THE YEAR IN REVIEW 2003: SELECTED CASES FROM THE ALASKA SUPREME COURT, THE ALASKA COURT OF APPEALS, THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT, AND THE SUPREME COURT OF THE UNITED STATES

TABLE OF CONTENTS

I. Introduction 115
II. Administrative Law 116
III. Business Law 113
IV. Civil Procedure 118
V. Constitutional Law 131
VI. Criminal Law 138
  A. Procedure 138
  B. Substantive Law 166
VII. Employment Law 174
VIII. Family Law 180
IX. Insurance Law 196
X. Property Law 201
XI. Tort Law 207

I. INTRODUCTION

The Year in Review is a collection of brief summaries of selected cases concerning Alaska law. This year's edition is devoted to cases decided in 2003. The Year in Review is comprehensive neither in its breadth (many cases are omitted) nor in its depth (many issues within individual cases are omitted). Attorneys should not rely on these summaries as an authoritative guide; rather, the summaries are intended to provide a useful starting

point for additional research. The summaries are grouped by subject matter and presented alphabetically within each grouping.

Abbreviations. Several abbreviations are used throughout the Year in Review. The Alaska Rules of Civil Procedure, Criminal Procedure, and Evidence are abbreviated "Civil Rule ___," "Criminal Rule ___," and "Evidence Rule ___," respectively. The State Department of Health and Social Services, Division of Family and Youth Services is abbreviated "DFYS."

II. ADMINISTRATIVE LAW

In *ACS of Alaska, Inc. v. Regulatory Commission of Alaska*,[1] the supreme court held that where a competitor challenges an incumbent rural local service provider's exemption under the Federal Telecommunications Act,[2] the burden of proof must fall on the competitor.[3] The Federal Telecommunications Act exempts rural local telecommunications providers from being required to allow competitors to piggyback (or "interconnect") on their telecommunications networks.[4] However, the exemption does not apply to rural service providers if a competitor receives a bona fide request for interconnection, and the state regulatory commission determines that the request is not economically burdensome.[5] GCI Communications Corp. ("GCI") requested interconnection with three subsidiaries of the incumbent service provider, Alaska Communications Systems ("ACS").[6] The Regulatory Commission of Alaska ("RCA") affirmed the termination of ACS's exemptions under the Telecommunications Act.[7] The court reversed the RCA's ruling, holding that the agency had inappropriately placed the burden on the incumbent local exchange carrier, ACS.[8] The court held that the Eighth Circuit's decision in *Iowa Utilities Board v. FCC*,[9] allocating the burden of proof to the competitor, controlled in this case, because federal appellate courts have jurisdiction to hear challenges to FCC rulings, and the Eighth Circuit's decision was the only ruling allocating the burden of proof in such

1. 81 P.3d 292 (Alaska 2003).
2. 47 U.S.C. § 251(c) (2001).
3. *ACS*, 81 P.3d at 293.
4. *Id.* at 293.
5. *Id.* at 296.
6. *Id.* at 294.
7. *Id.* at 295.
8. *Id.* at 301.
9. 219 F.3d 744 (8th Cir. 2000).

cases.[10] The court remanded the case for further proceedings that would allocate the burden of proof to GCI.[11]

In *Brigman v. State*,[12] the court of appeals held that the Department of Fish and Game ("DFG") had authority to define permit hunt areas and that these areas could be defined by internal decision.[13] Brigman was convicted for transporting a brown bear that was shot and killed in an area outside the designated permit hunt area.[14] Brigman appealed, arguing that the DFG had no authority to establish permit hunt areas and, in the alternative, that the DFG could not establish the permit hunt areas by internal decision since it would violate the Administrative Procedure Act ("APA").[15] Rejecting this argument, the court of appeals found that a former regulation granted the DFG the power to establish brown bear permit hunt areas.[16] The court then presumed that the DFG established the permit hunt areas while this regulation was in effect.[17] Since there were no regulations that abolished the permit hunt areas, the court concluded that the DFG had the power to establish them.[18] The court of appeals then found that the establishment of the permit hunt areas did not constitute a "regulation" under the APA and therefore could be made by internal decision.[19] The court based its decision on *Kachemak Bay Watch, Inc. v. Noah*,[20] which stated that identification of districts that do not alter the rights of parties, do not deprive parties of a fair opportunity for public participation, and do not establish criteria by which permit applications should be evaluated do not constitute regulations under the APA.[21] Here, the court of appeals reasoned that the hunting permits were awarded by lottery and that all applicants therefore had an equal chance to secure a permit for a specified area.[22] Thus, the court of appeals found that the DFG had the authority to

10. *ACS*, 81 P.2d at 298-99.
11. *Id.* at 299.
12. 64 P.3d 152 (Alaska Ct. App. 2003).
13. *Id.* at 155.
14. *Id.* at 157.
15. *Id.* at 158, 159.
16. *Id.* at 158.
17. *Id.* at 158-59.
18. *Id.* at 159.
19. *Id.* at 161-62.
20. 935 P.2d 816 (Alaska 1997).
21. *Id.* at 825-26.
22. *Brigman*, 64 P.3d at 161.

establish permit hunt areas by internal decision, and affirmed Brigman's conviction.[23]

In *Crawford & Co. v. Baker-Withrow*,[24] the supreme court held that an Alaska Workers' Compensation Board ("Board") finding that Crawford & Company had unfairly and frivolously controverted insurance claims was a final appealable order.[25] Upon a determination that an insurer has frivolously or unfairly reported a workers' compensation claim, Alaska Statutes section 23.30.155(o) requires the Board to notify the Division of Insurance ("Division"), and for the Division to determine whether the insurer committed an illegal claim settlement practice.[26] Based on a statement of the Division's practices and policies, the court held that the Board's determinations and subsequent Division procedures, though necessarily linked, did not amount to a review process for re-examining the Board's factual findings of frivolous conversion.[27] Furthermore, the court held that the appealability of the Division's determinations of unfair claim settlement practices, under Alaska Statutes section 21.36.125, had no effect on its determination that the Board's decisions were final orders which were appealable immediately.[28]

In *Enders v. Parker*,[29] the supreme court held that an estate's personal representative was entitled to attorney's fees if her claim was brought in good faith.[30] Enders unsuccessfully sued Parker over the admission into probate of Joel Kottke's 1997 will, which disinherited Enders and transferred all interest to Parker.[31] Enders then sought payment of attorney's fees under Alaska Statutes