class action lawsuit against auto dealerships lacked standing where class representatives had not made purchases at those dealerships, but that the superior court erred in entering final judgment without a showing of hardship or good

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[268] *Id.* at 251.
[269] 209 P.3d 1025 (Alaska 2009).
[270] *Id.* at 1027.
[271] *Id.* at 1028.
[272] *Id.* at 1032.
[273] *Id.* at 1033.
[274] *Id.* at 1027.
[275] *Id*.
[276] *Id.* at 1027.
[277] 223 P.3d 93 (Alaska 2009).
[278] *Id.* at 95.
[279] *Id.*
[280] *Id.* at 98.
[281] *Id.* at 97–98.
[282] *Id.* at 98.
[283] *Id.*
[284] *Id.* at 98–100.
[285] *Id.* at 95.
[286] 210 P.3d 1213 (Alaska 2009).

cause.[287] The consumers alleged that four auto dealerships failed to disclose important information about vehicles in accordance with statute.[288] The superior court dismissed the suit against two of the auto dealerships based on lack of standing and then entered final judgment.[289] The consumers appealed, arguing that they had standing against all the dealerships because of their common ownership and that final judgment should not have been entered before the consumers had a chance to amend their complaint to add new class representatives.[290] The supreme court held that common ownership did not confer standing.[291] In a class action lawsuit, each representative plaintiff must have individual standing, and because no plaintiff had bought a vehicle from two of the dealerships, no claim had properly been stated against those dealerships.[292] However, because granting final judgment was inappropriate where neither party would suffer hardship if the consumers were allowed to amend their complaint, the superior court erred in entering final judgment.[293] Reversing and remanding to allow the consumers to amend their complaint, the supreme court held that the consumers bringing a class action lawsuit against auto dealerships lacked standing to sue the dealerships where class representatives had not made purchases, but that the superior court erred in entering final judgment without a showing of hardship or good cause.[294]

Neese v. State

In *Neese v. State*,[295] the supreme court held that: (1) plaintiffs could not intervene as a matter of right when they did not satisfy the test required by Alaska Civil Rule 24(a), and (2) the superior court did not abuse its discretion by denying permissive intervention where it would unnecessarily delay other parties' actions.[296] Neese was the named plaintiff in a class action that alleged Lithia auto dealers were violating statutes governing the sale of used cars.[297] During this time, the State, which also was investigating Lithia's violation of various business statutes, reached a consent judgment with Lithia.[298] Neese then filed a second class action and moved to intervene in the consent judgment.[299] The superior court denied Neese's motion to intervene but mandated that the State amend the consent judgment to include an opt-out provision, which Neese accepted.[300] Neese appealed the denial of his motion to intervene, claiming that intervention should have been granted as a matter of right or at least permissive intervention should have been allowed.[301] In order to have an absolute right to intervene, Neese had to demonstrate that: (1) his motion was timely, (2) he had an interest in the subject matter of the State's case, (3) his interest was hindered due to the State's action, and (4) his interest was not sufficiently embodied by an existing party.[302] The supreme court held that Neese failed to meet the second prong because outside parties' rights to intervene are extinguished when the government exercises its sovereign power to enforce the law.[303] Further, Neese did not meet the third prong because the opt-out provision was adequately explained, Neese elected to opt-out, and Neese could still make any desired argument.[304] Lastly, the supreme court held that the superior court did not abuse its discretion by denying permissive intervention because it correctly decided that all remaining parties to the consent judgment would suffer from unnecessary delay if Neese was allowed to intervene.[305] Affirming the decision of the lower court, the supreme court held: (1) that plaintiffs could not intervene as a matter of right when they did not satisfy the

[287] *Id.* at 1215.
[288] *Id.* at 1216.
[289] *Id.* at 1217.
[290] *Id.* at 1220, 1222.
[291] *Id.* at 1220.
[292] *Id.* at 1221.
[293] *Id.* at 1223.
[294] *Id.* at 1215.
[295] 218 P.3d 983 (Alaska 2009).
[296] *Id.* at 987.
[297] *Id.* at 986.
[298] *Id.*
[299] *Id.*
[300] *Id.* at 986–87.
[301] *Id.* 987.
[302] *Id.*
[303] *Id.* 988.
[304] *Id.* at 990–91.
[305] *Id.* at 991–92.

test required by Alaska Civil Rule 24(a), and (2) the superior court did not abuse its discretion by denying permissive intervention when it would unnecessarily delay other parties' actions.[306]

Reust v. Alaska Petroleum Contractors, Inc.

In *Reust v. Alaska Petroleum Contractors, Inc.*,[307] the supreme court held that: (1) the State's interest in half of any punitive damage award attached when the jury returned its verdict;[308] (2) a supreme court's order to recalculate punitive damages did not destroy the State's interest;[309] and (3) the State's share should reflect the interest rate in effect at the time of the first judgment and a reduction for a pro rata share of a plaintiff's costs.[310] When a jury awarded Reust a punitive damage verdict, the State intervened to protect its fifty percent interest in any punitive damage award.[311] After an appeal, the supreme court remanded the case for a recalculation of the damage award.[312] Reust then settled and moved to dismiss the case.[313] The State objected to the dismissal because it had not received its one-half share of punitive damages.[314] The superior court refused to dismiss the case and entered a final judgment awarding the State its share.[315] On this appeal, Reust argued that the State's interest in the award did not attach until final judgment and that the supreme court's reversal of the judgment destroyed the State's interest in the settlement proceeds.[316] First, the court determined that the State's interest in a punitive damage award arose as soon as the jury returned a verdict because the statute in question generally used the word "award" to refer to verdicts and because a contrary interpretation would defeat the purpose of the statute by allowing parties to deny the State's interest by settling.[317] Since the interest attached at the jury's verdict, the court reasoned that its previous adjustment did not affect the State's interest because a new trial was never required and the original verdict was never upset.[318] Finally, the court observed that appellate rules and principles of unjust enrichment required that post-judgment interest accrue at the rate prevailing at the time of the first judgment, and that a pro rata share of Reust's costs and attorney's fees be deducted from the State's share.[319] Therefore, the supreme court affirmed the superior court, holding that: (1) the State's interest in a punitive damage award attached as soon as a jury returned its verdict,[320] (2) the recalculation did not destroy the State's interest,[321] and (3) the State's share should be modified to reflect the interest rate prevailing at the time of a judgment, as well as a reduction for a plaintiff's costs.[322]

Sayer v. Bashaw

In *Sayer v. Bashaw*,[323] the supreme court held that an offer of immediate dismissal with prejudice was not a valid form of judgment in Alaska and thus did not entitle the offering party to an award of full attorneys' fees under Alaska Civil Rule 68.[324] Before trial, in an effort to settle, Sayer had offered Bashaw $10,111 to file an immediate dismissal with prejudice.[325] Bashaw rejected the offer and went to trial, where Sayer was held not liable.[326] Sayer filed a motion for full attorneys' fees under Rule 68, but his motion was denied because his offer for dismissal with prejudice did not allow for an entry of judgment.[327] On appeal, the supreme court affirmed the lower court's

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[306] *Id.* at 987.
[307] 206 P.3d 437 (Alaska 2009).
[308] *Id.* at 439.
[309] *Id.* at 440.
[310] *Id.* at 441.
[311] *Id.* at 438.
[312] *Id.*
[313] *Id.*
[314] *Id.* at 438–39.
[315] *Id.* at 439.
[316] *Id.*
[317] *Id.* at 439–40.
[318] *Id.* at 440.
[319] *Id.* at 441.
[320] *Id.* at 439.
[321] *Id.* at 440.
[322] *Id.* at 441.
[323] 214 P.3d 363 (Alaska 2009).
[324] *Id.* at 363.
[325] *Id.* at 364.
[326] *Id.*
[327] *Id.*

decision, reasoning that an offer of immediate dismissal with prejudice is not a valid offer of judgment under Rule 68.[328] Although Alaska Civil Rule 68(a) allows a party who makes an offer to allow judgment to be entered to recover full attorneys' fees if the offeree declines the offer and eventually loses at trial,[329] Sayer's offer was invalid because it did not allow for judgment to be entered.[330] The supreme court affirmed the decision below, holding that an offer of immediate dismissal with prejudice was not a valid form of judgment in Alaska and thus did not entitle the offering party to an award of full attorneys' fees under Alaska Civil Rule 68.[331]

Shea v. State of Alaska, Department of Administration

In *Shea v. State of Alaska, Department of Administration*,[332] the supreme court held that Appellate Rule 502(b), which permits an extension of time to file an appeal for good cause, required only a showing of good cause, not excusable neglect, for an application to receive a time extension for filing.[333] Shea, a state employee, appealed a Public Employees' Retirement System decision denying her occupational disability claim.[334] On May 21, 2007, the Office of Administrative Hearings issued an order denying her appeal and stated that judicial review could be sought by filing an appeal in the Alaska Superior Court in accordance with Alaska Rule of Appellate Procedure 602(a)(2) within thirty days.[335] Shea's attorneys first attempted to file her appeal on June 20, thirty days after the administrative opinion and order were mailed, but the court clerk erroneously informed them that the appeal had to be taken to another agency for filing.[336] Another attempt was made on June 21, but was again refused by the court clerk.[337] After the notice of appeal was filed on June 26, 2007, the superior court denied the motion for late filing without prejudice and denied Shea's ensuing motion of reconsideration.[338] The supreme court reversed the superior court's order, finding that Shea demonstrated good cause under Appellate Rule 502(b)(2) for a six-day extension to file her appeal and that there was no plausible indication that the delay prejudiced the State or the court.[339] The court held that Shea's representative demonstrated good faith by trying to file timely appeals on both June 20 and June 21.[340] The supreme court reversed the decision of the lower court, holding that an untimely appeal can receive an extension upon a showing of good cause for the delay.[341]

Southeast Alaska Conservation Council v. State

In *Southeast Alaska Conservation Council v. State*,[342] the supreme court held that a conservation group that had successfully challenged a transfer of land by the State was entitled to full prevailing party attorneys' fees.[343] The Southeast Alaska Conservation Council ("SEAC") had successfully argued on appeal before the supreme court that a legislative action that transferred land from the State to the University of Alaska was in violation of Article IX, Section 7 of the Alaska Constitution (the "dedicated funds" clause).[344] SEAC then filed suit under Section 09.60.010(c)(1) of the Alaska Statutes, which provides for an award of full attorneys' fees for all appeals concerning the establishment, protection, or enforcement of a right under the Alaska Constitution.[345] The court rejected the State's attempt to distinguish between cases that sought to establish or protect constitutional rights and those that merely sought to have constitutional interpretations rendered.[346] It also held that the statute did not distinguish

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[328] *Id.*
[329] *Id.*
[330] *Id.* at 366.
[331] *Id.* at 363.
[332] 204 P.3d 1023 (Alaska 2009).
[333] *Id.* at 1028–29.
[334] *Id.* at 1025.
[335] *Id.*
[336] *Id.*
[337] *Id.*
[338] *Id.*
[339] *Id.* at 1029.
[340] *Id.* at 1030.
[341] *Id.*
[342] 211 P.3d 1146 (Alaska 2009).
[343] *Id.* at 1147.
[344] *Id.*
[345] *Id.*
[346] *Id.*

between constitutional provisions that created individual rights and those that protected important public rights.[347] Finally, the court held that the University of Alaska, a co-defendant, was required to pay its share of the attorneys' fees, even though it had merely offered a different interpretation in the litigation.[348] The supreme court thus held that a conservation group that had successfully challenged a transfer of land by the State was entitled to full prevailing party attorneys' fees.[349]

State, Department of Health & Social Services v. Okuley

In *State, Department of Health & Social Services v. Okuley*,[350] the supreme court held that it was not an abuse of discretion to award a common fund fee of 9.25% to a class's attorneys in a class action lawsuit against the State.[351] In 2005, a class of members filed suit against the State seeking Interim Assistance benefits that were wrongly denied to them.[352] The superior court awarded the class $990,010, including $91,575 in interest, as well as $91,575 to the class counsel from the common fund.[353] On appeal, the State argued that the latter amount should not have been awarded to the class's counsel from the common fund because the amount was unreasonable and the common fund doctrine should not apply to public benefits cases.[354] Using an abuse of discretion standard of review, the supreme court reasoned that the award amount was not unreasonable because the lower court accepted this award amount after taking into account the relevant common fund doctrine factors.[355] The supreme court further reasoned that the superior court had sufficiently scrutinized the plaintiff's counsel's award request and fulfilled its fiduciary duty by comparing the award amount under the lodestar and percentage methods, either of which was an appropriate standard.[356] Specifically, the lower court had considered the number of hours reasonably spent working on the case, the reasonable hourly rate of an attorney working on a similar case, and the amount the attorneys would have been awarded if their award were set at a flat twenty-five percent of the total award.[357] Furthermore, the supreme court reasoned that the appellant's argument that the common fund doctrine concerning attorney awards should not apply to public benefits cases also failed because of the decreased likelihood of prevailing against the State in litigation.[358] Affirming the decision of the lower court, the supreme court held that it was not an abuse of discretion to award a common fund fee of 9.25% to a class's attorneys in a class action lawsuit against the State.[359]

Valdez Fisheries Development Ass'n, Inc. v. Froines

In *Valdez Fisheries Development Ass'n, Inc. v. Froines*,[360] the supreme court held that the task of determining the amount of reasonable attorneys' fees requires an objective assessment.[361] In assessing attorneys' fees on remand, the superior court concluded that the supreme court's reversal of its initial decision forbade it from considering objective factors when determining whether the plaintiff's attorneys' fees were required.[362] Instead of using an objective evaluation, the superior court accepted the amount of time that the attorney chose to spend on the case.[363] The supreme court held that it was error for the superior court to avoid using an objective evaluation.[364] Reversing the lower court's decision, the supreme court held that the task of determining the amount of reasonable attorneys' fees requires an objective assessment.[365]

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[347] *Id.*
[348] *Id.* at 1147–48.
[349] *Id.* at 1147.
[350] 214 P.3d 247 (Alaska 2009).
[351] *Id.* at 258.
[352] *Id.* at 249.
[353] *Id.*
[354] *Id.* at 250.
[355] *Id.* at 251.
[356] *Id.* at 252.
[357] *Id.* at 253.
[358] *Id.*at 254–56.
[359] *Id.* at 258.
[360] 217 P.3d 830 (Alaska 2009).
[361] *Id.* at 835.
[362] *Id.*
[363] *Id.*
[364] *Id.*
[365] *Id.*

Williams v. State of Alaska

In *Williams v. State of Alaska*,[366] the supreme court held that a defendant who withdrew his request for jury instructions could not later challenge the superior court judge's ruling that the State could introduce evidence of the defendant's prior convictions if the jury instructions were given.[367] Williams was charged with driving under the influence.[368] His trial was bifurcated so that the jury would not know of his prior convictions for driving under the influence.[369] After testifying, Williams asked the superior court to instruct the jury on the lesser included offenses of reckless and negligent driving.[370] The superior court agreed to give these instructions but ruled that the State could then introduce evidence of Williams's past convictions to demonstrate his knowledge and establish recklessness.[371] Williams withdrew his request for jury instructions,[372] but then appealed to the supreme court, claiming that the superior court judge erred in ruling that the State could introduce his prior convictions if the court instructed the jury on the lesser included offenses.[373] On appeal, the supreme court ruled that Williams had not preserved the issue for appeal because he had withdrawn his request for jury instructions.[374] The court reasoned that ruling on the substantive issue would require too much speculation about whether Williams was prejudiced by the superior court's ruling.[375] The court further reasoned that: (1) Williams could have withdrawn his request for reasons other than the superior court's ruling, (2) the State could have decided not to introduce the prior convictions, and (3) there was no evidence to show whether the superior court's ruling was a harmless error.[376] Affirming the decision of the lower court, the supreme court held that a defendant who withdrew his request for jury instructions could not later challenge the superior court judge's ruling that the State could introduce evidence of the defendant's prior convictions if the jury instructions were given.[377]

CONSTITUTIONAL LAW

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United States Supreme Court

Polar Tankers, Inc. v. City of Valdez

In *Polar Tankers, Inc. v. City of Valdez*,[378] the Supreme Court held that a city ordinance violated the Tonnage Clause because it imposed a tax on vessels based on their carrying capacity and usage of the port, rather than for services provided to the vessel.[379] In 1999, the city of Valdez passed an ordinance that taxed ships based on their time spent in Valdez and their overall size.[380] In 2000, Polar Tankers, Inc. owned ships that were subject to this tax and brought suit claiming that the ordinance was unconstitutional because it violated the Tonnage Clause and Due Process Clause of the Constitution.[381] The Alaska Superior Court found the ordinance unconstitutional under the Due Process Clause, but the Alaska Supreme Court overruled this decision, asserting that the ordinance was constitutional.[382] The United States Supreme Court granted certiorari and declared the ordinance unconstitutional,

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[366] 214 P.3d 391 (Alaska 2009).
[367] *Id.* at 392.
[368] *Id.*
[369] *Id.*
[370] *Id.*
[371] *Id.*
[372] *Id.*
[373] *Id.*
[374] *Id.*
[375] *Id.* at 392–93.
[376] *Id.* at 393.
[377] *Id.* at 392.
[378] 129 S. Ct. 2277 (2009).
[379] *Id.* at 2282.
[380] *Id.* at 2281.
[381] *Id.*
[382] *Id.*

reasoning that the purpose of the Tonnage Clause was to prevent states from unfairly benefiting from their ports at the expense of other states.[383] The Court held that Valdez's ordinance violated the Tonnage Clause because it imposed a tax based on a factor related to a vessel's tonnage and the usage of Valdez's ports.[384] Furthermore, the Tonnage Clause has usually been applied to ordinances that raise revenue and the Valdez ordinance produces funds for municipal services.[385] Lastly, the ordinance was unconstitutional because it did not operate as an ordinary property tax.[386] Unlike other Alaskan property taxes, Valdez's ordinance applied only to ships rather than to all similar business property.[387] Thus, the Supreme Court reversed the decision of the Alaska Supreme Court, holding that Valdez's ordinance was unconstitutional under the Tonnage Clause because it imposed a tax on vessels based on their carrying capacity and usage of the port, rather than for services provided to the vessel.[388]

Ninth Circuit Court of Appeals

State v. Equal Employment Opportunity Commission

In *State v. Equal Employment Opportunity Commission*,[389] the Ninth Circuit held that states do not have Eleventh Amendment immunity from claims under the Government Employee Rights Act of 1991 ("GERA").[390] Two former employees of the Governor's office filed complaints with the Equal Employment Opportunity Commission ("EEOC") under GERA, in which they alleged sexual harassment, pay discrimination on the basis of race, and retaliatory discharge.[391] Before an administrative law judge, the State argued that the claims were barred by the Eleventh Amendment.[392] The judge rejected that argument, as did the EEOC on interlocutory appeal.[393] The State appealed to the Ninth Circuit on the same grounds.[394] The Ninth Circuit reasoned that the Eleventh Amendment's guarantee of sovereign immunity to the states was abrogable by Congress if Congress was acting pursuant to a valid grant of constitutional authority.[395] Here, the grant of authority was provided by Section 5 of the Fourteenth Amendment.[396] Since all three claims being brought under GERA were alleged constitutional violations pursuant to the Equal Protection and Due Process clauses of the Fourteenth Amendment, GERA was a valid abrogation of sovereign immunity.[397] The Ninth Circuit thus held that states do not have Eleventh Amendment immunity from claims under GERA.[398]

United States v. Jefferson

In *United States v. Jefferson,*[399] the Ninth Circuit held that law enforcement can detain and search a package before a guaranteed delivery time without conflicting with the recipient's Fourth Amendment possessory interest rights.[400] On April 6, a package addressed to John Jefferson arrived in Juneau, with a guaranteed delivery time of 3:00 p.m. on April 7.[401] The recipient's address on the package had previously been flagged by the postal inspector.[402] The inspector examined the package and used a canine to positively detect the presence of narcotics.[403]

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[383] *Id.* at 2282.
[384] *Id.* at 2283–84.
[385] *Id.*
[386] *Id.* at 2284–85.
[387] *Id.*
[388] *Id.* at 2287.
[389] 564 F.3d 1062 (9th Cir. 2009).
[390] *Id.* at 1065.
[391] *Id.*
[392] *Id.*
[393] *Id.*
[394] *Id.*
[395] *Id.* at 1066.
[396] *Id.* at 1067.
[397] *Id.* at 1071.
[398] *Id.* at 1065.
[399] 566 F.3d 928 (9th Cir. 2009).
[400] *Id.* at 935.
[401] *Id.* at 931.
[402] *Id.*
[403] *Id.* at 932.

After obtaining a warrant, law enforcement opened the package at 11:55 a.m. and discovered 253 grams of methamphetamine.[404] Around 5:00 p.m., law enforcement made a controlled delivery of the package to Jefferson's address and arrested Jefferson.[405] On appeal, Jefferson argued that his package was unlawfully detained in violation of his Fourth Amendment possessory interest rights.[406] The Ninth Circuit rejected this argument and held that a possessory interest in a package with a guaranteed delivery time does not prohibit law enforcement from detaining such packages for inspection until the contractual delivery time has passed.[407] The court reasoned that Jefferson's Fourth Amendment possessory interest was not implicated before the police inspection because the inspection occurred at 11:55 a.m. on April 6, and the package's delivery was not guaranteed until 3:00 p.m. that day.[408] Affirming the lower court, the Ninth Circuit held that law enforcement can detain and search a package before a guaranteed delivery time without conflicting with the recipient's Fourth Amendment possessory interest rights.[409]

Alaska Supreme Court

Bigley v. Alaska Psychiatric Institute

In *Bigley v. Alaska Psychiatric Institute*,[410] the supreme court held that a patient's due process rights were violated when he did not receive adequate notice of the State's petition for the involuntary administration of psychotropic drugs and he was denied access to his medical chart.[411] After ordering Bigley to be committed to the Alaska Psychiatric Institute ("API"), the trial court notified the parties on a Friday that it would hold an expedited hearing on the medication petition on the following Monday.[412] Bigley's attorney had not received notice of the court's earlier commitment order, and he had not received access to Bigley's complete medical chart.[413] Additionally, the petition used by API merely stated its intent to administer psychotropic medication, without information about proposed treatment or its justification.[414] The court held that the petition was insufficient to allow Bigley a reasonable opportunity to prepare his case and that the State must provide a plain, concise, and definite written statement of the facts, as well as the nature and reasons for the proposed treatment.[415] Furthermore, to satisfy due process, a patient must have access to his medical records once a petition to involuntarily medicate him has been filed.[416] Reversing the lower court, the supreme court held that a patient's due process rights were violated when he did not receive adequate notice of the State's petition for the involuntary administration of psychotropic drugs and he was denied access to his medical chart.[417]

Hertz v. Beach

In *Hertz v. Beach*,[418] the supreme court held that: (1) mere knowledge of a medical condition was not sufficient evidence of deliberate indifference to sustain an Eighth Amendment cause of action,[419] and (2) the question of whether a defendant's dental practitioner committed malpractice by failing to treat a prison patient was one of fact that may not require expert medical evidence.[420] Hertz received dental care from Dr. Anderson while incarcerated.[421] After having two teeth extracted, Hertz filed a medical request for a new partial denture because his

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[404] *Id.*
[405] *Id.*
[406] *Id.*
[407] *Id.* at 935.
[408] *Id.*
[409] *Id.*
[410] 208 P.3d 168 (Alaska 2009).
[411] *Id.* at 172.
[412] *Id.* at 174.
[413] *Id.* at 174, 185.
[414] *Id.* at 181.
[415] *Id.* at 181, 182.
[416] *Id.* at 184.
[417] *Id.* at 172.
[418] 211 P.3d 668 (Alaska 2009).
[419] *Id.* at 679–80.
[420] *Id.* at 682.
[421] *Id.* at 672.

existing denture no longer fit properly.[422] Hertz waited over five months without being seen by Dr. Anderson,[423] and then filed suit alleging violations of his Eighth Amendment rights by the nurses at the prison and malpractice on the part of Anderson, who had contracted with the prison to give dental care to patients.[424] The supreme court held that the prison did not violate the Eighth Amendment because the "deliberate indifference to serious medical needs" standard had not been met.[425] In particular, while the record was replete with evidence of knowledge of the nurses and Anderson that he had requested a new partial denture, the record did not demonstrate that the nurses or Anderson had been deliberate in failing to treat Hertz, because they did not have actual knowledge of his dental pain.[426] Examining the question of malpractice, the court reasoned that granting summary judgment in favor of Anderson had been erroneous because it was not clear from the record whether expert evidence was necessary to evaluate Dr. Anderson's actions in failing to treat Hertz for five months, and thus, a genuine issue of material fact remained unresolved.[427] Affirming in part and reversing in part the lower court's decision, the supreme court held that: (1) mere knowledge of a medical condition was not sufficient evidence of deliberate indifference to sustain an Eighth Amendment cause of action,[428] and (2) the question of whether a defendant's dental practitioner committed malpractice by failing to treat a prison patient was one of fact that may not require expert medical evidence.[429]

Huffman v. State

In *Huffman v. State*,[430] the supreme court held that an individual had the right to control medical treatment for his children, which is a fundamental liberty and privacy right protected by the Alaska Constitution and cannot be infringed upon absent a showing of a compelling state interest and no less restrictive means to accomplish that interest.[431] For religious reasons, the Huffmans refused to subject their children to a tuberculosis PPD skin test as required by statute.[432] The school refused to allow the children to attend school as result.[433] The Huffmans filed suit alleging that the State's regulation requiring tuberculosis testing interfered with their liberty and privacy interests under the Alaska Constitution.[434] The supreme court held that a fundamental liberty interest and privacy right exists with respect to decisions made about medical treatments for oneself or one's children based on valid analogous privacy protections under the Constitution.[435] The court held that further inquiry was required to examine whether the State's tuberculosis test requirement did not allow for a less restrictive means with which the State could further its compelling interest of ensuring student safety.[436] Reversing the lower court's decision and remanding the case, the supreme court held that an individual had a right to control medical treatment for his children, which is a fundamental liberty and privacy right protected by the Alaska Constitution and cannot be infringed upon absent a showing of a compelling state interest and no less restrictive means to accomplish that interest.[437]

Lot 04B & 5C, Block 83 Townsite v. Fairbanks North Star Borough

In *Lot 04B & 5C, Block 83 Townsite v. Fairbanks North Star Borough*,[438] the supreme court held that a partial property tax exemption neither violated the equal protection clause of the Alaska Constitution,[439] nor acted as a penalty within the meaning of Alaska statutory law.[440] Fairbanks North Star Borough applied a partial tax

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[422] *Id.*
[423] *Id.* at 682.
[424] *Id.* at 673–74.
[425] *Id.* at 677–80.
[426] *Id.* at 680.
[427] *Id.* at 682.
[428] *Id.* at 679–80.
[429] *Id.* at 682.
[430] 204 P.3d 339 (Alaska 2009).
[431] *Id.* at 347.
[432] *Id.* at 341.
[433] *Id.* at 342.
[434] *Id.*
[435] *Id.* at 346.
[436] *Id.* at 347.
[437] *Id.*
[438] 208 P.3d 188 (Alaska 2009).
[439] *Id.* at 194.
[440] *Id.*

exemption to residential property that had no back taxes owed.[441] Falke challenged the constitutionality and legality of the partial tax exemption, claiming that it violated the equal protection clause of the Alaska Constitution by discriminating against the poor and that it amounted to a penalty for payment of taxes in excess of statutory law.[442] The supreme court noted that purely economic interests are at the low end of the continuum of interests for equal protection purposes, and thus they are given a more lenient scrutiny.[443] The court held that the statute served a legitimate public purpose,[444] and had classifications that bore a fair relationship to that purpose.[445] With respect to the statutory claim, the court held that the drafters of the statute did not intend on treating the denial of the exemption as a penalty.[446] The supreme court held that a partial property tax exemption neither violated the equal protection clause of the Alaska Constitution,[447] nor acted as a penalty within the meaning of Alaska statutory law.[448]

Pepper v. Crabtree

In *Pepper v. Crabtree*,[449] the supreme court held that defendants are not entitled to immunity under the *Noerr-Pennington* doctrine if the plaintiff's claim will not unconstitutionally burden the defendants' petitioning activity.[450] Pepper sued Crabtree for violations of Alaska's Unfair Trade Practices and Consumer Protection Act ("UTPA").[451] The superior court found that the *Noerr-Pennington* doctrine required the court to strictly construe the UTPA to avoid burdening conduct protected by the petition clauses of the United States and Alaska Constitutions.[452] On appeal, the supreme court held that requiring the defendants to litigate the claims in a fair manner would not unconstitutionally burden the defendants' petitioning activities.[453] The court utilized the *Sosa* three-step analysis to determine whether *Noerr-Pennington* immunity applies.[454] First, the *Sosa* analysis required the court to identify what burden the threat of adverse adjudication would impose on the defendants' petitioning rights.[455] The court determined that a successful claim by Pepper might burden Crabtree's ability to obtain favorable judgments.[456] Second, the *Sosa* analysis required the court to determine whether the potential burden could be imposed consistently with the constitution.[457] The supreme court found that subjecting Crabtree to UTPA liability for the alleged conduct would not chill the First Amendment right to petition.[458] The supreme court held that defendants are not entitled to immunity under the *Noerr-Pennington* doctrine because the plaintiff's claim will not unconstitutionally burden the defendants' petitioning activity.[459]

Schiel v. Union Oil Co. of California

In *Schiel v. Union Oil Co. of California*,[460] the supreme court held that amendments to Sections 23.30.045(a) and 23.30.055 of the Alaska Statutes do not violate a worker's rights to equal protection under the Alaska Constitution.[461] Schiel sued the Union Oil Company of California ("UNOCAL") for injuries he sustained while working on one of the company's drilling platforms.[462] UNOCAL filed for summary judgment, arguing that

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[441] *Id.* at 190.
[442] *Id.* at 191.
[443] *Id.* at 192.
[444] *Id.*
[445] *Id.* at 193.
[446] *Id.*
[447] *Id.* at 194.
[448] *Id.*
[449] 219 P.3d 1017 (Alaska 2009).
[450] *Id.* at 1025.
[451] *Id.* at 1018.
[452] *Id.*
[453] *Id.*
[454] *Id.* at 1021.
[455] *Id.* at 1022.
[456] *Id.*
[457] *Id.*
[458] *Id.*
[459] *Id.* at 1025.
[460] 219 P.3d 1025 (Alaska 2009).
[461] *Id.* at 1037.
[462] *Id.* at 1028.

the Alaska Workers' Compensation Statute barred the claim.[463] Schiel responded with a cross-motion for summary judgment, arguing that the 2004 amendments to the Workers' Compensation Statute violated the equal protection clause of the Alaska Constitution.[464] The Alaska Workers' Compensation Statute (specifically Sections 23.30.045 and 23.30.055) was amended in 2004 to extend liability for workers' compensation coverage to project owners and to provide immunity from tort liability to both general contractors and project owners.[465] Schiel argued that the amendments violated his right to equal protection because they classify injured workers into two classes—those who can sue in tort and those who must recover through the workers' compensation system.[466] The court found that because the amendments deal with an economic interest and bear a substantial relationship to legitimate state goals, they do not violate Schiel's right to equal protection.[467] Answering a certified question from the lower court, the supreme court held that amendments to Sections 23.30.045(a) and 23.30.055 do not violate a worker's rights to equal protection and due process under the Alaska Constitution.[468]

State v. ACLU of Alaska

In *State v. ACLU of Alaska*,[469] the supreme court held that the bar on abstract adjudication precluded it from ruling on the constitutionality of a statute when the risk of offending the coequal branches of government outweighed the need for a decision.[470] The ACLU of Alaska challenged a statute based on constitutional right of privacy that criminalized the possession and use of less than one ounce of marijuana.[471] The supreme court found little need for a decision since: (1) even absent the state statute, private possession of marijuana was still prohibited by federal law;[472] (2) statements of anonymous marijuana users submitted by the ACLU suggested that they were not altering their drug usage in response to the new statute at issue;[473] and (3) there was little evidence that law enforcement officials were pursuing those who possessed and used only small amounts of marijuana in their own homes.[474] The court did, however, find significant risks in issuing a decision including: (1) the risk that there might be a set of facts to which the statute would apply constitutionally;[475] and (2) the risk of insulting the coequal branches of government by invalidating a statute when there was no pressing judicial need to do so.[476] Reversing the decision of the superior court, the supreme court held that the bar on abstract adjudication precluded it from ruling on the constitutionality of a statute when the risk of offending the coequal branches of government outweighed the need for a decision.[477]

Valentine v. State

In *Valentine v. State*,[478] the supreme court held that the amendment to DUI statute, Section 28.35.030(s) of the Alaska Statutes, which excluded delayed-absorption evidence to challenge prosecutions under the "under-the-influence" DUI theory subsection in the statute, violated due process.[479] Valentine appealed his conviction under the recently amended DUI law and challenged the constitutional validity of the DUI law that excluded delayed-absorption evidence.[480] The supreme court agreed with Valentine as to the unconstitutionality of the amendment, noting that a defendant's due process rights are violated when legislation significantly affects his or her ability to present a defense.[481] The court held that Valentine's due process rights were violated because the old statute required

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[463] *Id.*
[464] *Id.*
[465] *Id.* at 1029.
[466] *Id.* at 1030.
[467] *Id.* at 1034–35.
[468] *Id.* at 1037.
[469] 204 P.3d 364 (Alaska 2009).
[470] *Id.* at 366.
[471] *Id.*
[472] *Id.* at 369–70.
[473] *Id.* at 370–71.
[474] *Id.* at 371.
[475] *Id.* at 372–73.
[476] *Id.* at 373.
[477] *Id.* at 373–74.
[478] 215 P.3d 319 (Alaska 2009).
[479] *Id.* at 321.
[480] *Id.*
[481] *Id*. at 325–26.

the prosecution to demonstrate that a defendant was impaired while driving, where the new amendment denied the defendant the opportunity to show that they were not impaired while driving (even though a later chemical test may say otherwise).[482] Therefore, the supreme court reversed and remanded, finding that the amendment to the DUI statute, Section 28.35.030(s), was unconstitutional.[483]

CONTRACT LAW

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Alaska Supreme Court

AAA Valley Gravel, Inc. v. Totaro

In *AAA Valley Gravel, Inc. v. Totaro*,[484] the supreme court held that a gratuitous assignment of an interest in royalties from gravel mining was irrevocable and that one assignee would be entitled to one hundred percent of any royalties recovered.[485] It also held that the trial court's failure to consider whether a lease was exclusive and whether a warranty against encumbrances was waived prevented a final judgment.[486] Ramirez leased gravel mining rights to Cosmos Development, which then subleased to AAA Valley Gravel, which paid royalties to Ramirez and Cosmos.[487] Cosmos assigned its right to overriding royalties to Totaro.[488] Years later, AAA purchased the property being mined from Ramirez and stopped paying royalties.[489] Totaro sued AAA for breach of contract, and AAA filed a third-party complaint against Ramirez for breach of contract and warranty.[490] The trial court determined that AAA was still required to pay Totaro any overriding royalties under the sublease, and that Ramirez was not liable for misrepresentation because both parties to the property sale knew about the lease and sublease.[491] On appeal, the supreme court reasoned that Cosmos's gratuitous assignment to Totaro was made irrevocable when Cosmos notified AAA of the assignment in a signed and sealed the letter, which did not reveal any intention to make the assignment revocable.[492] The court also determined that because there was conflicting evidence about the exclusivity of the lease between Cosmos and Ramirez,[493] Ramirez could be liable for breach of the title unless he could prove that the deed did not express the parties' actual intent.[494] Thus, the supreme court held that Cosmos's assignment to Totaro was irrevocable and that Totaro was entitled to one hundred percent of the overriding royalties if she ultimately prevailed.[495] It then held that the trial court had failed determine whether the original lease was exclusive.[496] Accordingly, the court vacated the judgment of the trial court and remanded the case, holding that a gratuitous assignment of an interest in royalties from gravel mining was irrevocable and that one assignee would be entitled to one hundred percent of any royalties recovered.[497]

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[482] *Id.* at 326–27.
[483] *Id.* at 327.
[484] 219 P.3d 153 (Alaska 2009).
[485] *Id.* at 155.
[486] *Id.* at 154.
[487] *Id.* at 156.
[488] *Id.* at 157.
[489] *Id.* at 158.
[490] *Id.*
[491] *Id.*
[492] *Id.* at 159–60.
[493] *Id.* at 160–61.
[494] *Id.* at 164–65.
[495] *Id.*
[496] *Id.* at 154.
[497] *Id.* at 155.

Beal v. McGuire

In *Beal v. McGuire,*[498] the supreme court held that summary judgment was not appropriate when there were genuine issues regarding the scope of joint venture members' fiduciary duties and whether those duties were breached.[499] Nine members of a joint venture owned a medical condominium, which they rented out to an ambulatory surgical center.[500] Two of the members were responsible for relocating the surgical center from the location owned by the venture to an alternate location.[501] Six of the members filed suit for breach of fiduciary duty against the members initiating the move because the move was not consistent with the purpose of producing income and profit.[502] The trial court granted summary judgment for McGuire because Beal had not demonstrated how moving rather than extending the lease had breached any duty. The supreme court reversed, reasoning that while a provision existed that allowed members to deal at arm's length with competitors, it did not eliminate all fiduciary duties owed between members.[503] Instead, a duty continued to exist to prevent members from gravely harming the economic interests of the venture since the venture had been created with the sole purpose of producing income and profit, as noted in its explicit terms.[504] Reversing the lower court, the supreme court held that summary judgment was not appropriate when there were genuine issues regarding the scope of joint venture members' fiduciary duties and whether those duties were breached.[505]

Wagner v. Wagner

In *Wagner v. Wagner*,[506] the supreme court held that the awarding of specific performance for the payment of past damages was permissible if consistent with a written agreement.[507] In exchange for co-signing a loan, Gregory and his father, Richard, signed a written agreement that royalties from oil and gas leases Richard possessed would be used to pay this loan, with additional income being divided between Gregory and Richard.[508] Richard defaulted on payments and Gregory filed a complaint.[509] The trial court found that Richard had breached the agreement, and the court awarded Gregory past damages.[510] The superior court ordered specific performance, holding that the jury must have used the terms of the written agreement to calculate its award of past damages.[511] On appeal, the supreme court affirmed this decision, holding that the order of specific performance for contract damages did not constitute an abuse of discretion.[512] Therefore, affirming the decision of the lower court, the supreme court held that the awarding of specific performance for the payment of past damages was permissible if consistent with a written agreement.[513]

Weiner v. Burr, Pease & Kurtz, P.C.

In *Weiner v. Burr, Pease & Kurtz, P.C.*,[514] the supreme court held that the phrase "further substantial litigation" should be construed broadly to include preparation done for trial.[515] Weiner and Garrison retained the firm Burr, Pease & Kurtz, P.C. to represent them in a lawsuit.[516] Under a contingency agreement, the firm would get thirty-three percent of damages if the matter were resolved before the filing of an appeal;[517] otherwise, it would

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[498] 216 P.3d 1154 (Alaska 2009).
[499] *Id.* at 1166.
[500] *Id.* at 1158.
[501] *Id.* at 1160.
[502] *Id.* at 1161
[503] *Id.* at 1164.
[504] *Id.* at 1166.
[505] *Id*.
[506] 205 P.3d 306 (Alaska 2009).
[507] *Id*. at 310.
[508] *Id*.
[509] *Id*.
[510] *Id*.
[511] *Id*.
[512] *Id*. at 309.
[513] *Id*. at 310.
[514] 221 P.3d 1 (Alaska 2009).
[515] *Id*. at 9.
[516] *Id*. at 3.
[517] *Id*.

receive $250,000 if no work was done to "further substantial litigation."[518] The claim was settled after filing but before trial.[519] The firm claimed thirty-three percent of funds per the contingency agreement, claiming that it had done work to "further substantial litigation."[520] The firm argued that the term "further substantial litigation" should be viewed broadly to include preparation for trial and settlement negotiations.[521] The trial court held that the "further substantial litigation" meant additional considerable efforts in carrying on the legal contest and that the firm had met that standard.[522] On appeal, the clients argued that the trial court had misinterpreted the term and erred in finding that the firm's work met that standard.[523] The supreme court held that the trial court's interpretation of the term was correct and that the firm had met the standard because it had engaged in substantial preparation for trial.[524] Moreover, the court found that the term "further substantial litigation" was not ambiguous and included more than in-court filings and proceedings.[525] Affirming the lower court, the supreme court held that the phrase "further substantial litigation" should be construed broadly to include preparation done for trial.[526]

CRIMINAL LAW

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Ninth Circuit Court of Appeals

United States v. Anchrum

In *United States v. Anchrum*,[527] the Ninth Circuit held that: (1) substituting "motor vehicle" for "weapon" in the jury instructions for assault with a dangerous weapon was harmless error, (2) permitting a Drug Enforcement Agent ("DEA") to testify as first a lay witness and then an expert witness was not an abuse of discretion, (3) the DEA did not inappropriately opine on defendant's mental state, and (4) applying a six-level sentencing enhancement was warranted.[528] Anchrum received a package containing drugs and was pursued by the police shortly after.[529] In attempt to escape, he struck an officer, Agent Solek, with his vehicle.[530] A jury convicted him, and the district court applied a six-level enhancement to his sentence because the victim was an official.[531] Anchrum appealed, claiming that the district court erred by instructing the jury to find that he had used a "motor vehicle" instead of a "weapon," by allowing Solek to testify as a lay witness and an expert witness, by allowing Solek to testify about Anchrum's mental state, and by applying the sentence enhancement.[532] On appeal, the Ninth Circuit affirmed the district court on all counts.[533] The court reasoned that even though the district court erred in its jury instruction, it was harmless error because it was clear beyond a reasonable doubt that a rational jury would have found Anchrum guilty of using the motor vehicle as a deadly weapon.[534] The court then reasoned that it was not an abuse of discretion to allow Agent Solek to testify as both a lay and expert witness because his testimony was separated into two phases so the jury would not confuse his two distinct roles.[535] The court next reasoned that Solek did not improperly opine on

[518] *Id*.
[519] *Id*.
[520] *Id*. at 4.
[521] *Id*.
[522] *Id*.
[523] *Id*. at 5.
[524] *Id*. at 6.
[525] *Id*. at 8–10.
[526] *Id*. at 9.
[527] 590 F.3d 795 (9th Cir. 2009).
[528] *Id.* at 798.
[529] *Id.*
[530] *Id.* at 798–99.
[531] *Id.* at 799.
[532] *Id.* at 798.
[533] *Id.*
[534] *Id.* at 800–03.
[535] *Id.* at 803–04.

Anchrum's mental state because he only referenced the modus operandi of drug dealers in general, and not Anchrum's mental state specifically.[536] Also, because Anchrum intentionally drove his vehicle at Agent Solek and struck him after Solek exited a police car clad in a vest obviously marked "Police," the official victim six-level sentencing enhancement was correctly applied.[537] Affirming the decision of the lower court, the Ninth Circuit held: (1) that substituting "motor vehicle" for "weapon" in the jury instructions for assault with a dangerous weapon was harmless error, (2) that permitting a DEA to testify as first a lay witness and then an expert witness was not an abuse of discretion, (3) that the DEA did not inappropriately opine on defendant's mental state, and (4) that applying a six-level sentencing enhancement was warranted.[538]

Alaska Court of Appeals

Ambrose v. State

In *Ambrose v. State*,[539] the court of appeals held that a police officer did not conduct an illegal search when he removed and opened an object from a suspect's pocket during an arrest, reasonably believing the object could have been a weapon, and then recognized that it was a container for illegal drugs.[540] When Ambrose was arrested after a traffic stop, the arresting officer felt a small object in Ambrose's pocket while conducting a pat-down search.[541] The officer then removed and opened the object, a folded piece of newspaper, and found that it contained illegal drugs.[542] Ambrose was convicted of a drug offense and appealed, arguing that the officer's warrantless search was illegal.[543] The court of appeals pointed out that during investigative stops, an officer may remove an object found during the search if he reasonably believes the object might be used as a weapon.[544] Here, the officer reasonably believed the object contained a razor blade.[545] In addition, an officer may open an object in plain view if it is apparent that the object is a single-purpose container used to carry illegal drugs.[546] After removing the newspaper from Ambrose's pocket, it was apparent to the officer that the package was being used to carry drugs.[547] Therefore, the court of appeals held that the policeman did not conduct an illegal search when he removed and opened an object from a suspect's pocket during an arrest, reasonably believing the object could have been a weapon, and then recognized that it was a container for illegal drugs.[548]

Boles v. State

In *Boles v. State*,[549] the court of appeals held that: (1) it was improper for a sentencing court to require warrantless searches for weapons as a condition of probation for the charge of attempted second-degree sexual abuse of a minor when no weapon was involved,[550] and (2) the sentencing court had no authority to impose registration or reporting requirements under the Sex Offender Registration Act.[551] At trial, Boles pled guilty to two counts of attempted second-degree sexual abuse of a minor.[552] As a condition of probation, the superior court ordered him to submit to warrantless searches for weapons and required him to register as a sex offender.[553] On appeal, the court of appeals reversed the decision of the superior court that required warrantless firearm searches and held that the lower court's statement that Boles would have to register as a sex offender for life was not a ruling, but rather a

[536] *Id.* at 804–05.
[537] *Id.* at 805.
[538] *Id.* at 798.
[539] 221 P.3d 364 (Alaska Ct. App. 2009).
[540] *Id.* at 364–65.
[541] *Id.* at 365.
[542] *Id.*
[543] *Id.*
[544] *Id.* at 366.
[545] *Id.*
[546] *Id.* 366–67.
[547] *Id.* 367.
[548] *Id.*
[549] 210 P.3d 454 (Alaska Ct. App. 2009).
[550] *Id.* at 456.
[551] *Id.*
[552] *Id.* at 455.
[553] *Id.*

prediction.[554] The court of appeals also struck down the condition of probation because it was not reasonably related to the rehabilitation of the offender and the protection of the public,[555] and the court of appeals held that the lower court did not have the authority to determine the period of time required to register under the Sex Offender Registration Act because the registration and reporting requirements are not part of a defendant's sentence.[556] Vacating the warrantless weapon searches condition of Boles's probation, the court of appeals held that requiring warrantless searches for weapons was an inappropriate condition of probation when no weapon was involved in the commission of the crimes,[557] and that the sentencing court had no authority to rule on registration or reporting requirements under the Sex Offender Registration Act.[558]

Brown v. State

In *Brown v. State*,[559] the court of appeals vacated a defendant's conviction because his right to a speedy trial under Alaska Criminal Rule 45 was violated.[560] Brown was charged with two misdemeanors, and his trial was set in Sand Point, a rural community where misdemeanor trials are conducted once every two months.[561] Brown's first trial was scheduled for April, but he requested a continuance, and the court set his trial for October.[562] A different trial, however, had already been set for October, so Brown's trial was delayed until December.[563] In December, the court again had another trial scheduled that precluded Brown's case from being heard, so his trial was rescheduled to February.[564] In February, Brown's case was finally heard and he was convicted after the judge denied his motion to dismiss under Alaska Criminal Rule 45.[565] The court of appeals held that Brown's request for a continuance only excluded the days between his original April trial date and the October date set by the court.[566] The period from October through February, however, should have been viewed as non-excludable days under Rule 45 because Brown was not the legal cause of those delays.[567] Thus, Brown's motion to dismiss should have been granted because his trial was set for a date more than 120 non-excludable days after the time he was charged.[568] Vacating the conviction in the lower court, the court of appeals held that defendant's right to speedy trial under Alaska Criminal Rule 45 was violated.[569]

Cronce v. State

In *Cronce v. State*,[570] the court of appeals held that two separate assault convictions arising from a single incident merged into a single punishable offense where the record was ambiguous.[571] Cronce and Wims were involved in an argument.[572] When Wims attempted to escape, Cronce caught him and proceeded to beat him until police arrived.[573] Cronce was convicted of second- and third-degree assault.[574] On appeal, Cronce argued that these separate convictions should be barred by the double jeopardy rule.[575] The court of appeals held that a defendant should receive only one conviction if the record is ambiguous as to whether there was one offense or two.[576] The

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[554] *Id.* at 457.
[555] *Id.*
[556] *Id.* at 456.
[557] *Id.* at 455.
[558] *Id.* at 456.
[559] 221 P.3d 20 (Alaska Ct. App. 2009).
[560] *Id.* at 21.
[561] *Id.*
[562] *Id.*
[563] *Id.*
[564] *Id.*
[565] *Id.*
[566] *Id.* at 22.
[567] *Id.*
[568] *Id.*
[569] *Id.* at 21.
[570] 216 P.3d 568 (Alaska Ct. App. 2009).
[571] *Id.*
[572] *Id.* at 569.
[573] *Id.*
[574] *Id.*
[575] *Id.*
[576] *Id.* at 570.

court first examined whether the two statutory offenses as applied to the facts involved any differences in intent or conduct and then considered those differences in light of the basic public interests that the statutes sought to protect.[577] Here, the court determined that the record was ambiguous because there was nothing in the indictment, the jury instructions, or the prosecution's arguments that clearly differentiated the conduct that was second-degree assault from the conduct that was third-degree assault.[578] Indeed, it was likely that the jury convicted Cronce of third-degree assault based on the same intent and conduct for which it convicted him of second-degree assault.[579] The court further reasoned that second- and third-degree assault statutes both serve the identical goal of protecting the safety of individual citizens.[580] Reversing the decision of the lower court, the court of appeals held that two separate assault convictions arising from a single incident should merge into a single punishable offense where the record is ambiguous.[581]

Dale v. State

In *Dale v. State*,[582] the court of appeals held that exigent circumstances existed as a matter of law and police were therefore justified in conducting a blood test without a warrant when: (1) a motor vehicle accident had caused death or serious physical injury, and (2) police had probable cause to believe the driver was intoxicated.[583] Dale drove his truck off the road, and his two passengers were severely injured.[584] A blood test showed Dale to have been intoxicated, but Dale moved to suppress the results because the test was obtained without a warrant.[585] The superior court ruled that there were exigent circumstances as a matter of law and denied the motion; the court of appeals agreed.[586] The court of appeals reasoned that the speed with which alcohol dissipates in the blood supports a conclusion that exigent circumstances exist as a matter of law when a blood test is required.[587] Furthermore, requiring police to assess whether exigent circumstances exist on a case-by-case basis would place an unreasonable burden on law enforcement, as the officer would be required to make his determination based on speculation about factors such as how much the suspect had to drink, how recently the suspect stopped drinking, how quickly the suspect would metabolize the alcohol, and how quickly the test could be administered.[588] Accordingly, the court of appeals affirmed the denial of the motion to suppress, and held that exigent circumstances existed as a matter of law and police were therefore justified in conducting a blood test without a warrant when: (1) a motor vehicle accident had caused death or serious physical injury, and (2) police had probable cause to believe the driver was intoxicated.[589]

Douglas v. State

In *Douglas v. State*,[590] the court of appeals held: (1) that constitutionally flawed sentencing procedures could be amended to conform to the requirements of *Blakely*, and thus include jury trials of aggravating factors,[591] and (2) that an aggravating factor of the crime involving a particularly vulnerable victim would be satisfied if there had been an abusive relationship between the victim and a defendant.[592] Douglas appealed from the sentencing decision of the superior court, arguing that: (1) he did not receive a jury trial on the aggravating factors; (2) the jury should have been allowed to reevaluate his guilt in his previous convictions; (3) one aggravator, that of the crime involving a particular vulnerable victim, was not factually supported; and (4) his composite sentence was excessive.[593] In response, the court of appeals first found that Alaskan precedent established that when confronted

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[577] *Id*. at 569–70.
[578] *Id.* at 570.
[579] *Id.* at 571.
[580] *Id.*
[581] *Id.*
[582] 209 P.3d 1038 (Alaska Ct. App. 2009).
[583] *Id.* at 1044.
[584] *Id.* at 1039.
[585] *Id.* at 1040.
[586] *Id.*
[587] *Id.* at 1043.
[588] *Id.* at 1043–44.
[589] *Id.*
[590] 215 P.3d 357 (Alaska Ct. App. 2009).
[591] *Id.* at 361.
[592] *Id.* at 367.
[593] *Id.* at 360.

with pre-*Blakely*, constitutionally deficient sentencing laws, the previous procedure could be replaced by a jury trial.[594] The court, in finding that the aggravator of a "particularly vulnerable victim" was supported, pointed to Douglas's history of violent, manipulative, and controlling behavior towards the victim during their relationship, and concluded that a jury would be justified in finding that the victim suffered emotional or psychological vulnerability because of the pattern of abuse.[595] Finally, the court pointed out that a twenty-four-year sentence was less excessive than the original sentence of thirty years, which the court had previously upheld, and so the current sentence could not be excessive.[596] Therefore, the court of appeals affirmed the finding of the superior court, holding: (1) that constitutionally flawed sentencing procedures could be amended to conform to the requirements of *Blakely*, and thus include jury trials of the aggravating factors,[597] and (2) that an aggravating factor of the crime involving a particularly vulnerable victim would be satisfied if there had been an abusive relationship between the victim and a defendant.[598]

Espinal v. State

In *Espinal v. State*,[599] the court of appeals held that it was not required to conduct an interlocutory review of a superior court ruling merely because the ruling was based on the double jeopardy clause.[600] Espinal was charged with sexually assaulting J.L., M.T., K.T., and P.M., but the jury acquitted him of assaulting M.T. and could not reach a decision regarding the other charges.[601] The State decided to retry him and the superior court granted the State's request to introduce evidence that Espinal assaulted M.T., even though he had been acquitted of that crime.[602] Espinal petitioned the court of appeals to review the ruling.[603] He argued that introducing the evidence violated the Alaska and United States Constitutions' double jeopardy clause and violated Alaska Rule of Evidence 404(b).[604] Additionally, Espinal claimed that *Tritt v. State* required the court of appeals to hear his interlocutory petition for review because it was based on the double jeopardy clause.[605] However, the court of appeals decided that *Tritt* only requires review of motions to dismiss based on double jeopardy grounds, not evidentiary rulings.[606] Therefore, the court of appeals denied Espinal's petition for review, holding that it was not required to conduct an interlocutory review of a superior court ruling merely because the ruling was based on the double jeopardy clause.[607]

Ferrick v. State

In *Ferrick v. State*,[608] the court of appeals held that Alaska's child pornography statute was not unconstitutionally overbroad.[609] Ferrick was convicted of possession of child pornography and, on appeal, argued that the child pornography statute was unconstitutionally overbroad because it criminalized protected speech by prohibiting explicit images of virtual children rather than real children and by allowing conviction of people who thought they had pornography of real children but in fact had only virtual pornography.[610] The court of appeals reasoned that the child pornography statute had to be read in light of the crime defined in Alaska's sexual exploitation of a minor statute.[611] Thus, the child pornography statute at issue only criminalized material that depicted real, exploited minors, and thus it was not overly broad for criminalizing protected speech.[612] Similarly, the statute did not provide for the conviction of people who thought they possessed real child pornography but in fact

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[594] *Id.* at 361.
[595] *Id.* at 367.
[596] *Id.* at 369.
[597] *Id.* at 361.
[598] *Id.* at 361, 367.
[599] 220 P.3d 242 (Alaska Ct. App. 2009).
[600] *Id.* at 244.
[601] *Id.* at 242.
[602] *Id.* at 243.
[603] *Id.*
[604] *Id.*
[605] *Id.*
[606] *Id.* at 243–44.
[607] *Id.* at 244.
[608] 217 P.3d 418 (Alaska Ct. App. 2009).
[609] *Id.* at 419.
[610] *Id.*
[611] *Id.* at 420.
[612] *Id.*

possessed only virtual pornography.[613] Affirming the lower court, the court held that Alaska's child pornography statute was not unconstitutionally overbroad.[614]

Hanson v. State

In *Hanson v. State*,[615] the court of appeals held that when a defendant did not fulfill the obligations of his probation, the probations should not be set-aside under Section 12.55.085(e) of the Alaska Statutes, even when the Department of Corrections failed to properly supervise the defendant.[616] In 1997, Hanson was convicted of two felony counts of controlled substance misconduct, and in 2007, he was convicted of felony assault.[617] Under Alaska's sentencing statute, his possible prison term hinged on whether he was a first- or a second-time felony offender.[618] The court had discretion under 12.55.085(e) to award Hanson a set-aside of his previous conviction if he had successfully completed probation.[619] Typically, if a defendant completes probation, there is a presumption in favor of setting aside the previous sentence.[620] Here, however, the court determined that Hanson did not successfully complete probation because he never reported to the Department of Corrections, he failed to do his required community service, and he did not submit an alcohol and drug assessment during his probation.[621] These facts provided sufficient cause to overcome the presumption favoring set-asides.[622] Thus, the court of appeals affirmed the lower court in denying the set-aside of Hanson's conviction, holding that probations should not be set-aside under 12.55.085(e) even when the Department of Corrections failed to supervise the defendant.[623]

Khan v. State

In *Khan v. State*,[624] the court of appeals held that evidence of prior falsifications was relevant and admissible to show intent in a perjury case, and that the jury need not agree unanimously on which statement was false.[625] Khan was indicted for perjury for making false statements on an application for court-appointed counsel.[626] Kahn was convicted after the court instructed the jury that it could convict if it found any of Kahn's statements to be false, even if it could not agree about which statement was false.[627] Khan argued on appeal that evidence of his prior fraudulent conduct was inadmissible, and that the jurors needed to unanimously agree upon which particular statements were false.[628] The court held that evidence of Khan's prior fraudulent conduct was relevant because it made it less likely that Khan acted mistakenly or innocently, and the court held that the jury instructions were thus appropriate.[629] Accordingly, the court affirmed the judgment of the superior court and held that evidence of prior falsifications was relevant and admissible to show intent in a perjury case, and that the jury need not unanimously agree upon which statement was false.[630]

Lapp v. State

In *Lapp v. State,*[631] the court of appeals held that a defendant who had been ordered to pay restitution as part of a criminal sentence for manslaughter did not have his constitutional rights violated when the superior court judge later entered a civil judgment for the balance of the restitution.[632] Lapp was ordered to pay over $86,000 in

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[613] *Id.* at 420–22.
[614] *Id.* at 419.
[615] 210 P.3d 1240 (Alaska Ct. App. 2009).
[616] *Id.* at 1242–43.
[617] *Id.*
[618] *Id.*
[619] *Id.* at 1242.
[620] *Id.*.
[621] *Id.* at 1243.
[622] *Id.*
[623] *Id.* at 1242–43.
[624] 204 P.3d 1036 (Alaska Ct. App. 2009).
[625] *Id.* at 1038.
[626] *Id.*
[627] *Id.* at 1038–40.
[628] *Id.*
[629] *Id.* at 1039–40.
[630] *Id.* at 1038.
[631] 220 P.3d 534 (Alaska Ct. App. 2009).
[632] *Id.* at 542–43.

restitution after being convicted of manslaughter and assault, but after Lapp stopped making payments, the superior court judge converted the restitution order to a civil judgment for the remainder of the sum.[633] Lapp appealed the civil judgment, arguing that the judgment violated double jeopardy and his substantive due process rights, and was an unconstitutional application of an ex post facto law because a 2001 statute was relied on to increase punishment for his conviction, which occurred in 1995.[634] The appeals court reasoned that double jeopardy did not attach because restitution was an independent condition of Lapp's sentence rather than a condition of his parole,[635] and because the civil judgment did not increase Lapp's punishment.[636] Similarly, the court of appeals rejected Lapp's substantive due process and ex post facto arguments because application of the 2001 law resulted in a procedural change rather than a substantive change to the amount of the restitution.[637] The court of appeals held that a defendant ordered to pay restitution as part of a criminal sentence for manslaughter did not have his constitutional rights violated when the superior court judge later entered civil judgment for the balance of the restitution.[638]

Moffitt v. State

In *Moffitt v. State*,[639] the court of appeals held that a defendant knowingly fails to appear when he makes a conscious and deliberate choice not to attend court at the scheduled time.[640] Moffitt was convicted of felony failure to appear under Section 12.30.060 of the Alaska Statutes.[641] He filed a motion for a new trial, arguing that the prosecutor's rebuttal argument and the jury instructions misled the jury about the *mens rea* of the crime of failure to appear.[642] The prosecutor argued that "knowingly" meant that Moffitt knew at some point that he had a court appearance and then did not show up.[643] The jury instructions defined "knowingly" as awareness of the nature of the defendant's conduct and awareness of a substantial probability that a particular circumstance existed.[644] The court of appeals held that the prosecutor's comments misstated the law and that the jury instructions were misleading, although technically correct.[645] It first reasoned that "knowingly," in this context, implied a conscious choice to not come to court.[646] It further reasoned that the jury instructions misled by defining "knowingly" in regards to both conduct and surrounding circumstances, but only the conduct prong was relevant to Moffitt's case.[647] Moffitt did not contest that he knew he had a court date; rather, he argued that on the day of his hearing he forgot the time.[648] This could have misled the jury into believing that "knowingly" meant awareness of the court date rather than a conscious and deliberate decision not to attend court.[649] Therefore, because there was a substantial probability that the jury convicted Moffitt under an incorrect legal theory, the court of appeals reversed his conviction and ordered a new trial, holding that the defendant knowingly fails to appear when he makes a conscious and deliberate choice to not come to court at the scheduled time.[650]

Moore v. State

In *Moore v. State*,[651] the court of appeals held that a defendant who committed armed robbery: (1) was not eligible to argue that the mitigating doctrine of least serious offense applied to him, and (2) was eligible to have his assault and armed robbery convictions merged.[652] Moore committed armed robbery using a knife.[653] He was charged

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[633] *Id.* at 536.
[634] *Id.*
[635] *Id.* at 537.
[636] *Id.* at 539.
[637] *Id.* at 541.
[638] *Id.* at 542–43.
[639] 207 P.3d 593 (Alaska Ct. App. 2009).
[640] *Id.* at 595.
[641] *Id.* at 594.
[642] *Id.*
[643] *Id.* at 598.
[644] *Id.* at 599.
[645] *Id.*
[646] *Id.* at 595 (citing Hutchison v. State, 27 P.3d 744, 780 (Alaska Ct. App. 2001)).
[647] *Id.* at 600.
[648] *Id.*
[649] *Id.*
[650] *Id.* at 595, 603.
[651] 218 P.3d 303 (Alaska Ct. App. 2009).
[652] *Id.* at 306.

with first-degree robbery and third-degree assault.[654] He was convicted and appealed on two grounds: first, that his first-degree robbery offense should have been mitigated because it was conduct among the least serious covered by the definition of the offense; and second, that the separate convictions should have merged into a single conviction for the more serious offense.[655] On the first point, the court held that the mitigating factor was not present because the use of a knife could be as dangerous as the use of a firearm.[656] On the second point, the court held that the double jeopardy clause requires that both charges be merged when a single threat is the basis of both charges.[657] Affirming in part and reversing in part the decision of the lower court, the court of appeals held that a defendant who committed armed robbery: (1) was not eligible to argue that the mitigating doctrine of least serious offense applied to him, and (2) was eligible to have his assault and armed robbery convictions merged.[658]

Morrell v. State

In *Morrell v. State*,[659] the court of appeals held that: (1) a self-defense argument against a second-degree murder charge was not allowed when the defendant was the initial aggressor and (2) a lengthy prison sentence is appropriate when the defendant used a deadly weapon in an unprovoked attack in response to a minor social disagreement.[660] Morrell and Kalenka got into a minor car accident which escalated into a physical confrontation.[661] Morrell produced a knife and eventually stabbed Kalenka to death.[662] Morrell was convicted of second degree murder, and the judge sentenced him to sixty years imprisonment with ten years suspended.[663] On appeal, Morrell argued that the prosecution produced insufficient evidence that he did not act in self-defense,[664] and he further contented that his sentence was excessive.[665] The court of appeals rejected the former claim, reasoning that testimony from a bystander that Morrell was winning the fight at the time he stabbed Kalenka and evidence that Morrell had to be shoved off Kalenka after Morrell had been stabbed sufficiently demonstrated that a reasonable juror could have found Morrell to be acting as an aggressor rather than in self-defense.[666] Further, the court reasoned that a jury could reasonably find that Morrell's testimony was insufficient to show that Kalenka was a deadly threat.[667] The court also rejected Morrell's argument that his sentence was excessive because his crime was atypical: he had used a deadly weapon in an unprovoked attack in a minor car accident.[668] Affirming the jury's verdict and the defendant's sentence, the court of appeals held: (1) a self-defense argument against a second degree murder charge was not allowed when the defendant was the initial aggressor, and (2) a lengthy prison sentence was appropriate when the defendant used a deadly weapon in an unprovoked attack in response to a minor social disagreement.[669]

Phillips v. State

In *Phillips v. State*,[670] the court of appeals held that: (1) bouncing a forged check was insufficient evidence of harm to financial reputation to sustain a charge of criminal impersonation in the first degree,[671] and (2) a condition of probation requiring submission to drug and alcohol testing was reasonable when the defendant was involved in several alcohol-related criminal offenses in the past and nitrous oxide was found in his vehicle at the time of the arrest.[672] During a consensual search of Phillips's vehicle, a police officer found a false identification

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[653] *Id.* at 304.
[654] *Id.*
[655] *Id.* at 304–05.
[656] *Id.* at 305.
[657] *Id.* at 306.
[658] *Id.*
[659] 216 P.3d 574 (Alaska Ct. App. 2009).
[660] *Id.* at 580.
[661] *Id.*
[662] *Id.* at 576.
[663] *Id.*
[664] *Id.* at 577.
[665] *Id.* at 579.
[666] *Id.* at 578.
[667] *Id.*
[668] *Id.* at 580.
[669] *Id.*
[670] 211 P.3d 1148 (Alaska Ct. App. 2009).
[671] *Id.* at 1151.
[672] *Id.* at 1153.

card, checks issued in someone else's name, and nitrous oxide, which Phillips admitted to using to get high.[673] At trial, a jury convicted Phillips of multiple offenses, including criminal impersonation, as Phillips had bounced checks after one of his victims had closed his checking account.[674] The trial judge assigned a probation condition requiring Phillips to submit to drug and alcohol testing.[675] On appeal, the court of appeals reasoned that the applicable statutory requirements for criminal impersonation in the first degree were not met when the victim had two of his checks bounced, as the statute required damage to a victim's financial reputation vis-à-vis a victim's creditworthiness or his ability to obtain a loan, open an account, obtain credit, or obtain an access device.[676] The court also reasoned that the nitrous oxide found in Phillips's car, coupled with his prior record of underage alcohol possession, supported a "case-specific" basis to condition his probation on alcohol and drug testing.[677] The court of appeals reversed in part and affirmed in part, holding that: (1) bouncing a forged check was insufficient evidence of harm to financial reputation to sustain a charge of criminal impersonation in the first degree,[678] and (2) a condition of probation requiring submission to drug and alcohol testing was reasonable when the defendant was involved in several alcohol-related criminal offenses in the past and nitrous oxide was found in his vehicle at the time of the arrest.[679]

Rantala v. State

In *Rantala v. State*,[680] the court of appeals held that advice to a witness to give "yes" or "no" answers whenever reasonably possible, and not to volunteer information or elaborate on her answers, did not violate Alaska's witness tampering statute.[681] While in jail, Rantala phoned Mischler and urged her not to cooperate with the authorities in the burglary case because she had not been issued a subpoena, and Rantala advised that Mischler should answer "yes" or "no" whenever possible.[682] Rantala was charged with three separate counts of witness tampering, and was found guilty.[683] The court of appeals held that Rantala's conversations with Mischler did not support any of the charges of witness tampering because urging a witness not to volunteer information—if the information is not solicited by the examiner's questions—is permissible.[684] Specifically, the court of appeals rejected the notion that advising Mischler to answer "no" when possible was an attempt to offer misleading testimony because it is up to the prosecution to obtain the truth from a witness in direct or cross-examination.[685] Affirming the superior court's allowance of a second trial, the court of appeals held that advice to a witness to give "yes" or "no" answers whenever reasonably possible, and not to volunteer information or elaborate on their answers, did not violate Alaska's witness tampering statute.[686]

Rockwell v. State

In *Rockwell v. State*,[687] the court of appeals held that admitting as evidence a defendant's inculpatory statements was harmless error if the government could demonstrate that the statements did not contribute to the verdict obtained.[688] Rockwell was involved in a two-car accident.[689] The arresting officer asked Rockwell to sit in the back seat of the patrol car with the understanding that he was not under arrest.[690] The officer proceeded to question him in the car and took him to the station for a field sobriety test.[691] Upon a positive result, he was read his

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[673] *Id.* at 1150, 1153.
[674] *Id.* at 1150.
[675] *Id.* at 1153.
[676] *Id.* at 1151–52.
[677] *Id.* at 1153.
[678] *Id.* at 1151.
[679] *Id.* at 1153.
[680] 216 P.3d 550 (Alaska Ct. App. 2009).
[681] *Id.* at 561.
[682] *Id.*
[683] *Id.* at 551, 554.
[684] *Id.* at 561.
[685] *Id.*
[686] *Id.*
[687] 215 P.3d 369 (Alaska Ct. App. 2009).
[688] *Id.* at 374.
[689] *Id*. at 371.
[690] *Id*.
[691] *Id*. at 371–72.

rights and arrested.[692] Rockwell was then convicted of felony driving while under the influence and driving while his license was revoked.[693] On appeal, the court of appeals found that Rockwell's right to counsel was violated after he was advised of his rights but the police continued interrogation after he demanded an attorney, and the court remanded for additional findings to determine: (1) when the interview became custodial, and (2) whether the admission of statements from the interrogation was harmless beyond a reasonable doubt.[694] The superior court determined that Rockwell's interrogation became custodial as soon as he was seated in the patrol car for questioning and that he was entitled to reversal of his convictions because he might have advanced a different defense if he had not been forced to contend at trial with all of the conflicting statements he made to the police.[695] The court of appeals the held that Rockwell was not actually prejudiced by the evidence gathered in violation of *Miranda* because the jury did not rest its verdict on the evidence gathered during the detention.[696] The court further reasoned that there was no evidence that Rockwell would have argued a different defense had the evidence been excluded.[697] Reversing the ruling in the lower court and affirming the conviction, the court of appeals held that admitting as evidence a defendant's inculpatory statement was harmless error if the government could demonstrate that the statements did not contribute to the verdict obtained.[698]

Skjervem v. State

In *Skjervem v. State*,[699] the court of appeals held that law enforcement must have a separate, legally sufficient reason to continue to detain a defendant after suspicions that led to an initial investigative stop have been resolved.[700] After police observed a small canister in Skjervem's car during a burglary investigation, and after Skjervem admitted that the canister contained marijuana, police obtained his consent to search the car and found drug paraphernalia inside.[701] A subsequent search of Skjervem's person revealed a lump of crack cocaine.[702] The district court found that the police reasonably believed that a burglary was in progress when they began the search and that the defendant was connected to the burglary.[703] The trial court thus concluded that the police were initially justified in taking Skjervem into custody.[704] On appeal, the court of appeals remanded the case to the trial court to resolve two factual issues: (1) whether the burglary investigation had been resolved when the defendant consented to search of his car and was brought in for questioning, and (2) whether drug paraphernalia was in plain view on seat of the car.[705] The court reasoned that the observation of a canister on the seat of Skjervem's car did not justify his continued detention because a reasonable suspicion that a person has small amount of illegal drugs for personal use is not sufficient to justify an investigative stop.[706] The court also reasoned that if the defendant's continued detention was unlawful, then that detention would have tainted his consent to search his car.[707] Moreover, the court stated that if the defendant was detained after the burglary investigation had been resolved and if the drug paraphernalia was not in plain view, then the cocaine found on defendant should have been suppressed.[708] Remanding to the lower court to determine: (1) whether police observed drug paraphernalia in plain view, and (2) whether police learned that there was no burglary before or after beginning custodial interrogation of defendant,[709] the court of appeals held that law enforcement must have a separate, legally sufficient reason to continue to detain a defendant after suspicions that led to an initial investigative stop have been resolved.[710]

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[692] *Id*.
[693] *Id*.
[694] *Id*. at 372.
[695] *Id*.
[696] *Id*. at 374.
[697] *Id*. at 376.
[698] *Id*.
[699] 215 P.3d 1101 (Alaska Ct. App. 2009).
[700] *Id.* at 1105.
[701] *Id.* at 1104.
[702] *Id.*
[703] *Id.*
[704] *Id.*
[705] *Id.* at 1105.
[706] *Id.* at 1106.
[707] *Id.* at 1108.
[708] *Id.* at 1110–11.
[709] *Id.* at 1111.
[710] *Id.* at 1105.

State v. Hamilton

In *State v. Hamilton*,[711] the court of appeals held that a Juneau tire-spinning ordinance did not violate Section 28.01.010(a) of the Alaska Statutes.[712] In 1971, the City of Juneau enacted a traffic code which made it unlawful for a driver to accelerate a vehicle so rapidly as to cause the tires to spin or squeal.[713] At the time the provision was enacted, the Alaska Administrative Code contained an identical regulation, but it was repealed in 1979.[714] Section 28.01.010(a) prohibits municipalities from enacting traffic ordinances that are inconsistent with the Alaska Code.[715] The trial court found that the policy behind 28.02.010(a) was to maintain consistency in Alaska traffic laws and thus declared the ordinance to be invalid.[716] The court of appeals explained that when a question of consistency is raised, the issue is whether the discrepancy frustrates state policy.[717] Here, the court of appeals found nothing to suggest that the tire-spinning provision frustrated state policy.[718] Reversing the decision of the lower court, the court of appeals held that a Juneau tire-spinning ordinance did not violate Section 28.01.010(a).[719]

Wall v. State

In *Wall v. State*,[720] the court of appeals held that one can be convicted of driving under the influence when the driver is merely sitting in a stalled car in an intersection when the car is operable or reasonably capable of being rendered operable.[721] Wall was found sitting in a stopped car on the side of a road, with the keys in his left hand and an open beer in his right.[722] He was convicted by a jury of felony driving under the influence.[723] On appeal, he argued that the evidence was insufficient to establish either that he was operating the car or that the car was operable.[724] The court of appeals affirmed the jury's decision, reasoning that Wall had actual physical control of the vehicle, as he was the sole occupant of the car and had just removed the keys from the ignition.[725] The court further found that the car was reasonably capable of being rendered operable, comparing it to a car that has run out of gas (as opposed to a car with a cracked block, which would be inoperable).[726] The court of appeals thus affirmed the decision below and held that one can be convicted of driving under the influence when the driver is merely sitting in a stalled car at an intersection when the car is operable or reasonably capable of being rendered operable.[727]

Wilson v. State

In *Wilson v. State*,[728] the court of appeals held that Section 11.61.200(a)(1) of the Alaska Statutes, which punishes possession of a firearm by a convicted felon, did not violate the Alaska Constitution.[729] Wilson was pulled over during a traffic stop and police found him in possession of a firearm.[730] He was charged with being a convicted felon in possession of a firearm, but appealed, arguing that the statute violated his right to bear arms under Article I, Section 19 of the Alaska Constitution, because the Constitution does not distinguish violent from non-violent felons.[731] The court of appeals cited federal precedent to support the position that the right to bear arms can be

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[711] 216 P.3d 547 (Alaska Ct. App. 2009).
[712] *Id*. at 549.
[713] *Id.* at 548.
[714] *Id*.
[715] *Id*.
[716] *Id.* at 549.
[717] *Id*.
[718] *Id*.
[719] *Id*.
[720] 203 P.3d 1170 (Alaska Ct. App. 2009).
[721] *Id.* at 1172–74.
[722] *Id.* at 1171.
[723] *Id.*
[724] *Id.*
[725] *Id.* at 1172.
[726] *Id.* at 1173.
[727] *Id.* at 1172–74.
[728] 207 P.3d 565 (Alaska Ct. App. 2009).
[729] *Id.* at 568.
[730] *Id.* at 566.
[731] *Id.*

abridged when applied to convicted felons.[732] The court relied on *Gibson v. State* to demonstrate that the 1994 amendment to Article I, Section 19 of the Alaska Constitution was not intended to mandate strict scrutiny for firearm regulations.[733] Affirming the lower court, the court of appeals held that Section 11.61.200(a)(1), punishing the possession of a firearm by a convicted felon, did not violate the Alaska Constitution, which provides an individual with the right to bear arms.[734]

Wooley v. State

In *Wooley v. State*,[735] the court of appeals held that theft, which is normally a third-degree misdemeanor, cannot be enhanced to a second-degree misdemeanor under Section 11.46.130(a)(6) of the Alaska Statutes if the defendant had been convicted of two thefts but sentenced for both on the same day.[736] On February 12, 2002, Wooley was charged with theft.[737] Because he had been sentenced previously for two separate thefts on March 28, 1997, he pled guilty to second-degree theft based on the enhancement provision of 11.46.130(a)(6).[738] He later filed a motion for post-conviction relief, arguing that his past convictions were too old to support the enhancement because his guilty plea to the previous thefts fell outside the five-year range.[739] The supreme court held that the operative date was the date of sentencing, but the court remanded for determination as to whether being sentenced for two thefts on the same day constituted the two separate offenses required for enhancement.[740] On remand, the court of appeals reasoned that the statute was designed to target the "habitual criminal" and that one only becomes a habitual criminal if he has failed after two separate opportunities to reform.[741] Since the defendant had only been sentenced once before, he had only one opportunity for reformation.[742] Thus, the court of appeals held that theft, which is normally a third-degree misdemeanor, cannot be enhanced to a second-degree misdemeanor under 11.46.130(a)(6) if the defendant had been convicted of two thefts but sentenced for both on the same day.[743]

Worden v. State

In *Worden v. State*,[744] the court of appeals held that a defendant cannot be convicted of knowing possession of child pornography simply for having images stored in his computer's cache.[745] Law enforcement found images of child pornography in Worden's computer cache files.[746] The court of appeals held that Worden did not have the requisite intent to sustain the charge of knowing possession because the State offered no evidence that he knew the images he viewed on websites would be stored on his computer's cache.[747] Reversing the lower court, the court of appeals held that a defendant cannot be convicted of knowing possession of child pornography simply for having images stored in his computer's cache.[748]

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[732] *Id.* at 566–67.
[733] *Id.* at 567–70.
[734] *Id.* at 568.
[735] 221 P.3d 12 (Alaska Ct. App. 2009).
[736] *Id.* at 13.
[737] *Id.* at 14.
[738] *Id.*
[739] *Id.*
[740] *Id.*
[741] *Id.* at 17.
[742] *Id.*
[743] *Id.* at 13.
[744] 213 P.3d 144 (Alaska Ct. App. 2009).
[745] *Id.* at 145.
[746] *Id.*
[747] *Id.* at 148.
[748] *Id.* at 145.

United States Supreme Court

District Attorney's Office for the Third Judicial District v. Osborne

In *District Attorney's Office for the Third Judicial District v. Osborne*,[749] the Supreme Court held that a defendant had no constitutional right to access the State's evidence for the purpose of DNA testing.[750] In 1993, Osborne was arrested for sexually assaulting and murdering a prostitute.[751] Osborne denied the charge, but "DQ Alpha" DNA testing showed that he was within a sixteen percent segment of the population that could have committed the offense.[752] Osborne requested a more specific form of DNA testing, but his lawyer strategically refused, fearing that further testing would only prove guilt and diminish a mistaken identity defense.[753] Osborne was nonetheless convicted.[754] On appeal to the Supreme Court, he argued that the Due Process Clause entitled him to access the State's evidence in order to perform the most specific form of DNA testing available.[755] The Court held that Osborne did not have the same rights to access the State's information post-conviction as he did before he was found guilty in a fair trial.[756] Therefore, Osborne's claim under the Due Process Clause could only succeed if Alaska's post-conviction relief procedures were fundamentally flawed.[757] Since Alaska had guidelines for allowing convicts to seek post-conviction DNA testing, there was no fundamental injustice violating Osborne's due process right.[758] The Supreme Court held that a defendant had no constitutional right to access the State's evidence for the purpose of DNA testing.[759]

Ninth Circuit Court of Appeals

United States v. Johnson

In *United States v. Johnson*,[760] the Ninth Circuit held that the district court properly denied a defendant's motion to suppress evidence and his request for a Section 3E1.1(b) one level downward adjustment in his Sentencing Guidelines sentence.[761] Police noticed three men acting suspiciously around a bank.[762] When one of the men, Johnson, entered the bank, the police followed; Johnson then immediately left and got into a car waiting outside.[763] After pulling over the car, the officers searched the men and found a handgun inside Johnson's coat.[764] Johnson had a prior conviction in Florida and the federal government later indicted him for being a felon in possession of a firearm.[765] Johnson appealed the district court's denial of his motion to suppress the handgun found in the pat-down and the denial of his one level decrease pursuant to Section 3E1.1(b) of the Sentencing Guidelines.[766] The Ninth Circuit held that the search was proper because the Fourth Amendment allows officers to conduct stop-and-frisk searches when they have reasonable suspicion to believe criminal behavior is happening.[767]

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[749] 129 S. Ct. 2308 (2009).
[750] *Id.* at 2323.
[751] *Id.* at 2312–13.
[752] *Id.* at 2313.
[753] *Id.* at 2314.
[754] *Id.*
[755] *Id.* at 2315.
[756] *Id.* at 2320.
[757] *Id.*
[758] *Id.* at 2320–21.
[759] *Id.* at 2323.
[760] 581 F.3d 994 (9th Cir. 2009).
[761] *Id.* at 996.
[762] *Id.* at 997.
[763] *Id.*
[764] *Id.*
[765] *Id.* at 998.
[766] *Id.* at 996.
[767] *Id.* at 999.

The court also held that Johnson was not entitled to a one level sentencing guidelines decrease.[768] The Guidelines allow a one-level decrease on motion by the government when the defendant pleads guilty and accepts responsibility so the court and government can use their resources efficiently by avoiding trial.[769] The government has broad discretion about whether to file this motion, but it is not unlimited, and courts can grant the one-level decrease if the government has abused its discretion.[770] Here, the government did not file a motion for a one-level reduction because although Johnson pled guilty, he still retained the right to appeal and thus forced the government to defend the appeal.[771] The Ninth Circuit held that this use of discretion was proper because Section 3E1.1(b) is designed to conserve resources and encourage guilty pleas.[772] Thus, the Ninth Circuit held that the district court properly denied defendant's motion to suppress evidence and a request for a Section 3E1.1(b) one level downward adjustment in the Sentencing Guidelines.[773]

United States v. Leniear

In *United States v. Leniear*,[774] the Ninth Circuit held that a motion for a sentence reduction based on Amendment 706 would not be granted when the Amendment did not lower the applicable sentencing guideline range and the sentence reduction was not consistent with U.S.S.G. § 1B1.10.[775] Leniear filed a motion seeking a sentence reduction based on Amendment 706, which reduced the base level assigned to each threshold quantity of crack cocaine by two points.[776] Leniear had previously pled guilty to four counts, one of which involved crack cocaine.[777] The district court held that it lacked jurisdiction to reduce Leniear's sentence because Amendment 706 did not lower the applicable guideline range in light of the grouping rules under U.S.S.G. § 3D1.4.[778] Although courts are generally not permitted to alter a sentence once it has been imposed, 18 U.S.C. § 3582(c)(2) permits a change if: (1) the sentence is based on a sentencing range that has subsequently been lowered by the Sentencing Commission, and (2) such a reduction is consistent with applicable policy statements issued by the Sentencing Commission.[779] Leniear's motion did not satisfy the two elements.[780] First, the sentencing range applicable to Leniear remained the same, as the combined offense level did not change.[781] Second, a sentence reduction would not be consistent with the Sentencing Commissions policy statement in U.S.S.G. § 1B1.10, which forbids a reduction in a sentence if it does not lower the defendant's applicable guideline.[782] Affirming the decision of the district court, the Ninth Circuit held that a motion for a sentence reduction based on Amendment 706 would not be granted when the Amendment did not lower the applicable sentencing guideline and the sentence reduction was not consistent with U.S.S.G. § 1B1.10.[783]

United States v. Maness

In *United States v. Maness*,[784] the Ninth Circuit held that a district court's denial of a defendant's request to represent himself at sentencing was subject to harmless error analysis, and because the denial did not cause any error, the sentence was upheld.[785] The court also held that while the Sentencing Guidelines borrow the definition of a semiautomatic assault weapon from 18 U.S.C. § 921(a)(30), the statute's effective date is not incorporated into the Guidelines.[786] Maness appealed a conviction of two counts of firearm possession.[787] On remand, the district court

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[768] *Id.* at 1007.
[769] *Id.* at 1001.
[770] *Id.*
[771] *Id.* at 1002.
[772] *Id.* at 1002, 1007.
[773] *Id.* at 996.
[774] 574 F.3d 668 (9th Cir. 2009).
[775] *Id.* at 674.
[776] *Id*. at 670.
[777] *Id*.
[778] *Id*. at 671.
[779] *Id*. at 673.
[780] *Id.* at 673–74.
[781] *Id*. at 673.
[782] *Id*. at 674.
[783] *Id.*
[784] 566 F.3d 894 (9th Cir. 2009).
[785] *Id.* at 897.
[786] *Id.*

denied his motion to proceed pro se and sentenced him to 120 months.[788] However, the district court did allow Maness to file briefs and motions pro se, although it did not allow him to proceed without an attorney.[789] The Ninth Circuit held that while an improper request to proceed pro se at trial cannot be subject to harmless error analysis, such analysis may be used if the violation occurred only at the sentencing.[790] The court also held that while the Sentencing Guidelines borrow the definition of a semiautomatic assault weapon from 18 U.S.C. § 921(a)(30), the statute's effective date is not incorporated into the Guidelines.[791] Affirming the decision of the district court, the Ninth Circuit held that a district court's denial of a defendant's request to represent himself at sentencing was subject to harmless error analysis, and because the denial did not cause any error, the sentence was upheld.[792]

Alaska Supreme Court

Beltz v. State

In *Beltz v. State*,[793] the supreme court held that the police's reasonable suspicion of methamphetamine production was sufficient to justify the warrantless search of the suspect's garbage even though there was some reasonable expectation of privacy in garbage set out for collection.[794] Without a warrant, police collected garbage bags that Beltz placed on public property at the end of his driveway.[795] The bags contained evidence of methamphetamine manufacturing.[796] Beltz moved to suppress the evidence resulting from collection of his garbage.[797] The superior court granted the motion, but the court of appeals reversed.[798] On appeal, Beltz argued that the police violated his right to be free from unreasonable searches and seizures.[799] The court found no violation of the U.S. Constitution because a subjective expectation of privacy in garbage left for collection is unreasonable under U.S. Supreme Court precedent.[800] Under the Alaska Constitution, however, the court held that highly personal information can be gleaned from a garbage search, but that leaving garbage out necessarily contemplates a risk of intrusion by human or natural forces.[801] The court therefore concluded that under the Alaska Constitution there is a reasonable but diminished expectation of privacy in garbage left out for collection.[802] Nonetheless, the court determined that a reasonable suspicion of evidence of a crime causing serious harm to people or property is sufficient to justify a warrantless search of garbage because the expectation of privacy is diminished and because the search is minimally invasive.[803] Here, evidence that Beltz purchased the necessary materials for methamphetamine production was sufficient to create a reasonable suspicion that he was manufacturing methamphetamine.[804] Affirming the appellate court, the supreme court held that the police's reasonable suspicion of methamphetamine production was sufficient to justify the warrantless search of the suspect's garbage even though there is some reasonable expectation of privacy in garbage set out for collection.[805]

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[787] *Id.* at 896.
[788] *Id*.
[789] *Id.* at 897.
[790] *Id*.
[791] *Id*.
[792] *Id.* at 897.
[793] 221 P.3d 328 (Alaska 2009).
[794] *Id.* at 330.
[795] *Id*. at 331.
[796] *Id.*
[797] *Id.*
[798] *Id.*
[799] *Id.*
[800] *Id.* at 332.
[801] *Id.* at 335.
[802] *Id.*
[803] *Id.* at 336–37.
[804] *Id.* at 337.
[805] *Id.* at 330.

State v. Smart

In *State v. Smart*,[806] the supreme court held that the United States Supreme Court's holding in *Blakely*, which grants the right to a jury trial to determine every fact in a case—including aggravating factors in a presumptive sentencing scheme—would not apply retroactively in Alaska.[807] Smart was convicted by a jury of second-degree assault, and the sentencing judge found an aggravating factor that extended his sentence.[808] The court of appeals overturned Smart's sentence, holding that the *Blakely* doctrine was retroactive and required that aggravating facts must be found by a jury beyond a reasonable doubt.[809] The supreme court identified three criteria to guide whether a new ruling should be retroactive: the purpose of the new standards, the extent of reliance on the old standards, and the administrative effect of retroactive application of the new standards.[810] The court reasoned that the purpose of the new standard was not contravened because no serious questions were raised about the fairness of prior criminal trials;[811] the reliance on the old standard was heavy and consistent;[812] and making the new rule retroactive would create a large administrative problem because many cases would need to be retried.[813] As all three factors gravitated against retroactivity, the supreme court reversed the decision of the lower court and held that the Supreme Court's holding in *Blakely*, which grants the right to a jury trial to determine every fact in a case, including aggravating factors in a presumptive sentencing scheme, would not apply retroactively in Alaska.[814]

State v. Miller

In *State v. Miller*,[815] the supreme court held that a police officer's reasonable suspicion was sufficient to conduct an investigative stop of a car when the factors of a balancing test were met.[816] An anonymous 911 call alerted the police that a man and woman were engaged in a nonphysical fight in a bar parking lot and an officer was dispatched to the scene.[817] Upon arriving, the officer saw the man and woman beginning to drive off.[818] The officer pulled the car over at the parking lot exit to investigate and determined that the driver, Miller, was intoxicated.[819] At trial, Miller argued that the officer did not have reasonable suspicion necessary to stop his car, and Miller moved to suppress the results of the investigation.[820] The district court found the officer's suspicion sufficient and denied the motion.[821] On appeal, the supreme court held that to determine whether an investigative stop is appropriate, a balancing test that considers: (1) the seriousness of the suspected crime; (2) the immediacy of the investigation; (3) the strength of the officer's reasonable suspicion; and (4) the intrusiveness of the stop should be applied.[822] Here, the court held that domestic violence was a serious crime,[823] and that it was reasonable for the officer to believe that domestic violence had been or would be committed.[824] Moreover, the investigation through a car window was minimally invasive and occurred in the immediate area of the suspected crime.[825] Accordingly, the supreme court reversed the court of appeals, holding that an investigative stop was appropriate when a balancing test indicated that an officer's reasonable suspicion supported the stop.[826]

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[806] 202 P.3d 1130 (Alaska 2009).
[807] *Id.* at 1132.
[808] *Id.* at 1133.
[809] *Id.* at 1134.
[810] *Id.* at 1136.
[811] *Id.* at 1145.
[812] *Id.* at 1146.
[813] *Id.*
[814] *Id.* at 1132.
[815] 207 P.3d 541 (Alaska 2009).
[816] *Id.* at 551.
[817] *Id.* at 542.
[818] *Id.*
[819] *Id.* at 542–43.
[820] *Id.* at 543.
[821] *Id.*
[822] *Id.* at 544.
[823] *Id.* at 545–46.
[824] *Id.* at 545–47.
[825] *Id.* at 547, 549.
[826] *Id.* at 551.

Alaska Court of Appeals

Alex v. State

In *Alex v. State*,[827] the court of appeals held that: (1) federal post-conviction relief law does not affect the interpretation of Section 12.72.020(a)(3)(A) of the Alaska Statutes, which governs the time limit to file a petition for post-conviction relief for state convictions; and (2) a defendant's petition for post-conviction relief is not untimely for purposes of Section 18.85.100(c)(1) until that claim is resolved against the defendant.[828] Alex filed a petition for post-conviction relief in the superior court thirteen months after the supreme court denied his petition for hearing.[829] However, according to 12.72.020(a)(3)(A), the deadline was twelve months, so the superior court dismissed the petition.[830] On appeal, Alex argued that under federal law, he still had time to file the petition because the United States Supreme Court rules allow the defendant ninety days to file a petition for certiorari.[831] Alex also argued that he was denied effective assistance of counsel, which should have equitably tolled the statute of limitations.[832] On the former issue, the court of appeals reasoned that the federal statutory and case law cited by Alex only applied to federal convictions.[833] On the latter issue, the court reasoned that because defendants have a constitutional right to representation when challenging a statute their conviction, the defendant's petition for post-conviction relief is not untimely for purposes of 18.85.100(c)(1) until that claim is resolved against the defendant.[834] Thus, the court of appeals held that: (1) federal post-conviction relief law does not affect the interpretation of 12.72.020(a)(3)(A), which governs the time limit to file a petition for post-conviction relief for state convictions; and (2) a defendant's petition for post-conviction relief was not untimely for purposes of 18.85.100(c)(1) until his ineffective assistance of counsel claim had been resolved.[835]

Bennett v. Municipality of Anchorage

In *Bennett v. Municipality of Anchorage*,[836] the court of appeals held that in a domestic violence proceeding, a trial judge did not abuse his discretion by admitting evidence of a defendant's other crime of domestic violence or by failing to explain the basis for admitting the evidence on the record.[837] Bennett was arrested and charged with assault, family violence, and malicious destruction of property.[838] The trial court admitted evidence that Steven had struck his wife once before, in 2005.[839] On appeal, Bennett claimed that evidence about the 2005 incident was improperly admitted because there was insufficient proof that that incident was domestic violence,[840] and that the trial judge erred in not explaining on the record why the 2005 incident was relevant to the present case.[841] The court noted that the relevancy of evidence depends upon whether a reasonable juror could find that the prior incident had been established as domestic violence.[842] The court further reasoned that this standard had been met, given the victim's testimony that in 2005 Steven struck her in the face multiple times.[843] The court also determined that a trial judge is not required to explain on the record the analysis of each and every factor in his or her decision to admit evidence.[844] Therefore, the court of appeals held that in a domestic violence proceeding, a trial

[827] 210 P.3d 1225 (Alaska Ct. App. 2009).
[828] *Id.* at 1227–29.
[829] *Id.* at 1226.
[830] *Id.*
[831] *Id.*
[832] *Id.* at 1228.
[833] *Id.* at 1227–28.
[834] *Id.* at 1229.
[835] *Id.* at 1227–29.
[836] 205 P.3d 1113 (Alaska Ct. App. 2009).
[837] *Id.* at 1114.
[838] *Id.*
[839] *Id.*
[840] *Id.* at 1116.
[841] *Id.* at 1119.
[842] *Id.* at 1117.
[843] *Id.* at 1117–18.
[844] *Id.* at 1119.

judge did not abuse his discretion by admitting evidence of a defendant's other crime of domestic violence or by failing to explain the basis for admitting the evidence on the record.[845]

Brand v. Alaska

In *Brand v. Alaska*,[846] the court of appeals held that a police officer could not conduct a protective sweep of a residence unless he has a reasonable belief that there were other individuals inside the home who might put him in danger.[847] Brand consented to a search of his residence after police had already conducted a protective sweep of his home and discovered a marijuana-growing operation inside.[848] Brand was convicted of two counts of fourth-degree misconduct involving a controlled substance and was sentenced to four years of imprisonment.[849] On appeal, the court of appeals found that the trial court should have suppressed the State's evidence because the police lacked reasonable cause to perform a protective sweep of the Brand residence.[850] The court reasoned that there was no reasonable cause to believe that a dangerous person was inside the house because the officers who arrested Brand and performed the sweep of his residence testified that they did not have any actual belief that another individual was in the home and posed a threat, and Brand and the other suspects were all secured outside of the home.[851] Reversing the decision of the lower court, the court of appeals held that police may not conduct a protective sweep of a residence unless they have reason to believe that there are other individuals inside the home who might put them in danger.[852]

Clark v. State

In *Clark v. State*,[853] the court of appeals held that a victim's prior testimony at an evidentiary hearing could be used at trial without violating the confrontation clause, even though the victim refused to testify at trial and refused to be cross examined.[854] Amouak, the victim of Clark's assault, arrived at the hospital and informed medical personnel that she was assaulted by Clark.[855] During trial, Amouak refused to testify, and the State relied on the hospital conversation to detail the cause of Amouak's injury.[856] Clark was convicted, but on appeal argued that the conversation should not have been admitted because it was hearsay.[857] The court of appeals then remanded the case for an evidentiary hearing to determine whether the conversation should have been excluded under the confrontation clause of the Sixth Amendment.[858] At the evidentiary hearing, Amouak testified about the conversation, but refused to answer cross-examination questions.[859] Clark claimed that Amouak's entire testimony should have been stricken because she elected not to subject herself to cross-examination.[860] The court of appeals affirmed the decision to admit the testimony because Clark's attorney was still able to substantially make his argument without questioning Amouak.[861] The court of appeals also affirmed that the conversation with medical personnel was an exception to the hearsay rule under Alaska Rule of Evidence 803(4) because it was intended to facilitate medical treatment.[862] Furthermore, the court stated that the conversation was not testimonial because Amouak's primary purpose for disclosing information was to obtain treatment.[863] Affirming the lower court, the court of appeals held that a victim's

[845] *Id.* at 1114.
[846] 204 P.3d 383 (Alaska Ct. App. 2009).
[847] *Id.* at 384.
[848] *Id.* at 385.
[849] *Id.*
[850] *Id.* at 384, 389.
[851] *Id.* at 386, 388–89.
[852] *Id.* at 384, 389.
[853] 199 P.3d 1203 (Alaska Ct. App. 2009).
[854] *Id.* at 1213.
[855] *Id.* at 1205.
[856] *Id.*
[857] *Id.* at 1205–06.
[858] *Id.* at 1206.
[859] *Id.*
[860] *Id.*
[861] *Id.* at 1207.
[862] *Id.* at 1205.
[863] *Id.* at 1213.

prior testimony at an evidentiary hearing could be used at trial without violating the confrontation clause, even though the victim refused to testify at trial or be cross examined.[864]

Dayton v. State

In *Dayton v. State*,[865] the court of appeals held that tardy filing was not grounds for a dismissal when the brief was actually filed and the opposing party did not demonstrate any hardship brought by the filing's lateness.[866] Dayton was convicted of first-degree sexual assault and first-degree burglary.[867] After being convicted, Dayton filed a petition for post-conviction relief, but did so a full sixty days after the deadline set by the trial court judge.[868] The judge then granted the State's motion to strike the petition and dismissed the action, orally citing the tardiness of the petition.[869] On appeal, the court of appeals held that late filing was not grounds for dismissal when: (1) the brief was actually filed; and (2) the opposing party had not demonstrated any hardship brought by the tardy filing.[870] Since these factors were both present here, the court held dismissal of the appeal was inappropriate and remanded the case to the trial court, where the State could pursue other avenues for dismissal.[871] Reversing the lower court, the court of appeals held that a tardy filing was not grounds for a dismissal when the brief was actually filed and the opposing party did not demonstrate any hardship brought by the filing's lateness.[872]

Gibson v. State

In *Gibson v. State*,[873] the court of appeals held that the State could not use evidence procured under the emergency aid exception to the warrant requirement when the circumstances surrounding the search would not have led a reasonable officer to perceive an immediate need to take action in order to prevent death or to protect against serious injury.[874] The police responded to a 911 call, in which a woman reported that a man was threatening to stab her in the back of the head.[875] Moments after their arrival, the police saw Bevin tumble out the door with a cut on the back of her head and a swollen eye.[876] When ordered to come out of the trailer, Gibson offered no resistance and was placed in the back of a patrol car.[877] Although the officers had seen nothing to indicate that there were other people in the trailer, an officer entered the trailer to make sure no one else was inside and injured.[878] Upon entering the trailer, an officer discovered a methamphetamine laboratory.[879] The police then obtained a warrant and returned to gather evidence.[880] Gibson filed a motion to suppress arguing that the police illegally entered his trailer without a warrant.[881] The State argued that the officers were justified under the emergency aid exception to the warrant requirement.[882] On appeal, the court of appeals held that warrantless entries are deemed per se unreasonable and are only tolerated if they fall within a well-established and specifically defined exception, such as the emergency aid exception. For that exception to apply: (1) the police must have reasonable grounds to believe that there is an immediate need for their assistance for the protection of life or property; (2) the search must not be primarily motivated by intent to arrest and seize evidence; and (3) there must be some reasonable basis to associate the emergency with the area or place to be searched.[883] The court held that the exception did not apply here because the State had failed to show that there was an immediate need for the officers' assistance, thus leaving no reasonable

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[864] *Id.*
[865] 198 P.3d 1189 (Alaska Ct. App. 2009).
[866] *Id.* at 1190.
[867] *Id.*
[868] *Id.*
[869] *Id.* at 1190–91.
[870] *Id.* at 1192.
[871] *Id.* at 1192–93.
[872] *Id.* at 1194.
[873] 205 P.3d 352 (Alaska Ct. App. 2009).
[874] *Id.* at 353.
[875] *Id.*
[876] *Id.*
[877] *Id.*
[878] *Id.*
[879] *Id.*
[880] *Id.*
[881] *Id.*
[882] *Id.*
[883] *Id.* at 355.

basis for them to enter the trailer.[884] The supreme court reversed the decision of the trial court and held that the State may not use evidence procured under the emergency aid exception to the warrant requirement when the circumstances surrounding the search would not have led a prudent and reasonable officer to perceive an immediate need to take action in order to prevent death or to protect against serious injury to persons or property.[885]

Kalmakoff v. State

In *Kalmakoff v. State*,[886] the court of appeals held that when a defendant's *Miranda* rights are violated but there is a sufficient break in the stream of events between the violation and a subsequent statement, then the subsequent statement is admissible.[887] During an initial interview, Kalmakoff made statements that caused police to suspect his involvement in the crime, but he was not given *Miranda* warnings.[888] In a second interview, Kalmakoff was warned of his right to silence, but troopers prodded him for information after he expressed a desire to stop talking.[889] Three hours after the conclusion of this interview, troopers came to his home to speak with him again; he was again warned, after which he confessed to the crime without invoking a right to silence.[890] The trial judge admitted statements from the first interview, but excluded the entire second interview due to the *Miranda* violation.[891] The court of appeals declined to rule on whether the first interview was improperly admitted, but held that the statements from the third interview were sufficient to convict Kalmakoff regardless of whether the first interview's statements were heard by a jury or not.[892] It held that the third interview was properly admitted because, under the *Halberg* rule, there was a sufficient break in the stream of events between the second and third interviews (time had elapsed, Kalmakoff had gone to school and his home and had time to speak with family and friends), and that the third interview was not tainted by the prior *Miranda* violation.[893] Affirming the decision of the lower court, the court of appeals held that when a defendant's *Miranda* rights are violated but there is a sufficient break in the stream of events between the violation and a subsequent statement, then the subsequent statement is admissible.[894]

Malutin v. State

In *Malutin v. State*,[895] the court of appeals held that a criminal defendant's negotiated plea bargain was constitutionally valid when the defendant's attorney stipulated to two aggravating factors without the defendant's express permission.[896] Malutin pled no contest to attempted first-degree sexual abuse of a minor as part of a plea bargain.[897] The plea bargain had a negotiated sentence of twelve years imprisonment with seven years suspension.[898] However, because attempted sexual abuse of a minor is a class A felony, the superior court could not lawfully impose the twelve year sentence unless it found at least one aggravating factor.[899] Thus, the defense stipulated to two aggravating factors.[900] On appeal, Malutin challenged his plea agreement,[901] arguing that the court was in error when it allowed his defense attorney to make a stipulation for him without his express permission.[902] The court of appeals held that it is not plain error for the superior court to allow the defense attorney to concede aggravating factors for the client.[903] Although the court decided that there was no factual basis for the second aggravating factor, it held that

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[884] *Id.* at 356.
[885] *Id.* at 353.
[886] 199 P.3d 1188 (Alaska Ct. App. 2009).
[887] *Id.* at 1189.
[888] *Id.* at 1190–91.
[889] *Id.* at 1192–93.
[890] *Id.* at 1193–94.
[891] *Id.* at 1194–95.
[892] *Id.* at 1200.
[893] *Id.* at 1200–01.
[894] *Id.* at 1189.
[895] 198 P.3d 1177 (Alaska Ct. App. 2009).
[896] *Id.* at 1189.
[897] *Id.* at 1178.
[898] *Id.*
[899] *Id.*
[900] *Id.* at 1179.
[901] *Id.*
[902] *Id.* at 1184.
[903] *Id.*

only one aggravating factor was needed to sustain the plea bargain.[904] Affirming the lower court, the court of appeals held that a criminal defendant's negotiated plea bargain was constitutionally valid where the defendant stipulated to two aggravating factors through his attorney without the defendant's express permission.[905]

McKinley v. State

In *McKinley v. State*,[906] the court of appeals held that placement at a residential treatment facility, even if court ordered, does not approximate incarceration if the program does not require residency and twenty-four hour custody.[907] After completing a residential treatment program, McKinley entered an aftercare program.[908] He filed a motion requesting credit for the time he resided at the aftercare program.[909] The court of appeals held that McKinley was not entitled to credit for the time he resided at the aftercare program.[910] The court used three of the *Nygren* criteria to determine whether McKinley was considered in custody during the aftercare program: first, whether the program required residency; second, whether the facility required twenty-four hour supervision; and third, whether a court order required the person to reside at the facility.[911] The court of appeals held that McKinley was not subjected to incarceration during the aftercare program because, even though it was court ordered, the aftercare program did not require residency and he was not under twenty-four hour supervision.[912] Affirming the decision of the superior court, the court of appeals held that placement at a residential treatment facility, even if court ordered, does not approximate incarceration if the program does not require residency and twenty-four hour custody.[913]

McLaughlin v. State

In *McLaughlin v. State*,[914] the court of appeals held that a person convicted of a criminal offense could not circumvent the statute of limitations on a petition for post-conviction relief by appealing to civil rules that allow relief under certain circumstances.[915] McLaughlin pled no contest and was convicted of driving under the influence.[916] Nearly three years later, he applied to the superior court for post-conviction relief, but the application was denied because it was untimely.[917] On appeal, McLaughlin admitted that the statute of limitations on his application had run but argued that his application should be allowed because Alaska's criminal rules explicitly applied civil rules to post-conviction relief, and because under the civil rules there was no time limit on an application for relief from a void judgment.[918] The court of appeals determined that the grounds and procedure—including the statute of limitations—for seeking relief from a criminal conviction are provided under Alaska's Criminal Rules.[919] The court reasoned that although the Alaska Criminal Rules provide that civil rules will typically be used in post-conviction relief actions, the provision at issue was intended to promote administrative efficiency, rather than to create an alternative procedure for seeking relief.[920] To create an alternative procedure would undermine the intent of the legislature in enacting the statute.[921] Accordingly, the court of appeals affirmed the superior court decision and held that a person convicted of a criminal offense could not circumvent the statute of limitations on a petition for post-conviction relief by appealing to civil rules that allow relief under certain circumstances.[922]

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[904] *Id.* at 1187.
[905] *Id.* at 1189.
[906] 215 P.3d 378 (Alaska Ct. App. 2009).
[907] *Id.* at 379.
[908] *Id.*
[909] *Id.*
[910] *Id.* at 381.
[911] *Id.* at 380.
[912] *Id.* at 381.
[913] *Id.* at 379.
[914] 214 P.3d 386 (Alaska Ct. App. 2009).
[915] *Id.* at 387.
[916] *Id.* at 386.
[917] *Id.*
[918] *Id.*
[919] *Id.*
[920] *Id.* at 387.
[921] *Id.*
[922] *Id.*

Newsom v. State

In *Newsom v. State*,[923] the court of appeals held that the police may stop a suspect even in the absence of public danger or a serious crime.[924] When Officer Busey attempted to pull over Newsom for driving at night without lights, Newsom accelerated and began weaving through traffic but was eventually caught as he fled into a Walmart.[925] Newsom was convicted of first-degree failing to stop at the direction of a police officer; the crime was a felony because it was accompanied by reckless driving.[926] On appeal, he argued that the police were not authorized to conduct this investigative stop because he presented no immediate public danger and because the crime being investigated did not involve serious harm to person or property.[927] The court held that an investigative stop was appropriate even in the absence of public danger, and was a serious crime when, as here, the stop was minimally intrusive and was based on solid information suggesting the existence of a crime.[928] The court also found support in two guiding principles for close cases like this one: (1) a stop may not be used a pretext to a search for evidence and (2) practical necessity sometimes requires a stop.[929] Here, the court believed that the stop was conducted not to search for evidence but to prevent the suspect from leaving.[930] Accordingly, the court of appeals affirmed the judgment of the superior court and held that the police may stop a suspect even in the absence of public danger or a serious crime.[931]

State v. Avery

In *State v. Avery*,[932] the court of appeals held that an inmate has no reasonable expectation of privacy in phone calls made from jail, and the contents of such phone calls are admissible as evidence.[933] In February and March 2005, Avery was in jail awaiting trial and was under an order prohibiting him from contacting his wife.[934] When police became aware that Avery violated the order several times, they obtained a warrant giving them access to the phone calls, which had been recorded by the Department of Corrections as part of a routine process.[935] The calls became the basis for additional charges.[936] Avery moved to suppress the telephone recordings, arguing that his rights under the United States and Alaska Constitutions were violated when the recordings were made without a warrant.[937] The motion was granted by the superior court and the State appealed.[938] The court of appeals held that under the Fourth Amendment of the Constitution, Avery did not have a reasonable expectation of privacy when making the phone calls, reasoning that the privacy rights of Avery were outweighed by the security interest of the jail.[939] The court further reasoned that under the Alaska Constitution, prison security is a compelling government interest and conversations could be recorded if they furthered that interest.[940] The court of appeals reversed the motion, holding that an inmate has no reasonable expectation of privacy in phone calls made from jail, and the contents of such phone calls are admissible as evidence.[941]

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[923] 199 P.3d 1181 (Alaska Ct. App. 2009).
[924] *Id*. at 1182.
[925] *Id*. at 1182–83.
[926] *Id*. at 1184.
[927] *Id*. at 1185.
[928] *Id.* at 1186.
[929] *Id.*
[930] *Id.*
[931] *Id.* at 1182.
[932] 211 P.3d 1154 (Alaska Ct. App. 2009).
[933] *Id*. at 1156
[934] *Id*.
[935] *Id*. at 1155.
[936] *Id*.
[937] *Id*.
[938] *Id*.
[939] *Id*. at 1157, 1158.
[940] *Id*. at 1158–59.
[941] *Id*. at 1160.

State v. Galbraith

In *State v. Galbraith*,[942] the court of appeals held that a judge who was preempted in a dismissed indictment remained preempted when an identical indictment is filed anew, but that a judge who was not preempted during original proceedings could not be preempted in a later proceeding on an identical indictment.[943] After a judge dismissed murder charges against Galbraith, the State obtained a new indictment on identical charges.[944] When the original judge was assigned to the newly filed case, the State attempted to remove the judge through a peremptory challenge.[945] This challenge was denied, and the State appealed.[946] The court reviewed previous Alaska criminal cases and concluded that, at least in the criminal context, the decision to use or forego a peremptory challenge in an earlier proceeding should remain binding in a newly filed identical proceeding.[947] Therefore, the court of appeals affirmed the denial of the State's peremptory challenge holding that a judge who was preempted in a dismissed indictment remains preempted when an identical indictment is filed anew but that a judge who was not preempted during original proceedings cannot be preempted in a later proceeding on an identical indictment.[948]

State v. Jones

In *State v. Jones*,[949] the court of appeals held that a criminal complaint from a prior prosecution, in which the defendant pled no contest, was inadmissible hearsay when offered to prove the facts of the prior assault.[950] During Jones' trial for second-degree assault, the prosecution introduced evidence of prior similar violent behavior through the judgment and complaint from a former case in which Jones had pled no contest.[951] The prosecution argued that by pleading no contest, the defendant admitted the acts alleged in the complaint.[952] The superior court accepted this argument, admitted the evidence, and Jones was convicted.[953] On appeal, the court of appeals reversed the conviction, reasoning that the evidence was inadmissible and that its admission may have appreciably affected the jury's verdict.[954] Under Alaska law, a judge is only required to ascertain the factual basis of a plea when a defendant enters a guilty plea, but not when a defendant enters a no contest plea.[955] Further, the evidence admitted in error may have appreciably affected the jury's verdict, because without it the State had little evidence to demonstrate the assault occurred as alleged.[956] Reversing the superior court's decision, the court of appeals held that a criminal complaint from a prior prosecution, in which the defendant pled no contest, was inadmissiable hearsay when offered to prove the facts of the prior assault.[957]

Tegoseak v. State

In *Tegoseak v. State*,[958] the court of appeals held that potential problems with a photo lineup procedure were harmless beyond a reasonable doubt when the witness had followed the defendant until his arrest.[959] When Maestas witnessed a car swerving as though the driver was intoxicated, he called the police and followed the car until officers arrived.[960] One week later, Maestas identified Tegoseak from a photo array, but the officer administering the photo lineup may have conducted the photo lineup in a suggestive way.[961] After he was convicted,

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[942] 199 P.3d 1216 (Alaska Ct. App. 2009).
[943] *Id.* at 1217.
[944] *Id.*
[945] *Id.* at 1217–18.
[946] *Id.* at 1218.
[947] *Id.* at 1218–19.
[948] *Id.* at 1219.
[949] 215 P.3d 1091 (Alaska Ct. App. 2009).
[950] *Id.* at 1101.
[951] *Id.* at 1093.
[952] *Id.* at 1094.
[953] *Id.*
[954] *Id.* at 1093.
[955] *Id.* at 1095.
[956] *Id.* at 1101.
[957] *Id.*
[958] 221 P.3d 345 (Alaska Ct. App. 2009).
[959] *Id.* at 346.
[960] *Id.* at 346–47.
[961] *Id.* at 347–49.

Tegoseak appealed the superior court's denial of his motion to suppress the results of the photo lineup.[962] The court of appeals reasoned that even if the identification procedure had been unnecessarily suggestive, the identity of the perpetrator was not in doubt here because Maestas had followed Tegoseak until he was arrested.[963] Affirming the decision of the lower court, the court of appeals held that potential problems with a photo lineup procedure were harmless beyond a reasonable doubt when the witness had followed the defendant until his arrest.[964]

ELECTION LAW

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Alaska Supreme Court

Carmony v. McKechnie

In *Carmony v. McKechnie*,[965] the supreme court held that a land use ballot initiative was unenforceable as a matter of law because it circumvented the planning commission's statutory duty to create a consistent and comprehensive land use plan.[966] Carmony submitted an initiative that imposed expiration dates on all land use ordinances enacted after July 1, 2007 unless they were approved by voters.[967] The borough clerk rejected the initiative application because: (1) the initiative was unenforceable as a matter of law; (2) it was related to administrative rather than legislative matters; and (3) it was more similar to a referendum than an initiative.[968] The superior court affirmed.[969] Carmony then appealed to the supreme court.[970] In order to be valid, an initiative must be enforceable as a matter of law.[971] Carmony's proposed initiative was not enforceable because it would set automatic expiration dates for land use ordinances without allowing the planning commission to have any say in the matter.[972] Because state law assigns the planning commission the duty of establishing a comprehensive land use plan, a voter initiative cannot strip them of their power and avoid the legislative intent.[973] Affirming the decision of the superior court, the supreme court held that the land use ballot initiative was unenforceable as a matter of law because it circumvented the planning commission's statutory duty to create a consistent and comprehensive land use plan.[974]

Swetzof v. Philemonoff

In *Swetzof v. Philemonoff*,[975] the supreme court held that a proposed ballot initiative should have been subject to approval by the city clerk because the initiative was enforceable as a matter of law and was legislative in nature.[976] Philemonoff included language in his proposed ballot initiative which required the City of St. Paul to take express action toward receiving regulatory approval to end the retail sale of electric power.[977] The supreme court held that because the initiative clearly stated that the city would be required to take action, it became enforceable as a matter of law.[978] The court noted that legislative matters tend to involve new rules of a permanent nature, whereas

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[962] *Id.* at 346.
[963] *Id.* at 363.
[964] *Id.*
[965] 217 P.3d 818 (Alaska 2009).
[966] *Id.* at 821.
[967] *Id.* at 819.
[968] *Id.*
[969] *Id.* at 821.
[970] *Id.*
[971] *Id.*
[972] *Id.*
[973] *Id.*
[974] *Id.*
[975] 203 P.3d 471 (Alaska 2009).
[976] *Id.* at 473.
[977] *Id.*
[978] *Id.* at 475.

administrative matters regulate existing rules in a temporary manner.[979] The supreme court held that an initiative is legislative when it: (1) makes new law; (2) declares a public policy with a way to achieve it; and (3) does not require specific training or knowledge.[980] Philemonoff's proposed initiative met the first two prongs.[981] However, the court held that the third prong was subordinate to the first two, due to the state's standing policy of liberally construing voter initiatives so as to maintain their validity.[982] The supreme court therefore affirmed the lower court, holding that the proposed initiative should have been approved by the city clerk because the initiative was enforceable as a matter of law and was legislative in nature.[983]

EMPLOYMENT LAW

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Alaska Supreme Court

Classified Employees Ass'n v. Matanuska-Susitna Borough School District

In *Classified Employees Ass'n v. Matanuska-Susitna Borough School District*,[984] the supreme court held that a school district's decision to outsource its custodial services was not subject to arbitration with a union when the collective bargaining agreement did not prohibit or limit outsourcing.[985] Both parties agreed to a collective bargaining agreement that did not prohibit or limit outsourcing.[986] In December 2005, the Matanuska-Susitna Borough School District began outsourcing custodial work, replacing union workers with contract employees.[987] The union filed a grievance and the school district sought a declaratory judgment that outsourcing was not arbitrable.[988] In response, the union filed suit to compel the arbitration.[989] The superior court found in favor of the school district, concluding that the question of whether an issue is arbitrable is not a question of law and that there was no statutory prohibition to prevent the school board from outsourcing.[990] The supreme court affirmed the decision,[991] holding that the school district's decision to outsource its custodial services was not subject to arbitration with a union when the collective bargaining agreement did not prohibit or limit outsourcing.[992]

Gibson v. Nye Frontier Ford, Inc.

In *Gibson v. Nye Frontier Ford, Inc.*,[993] the supreme court held that an employment arbitration clause that placed restrictions on an employee's right to appeal an arbitration award and required a claimant to pay half the arbitration costs was unconscionable and unenforceable.[994] Larry Gibson filed suit against Nye Frontier Ford, Inc. to receive unpaid overtime compensation.[995] Nye answered that Gibson's claim was subject to an arbitration agreement,[996] but Gibson argued that the arbitration clause was unenforceable because it precluded appeals on

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[979] *Id.*
[980] *Id.* at 479–82.
[981] *Id.* at 479.
[982] *Id.* at 479–80.
[983] *Id.* at 482.
[984] 204 P.3d 347 (Alaska 2009).
[985] *Id*. at 353.
[986] *Id*. at 350.
[987] *Id*. at 350–351.
[988] *Id*. at 351.
[989] *Id*.
[990] *Id*.
[991] *Id*. at 360.
[992] *Id.* at 353.
[993] 205 P.3d 1091 (Alaska 2009).
[994] *Id.* at 1099.
[995] *Id.* at 1093.
[996] *Id.*

awards less than $50,000 and the clause required him to pay one half of the arbitration costs.[997] The superior court entered an order staying proceedings pending arbitration and Gibson appealed.[998] The supreme court reasoned that a $50,000 threshold to bring an appeal was unconscionable because a losing claimant would be unable to appeal an arbitrator's award.[999] Further, the party imposing the award threshold anticipated being the defendant; therefore, it was one-sided and unconscionable.[1000] The supreme court held that requiring a claimant to pay half of the costs associated with arbitrating his claim would run afoul of AWHA's purpose.[1001] Specifically, the court reasoned that the deterrent effect of requiring a claimant to pay arbitration costs would be a de facto forfeiture of an employee's statutory right to bring suit.[1002] Reversing the superior court, the supreme court held that an employment arbitration clause that placed restrictions on an employee's right to appeal an arbitration award and required a claimant to pay half the arbitration costs was unconscionable and unenforceable.[1003]

Hageland Aviation Services, Inc. v. Harms

In *Hageland Aviation Services, Inc. v. Harms*, the supreme court held that Chapter 19 of the Alaska Wage and Hour Act violated the takings and contract clauses of the Alaska Constitution.[1004] In 2002, pilots of Hageland Aviation Services filed a class action lawsuit for unpaid overtime wages under the Alaska Wage and Hour Act.[1005] A 2003 amendment to the Act exempted pilots from the Act's overtime compensation provision, and a 2005 amendment made that exemption retroactive to 2000.[1006] Hageland moved for summary judgment based on the 2005 amendment, arguing that the amendment's retroactive exemption violated several provisions of both the state and federal constitutions.[1007] The superior court found that the 2005 amendment violated the takings and contracts clauses of the Alaska Constitution.[1008] On appeal, the supreme court agreed.[1009] The court reasoned that Chapter 19 stripped pilots of the vested property interests that were lawfully owed to them at the end of each pay period and protected by the Alaska Constitution's takings clause.[1010] Additionally, the Chapter 19 provisions failed the multifactor test for takings violations.[1011] The court further stated that Chapter 19 was an unconstitutional impairment of contracts because it impaired the parties' contractual relationship by eliminating the pilots' claims to unpaid overtime wages and was not reasonable and necessary to serve a significant public purpose.[1012] Affirming the decision of the superior court, the supreme court held that Chapter 19 of the Alaska Wage and Hour Act violated the takings and contract clauses of the Alaska Constitution.[1013]

Kelly v. State, Department of Corrections

In *Kelly v. State, Department of Corrections*,[1014] the supreme court held that an employee who suffered from a mental disorder caused by extraordinary and unusual stress from his employment was entitled to benefits.[1015] Kelly, a prison guard, was responsible for overseeing an individual unit in Cook Inlet Pretrial Facility.[1016] One of the inmates, who had been previously convicted of murder, approached him with a sharpened pencil and threatened to stab him to death.[1017] Kelly later reported angina and increased blood pressure.[1018] Kelly filed a claim and began to

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[997] *Id.* at 1098, 1099.
[998] *Id.* at 1093.
[999] *Id.* at 1098.
[1000] *Id.*
[1001] *Id.* at 1101.
[1002] *Id.* at 1099.
[1003] *Id.*
[1004] 210 P.3d 444 (Alaska 2009).
[1005] *Id.* at 446.
[1006] *Id.*
[1007] *Id.*
[1008] *Id.*
[1009] *Id.* at 454.
[1010] *Id.* at 449.
[1011] *Id.* at 449–50.
[1012] *Id.* at 453–54.
[1013] *Id.* at 444, 454.
[1014] 218 P.3d 291 (Alaska 2009).
[1015] *Id.* at 300–01.
[1016] *Id.* at 293.
[1017] *Id.* at 293–94.

receive disability benefits in 1995, which continued until 2004 when the State filed a controversion notice for all benefits.[1019] The Workers' Compensation Board (the "Board") held that Kelly's claim was not compensable because his injury was not unusual and extraordinary when compared to the experiences of fellow prison guards.[1020] Kelly appealed, claiming that the Board gave inappropriate weight to a correctional officer's testimony.[1021] The supreme court held that any time a person is faced with a verifiable and credible death threat, it qualifies as an unusual and extraordinary experience[1022] and as a work-related injury.[1023] Because Kelly was threatened in an open space by a convicted murderer with a sharpened pencil, he suffered a work-related injury.[1024] In reversing the decision of the Commission, the supreme court held that an employee who suffered from a mental disorder caused by extraordinary and unusual stress from his employment was entitled to benefits[1025]

Smith v. CSK Auto, Inc.

In *Smith v. CSK Auto, Inc.*,[1026] the supreme court held that the Alaska Workers' Compensation Board (the "Board") improperly approved a settlement agreement where a worker was not medically stable at the time of the agreement and the Board made no finding that the settlement was in his best interests.[1027] Smith injured his back during work at CSK Auto.[1028] Smith's doctor eventually decided that he was medically stable,[1029] meaning that additional medical treatment would not improve his condition.[1030] Smith and CSK Auto reached a settlement in which Smith accepted $10,000 as full payment of any permanent total disability and reemployment benefits, and CSK Auto would continue to pay medical benefits.[1031] Smith signed the agreement and the Board approved it at a hearing where Smith was not present.[1032] Later, Smith petitioned the Board to set aside the settlement agreement, but it refused.[1033] On appeal, the supreme court held that the Board must determine that a settlement agreement is in an employee's best interests before approving it.[1034] When a settlement waives future permanent disability benefits before the employee is medically stable, there is a presumption that the settlement is not in the employee's best interests.[1035] The court concluded that Smith was not medically stable because he underwent more medical treatment after his first doctor initially classified him as stable.[1036] The supreme court held that the Board improperly approved a settlement agreement where the worker was not medically stable at the time of the agreement and the Board made no finding that the settlement was in his best interests.[1037]

Thurston v. Guys With Tools, Ltd.

In *Thurston v. Guys With Tools, Ltd.*,[1038] the supreme court held that to be eligible for temporary total disability ("TTD") or permanent total disability ("PTD") benefits, it must be shown that a work-related disability is a substantial factor of the total disability, without regard to whether any unrelated subsequent diseases or injuries could independently have caused the total disability.[1039] Thurston, while working for Guys With Tools ("GWT"),

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[1018] *Id.* at 294.
[1019] *Id.*
[1020] *Id.* at 296.
[1021] *Id.* at 296–97.
[1022] *Id.* at 300–01.
[1023] *Id*. at 298–99.
[1024] *Id.* at 302–03.
[1025] *Id.* at 300–01.
[1026] 204 P.3d 1001 (Alaska 2009).
[1027] *Id.* at 1012–13.
[1028] *Id.* at 1004.
[1029] *Id.*
[1030] *Id.* at 1012, n.35.
[1031] *Id.*
[1032] *Id.*
[1033] *Id.*
[1034] *Id.* at 1011.
[1035] *Id.*
[1036] *Id.* at 1012.
[1037] *Id.*
[1038] 217 P.3d 824 (Alaska 2009).
[1039] *Id*. at 828.

suffered a knee injury in 2003 for which GWT paid her TTD and medical benefits.[1040] In October 2003, Thurston began treatment for lung cancer.[1041] In 2006, Thurston filed a new workers' compensation claim purporting to still be unable to perform her job functions.[1042] GWT attributed her disability to the cancer and claimed that her knee injury was medically stable.[1043] The Workers' Compensation Board (the "Board") found that Thurston was eligible for PTD benefits relating to the 2002 knee injury and that the combination of the knee injury and cancer rendered her totally disabled.[1044] On review, the supreme court held that the Board must first determine if the knee injury was a substantial factor in her disability, independent of the cancer.[1045] However, the court noted that the test for total disability when there is a subsequent condition is not a but-for test.[1046] Remanding to the Board, the supreme court held that to be eligible for TTD or PTD benefits, it must be shown that the work-related disability was a substantial factor in her total disability, without regard to whether any subsequent diseases or injuries could independently have caused the total disability.[1047]

ENVIRONMENTAL LAW

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Ninth Circuit Court of Appeals

Center for Biological Diversity v. Kempthorne

In *Center for Biological Diversity v. Kempthorne*,[1048] the Ninth Circuit held that five-year permits for non-lethal "takes" of polar bears and walrus by oil and gas activities were allowed under both the Marine Mammal Protection Act ("MMPA") and the National Environmental Policy Act ("NEPA").[1049] The Center for Biological Diversity (the "Center") alleged that allowing a five-year period of "takes" of polar bears and walrus violated both the MMPA and the NEPA.[1050] A "take" is harassment, hunting, capture, or killing of a marine animal.[1051] The Ninth Circuit held that allowing the takes violated neither MMPA nor NEPA.[1052] Under the MMPA, incidental takes of marine species are allowed for specified activities in specified regions.[1053] The court held that oil and gas exploration, development, and production activities were not too broad to qualify as specified activities.[1054] The court also reasoned that the threat to polar bears of reduced fitness was negligible and that further harm as a result of climate change could not be reasonably expected to be caused by gas and oil exploration.[1055] Further, the court noted that NEPA requires an environmental impact statement to be produced for federal actions that would significantly affect the quality of human environment, but the court found that the environmental organizations could not sufficiently show that non-lethal takes in a specific industry and during the specific time period would have the requisite significant impact.[1056] Similarly, no environmental impact statement was necessary because the effect of the takes had only normal uncertainty, not high uncertainty.[1057] Thus, the court affirmed the decision of the district

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[1040] *Id*. at 825–26.
[1041] *Id*. at 826.
[1042] *Id*.
[1043] *Id*.
[1044] *Id*. at 826–27.
[1045] *Id*. at 829.
[1046] *Id.* at 828.
[1047] *Id*.
[1048] 588 F.3d 701 (9th Cir. 2009).
[1049] *Id.* at 712.
[1050] *Id.*
[1051] *Id.* at 705
[1052] *See id.* at 707–12.
[1053] *Id.* at 709–10.
[1054] *Id.*
[1055] *Id.* at 711.
[1056] *Id.* at 711–12.
[1057] *Id.* at 712.

court, holding that five-year permits for non-lethal "takes" of polar bears and walrus were allowed under both the MMPA and NEPA.[1058]

ETHICS AND PROFESSIONAL RESPONSIBILITY

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Alaska Supreme Court

DeNardo v. Maasen

In *DeNardo v. Maasen,*[1059] the supreme court held that as long as a judge reasonably believes he or she can be fair and impartial, that judge does not have to recuse himself simply because one of the parties is separately suing the judge.[1060] DeNardo sued a judge based on his actions in prior cases, and then the same judge was assigned another of DeNardo's cases.[1061] After a pre-litigation screening order was filed against DeNardo, he appealed, claiming that the judge should have recused himself because DeNardo was suing the judge in another suit.[1062] The supreme court held that a judge need not recuse himself just because one of the litigants is suing him in his official capacity or based on his performance of official duties, as long as the judge believes that he can be fair and impartial.[1063] The pre-litigation screening order was found to be tailored to the circumstances of this case.[1064] The supreme court affirmed the decision of the court of appeals, holding that so long as a judge reasonably believes he or she can be fair and impartial, that judge does not have to recuse himself simply because a party is separately suing the judge.[1065]

In re Disciplinary Matter Involving Brion

In *In re Disciplinary Matter Involving Brion*,[1066] the supreme court held that a three-year suspension from the practice of law issued by the Disciplinary Board of the Alaska Bar Association (the "Board") was appropriate.[1067] After being suspended by the Board for violating the Alaska Rules of Professional Conduct (the "Rules") in dealings with at least six different clients, Brion challenged his suspension on two grounds: (1) that it was disproportionate with sentences for similar offenses; and (2) that the sentencing hearing was procedurally flawed.[1068] The court held that although the Board used a standard that was ad hoc and not rooted in precedent, the suspension was equal to the length of time that Brion was violating the Rules and consistent with ABA Standards, which are judged by three factors: (1) the duty violated, the lawyer's mental state, and the extent of injury; (2) what the appropriate ABA Standard is for the type of offense; and (3) what the aggravating and mitigating factors are.[1069] In considering Brion's offenses in light of these factors, the sentence was appropriate.[1070] Procedurally, the court held that the disciplinary hearing comported with due process because Brion was provided with adequate notice of the pending hearing via a mailed letter, he was given adequate opportunity to rebut the statements of the Bar Counsel, the panel was adequately informed of Alaska precedent, and Brion was not subject to character

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[1058] *Id.*
[1059] 200 P.3d 305 (Alaska 2009).
[1060] *Id.* at 311.
[1061] *Id.* at 308.
[1062] *Id.* at 310.
[1063] *Id.* at 311.
[1064] *Id.*
[1065] *Id.*
[1066] 212 P.3d 748 (Alaska 2009).
[1067] *Id.* at 750.
[1068] *Id.*
[1069] *Id.* at 751–52.
[1070] *Id.* at 752.

assassination.[1071] Therefore, the supreme court affirmed the decision of the Board, holding that a three-year suspension from the practice of law was appropriate.[1072]

In re Cummings

In *In re Cummings*,[1073] the supreme court affirmed the Judicial Conduct Commission's suspension of a trial judge who made *ex parte* communications with a witness in a criminal trial and—after stating an intent to recuse himself—continued to preside over the hearing.[1074] During a recess from a domestic violence trial, Judge Cummings passed a note to a state trooper testifying for the prosecution that referred the trooper to material useful in his testimony.[1075] As he handed the state trooper the note, the judge stated, "Just in case you want to go fishing."[1076] The prosecutor informed defense counsel about the note, and the judge was then prompted to give a similar note to the defense.[1077] At this time, he stated that he intended to recuse himself, but he did not do so and instead presided over the trial until granting the defendant's motion for a mistrial.[1078] The court upheld the commission's findings: the passing of the note was an *ex parte* communication that created an "appearance of impropriety," and the judge acted knowingly in passing the note and negligently in continuing to preside over the case.[1079] The court then held that Section 22.30.070(c) of the Alaska Statutes implicitly grants the court the power to suspend a judge for willful misconduct in office.[1080] Finally, the court upheld the suspension's length of three months and held that the commission had appropriately reduced the standard six-month suspension for legal misconduct because no harm was actually caused and the judge previously had a stellar record.[1081] The supreme court affirmed the Judicial Conduct Commission's suspension of a trial judge who made *ex parte* communications with a witness in a criminal trial and continued to preside over the hearing after stating an intent to recuse himself.[1082]

FAMILY LAW

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Alaska Supreme Court

Barlow v. Thompson

In *Barlow v. Thompson*,[1083] the supreme court held that the superior courts have jurisdiction in custody disputes and that monthly child support should be calculated with respect to income.[1084] Thompson, the mother, was given sole custody of her child by the superior court.[1085] On appeal, Barlow disputed the superior court's jurisdiction and argued that the court erred in calculating the amount of child support he owed.[1086] The supreme court held that the superior court had jurisdiction and that Barlow's consent was not needed in order to satisfy the requirements of personal jurisdiction.[1087] It reasoned that while a party may raise a question about jurisdiction, the court does not

[1071] *Id.* at 753–56.
[1072] *Id.* at 756.
[1073] 211 P.3d 1136 (Alaska 2009).
[1074] *Id.* at 1140.
[1075] *Id.* at 1138.
[1076] *Id.*
[1077] *Id.*
[1078] *Id.*
[1079] *Id.* at 1139.
[1080] *Id.*
[1081] *Id.* at 1139–40.
[1082] *Id.* at 1140.
[1083] 221 P.3d 998 (Alaska 2009).
[1084] *Id.* at 1000.
[1085] *Id.*
[1086] *Id.*
[1087] *Id.* at 1002.

have to dismiss a case based merely on that suggestion.[1088] With respect to child support, the court was unable to determine whether the implied imputation of income was erroneous and remanded for further factual determinations.[1089] Thus, the supreme court held that the superior courts have jurisdiction in custody disputes and that monthly child support should be calculated with respect to income.[1090]

Bilbao v. Bilbao

In *Bilbao v. Bilbao*,[1091] the supreme court held that in a divorce proceeding, the party seeking to establish a mixed secondary asset as separate property bore the burden of proof and that certificates of deposit were marital property.[1092] Annette filed for divorce from her husband Pedro in November 2005.[1093] On December 2, 2005, Pedro cashed out two certificates of deposit worth $50,500 from an account where marital funds had also been deposited.[1094] In July 2006, the superior court decided that the marital property should be divided equally.[1095] The court rejected Pedro's argument that the $50,500 was his separate property and included that amount in its calculation of the marital property.[1096] On appeal, the supreme court noted that where there is a commingling of separate and marital assets in one account, a mixed secondary asset is created.[1097] The party seeking to establish such a secondary asset as separate property bears the burden of proof.[1098] The court thus reasoned that the lower court was correct in finding that Pedro bore the burden of showing that the $50,500 was separate property.[1099] The court determined that Pedro's testimony and account statements were insufficient to demonstrate that the certificates of deposit funds worth $50,500 originated from his separate property.[1100] Affirming the decision of the lower court, the supreme court held that in a divorce proceeding the party seeking to establish a mixed secondary asset as separate property bore the burden of proof and that certificates of deposit were marital property.[1101]

Brotherton v. State ex rel Brotherton

In *Brotherton v. State ex rel Brotherton*,[1102] the supreme court held that: (1) the superior court should have made more factual findings before modifying a child support obligation; (2) marital property awards did not count as income for child support purposes; and (3) post-judgment interest on a marital property settlements was income for child support purposes.[1103] Douglas and Tahni Brotherton had two children and divorced in 1995.[1104] Douglas received complete custody of the children in 2004 and the superior court ordered Tahni to pay child support.[1105] Later, Tahni asked Child Support Services Division ("CSSD") to reduce her child support due to her reduced income.[1106] She originally estimated her 2006 income at $20,000 but changed it to $16,000 in September.[1107] CSSD decided that Tahni's child support obligation should be lowered.[1108] Douglas appealed, and the supreme court held that the superior court did not make sufficient factual findings concerning Tahni's 2006 income.[1109] Tahni did not clearly explain why her income would only be $16,000 in 2006 given that she made about $20,000 in 2005 and that

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[1088] *Id.*
[1089] *Id.* at 1003.
[1090] *Id.*
[1091] 205 P.3d 311 (Alaska 2009).
[1092] *Id.* at 312.
[1093] *Id.*
[1094] *Id.*
[1095] *Id.*
[1096] *Id.* at 313.
[1097] *Id.*
[1098] *Id.* at 314.
[1099] *Id.*
[1100] *Id.* at 315.
[1101] *Id.*
[1102] 201 P.3d 1206 (Alaska 2009).
[1103] *Id.* at 1214.
[1104] *Id.* at 1208.
[1105] *Id.*
[1106] *Id.* at 1209.
[1107] *Id.*
[1108] *Id.*
[1109] *Id.* at 1210.

even when making minimum wage she would earn $20,000 in 2006 as well.[1110] Second, the court rejected Douglas's argument that Tahni's marital property award was income because property awards are not considered income under Rule 90.3.[1111] However, the court did hold that post-judgment interest was income for the purposes of calculating child support under Rule 90.3.[1112] Thus, the post-judgment interest Tahni received in 2006 was part of her 2006 income for calculating child support.[1113] Remanding to the superior court, the supreme court held that: (1) the superior court should have made more factual findings before modifying a child support obligation; (2) marital property awards did not count as income for child support purposes; and (3) post-judgment interest on a marital property settlements was income for child support purposes.[1114]

Cusack v. Cusack

In *Cusack v. Cusack*,[1115] the supreme court held that the superior court did not abuse its discretion by awarding a divorced father the sole legal and primary physical custody of his daughter,[1116] by refusing the mother's request for court-ordered family therapy,[1117] or by authorizing the father to send his daughter to boarding school.[1118] The superior court gave John Cusack sole legal and primary physical custody of his daughter, including the authority to send her to boarding school.[1119] Gretchen Cusack appealed the court's decision to give John custody.[1120] The supreme court concluded that in light of the parents' inability to communicate or act civilly with one another or others involved in the care of their daughter, the trial court did not err in awarding sole legal custody to John.[1121] It further reasoned that in light of unsuccessful family therapy sessions and nine years of unimproved relations between Gretchen and her daughter, the trial court did not abuse its discretion when it concluded that ordering family counseling was not advisable.[1122] The supreme court also concluded that the trial court did not abuse its discretion by determining that boarding school would be in the daughter's best interests.[1123] Affirming the lower court's decision, the supreme court held that the trial court did not abuse its discretion by awarding sole legal and primary physical custody to the father,[1124] by refusing to order family therapy,[1125] or by authorizing the father to send his daughter to boarding school.[1126]

Danielle A. v. State, Office of Children's Services

In *Danielle A. v. State, Office of Children's Services*,[1127] the supreme court held that extending custody of a child who is covered by the Indian Child Welfare Act ("ICWA") to the Office of Children's Services ("OCS") requires the court to find that: (1) the child continues to be in need of aid; (2) extending custody is in her best interests; and (3) the OCS has been complying with ICWA's placement and active efforts requirements.[1128] OCS took emergency custody of Danielle's daughter Roberta, and the superior court continued custody until the reunification process between mother and child could be completed.[1129] Danielle appealed the extension of custody, claiming that under ICWA, the State was required to show that continued custody of the child by the parent would result in serious damage to the child.[1130] She also argued that Alaska law requires the superior court to determine

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[1110] *Id.*
[1111] *Id.* at 1212.
[1112] *Id.*
[1113] *Id.*
[1114] *Id.* at 1214.
[1115] 202 P.3d 1156 (Alaska 2009).
[1116] *Id.* at 1159.
[1117] *Id.* at 1161.
[1118] *Id.*
[1119] *Id.* at 1158.
[1120] *Id.*
[1121] *Id.* at 1161.
[1122] *Id.*
[1123] *Id.* at 1161–62.
[1124] *Id.* at 1159.
[1125] *Id.* at 1161.
[1126] *Id.*
[1127] 215 P.3d 349 (Alaska 2009).
[1128] *Id.* at 350.
[1129] *Id.* at 351–52.
[1130] *Id.*

whether OCS complied with ICWA's placement and active efforts requirement, and that the superior court had failed to make such a determination.[1131] On appeal, the supreme court affirmed the decision of the superior court on the first issue because the correct rule to apply was whether the child is in need of aid and OCS custody is in the child's best interests.[1132] The court found that there was sufficient evidence to support the finding that Roberta was in fact a child in need of aid and that OCS custody was in her best interests because she was not yet ready to transition back to living with her mother.[1133] The court remanded on the second issue because the superior court had not made a proper inquiry into whether OCS had complied with ICWA's placement and active efforts requirements.[1134] Affirming in part and remanding in part, the supreme court held that extending custody of a child who is covered by the ICWA to the OCS requires the court to find that: (1) the child continues to be in need of aid; (2) extending custody is in her best interests; and (3) the OCS has been complying with ICWA's placement and active efforts requirements.[1135]

Dashiell R. v. State, Office of Children's Services

In *Dashiell R. v. State, Office of Children's Services*,[1136] the supreme court held that parental rights could be terminated where a lower court finds that conditions causing harm to children remain unremedied and that termination of parental rights was in the best interest of the children based on past acts of violence by one of the parents.[1137] Dashiell, the father of two children, was serving a twelve-year prison sentence for multiple felony convictions to end no earlier than 2013.[1138] He also made phone calls to the children that severely distressed them.[1139] Prior to the convictions, the State responded to multiple reports involving harm to the children resulting from his conduct.[1140] In June 2008, the OCS filed a petition to terminate Dashiell's parental rights.[1141] The court granted the motion, finding that the children were in need of aid due to the father's incarceration and that continued custody by Dashiell would constitute harm to the children.[1142] On appeal, the supreme court found the trial court was not in error in finding that the condition of Dashiell's incarceration constituted harm to the children,[1143] and that Dashiell had failed to remedy the conditions causing harm to the children.[1144] In upholding the decision of the trial court, the supreme court held that parental rights could be terminated when the superior court finds that conditions causing harm to children remain unremedied and that termination of parental rights was in the best interest of the children.[1145]

Dragseth v. Dragseth

In *Dragseth v. Dragseth*,[1146] the supreme court held that in divorce and custody proceedings: (1) a trial court must come to specific findings regarding the best interests of the child; (2) a spouse's premarital separate property can become marital property; and (3) attorneys' fees may be paid in property rather than cash if there are findings to justify the substitution.[1147] Gina Dragseth divorced her husband, Josesph, and in the child custody proceedings, the trial court awarded joint physical custody of their children.[1148] Additionally, the trial court ruled that promissory notes from Joseph's business were his separate property.[1149] Lastly, the trial court gave Joseph the

[1131] *Id.* at 356.
[1132] *Id.* at 353.
[1133] *Id.* at 354–55.
[1134] *Id.* at 356.
[1135] *Id.* at 350.
[1136] 222 P.3d 841 (Alaska 2009).
[1137] *Id.* at 843.
[1138] *Id.*
[1139] *Id.* at 844.
[1140] *Id.*
[1141] *Id.* at 845.
[1142] *Id.*
[1143] *Id.* at 847.
[1144] *Id.*
[1145] *Id.* at 843.
[1146] 210 P.3d 1206 (Alaska 2009).
[1147] *Id.* at 1207–08.
[1148] *Id.* at 1208, 1209.
[1149] *Id.* at 1211.

option of paying Gina's attorneys' fees with property rather than cash.[1150] Gina appealed all three decisions.[1151] The supreme court vacated the trial court's custody award,[1152] stating that nowhere in the trial court's opinion were the children's best interests mentioned.[1153] The supreme court held that the trial court did not address the relevant statutory factors in determining the custody of the children and did not give any clear indication of the factors that it used.[1154] On the issue of the promissory notes, the supreme court held that they could be marital property because they were obtained during the marriage and because a spouse's premarital separate property, by the process of transmutation, can become marital property.[1155] With respect to attorneys' fees, the supreme court held that there is no problem in awarding property instead of cash payments, but the trial court must give reasons for doing so when one of the parties claims that he is unable to convert the property into cash.[1156] Reversing and remanding the decision of the lower court, the supreme court held that in divorce and custody proceedings: (1) a trial court must come to specific findings regarding the best interests of the child; (2) a spouse's premarital separate property can become marital property; and (3) attorneys' fees may be paid in property rather than cash if there are findings to justify the substitution.[1157]

Hartley v. Hartley

In *Hartley v. Hartley*,[1158] the supreme court held that when a property settlement agreement does not expressly resolve disputes regarding the division of benefits accrued in a Federal Employee Retirement System ("FERS") defined benefit plan, a superior court may use its discretion in resolving those disputes and need not hold an evidentiary hearing when no genuine issue of material fact exists.[1159] Tina Hartley filed for divorce from John Hatley and the couple entered into and filed a property settlement agreement.[1160] The agreement divided John's FERS plan by awarding Tina fifty-seven percent of the plan's monthly benefits accrued during the marriage and the time following the divorce.[1161] Tina filed qualified domestic relations orders ("QDRO"), proposing that her fifty-seven percent of the FERS benefits should be calculated from John's highest three years of salary, even if those years occurred after the divorce,[1162] and the superior court adopted her FERS QDRO.[1163] On appeal the supreme court held that the superior court did not abuse its discretion in assessing the benefits based on John's highest three salary years rather than the three highest salary years during the marriage.[1164] The court held further that the superior court permissibly declined to conduct an evidentiary hearing because there was no genuine issue of material fact, only a legal dispute over the proper interpretation of the agreement.[1165] The supreme court affirmed the lower court's decision and thus held that when a property settlement agreement does not expressly resolve disputes regarding the division of benefits accrued in a FERS defined benefit plan, a superior court may use its discretion in resolving those disputes and need not hold an evidentiary hearing when no genuine issue of material fact exists.[1166]

Heitz v. State

In *Heitz v. State*,[1167] the supreme court held that a foster parent's interest in foster care reimbursement payments is protected by the Due Process Clause of the U.S. Constitution, and such payments cannot be recouped by the State without the parent receiving adequate notice of an intention to recoup and a chance to contest the state

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[1150] *Id.* at 1212.
[1151] *Id.* at 1208.
[1152] *Id.* at 1211.
[1153] *Id.* at 1210.
[1154] *Id.*
[1155] *Id.* at 1212.
[1156] *Id.*
[1157] *Id.* at 1207–08.
[1158] 205 P.3d 342 (Alaska 2009).
[1159] *Id.* at 344.
[1160] *Id.*
[1161] *Id.* at 345.
[1162] *Id.*
[1163] *Id.*
[1164] *Id.* at 347.
[1165] *Id.* at 350.
[1166] *Id.* at 344.
[1167] 215 P.3d 302 (Alaska 2009).

action.[1168] Heitz was a foster parent who received reimbursement payments for foster care from the State for taking care of Timothy, as well as other children.[1169] In 2006, the Office of Children's Services ("OCS") audited Timothy's file, found that Heitz had been overcompensated for caring for him, and informed Heitz that it intended to deduct the amount of overcompensation from future payments.[1170] On appeal, the supreme court held that foster care payments constitute an individual entitlement grounded in state law, which cannot be removed without cause.[1171] Before the State could take or reduce such property rights, due process required that adequate notice be given with a fair opportunity to contest the decision.[1172] To determine if the agency's notice had been adequate, the court applied a balancing test which considered: (1) the private interest involved; (2) the risk of erroneous deprivation of property rights through procedure used; (3) probable value of additional procedures if used; and (4) the Government's interest, including the risk of added administrative burden in adding additional procedures.[1173] Applying this test, the court held that the notice given was inadequate, due largely to the great reliance Heitz placed on these payments and the minimal burden the additional requirements would impose on the State.[1174] Remanding the case to determine whether OCS provided sufficient notice,[1175] the supreme court held a foster parent's interest in foster care reimbursement payments that is protected by the Due Process Clause of the U.S. Constitution, and such payments cannot be recouped by the State without the parent receiving adequate notice of an intention to recoup and a chance to contest the state action.[1176]

Havel v. Havel

In *Havel v. Havel*,[1177] the supreme court held that a court can modify a child custody agreement to include a schedule of visitation, but such modification cannot permanently change the amount of time that each parent will spend with the child.[1178] The father appealed from a district court decision granting the mother's request for a specific custody schedule for their child.[1179] The original agreement between the Havels had a fifty-fifty split in custody, with no specific scheduling plan.[1180] The superior court implemented a scheduling plan that, when implemented, resulted in a sixty-forty split in custody, with more of the child's time spent with his mother.[1181] The supreme court held that the superior court was allowed to change the original plan because the plan originally had no schedule and communications between the parties had broken down, necessitating court intervention.[1182] The court, however, found that modifying the plan to a sixty-forty custody split was unacceptable.[1183] Although theoretically the new plan would split the custody time at fifty-six to forty-four in favor of the mother, when applied practically, it would result in a sixty-forty split in favor of the mother.[1184] The superior court based its plan for custody partially on the father's work schedule.[1185] However, the supreme court found that the evidence did not support the father's work schedule as a basis for a necessary deviation from fifty-fifty custody.[1186] Since there was no evidence that deviation from the original agreement was necessary, and because the parties originally bargained for equal time with their child, the supreme court remanded the decision to the superior court.[1187] It held that while the superior court was

[1168] *Id.* at 303.
[1169] *Id.* at 304.
[1170] *Id.*
[1171] *Id.* at 306.
[1172] *Id.*
[1173] *Id.* at 307.
[1174] *Id.* at 307–08.
[1175] *Id.*
[1176] *Id.* at 303.
[1177] 216 P.3d 1148 (Alaska 2009).
[1178] *Id.* at 1151.
[1179] *Id.* at 1150.
[1180] *Id.*
[1181] *Id.* at 1153.
[1182] *Id.* at 1151, 1152.
[1183] *Id.* at 1154.
[1184] *Id.* at 1153.
[1185] *Id.*
[1186] *Id.*
[1187] *Id.* at 1153–54.

allowed to create a schedule of visitation, it could not permanently change the amount of time each parent will spend with the child.[1188]

Hunter v. Conwell

In *Hunter v. Conwell*,[1189] the supreme court held that a challenge to an initial custody determination two years after default judgment was time-barred, but an evidentiary hearing to modify custody may be granted when significant facts exist that demonstrate a substantial change in circumstances.[1190] After Hunter and Conwell ended their relationship in early 2006, Conwell sued for sole legal and primary physical custody of their two children.[1191] After Hunter failed to respond or attend the scheduled hearing, Conwell was awarded legal custody, with visitation rights given to Hunter.[1192] In 2008, Hunter filed a pro se motion seeking modification of the custody order which the superior court denied because Hunter failed to show a substantial change of circumstances.[1193] On appeal, the supreme court held that Hunter's arguments regarding the initial custody determination were time-barred, but reversed the superior court's decision on the modification issue, reasoning that Hunter's allegations, if proven true at an evidentiary hearing, would be sufficient to show a substantial change of circumstances.[1194] These allegations included claims that Conwell's girlfriend had verbally abused the children; that the children were left alone for extended periods with third parties; and that Conwell was knowingly interfering with the Hunter's visitation.[1195] Reversing the lower court, the supreme court held that a challenge to an initial custody determination two years after default judgment was time-barred, but an evidentiary hearing to modify custody may be granted when significant facts exist that demonstrate a substantial change in circumstances.[1196]

In re Adoption of S.K.L.H.

In *In re Adoption of S.K.L.H.*,[1197] the supreme court held that misunderstandings of the details of an adoption did not invalidate consent to the adoption, absent fraud, misrepresentation, duress, or undue influence.[1198] Donna, the biological mother, sued the Smiths, the adoptive parents, when they began restricting her visitation rights with the child.[1199] She alleged that her consent had initially been obtained by misrepresentation and undue influence.[1200] The superior court, though finding no misrepresentation or undue influence, set aside the adoption, concluding that there was no meeting of the minds. [1201] The court also analyzed the agreement under the "best interests" analysis set forth under Section 25.24.150(c) of the Alaska Statutes.[1202] The Smiths appealed the decision.[1203] The supreme court first held that mere mistake or confusion about the finality of an adoption agreement does not invalidate an adoption agreement.[1204] The court agreed with the Uniform Adoption Act that post-adoption disputes about the details of an adoption cannot be grounds to overturn the adoption.[1205] Further, the supreme court found that use of a "best interests" analysis was incorrect, as adoption statutes never suggest that an otherwise-valid adoption contract can be set aside if it is in the best interests of the child to do so.[1206] Therefore, the court reversed the decision of the superior court, by holding that misunderstandings of the details of an adoption did not invalidate consent to the adoption, absent fraud, misrepresentation, duress, or undue influence.[1207]

[1188] *Id.* at 1154.
[1189] 219 P.3d 191 (Alaska 2009).
[1190] *Id.* at 197–98.
[1191] *Id.*
[1192] *Id.* at 192–93.
[1193] *Id.* at 193–94.
[1194] *Id.* at 195–97.
[1195] *Id.* at 197–98.
[1196] *Id.*
[1197] 204 P.3d 320 (Alaska 2009).
[1198] *Id.* at 332.
[1199] *Id.* at 323.
[1200] *Id.*
[1201] *Id.* at 323–24.
[1202] *Id.* at 324.
[1203] *Id.*
[1204] *Id.* at 327.
[1205] *Id.*
[1206] *Id.*
[1207] *Id.* at 332.

Jaymot v. Skillings-Donat

In *Jaymot v. Skillings-Donat*,[1208] the supreme court held that a custody ruling in favor of the father was within the discretion of the superior court, but that insufficient factual findings had been presented for the superior court to have made a property distribution finding.[1209] After an informal custody agreement between Jaymot (the mother), and Skillings-Donat (the father) failed, Jaymot filed suit in the superior court seeking sole legal custody, primary physical custody, child support, and a share of property acquired in the course of the relationship.[1210] The court gave sole legal and primary physical custody to Skillings-Donat and denied Jaymot's request to have the property split.[1211] Jaymot appealed, arguing that the court abused its discretion in making its custody determination, in determining the best interests of the daughter, and in failing to find that the property should be split.[1212] The supreme court affirmed on the custody question, reasoning that the court below had wide discretion on factual issues,[1213] properly considered statutory factors governing custody determination,[1214] and was not clearly erroneous in finding that joint legal custody was inappropriate because of communication problems between the parents.[1215] Further, it held that the father was more emotionally suitable as a parent.[1216] However, the supreme court vacated the ruling below on the property issue, holding that the evidence was conflicting and that insufficient facts were to determine whether the parties had intended to engage in a domestic partnership.[1217] Affirming in part and reversing in part, the supreme court held that a custody ruling in favor of the father was within the discretion of the superior court, but that insufficient factual findings had been presented for the superior court to have made a property distribution finding.[1218]

Johnson v. Johnson

In *Johnson v. Johnson*,[1219] the supreme court held that there was no clerical error in a divorce agreement where the former husband had ample time to review the agreement and consult an expert to review it.[1220] During divorce proceedings, Kathleen Johnson presented the superior court with a draft order proposing a division of Sam Johnson's military pension.[1221] He did not object to provisions that allowed Kathleen to receive payments even if she remarried or Sam stopped receiving payments.[1222] The court issued an order that reflected Sam's revisions.[1223] Nine months after the divorce was finalized, Sam filed a motion to correct the order and remove the provisions.[1224] The superior court denied Sam's motion.[1225] On appeal, Sam argued that the provisions were clerical error or were entered by mistake, and also argued that the provisions did not appear in the draft order he was given to approve.[1226] Although courts may correct judgments that contain clerical errors or are based on mistake, the supreme court reasoned that the challenged provisions did not contain clerical errors and were not based on mistake because Sam had had time to review the order and even consult an expert.[1227] Moreover, Sam had waived any argument that the provisions were not in the original draft order because he did not present that issue to the superior court, and thus it was not properly before the supreme court.[1228] Accordingly, the supreme court affirmed the judgment of the superior

[1208] 216 P.3d 534 (Alaska 2009).
[1209] *Id.* at 536.
[1210] *Id.* at 538.
[1211] *Id.*
[1212] *Id.*
[1213] *Id.*
[1214] *Id.* at 540.
[1215] *Id.*
[1216] *Id.* at 541.
[1217] *Id.* at 546.
[1218] *Id.* at 536.
[1219] 214 P.3d 369 (Alaska 2009).
[1220] *Id.* at 370.
[1221] *Id.*
[1222] *Id.* at 370–71.
[1223] *Id.* at 371.
[1224] *Id.*
[1225] *Id.*
[1226] *Id.* at 372–73.
[1227] *Id.* at 372.
[1228] *Id.* at 372–73.

court and held that there was no clerical error in a divorce agreement where the former husband had ample time to review the agreement and consult an expert to review it.[1229]

Lara S. v. State, Department of Health & Social Services

In *Lara S. v. State, Department of Health & Social Services*,[1230] the supreme court held that a mother failed to demonstrate good cause sufficient to entitle her to a hearing to review her relinquishment of parental rights.[1231] The Office of Children's Services ("OCS") took custody of Lara S.'s three sons because of her repeated substance abuse problems.[1232] OCS then filed to terminate Lara's parental rights.[1233] Lara agreed to relinquish her parental rights upon the condition that the boys be placed with a family member, but when that plan failed, she sought custody.[1234] Lara claimed that she was now capable of caring for the children and submitted an affidavit citing her full-time employment, drug treatment, and stable living situation as reasons to grant the review hearing.[1235] The superior court denied the motion because Lara failed to establish that her substance abuse had ceased or that she was ready to care for the children.[1236] On appeal, the supreme court stated that a Lara would need to make a prima facie showing that: (1) reinstatement of her parental rights was in her children's best interests; (2) she was rehabilitated; and (3) she was capable of caring for the children.[1237] The court noted that Lara must have contemplated the failure of the planned child placement when she relinquished her rights.[1238] While Lara demonstrated some positive steps in her life, the court determined that these steps were not sufficient to establish that she had addressed her substance abuse problems.[1239] Finally, the supreme court determined that it was in the children's best interest to place them in a permanent home as soon as possible.[1240] Accordingly, the supreme court held that a superior court did not abuse its discretion by determining that that a mother had failed to make a sufficient showing of good cause to entitle her to a hearing to review her relinquishment of her parental rights.[1241]

Morris v. Horn

In *Morris v. Horn*,[1242] the supreme court court held that: (1) a child support payment must be based on specific findings in the record; and (2) a past restraining order, where the issue of domestic violence was not litigated, did not preclude litigation of that same issue in a child visitation proceeding.[1243] Following Sandra Horn and Dewey Morris's divorce in 2002, the parties agreed that Morris would pay $1,545.76 in monthly child support.[1244] In 2003, Horn was granted a protective order against Morris for domestic violence.[1245] In June 2006, after Morris failed to pay his full monthly child support payments, he filed a motion to modify the child support.[1246] Horn filed a cross-motion seeking past due child support and full custody of their children.[1247] The superior court reduced Morris's child support payments to $921.83 and found that the two instances of domestic violence created an unrebuttable presumption limiting Morris's visitation rights.[1248] On appeal, Morris argued that his modified child support payments were erroneously based on an income of $40,000 and that the superior court erroneously limited his visitation rights based on testimonial evidence from the 2003 protective order.[1249] The supreme court held that

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[1229] *Id.* at 370.
[1230] 209 P.3d 120 (Alaska 2009).
[1231] *Id*. at 121.
[1232] *Id*. at 121–22.
[1233] *Id.* at 123.
[1234] *Id.*
[1235] *Id*. at 123–24.
[1236] *Id*. at 124.
[1237] *Id.* at 125.
[1238] *Id.*
[1239] *Id.* at 125–27.
[1240] *Id.* at 127–28.
[1241] *Id*. at 128.
[1242] 219 P.3d 198 (Alaska 2009).
[1243] *Id.* at 200.
[1244] *Id.*
[1245] *Id.* at 201.
[1246] *Id.*
[1247] *Id.*
[1248] *Id.* at 203.
[1249] *Id.* at 205, 207.

the amount of $921.83 per month was invalid because it was not based on specific findings in the record.[1250] On the issue of visitation rights, the supreme court reasoned that the superior court should have allowed testimony concerning the 2003 protective order because Morris had not been present to litigate the issue.[1251] Because the trial court erred in relying on the 2003 protective order, an unrebuttable presumption had not been raised.[1252] Reversing and remanding the case to the superior court, the supreme court held that: (1) a child support payment must be based on specific findings in the record; and (2) a past restraining order, where the issue of domestic violence was not litigated, did not preclude litigation of that same issue in a child visitation proceeding.[1253]

Parks v. Parks

In *Parks v. Parks*,[1254] the supreme court held that a parent's visitation rights cannot automatically shift from supervised to unsupervised, and that joint legal custody does not conflict with a long-term protective order.[1255] Robert Parks and Tracy Parks were married and had one daughter.[1256] After being assaulted by Robert, Tracy was granted a long-term domestic violence protective order barring Robert from contacting her or her parents.[1257] Tracy filed for divorce, and the divorce court granted the parties joint legal custody of their daughter, with primary custody awarded to Tracy.[1258] The court also stipulated that Robert would have the right to supervised visitation, which would become unsupervised visitation upon Robert's completion of domestic-violence classes.[1259] The supreme court held that Robert's visitation could not automatically shift from supervised to unsupervised without showing the mother and the court that he had completed a state-approved domestic-violence course.[1260] The court reasoned that the automatic change provision was not in the best interests of the child, and the district court abused its discretion when it allowed for the automatic shift.[1261] The supreme court also held that the trial court was correct in assigning joint legal custody because of the need of the parents to jointly discuss the raising of their daughter.[1262] The supreme court determined that the trial court was in the best position to make the decision, and that the parents could cooperate enough to share legal custody despite the long-term protective order.[1263] Affirming in part and reversing in part, the supreme court held that visitation cannot automatically shift from supervised to unsupervised, and long-term protective orders do not preempt parents from having joint legal custody.[1264]

Roland v. State of Alaska, Office of Children's Services

In *Roland v. State of Alaska, Office of Children's Services*,[1265] the supreme court held that the Office of Children's Services ("OCS") must make the statutorily required active efforts to reunify a parent with a child in a termination of parental rights case, and that such efforts are evaluated over a period of time.[1266] The superior court terminated Roland's parental rights and found that under the totality of the circumstances, the OCS made the "active efforts" required by the Indian Child Welfare Act to prevent the breakup of Indian families.[1267] On appeal, Roland argued that OCS initially failed to make the required active efforts and that the efforts made in the spring of 2008 were "too little, too late" because they did not provide him with enough time to complete the case plan before termination of his parental rights.[1268] The State responded that Roland's deficient conduct overshadowed OCS's

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[1250] *Id.* at 205–06.
[1251] *Id.* at 207–10.
[1252] *Id.*
[1253] *Id.* at 200.
[1254] 214 P.3d 295 (Alaska 2009).
[1255] *Id.* at 298.
[1256] *Id.*
[1257] *Id.*
[1258] *Id.*
[1259] *Id.*
[1260] *Id.* at 302.
[1261] *Id.* at 303.
[1262] *Id.*
[1263] *Id.* at 303–04.
[1264] *Id.* at 303, 304.
[1265] 206 P.3d 453 (Alaska 2009).
[1266] *Id.* at 453–54.
[1267] *Id.* at 455–56.
[1268] *Id.* at 456.

admitted failure to make the required active efforts during the first three months that Roland was in jail.[1269] The supreme court affirmed the decision of the superior court, concluding that the State made active efforts.[1270] The court reasoned that active efforts must be evaluated over time.[1271] Thus, the State's failure to make active efforts during the first three months of the child's life was not "too little, too late" because active efforts were subsequently made.[1272] The court further reasoned that Roland's slow and insufficient progress with reunification resulted from his failure to take on opportunities the State made available to him and his refusal to work with the social workers assigned to his daughter's case.[1273] Affirming the decision of the lower court, the supreme court held that OCS must make the statutorily required active efforts to reunify a parent with a child in a termination of parental rights case, and that such efforts should be evaluated over a period of time.[1274]

Vanvelzor v. Vanvelzor

In *Vanvelzor v. Vanvelzor*,[1275] the supreme court held that a superior court did not need personal jurisdiction over both parties in a termination of marriage proceeding in order to end the marriage.[1276] Mark Vanvelzor filed a complaint for annulment of his marriage with Jessica Vanvelzor in Alaska, even though they were married in New York, lived together in Ohio, and at the time of the proceeding she made her permanent home in Ohio.[1277] The superior court granted Jessica's request for change of venue because it did not have personal jurisdiction over her, since she never lived in Alaska.[1278] Mark appealed, claiming that: (1) the superior court erred in not giving him an opportunity to brief jurisdiction; (2) Alaska had jurisdiction because Jessica requested spousal support; (3) Jessica waived her jurisdictional defense by not raising it with her motion to change venue; and (4) even if the court did not have personal jurisdiction, it still had the power terminate his marriage.[1279] On appeal, the supreme court affirmed the decision of the superior court on all issues but the last, finding that the superior court did not need personal jurisdiction over Jessica to terminate the marriage.[1280] The supreme court found that any error that occurred because Mark was not able to argue the jurisdiction issue in front of the superior court was cured because he had the opportunity to present his arguments in front of the supreme court.[1281] The court further found that Jessica did not waive her jurisdictional defense because she proceeded *pro se* and thus was held to a less stringent standard.[1282] The court also found that the superior court had jurisdiction to terminate a marriage if one of the parties lives in Alaska and intends to remain there.[1283] Affirming in part and remanding in part the decision of the lower court, the supreme court held that a superior court did not need personal jurisdiction over both parties in a termination of marriage proceeding in order to terminate the marriage.[1284]

Young v. Lowery

In *Young v. Lowery*,[1285] the supreme court held that a trial court had limited authority to divide a military pension upon divorce, and that the court did not abuse its discretion when it awarded two-thirds of the marital assets to one party, as long as there was reasonable justification for the unequal distribution.[1286] During divorce proceedings, Lowery, Young's ex-wife, received a portion of Young's pension and a trust on Young's assets if Young chose to decrease Lowery's pension payments.[1287] Young appealed, claiming that the division of his military

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[1269] *Id.*
[1270] *Id.* at 457.
[1271] *Id.* at 456.
[1272] *Id.* at 456–57.
[1273] *Id.* at 457.
[1274] *Id.* at 458.
[1275] 219 P.3d 184 (Alaska 2009).
[1276] *Id.* at 191.
[1277] *Id.* at 186.
[1278] *Id.*
[1279] *Id.*
[1280] *Id.*
[1281] *Id.* at 187.
[1282] *Id.* at 189.
[1283] *Id.* at 190.
[1284] *Id.* at 191.
[1285] 221 P.3d 1006 (Alaska 2009).
[1286] *Id.* at 1016.
[1287] *Id.* at 1008.

pension violated federal law by dividing disability payments which should not be subject to division.[1288] On appeal, the supreme court reversed the decision of the trial court to give Lowery part of Young's military pension because under federal law, the court was required to divide only the amount of pension remaining after a deduction for waived retired pay and the cost of buying survivor benefits.[1289] The court further found that the trial court did not err in dividing the marital assets unequally because Lowery had a need to secure additional retirement and health benefits.[1290] Reversing in part and affirming in part the decision of the lower court, the supreme court held that a trial court had limited authority to divide a military pension upon divorce, and that the court did not abuse its discretion when it awarded two-thirds of the marital assets to one party, as long as there was reasonable justification for the unequal distribution.[1291]

INSURANCE LAW

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Alaska Supreme Court

O'Donnell v. Johnson

In *O'Donnell v. Johnson*,[1292] the supreme court held that once an insurance company requests that the policyholder not pursue their subrogation interest, the policyholder cannot then recover costs, fees, and interests related to that claim in a subsequent judgment.[1293] State Farm paid O'Donnell's medical bills, and thereby acquired a subrogation interest in any claims based on an accident with Johnson.[1294] State Farm also mandated in writing that O'Donnell's attorney not pursue State Farm's subrogation claim against Allstate.[1295] O'Donnell then accepted an offer of judgment that included $14,047 in subjugation interest, which the court later adjusted to $16,000 despite a combined judgment and subrogation interest of $30,047.[1296] O'Donnell appealed, and claimed it was an error to exclude the subrogation claim from the calculation of the final judgment, relying on the plain meaning of the agreement and the common fund doctrine.[1297] The supreme court upheld the decision, holding that because State Farm had requested that O'Donnell not pursue its subrogation claim, costs, fees, and interests from Allstate, the subrogation claim could not be recovered by O'Donnell.[1298] The supreme court affirmed the decision of the superior court and held that once an insurance company requests that the policyholder not pursue their subrogation interest, the policyholder cannot then recover costs, fees, and interests related to that claim in a subsequent judgment.[1299]

Progressive Casualty Insurance Co. v. Skin

In *Progressive Casualty Insurance Co. v. Skin*,[1300] the supreme court held that an "owner's motor vehicle" insurance policy could not be construed through the doctrine of reasonable expectations to require coverage for the insured's operation of an ATV; however, the court also held that due to a vague definition of "vehicle" in the policy, the insurer was liable for injuries to the policyholder from an ATV accident.[1301] In 2002, Skin purchased an owner's motor vehicle insurance policy from Progressive to cover her Chevrolet automobile; the policy also insured her two

[1288] *Id.* at 1010.
[1289] *Id.* at 1011.
[1290] *Id.* at 1014.
[1291] *Id.* at 1016.
[1292] 209 P.3d 128 (Alaska 2009).
[1293] *Id.* at 129–30.
[1294] *Id.*
[1295] *Id.*
[1296] *Id.*
[1297] *Id.*
[1298] *Id.* at 132.
[1299] *Id.* at 129–30.
[1300] 211 P.3d 1093 (Alaska 2009).
[1301] *Id.* at 1095.

sons.[1302] Two weeks later, one son ran a stop sign while driving an ATV, which resulted in a collision that injured the boy and occupants of the other vehicle.[1303] Progressive refused to pay the medical expenses for all of those injured because Skin's son was not driving a covered motor vehicle at the time of the accident.[1304] The court held that the policy was not an "owner's policy" under Alaska law absent explicit language to this effect, due to the fact that the policy indicated that it was covering not "any auto," but rather one specific vehicle.[1305] The court then held that because the definitional section of the policy did not cover the ATV, third party liability coverage was not to be extended to those who had been injured in the accident.[1306] Finally, the court upheld the superior court's determination that the practice of attaching two definitions for "vehicle" and "motor vehicle" at different places in the policy was confusing to a policyholder, and that this ambiguity gave rise to Progressive's liability for medical expenses.[1307] The supreme court held that an "owner's motor vehicle" insurance policy could not be construed through the doctrine of reasonable expectations to require coverage for the insured's operation of an ATV; however, the court held that due to a vague definition of "vehicle" in the policy, the insurer was liable for injuries to the policyholder from an ATV accident.[1308]

State Farm Mutual Automobile Insurance Co. v. Wilson

In *State Farm Mutual Automobile Insurance Co. v. Wilson*,[1309] the supreme court held that damages should be viewed in the aggregate when deciding whether a double recovery had occurred under Section 28.20.445(b) of the Alaska Statutes.[1310] Wilson was injured in an accident when Sauve crashed into the car he was riding in.[1311] The arbitrator found that Wilson suffered $210,000 in damages and that Suave was responsible for sixty percent of the damages.[1312] Because the driver of car that Wilson was riding in had underinsured motorist coverage, Wilson was eligible to receive extra funding, which State Farm calculated to be $54,000.[1313] The arbitrator awarded Wilson $76,000, and State Farm appealed.[1314] The supreme court held that the purpose of underinsured motorist coverage was to offset the difference between actual damages and how much the injured received from insurance payments.[1315] The supreme court then decided that damages should be viewed in the aggregate rather than separated in order to reach a fair result and avoid more confusion.[1316] When viewed in the aggregate, Sauve was liable for $126,000 in damages (sixty percent of $210,000).[1317] Having already paid $50,000, State Farm could still be required to pay up to $76,000 on the underinsured motorist policy without making duplicative payments.[1318] Thus, the supreme court affirmed the lower court and held that damages should be viewed in the aggregate when deciding whether a double recovery had occurred under Section 28.20.445(b).[1319]

[1302] *Id.* at 1095–96.
[1303] *Id.* at 1099.
[1304] *Id.*
[1305] *Id.*
[1306] *Id.* at 1100.
[1307] *Id.* at 1101–02.
[1308] *Id.* at 1095.
[1309] 199 P.3d 581 (Alaska 2008).
[1310] *Id.* at 591.
[1311] *Id.* at 582.
[1312] *Id.*
[1313] *Id.* at 582–83.
[1314] *Id.* at 583.
[1315] *Id.* at 584.
[1316] *Id.* at 586.
[1317] *Id.* at 587.
[1318] *Id.*
[1319] *Id.* at 591.

Alaska Supreme Court

Jon S. v. State, Office of Children's Services

In *Jon S. v. State, Office of Children's Services*,[1320] the supreme court held that, under the Indian Child Welfare Act ("ICWA"): (1) a parent abandons his child by failing to pay child support; (2) the State met its "active efforts" burden to allow a parent reasonable visitation under Section 47.10.086(a) of the Alaska Statutes even though the State declined to move a child after a parent was incarcerated; and (3) future harm to a child may be based on expert testimony as well as evidence of past serious emotional harm.[1321] Jon S. had a daughter who qualified as an Indian child under ICWA because of her mother Mae's tribal affiliation.[1322] The State placed the child with Jon because Mae needed to enter treatment.[1323] Through the next three years, Jon was repeatedly incarcerated for using cocaine and violating his parole, and even after his release he failed to pay child support while working.[1324] At trial, the superior court concluded that Jon abandoned his child by failing to pay child support, the State met its active efforts burden by attempting to place the child reasonably near Jon, and that future harm was likely from placement with Jon.[1325] On appeal, the supreme court affirmed the trial court's decision.[1326] The supreme court held that it was not clearly erroneous to find abandonment where Jon failed to pay child support despite working and recently being released from prison.[1327] Further, the fact that the State failed, for one month, to attempt to place Jon's child near him after he was incarcerated was not evidence that the State did not meet its "active efforts" statutory burden.[1328] Lastly, the supreme court held that the lower court's finding of likely future harm to the child from Jon's custody was not clearly erroneous because evidence of past harm, coupled with expert testimony, may sustain such a finding.[1329] Affirming the lower court's decision, the supreme court held that it was not clearly erroneous for a lower court to find that, under ICWA: (1) a parent abandons his child by failing to pay child support, (2) the State met its "active efforts" burden to allow a parent reasonable visitation under 47.10.086(a) even though the State declined to move a child after a parent was incarcerated, and (3) future harm to a child may be based on expert testimony as well as evidence of past serious emotional harm. [1330]

Marcia V. v. State, Office of Children's Services

In *Marcia V. v. State*, *Office of Children's Services*,[1331] the supreme court held that an expert with the Office of Children's Services ("OCS") may be qualified as an expert witness in a termination of parental rights case of a Native child without having expertise in Native culture.[1332] In 2008, the trial court granted OCS's petition for termination of Marcia's parental rights to her Native daughter Alice.[1333] Marcia appealed, arguing that OCS's expert witness was unqualified.[1334] The court reasoned that expertise in Native culture was unnecessary in qualifying an expert when the basis for termination was unrelated to Native culture and a lack of such expertise would not affect the termination decision.[1335] The supreme court affirmed the termination of parental rights, holding that an expert

[1320] 212 P.3d 756 (Alaska 2009).
[1321] *See id.* at 759.
[1322] *Id.*
[1323] *Id.*
[1324] *Id.* at 761–62.
[1325] *See id.* at 759.
[1326] *Id.*
[1327] *Id.* at 762.
[1328] *Id.*
[1329] *Id.* at 766–67.
[1330] *Id.* at 759.
[1331] 201 P.3d 496 (Alaska 2009).
[1332] *Id.* at 499.
[1333] *Id.* at 502.
[1334] *Id.* at 503.
[1335] *Id.*

with OCS may be qualified as an expert witness in a termination of parental rights case of a Native child without having expertise in Native culture.[1336]

Neal M. v. State, Department of Health and Social Services

In *Neal M. v. State, Department of Health and Social Services*,[1337] the supreme court held that the superior court did not commit clear error in terminating a mother's parental rights because the children needed aid, and the State made active and reasonable efforts to keep the family together as required by the Indian Child Welfare Act ("ICWA").[1338] Since 1998, the parents had neglected their children and subjected them to the father's continual substance abuse.[1339] Because of these issues, the superior court found that the children were in need of aid.[1340] The State then developed a safety plan requiring the mother would move out of the house and into a women's shelter.[1341] When the shelter removed the mother for misbehaving, the State then moved the children, supplied them with food and necessities, and found a therapist for the mother.[1342] However, the mother eventually left the shelter and resumed living with the father against state orders, causing the superior court to terminate her parental rights.[1343] According to the supreme court, a child is in need of aid if, by a preponderance of the evidence, the parent is found to have subjected the child to neglect by not providing food, education, shelter, or health care.[1344] Evidence of parental substance abuse is another factor the court may consider.[1345] The supreme court concluded that the State presented sufficient evidence of neglect because of the father's substance abuse and the mother's inability to keep the children away from the harmful situation.[1346] Second, the court considered whether the State had proven by clear and convincing evidence that it made active efforts to keep the Indian family together as required by ICWA.[1347] It concluded that the State had made active efforts to keep the family intact by sending the mother to counseling, finding her a shelter, providing the family with food, and attempting to send the father to substance abuse treatment.[1348] Therefore, the supreme court held that the superior court did not commit clear error in terminating a mother's parental rights because the children needed aid, and the State made active and reasonable efforts to keep the family together as required by the ICWA.[1349]

Sandy B. v. State, Office of Children's Services

In *Sandy B. v. State, Office of Children's Services*,[1350] the supreme court held that under the Indian Child Welfare Act, once the Office of Children's Services ("OCS") conducts an active effort to reunite parents and child following a loss of custody, it is appropriate to admit expert testimony that continued custody of the child by parents would result in serious emotional or physical damage to the child, even if that testimony is via telephone.[1351] Sandy B. lost custody of her three children to OCS due to allegations related to her alcohol and drug abuse.[1352] OCS filed petitions to terminate parental rights, which were granted by the superior court.[1353] Sandy appealed, challenging the superior court's finding concerning sufficiency of the expert testimony to support its finding that her children would likely suffer serious harm if they were returned to her care; the supreme court found that OCS had made active but unsuccessful efforts to reunite Sarah with her children.[1354] The court further found that expert testimony was

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[1336] *Id.* at 508.
[1337] 214 P.3d 284 (Alaska 2009).
[1338] *Id.* at 285–86.
[1339] *Id.* at 286–87.
[1340] *Id.* at 287.
[1341] *Id.*
[1342] *Id.* at 287–88.
[1343] *Id.* at 288–90.
[1344] *Id.* at 291.
[1345] *Id.*
[1346] *Id.* at 289.
[1347] *Id.* at 293.
[1348] *Id.* at 293–94.
[1349] *Id.* at 285–86.
[1350] 216 P.3d 1180 (Alaska 2009).
[1351] *Id.* at 1191–92.
[1352] *Id.* at 1183–85.
[1353] *Id.* at 1185.
[1354] *Id.* at 1187–90.

admissible, since the State's expert was qualified under the Indian Child Welfare Act.[1355] Finally, the supreme court found that expert testimony given over the telephone was admissible, since there was no showing that the telephone compromised in any way the reliability of the testimony.[1356] In affirming the decision of the superior court, the supreme court held that under the Indian Child Welfare Act, once an active effort to reunite parents and child had been attempted, it was appropriate to admit expert testimony that continued custody of child by parents would result in serious emotional or physical damage to the child, even if that testimony is via telephone.[1357]

Shageluk Ira Council v. State, Office of Children's Services

In *Shageluk Ira Council v. State, Office of Children's Services*,[1358] the supreme court held that it was lawful for the superior court to refuse to transfer jurisdiction of two child-in-need-of-aid cases to the Shageluk Ira Council (hereinafter the "Tribe") because the proceedings were already at an advanced stage when the request was made.[1359] Della and Rachel were born to two members of the Shageluk tribe and were accordingly subject to the laws of the Indian Child Welfare Act ("ICWA").[1360] The State removed the children from their parents' home because of the parents' history of alcohol abuse and violence and their failure to care for the children.[1361] The State scheduled several custody hearings and notified the Tribe as required under ICWA; the State specified that if the Tribe wanted to intervene in these cases it would have to do so in writing.[1362] The Tribe did not file a petition to transfer jurisdiction to its tribal council until about five months after it had been first notified—at a point at which the children had already been placed in foster homes and the State had already determined that the children should be adopted because the father had not made substantial progress in his recovery.[1363] The superior court denied the Tribe's petition on the ground that it was untimely because the case was so far advanced.[1364] On appeal, the Tribe argued largely that the denial was based on an assumption that the tribal council was incompetent and that the trial court improperly considered the best interests of the children in making its decision.[1365] Reviewing the record, however, the supreme court concluded that the Tribe's argument about incompetence motivating the decision below was a meritless claim.[1366] The court further determined that the lower court acted properly in that it considered the advanced stage of the proceedings and the lateness of the Tribe's petition in reaching its decision.[1367] The supreme court therefore affirmed the judgment of the lower court and held that its refusal to transfer jurisdiction to the Tribe was proper because the proceedings were already at an advanced stage when the request was made.[1368]

Ted W. v. State, Office of Children's Services

In *Ted W. v. State, Office of Children's Services*,[1369] the supreme court held that when a father, whose parental rights had already been terminated, obtains an Indian custodianship solely by the mother's temporary placement of a child with him, that status may be revoked at any time by the mother acting in concert with the Office of Children's Services ("OCS").[1370] Ted's parental rights to Danny, a Native, were terminated in April 2001.[1371] OCS removed Danny from Ted's home and filed an emergency petition for adjudication of child in need of aid and temporary custody.[1372] It was agreed by all parties that Ted would be Danny's Indian custodian under the Indian Child Welfare Act, but Ted contested that Danny was a child in need of aid.[1373] OCS and Joanne filed a

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[1355] *Id.* at 1190–91
[1356] *Id.* at 1191.
[1357] *Id.* at 1191–92.
[1358] No. S-13172, 2009 WL 723381 (Alaska Mar. 18, 2009).
[1359] *Id.* at *1.
[1360] *Id.*
[1361] *Id.*
[1362] *Id.* at *1–*2.
[1363] *See id.* at *3.
[1364] *Id.*
[1365] *Id.* at *4–*5.
[1366] *Id.* at *4.
[1367] *Id.* at *5.
[1368] *Id.* at *1.
[1369] 204 P.3d 333 (Alaska 2009).
[1370] *Id.* at 334.
[1371] *Id.*
[1372] *Id.*
[1373] *Id.* at 334, 336.

motion requesting that Ted's Indian custodianship be terminated.[1374] The superior court granted the motion to terminate Ted's status as Indian custodian, reasoning that Joanne and OCS had effectively withdrawn his status because they were in agreement and had sole legal and physical custody of Danny.[1375] The supreme court held that a Native custodian's status is derived from the temporary transfer of care and is not intended to usurp the parent's right to raise the child.[1376] Thus, the supreme court held that when a father, whose parental rights had already been terminated, obtains an Indian custodianship solely by the mother's temporary placement of a child with him, that status may be revoked at any time by the mother acting in concert with the Office of Children's Services as the child's legal custodian.[1377]

PROPERTY LAW

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Alaska Supreme Court

Cragle v. Gray

In *Cragle v. Gray*,[1378] the supreme court held that an oral succession contract devising a house to the devisor's granddaughter was unenforceable because such a contract must be in writing.[1379] Cragle sued to evict Gray, the devisee, but the superior court awarded the house to Gray.[1380] Cragle appealed, arguing that the statute of frauds barred Gray from claiming ownership of the house.[1381] The supreme court held that an Alaska statute governing devisement contracts was controlling.[1382] The oral contract here was a devisement because it was intended to go into effect upon the death of the transferor.[1383] Under the statute, oral devisement contracts are unenforceable.[1384] Reversing the lower court, the supreme court held that the oral succession contract devising a house to the devisor's granddaughter was unenforceable because it was not in writing.[1385]

Hansen v. Davis

In *Hansen v. Davis*,[1386] the supreme court held that an easement may be extinguished by prescription and that the prescriptive period for adverse use of an easement begins when a servient estate owner unreasonably interferes with the easement holder's use of the easement.[1387] The Davises bought land containing an easement allowing access to neighboring property, owned by the Hansens.[1388] The Davises planted a garden that covered the disputed easement, and they later built a greenhouse there.[1389] The Hansens then cleared the easement, built a road on it, and began installing water and sewer lines.[1390] The Davises sued, alleging trespass and property damage, and were awarded judgment by the trial court.[1391] On appeal, the Hansens argued that an easement cannot be extinguished by prescription and, alternatively, that the prescriptive period had not run for a sufficient length of

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[1374] *Id.*
[1375] *Id.*
[1376] *Id.*
[1377] *Id.* at 334.
[1378] 206 P.3d 446 (Alaska 2009).
[1379] *Id.* at 448.
[1380] *Id.*
[1381] *Id.*
[1382] *Id.* at 452.
[1383] *Id.* at 451.
[1384] *Id.* at 449.
[1385] *Id.* at 448.
[1386] 220 P.3d 911 (Alaska 2009).
[1387] *Id.* at 913.
[1388] *Id.*
[1389] *Id.*
[1390] *Id.* at 914.
[1391] *Id.*

time.[1392] The supreme court reversed, reasoning that while an easement could be extinguished by prescription, the prescriptive period did not begin until unreasonable interference with current or prospective use of the easement had occurred.[1393] The court suggested that the interference should adequately provide notice that the easement is under threat and should be an affirmative assertion that the adverse use is hostile to the rights of the easement holder. It also ruled that temporary improvements to an unused easement that are easily and inexpensively removed will not activate the prescriptive period.[1394] Thus, the Davises' garden did not constitute an improvement that sufficiently triggered the prescriptive period, and the greenhouse, constructed in 2003, was built too recently to fulfill the ten-year adverse use requirement.[1395] Reversing the decision of the lower court, the supreme court held that an easement may be extinguished by prescription and that the prescriptive period for adverse use of an easement begins when a servient estate owner unreasonably interferes with the easement holder's use of the easement.[1396]

Hillstrand v. City of Homer

In *Hillstrand v. City of Homer*,[1397] the supreme court held that Section 09.55.275 of the Alaska Statutes does not require a condemnor to obtain final plat approval at a specific point in the taking process.[1398] Additionally, the court held that when a condemnor takes land in fee for a public building, land for subsidiary features may also be taken in fee, provided the subsidiary features are reasonably necessary to accomplish the condemnor's purpose.[1399] The city of Homer sought land through eminent domain to expand an existing water treatment center.[1400] Hillstrand, the landowner, objected to the taking because it would close off an access road to her property without providing an alternate way of access, and because the city sought a fee simple interest rather than an easement.[1401] The lower court found that the platting statute, Section 09.55.275, does not require the city to determine a final plat by a specific time.[1402] On appeal, the supreme court held that Hillstrand's rights would be considered at the later compensation proceedings, and the lower court did not err on refusing to order the city to obtain plat approval before the end of the taking process.[1403] It was not arbitrary for the city to take the buffer zone in fee simple.[1404] Because in takings cases the court must look to the whole of the project rather than scrutinize the parts, the city may take the property in fee simple for the buffer zone.[1405] Here, a buffer zone was reasonably necessary to fulfill the City's purpose.[1406] Additionally, when a condemnor takes land in fee for a public building, land for subsidiary features may also be taken in fee simple, provided the subsidiary features are reasonably necessary to accomplish the condemnor's purpose.[1407] Affirming the lower court, the supreme court held that 09.55.275 does not require a condemnor to obtain final plat approval at a specific point in the taking process.[1408]

Labrenz v. Burnett

In *Labrenz v. Burnett*,[1409] the supreme court held that: (1) an easement holder must remove landscaping from an easement on his neighbor's property because the landscaping was not reasonably necessary to protect the easement from erosion and vandalism, and (2) the neighbor could construct his own driveway over the easement.[1410] Labrenz held an easement for a driveway over Burnett's land.[1411] Labrenz installed landscaping on Burnett's

[1392] *Id.* at 915.
[1393] *Id.* at 916.
[1394] *Id.* at 916–17.
[1395] *Id.* at 917–18.
[1396] *Id.* at 913.
[1397] 218 P.3d 685 (Alaska 2009).
[1398] *Id.* at 690–91.
[1399] *Id.* at 696.
[1400] *Id.* at 687.
[1401] *Id.* at 689.
[1402] *Id.* at 691.
[1403] *Id.* at 690–91.
[1404] *Id.* at 694.
[1405] *Id.* at 696–97.
[1406] *Id.*
[1407] *Id.* at 696.
[1408] *Id.* at 690–91.
[1409] 218 P.3d 993 (Alaska 2009).
[1410] *Id.* at 995.
[1411] *Id.* at 996.

property in the area around the driveway, justifying the installations by claiming that they controlled erosion and prevented vandalism.[1412] Burnett sued for Labrenz to remove the landscaping.[1413] The superior court ruled that Labrenz must remove the improvements because they were merely decorative.[1414] On appeal, Labrenz argued that the superior court improperly determined that his installations were not reasonably necessary, and that the court should not allow Burnett to construct his own driveway through the easement.[1415] The court held that Labrenz's installments were not reasonably necessary, given that: (1) testimony established that grass alone would control erosion; (2) vandalism was not a problem in the area; and (3) Labrenz could simply move a fence back to his property line.[1416] Finally, the supreme court held it was reasonable for Burnett to construct a driveway to reach the lower portion of their property because the driveway would not interfere with Labrenz's easement.[1417] Accordingly, the supreme court affirmed the superior court in all respects and held that: (1) an easement holder must remove landscaping from an easement on his neighbor's property because the landscaping was not reasonably necessary to protect the easement from erosion and vandalism, and (2) that the dominant estate holder could construct his own driveway over the easement.[1418]

Lakloey, Inc. v. Ballek

In *Lakloey, Inc. v. Ballek*,[1419] the supreme court held that an equipment lessor could not place a mechanic's lien on property owned by a lessee's dirt supplier because buying and removing dirt was not construction, alteration, or repair to the supplier's property.[1420] Yingst bought some fill dirt from White Eagle's condominium construction site to use in other projects.[1421] He leased equipment from Lakloey in order to obtain and transport the dirt.[1422] However, because Yingst never paid the rental charges, Lakloey recorded a mechanic's lien against White Eagle's property.[1423] The supreme court held that the sale and removal of dirt from property was not construction or alteration because the primary purpose of the activity was for Yingst to obtain dirt, not for White Eagle to clean up its job site.[1424] The court noted that the contract between Yingst and White Eagle only specified the dirt's price and did not require Yingst to remove any specific quantity of dirt.[1425] Removing dirt from standing piles was not construction or alteration, so no lien could be recorded.[1426] Therefore, the supreme court held that an equipment lessor could not place a mechanic's lien on property owned by a lessee's dirt supplier because buying and removing dirt was not construction, alteration, or repair to the supplier's property.[1427]

Lundgrun v. City of Wasilla

In *Lundgrun v. City of Wasilla*,[1428] the supreme court held that: (1) an action taking property could not be dismissed once the municipality had taken possession of the property, and (2) the proper date of valuation of the property taken is the date of the summons.[1429] The city of Wasilla used eminent domain to take Lundgrun's land.[1430] Lundgrun filed a motion to dismiss the taking or to change the valuation date because the city delayed in replatting and providing a legal description of the land.[1431] The superior court denied the motion and Lundgrun appealed.[1432]

[1412] *Id.*
[1413] *Id.*
[1414] *Id.* at 996–97.
[1415] *Id*. at 999, 1002.
[1416] *Id.* at 999–1001.
[1417] *Id.* at 1002.
[1418] *Id.* at 1003.
[1419] 211 P.3d 662 (Alaska 2009).
[1420] *Id.* at 665.
[1421] *Id.* at 663.
[1422] *Id.*
[1423] *Id.*
[1424] *Id.*
[1425] *Id.*
[1426] *Id.*
[1427] *Id.*
[1428] 220 P.3d 919 (Alaska 2010).
[1429] *Id.* at 921.
[1430] *Id.* at 920.
[1431] *Id.*
[1432] *Id.*

Rule 72(i)(3) of the Alaska Rules of Civil Procedure provides that a court cannot dismiss a taking after the plaintiff has taken possession or title.[1433] Therefore, the superior court correctly dismissed Lundgrun's motion to dismiss the taking.[1434] Also, Alaska law states that the date of valuation is the date the summons is issued, so the superior court did not err in dismissing Lundgrun's motion to change the date of valuation.[1435] Thus, the supreme court held that: (1) an action taking property could not be dismissed once the municipality had taken possession of the property, and (2) the proper date of valuation of the property taken is the date of the summons.[1436]

Luper v. City of Wasilla

In *Luper v. City of Wasilla*,[1437] the supreme court held that: (1) a city may deny land-use permits when there is a reasonable basis for denial, and (2) an ordinance requiring a permit in order to keep more than three dogs over the age of six months on a district zoned as "rural residential" was not an unconstitutional infringement of property rights.[1438] Luper owned an approximately one-acre parcel of land zoned rural residential, on which she maintained a Shetland sheepdog kennel with approximately eighteen dogs over four months old.[1439] A city zoning ordinance required a use permit for the operation of a "dog kennel," defined as a lot in which more than three dogs over four months are kept, in a rural residential zoning district.[1440] In 2005, she applied for a use permit which was denied by the city and affirmed by the superior court. [1441] On appeal, the supreme court held that the commission had correctly denied Luper's permit, given that the commission's factual findings demonstrated that she did not meet all the criteria required for the permit.[1442] Further, the court held that her alleged reliance on a city clerk's offhand statement that no permit would be necessary was not a legitimate ground for estoppel.[1443] Finally, the court held that the three-dog limit was not an unconstitutionally arbitrary infringement on Luper's property rights because numerous dogs in a residential setting pose a potential for nuisance and a three-dog limit bears a fair and substantial relationship to the city's legitimate governmental purpose of controlling dog noise, odor, pollution, disease, and the potential for loose dogs.[1444] Thus, the supreme court affirmed the superior court, holding that: (1) a city may deny land-use permits when there is a reasonable basis for denial, and (2) an ordinance that requires a permit to keep more than three dogs over the age of six months on a lot in a "rural residential" zoning district was not an unconstitutional infringement of property rights.[1445]

Roeland v. Trucano

In *Roeland v. Trucano*,[1446] the supreme court held that: (1) a right of first refusal was not breached when the right holder received adequate notice of the proposed sale and waived his right to match the offer terms; and (2) a subsequent formalistic transfer did not implicate the right of first refusal.[1447] Trucano owned a parcel of real property, and Roeland held a first right of refusal in that parcel.[1448] Trucano entered into a Memorandum of Understanding ("MOU") to sell a twenty-five percent interest in the land to a different buyer in exchange for a twenty-five percent interest in any profits from the development of the land; he sent a copy of this MOU to Roeland.[1449] Roeland objected that the MOU was not sufficiently precise, and he indicated that he did not want to be a partner.[1450] The sale then went through without further communication between Roeland and Trancuso.[1451]

[1433] *Id.* at 921.
[1434] *Id.*
[1435] *Id.*
[1436] *Id.*
[1437] 215 P.3d 342 (Alaska 2009).
[1438] *Id.* at 344.
[1439] *Id.* at 345.
[1440] *Id.*
[1441] *Id.*
[1442] *Id.* at 346.
[1443] *Id.*
[1444] *Id.* at 348–49.
[1445] *Id.* at 344.
[1446] 214 P.3d 343 (Alaska 2009).
[1447] *Id.* at 352–53.
[1448] *Id.* at 346.
[1449] *Id.*
[1450] *Id.* at 346–47.
[1451] *Id.* at 347.

Thereafter, the parcel was transferred to a new corporation, which was owned by Trancuso and the buyer according to their proportionate interests in the land itself.[1452] Roeland sued for two breaches of his right of first refusal.[1453] The superior court ruled against him on all claims.[1454] The supreme court held that it was not erroneous for the trial court to conclude that the MOU outlined the core terms of the transaction well enough for Roeland to decide whether to match the offer.[1455] Moreover, it was not erroneous for the court to find that Roeland's objections were in fact a rejection of a potential partnership arrangement and or that Roeland never investigated the possibility of an alternative arrangement with Trancuso.[1456] Accordingly, Roeland had waived his right of first refusal.[1457] The supreme court further reasoned that the trial court did not err in concluding that Roeland was estopped from claiming a breach of his right of first refusal because Trucano reasonably relied on that waiver.[1458] Lastly, the court held that in the transfer of the property to the corporation, Roeland's right of first refusal was not implicated because the property was not transferred to a stranger.[1459] Affirming the trial court, the supreme court held that: (1) a right of first refusal was not breached when the right holder received adequate notice of the proposed sale and waived his right to match the offer terms; and (2) a subsequent formalistic transfer did not implicate the right of first refusal.[1460]

Smith v. Kofstad

In *Smith v. Kofstad*,[1461] the supreme court held that a judgment creditor was not entitled to execute a judgment upon a property held in tenancy by the entirety when the debtor's interest had vested in his spouse upon his death.[1462] The judgment creditor, Smith, moved for execution of judgment ten years after the judgment was entered.[1463] The district court denied permission to execute, failing to find just and sufficient reasons for Smith's failure to execute within a reasonable time frame and the superior court affirmed the decision.[1464] On appeal, Smith argued that he had failed to execute earlier because he had believed that the debtor had insufficient assets to cover the debts.[1465] The supreme court declined to address that argument and decided the case on the alternative ground that the judgment debtor's interest in the property terminated upon his death since the property had been owned as a tenancy by the entirety.[1466] The court noted that the decedent's share in a tenancy by the entirety is extinguished at death, with the surviving spouse taking full ownership; therefore, the debtor's interest in the property did not pass by probate to his wife, but rather it ceased to exist.[1467] The supreme court held that a judgment creditor was not entitled to execution upon a property held in tenancy by the entirety which had transferred to the judgment debtor's spouse upon the judgment debtor's death.[1468]

[1452] *Id.*
[1453] *Id.*
[1454] *Id.*
[1455] *Id.* at 349.
[1456] *Id.* at 349–50.
[1457] *Id.* at 350.
[1458] *Id.* at 350–51.
[1459] *Id.* at 351–52.
[1460] *Id.* at 352–53.
[1461] 206 P.3d 441 (Alaska 2009).
[1462] *Id.* at 443.
[1463] *Id.*
[1464] *Id.*
[1465] *Id.*
[1466] *Id.*
[1467] *Id.* at 445.
[1468] *Id.* at 443.

Alaska Supreme Court

Asher v. Alkan Shelter, L.L.C.

In *Asher v. Alkan Shelter, L.L.C.*,[1469] the supreme court held that: (1) trial courts may not amend their judgments after a party has filed an appeal; and (2) when a trial court makes an allocation of fault, it must explain how it determined the allocation.[1470] After divorcing Martha Asher, Mitch Asher began working for Alkan Shelter, L.L.C., where he embezzled $104,000.[1471] During that time, Martha received health insurance from Alkan as Mitch's spouse, and Mitch purchased a house for Martha in Fairbanks.[1472] After Alkan sued Mitch and Martha for damages, Martha gave an affidavit stating that she had no knowledge of the embezzlement and that Mitch had no interest in the house.[1473] The trial court held Martha jointly and severally liable with Mitch for an amount consisting of Mitch's estimated gain on the house, insurance costs, and punitive damages.[1474] Martha appealed, objecting to joint and several liability, and the trial court filed an amended judgment that made Martha liable for twenty-five percent of the embezzled funds.[1475] On appeal, the supreme court affirmed the trial court's finding of liability, but reversed and remanded on the issue of damages.[1476] Although the trial court correctly recognized that Alaska no longer uses joint and several liability, Martha had already filed her appeal when it entered its amended final judgment, and the trial court thus no longer had jurisdiction.[1477] Further, even if it had retained jurisdiction, the trial court erred by failing to describe how it reached both a twenty-five percent allocation of fault and the amount of punitive damages awarded.[1478] The trial court also erred by calculating Martha's liability as a percentage of the full amount that Mitch embezzled, rather than basing it upon the portion for which she was personally responsible.[1479] The supreme court affirmed the trial court on liability, but reversed and remanded on damages, holding that: (1) trial courts may not amend their judgments after a party has filed an appeal; and (2) when a trial court makes an allocation of fault, it must explain how it came to the allocation used.[1480]

Ayuluk v. Red Oaks Assisted Living, Inc.

In *Ayuluk v. Red Oaks Assisted Living, Inc.*,[1481] the supreme court held that the trial court erred: (1) in excluding testimony of two expert witnesses;[1482] (2) in excluding evidence of a defendant's past conduct;[1483] and (3) by failing to include an aided-in-agency theory in the jury instructions.[1484] Ayuluk was mentally impaired and lived in Red Oaks Assisted Living Home, where one of her caregivers was Austin.[1485] The owners of Red Oaks were notified that Austin watched pornography at work and came to work under the influence of alcohol.[1486] Austin had sex with Ayuluk multiple times.[1487] Ayuluk sued Austin for bodily injury and emotional distress, as well as the owners of Red Oaks for negligent hire, for failure to protect, and for being vicariously liable for Austin's acts.[1488]

[1469] 212 P.3d 772 (Alaska 2009).
[1470] *Id.* at 783–85.
[1471] *Id.* at 776.
[1472] *Id.*
[1473] *Id.*
[1474] *Id.* at 782–83.
[1475] *Id.* at 777.
[1476] *Id.*
[1477] *Id.* at 783.
[1478] *Id.* at 783–85.
[1479] *Id.* at 784.
[1480] *Id.* at 783–85.
[1481] 201 P.3d 1183 (Alaska 2009).
[1482] *Id.* at 1192.
[1483] *Id.* at 1194.
[1484] *Id.* at 1199.
[1485] *Id.* at 1188.
[1486] *Id.* at 1189.
[1487] *Id.* at 1190.
[1488] *Id.*

The supreme court held that the trial court erred in excluding the testimony of two expert witnesses.[1489] The first witness, a nurse, was qualified to speak about the duty of care applicable to a certified nursing assistant, and the second witness was familiar with investigating complaints made by residents in assisted living homes, thus making her qualified to testify to the standard of care that such homes should meet with respect to the supervision of caregivers.[1490] The supreme court held that it was error to exclude Austin's past conduct because the evidence could be used in demonstrating Red Oaks' knowledge of Austin's acts.[1491] The supreme court also held that the jury instructions should have included an aided-in-agency theory of vicarious liability.[1492] Reversing in part the decision of the lower court, the supreme court held that the trial court erred: (1) in excluding testimony of two expert witnesses;[1493] (2) in excluding evidence of a defendant's past conduct;[1494] and (3) by failing to include an aided-in-agency theory in the jury instructions.[1495]

Clemenson v. Providence Alaska Medical Center

In *Clemenson v. Providence Alaska Medical Center*,[1496] the supreme court held that economic damages caused by divorce actions were not actionable.[1497] Clemenson took his wife to Providence Alaska Medical Center ("PAMC") for a mental evaluation, leaving her there on the facility's promise that it would release her to no one but him.[1498] The hospital then released the woman to her daughter, and soon after, Clemenson's wife filed for divorce.[1499] Clemenson then filed suit against PAMC, claiming that its release of his wife to someone other than him led to the divorce proceeding, and that he had suffered emotional distress from this proceeding.[1500] The supreme court held that economic damages resulting from a divorce action were not actionable, and therefore the complaint was barred.[1501] The court held that it was ill-suited to consider the very personal reasons for a divorce action.[1502] The court also held that the action had been barred by the statute of limitations and that Clemenson lacked the authority to contract with PAMC to prevent the facility from releasing his wife to someone other than him.[1503] Affirming the decision of the superior court, the supreme court held that economic damages resulting from a divorce action were not actionable.[1504]

Helfrich v. Valdez Motel Corp.

In *Helfrich v. Valdez Motel Corp.,*[1505] the supreme court held that a landlord did not violate the anti-retaliation statute of the Uniform Residential Landlord and Tenant Act ("URLTA") by evicting a tenant who demanded personal injury compensation following an on-premises slip-and-fall.[1506] Tenant Helfrich sued Valdez Motel for damages resulting from an on-premises slip-and-fall.[1507] Subsequently, Helfrich was asked to move out of his current living situation at Valdez Motel.[1508] Helfrich then sued the Motel, claiming both negligence and violations of URLTA.[1509] The superior court granted a directed verdict on the URLTA claim.[1510] Helfrich appealed,

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[1489] *Id.* at 1192.
[1490] *Id.* at 1192, 1193.
[1491] *Id.* at 1194.
[1492] *Id.* at 1200.
[1493] *Id.* at 1192.
[1494] *Id.* at 1194.
[1495] *Id.* at 1199.
[1496] 203 P.3d 1148 (Alaska 2009).
[1497] *Id.* at 1149.
[1498] *Id.* at 1150.
[1499] *Id.*
[1500] *Id.*
[1501] *Id.* at 1151–52.
[1502] *Id.*
[1503] *Id.* at 1149.
[1504] *Id.*
[1505] 207 P.3d 552 (Alaska 2009).
[1506] *Id.* at 554.
[1507] *Id.* at 555.
[1508] *Id.*
[1509] *Id.*
[1510] *Id.* at 555–56.

arguing that Valdez Motel violated URLTA's anti-retaliation provision.[1511] The supreme court found that Valdez Motel did not violate URLTA's anti-retaliation provision because URLTA does not provide a remedy to recover from personal injury when fitness and habitability of the premises are not in issue.[1512] Because that right and remedy would be better addressed under Alaska tort law, and not under URLTA, the court determined that URLTA does not protect tenants from eviction when they threaten or actually file suits for personal injury compensation.[1513] Affirming the decision of the superior court, the supreme court held that a landlord did not violate the anti-retaliation statute of URLTA by evicting a tenant who demanded personal injury compensation following an on-premises slip-and-fall.[1514]

L.D.G., Inc. v. Brown

In *L.D.G., Inc. v. Brown*,[1515] the supreme court held that Section 09.17.010 of the Alaska Statutes did not violate the constitution and that the total recovery in a wrongful death suit was limited by a single cap despite multiple injured parties.[1516] On July 17, 1998, Freeman was refused more alcohol at a bar owned by L.D.G.[1517] After finishing the rest of his current drink, he went home and fatally shot his girlfriend and Tracy Eason after an argument.[1518] On behalf of Eason's two sons, Brown brought a wrongful death suit against L.D.G. for violating 04.16.030, which prohibits licensed liquor establishments from permitting visibly intoxicated people to consume alcohol on the premises.[1519] After a jury trial, the superior court granted Brown's motion for a judgment notwithstanding the verdict because the jury refused to assign liability to L.D.G. even though they found all the facts that would establish L.D.G. as the legal cause of Eason's death.[1520] A separate trial for damages ensued where the superior court entered judgment capping non-economic damages at $421,824 under 09.17.010.[1521] On review, the supreme court affirmed the judgment notwithstanding the verdict.[1522] Brown argued on appeal that the sole owner of L.D.G. should not have been released from personal liability because he and the corporation were the same entity.[1523] The supreme court agreed that and remanded on the issue of piercing the corporate veil.[1524] The supreme court also held that 09.17.010 is constitutional on its face and as applied because it represents the legislature's legitimate policy decision to limit liability and malpractice insurance costs.[1525] The supreme court affirmed the lower court's decision and held that 09.17.010 did not violate the constitution and that the total recovery in a wrongful death suit was limited by a single cap despite multiple injured parties.[1526]

Lockhart v. Draper

In *Lockhart v. Draper*,[1527] the supreme court held that punitive damages were proper when the reward was not based solely on unanswered requests for admissions and when the lower court had held a two-day hearing on punitive damages.[1528] The court also held that prejudgment interest could not be imposed on punitive damages.[1529] The Drapers filed suit when Lockhart refused to return money the Drapers had given him as a retainer after they discovered he was not an attorney, as they previously believed.[1530] Lockhart transferred his only property of value, a

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[1511] *Id.* at 558.
[1512] *Id.* at 559.
[1513] *Id.*
[1514] *Id*. at 552.
[1515] 211 P.3d 1110 (Alaska 2009).
[1516] *Id.* at 1136.
[1517] *Id.*
[1518] *Id.* at 1116.
[1519] *Id.*
[1520] *Id.* at 1116–17.
[1521] *Id.* at 1117.
[1522] *Id.* at 1120.
[1523] *Id.* at 1125.
[1524] *Id.* at 1126–27.
[1525] *Id.* at 1133–36.
[1526] *Id.* at 1136.
[1527] 209 P.3d 1025 (Alaska 2009).
[1528] *Id.* at 1027.
[1529] *Id.* at 1028.
[1530] *Id.* at 1032.

duplex, to his brother for what the trial court found to be inadequate consideration.[1531] The trial court found that Lockhart acted in total disregard of the Drapers' rights and that his actions were sufficiently egregious to justify an award of punitive damages.[1532] Affirming the trial court, the supreme court held that the trial court did not rely solely on unanswered requests for admissions in finding punitive damages liability when the court held a two-day hearing on punitive damages.[1533] The supreme court further held that prejudgment interest could not be imposed on punitive damages.[1534] Affirming the lower court, the supreme court held that punitive damages were proper when the reward was not based solely on unanswered requests for admissions and when the lower court had held a two-day hearing on punitive damages.[1535]

North Slope Borough v. Brower

In *North Slope Borough v. Brower*,[1536] the supreme court held that: (1) a beneficiary who recovers wrongful death damages may recover the decedent's pre-death pain and suffering survival damages, even if the beneficiary is also the personal representative of the decedent's estate;[1537] and (2) the beneficiary's expected lifespan is immaterial to the amount he or she may collect from the decedent's lost future earnings.[1538] Alfred Brower died when he drove his snow machine into a hole dug by the North Slope Borough Department of Public Works.[1539] He was unemployed, but he hunted and fished to help support his mother Isabel Brower.[1540] After his death, Isabel opened an estate on his behalf and filed a wrongful death suit against the North Slope Borough in superior court.[1541] At trial, the jury found in Isabel's favor that the borough was liable for Alfred's death under both the wrongful death statute and the survival of claims statute.[1542] On appeal, the supreme court interpreted the survival statute to allow survival damages to be recovered by the beneficiary of wrongful death damages.[1543] The court reasoned that nothing in the language of the survival statute prevented a beneficiary from recovering survival damages as the personal representative of the decedent or his estate.[1544] Furthermore, the court held that the lower court had permissibly allowed Isabel to recover damages from Alfred's full lost earning potential.[1545] Affirming the lower court's denial of a new trial and remittitur, the supreme court held that: (1) a beneficiary who recovers wrongful death damages may recover the decedent's pre-death pain and suffering survival damages, even if the beneficiary is also the personal representative of the decedent's estate;[1546] and (2) the beneficiary's expected lifespan is immaterial to the amount he or she may collect from the decedent's lost future earnings.[1547]

Sea Hawk Seafoods, Inc. v. State

In *Sea Hawk Seafoods, Inc. v. State*,[1548] the supreme court held that the State can waive its affirmative defense of sovereign immunity by failing to claim it in a timely manner.[1549] Sea Hawk Seafoods alleged that the State received millions of dollars in fraudulently conveyed loan payments.[1550] Sea Hawk also brought a tort claim against the State.[1551] The State did not respond with its sovereign immunity defense until after Sea Hawk had

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[1531] *Id.* at 1033.
[1532] *Id.* at 1027.
[1533] *Id.*
[1534] *Id.* at 1028.
[1535] *Id.* at 1027.
[1536] 215 P.3d 308 (Alaska 2009).
[1537] *Id.* at 310, 312.
[1538] *Id.* at 313.
[1539] *Id.* at 310.
[1540] *Id.*
[1541] *Id.*
[1542] *Id.* at 311.
[1543] *Id.* at 312.
[1544] *Id.*
[1545] *Id.*
[1546] *Id.*
[1547] *Id.* at 313.
[1548] 215 P.3d 333 (Alaska 2009).
[1549] *Id.* at 341.
[1550] *Id.* at 335.
[1551] *Id.*

already settled with Valdez Fisheries.[1552] The superior court then dismissed Sea Hawk's claims against the State, concluding that the State had not engaged in fraudulent conveyances or conspiracy.[1553] On appeal, the supreme court acknowledged that sovereign immunity is an affirmative defense.[1554] The court also found that the State's failure to affirmatively plead the defense did not necessarily result in a waiver of the defense; rather, the test was whether the adverse party was unduly prejudiced by the State's delayed assertion of the defense.[1555] The court further reasoned that certain factors may be applied when determining whether a party would be prejudiced, including added expense and delay, a longer or more burdensome trial, or if the issues being raised in the amendment are remote from the scope of the original case.[1556] Reversing the decision of the lower court, the supreme court held that the State may waive its affirmative defense of sovereign immunity by failing to claim it in a timely fashion.[1557]

Sowinski v. Walker

In *Sowinski v. Walker*,[1558] the supreme court held that: (1) the State is not obligated to maintain an entire access road for third-parties when it has entered into an agreement with private landowners to maintain part of the road;[1559] and (2) that a liquor store that is found responsible for selling alcohol to minors is only responsible for its percentage of contribution to any accidents that result.[1560] After consuming alcohol purchased from a liquor store, two minors were killed when they rode an ATV into a cable stretched across an access road.[1561] Representatives of the decedents' estates sued the State of Alaska for failing to keep the access road free of hazards, and the liquor store for providing alcohol to the two minors.[1562] The trial court granted summary judgment for the State, finding it was immune from liability.[1563] The jury found the store thirty-five percent at fault for the accident, and the court ordered it to pay for its percentage, as well as the decedents' percentage, of the accident.[1564] On appeal, the supreme court found the State had no obligation to maintain the access road.[1565] The court further held that the store was responsible only for its own share of the damages, given Alaska's system of comparative negligence with pure several liability.[1566] Reversing the lower court, the supreme court held that the State was not obligated to maintain an entire access road for third-parties when it has entered into an agreement with private landowners to maintain part of the road.[1567] The court further held that a liquor store that is found responsible for selling alcohol to minors is only responsible for its percentage of contribution to any accidents that result.[1568]

[1552] *Id.* at 336.
[1553] *Id.*
[1554] *Id.* at 339.
[1555] *Id.* at 340.
[1556] *Id.*
[1557] *Id.* at 341.
[1558] 198 P.3d 1134 (Alaska 2008).
[1559] *Id.* at 1145.
[1560] *Id.* at 1149.
[1561] *Id.* at 1140–41.
[1562] *Id.* at 1141.
[1563] *Id.*
[1564] *Id.* at 1141, 1142.
[1565] *Id.* at 1145.
[1566] *Id.* at 1149.
[1567] *Id.* at 1145.
[1568] *Id.* at 1149.

Alaska Supreme Court

In re Estate of Fields

In *In re Estate of Fields*,[1569] the supreme court held that: (1) probate court proceedings are sufficient evidence of notice to deny a Rule 60 Motion to Set Aside Judgment for lack of pre-trial notice;[1570] and (2) a probate court has subject matter jurisdiction to impose a constructive trust.[1571] The executor of Wayne's estate filed for informal probate of the will in 1991.[1572] In 2004, the probate proceeding was reopened and Joseph and Wayne Jr., Wayne's sons, were given notice to this effect.[1573] During the proceeding, a constructive trust was established to contain the estate's real property.[1574] Joseph and Wayne Jr. opposed the creation of the constructive trust.[1575] In 2005, Joseph and Wayne Jr. moved to set aside the judgments of the probate proceeding for lack of notice and lack of subject matter jurisdiction.[1576] The superior court denied this motion, and the supreme court affirmed.[1577] The supreme court reasoned that a probate court is part of the superior court, and that its adjudicative ability extends over a broad range of disputes.[1578] Also, notice of probate proceedings are sufficient to deny a Rule 60 motion for lack of notice.[1579] Affirming the lower court, the supreme court held that: (1) probate court proceedings are sufficient evidence of notice to deny a Rule 60 Motion to Set Aside Judgment for lack of pre-trial notice;[1580] and (2) a probate court has subject matter jurisdiction to impose a constructive trust.[1581]

[1569] 219 P.3d 995 (Alaska 2009).
[1570] *Id.* at 1010.
[1571] *Id.* at 1006.
[1572] *Id.*
[1573] *Id.* at 1000.
[1574] *Id.*
[1575] *Id.* at 1002.
[1576] *Id.*
[1577] *Id.* at 1010.
[1578] *Id.* at 1005.
[1579] *Id.* at 1010.
[1580] *Id.*
[1581] *Id.*

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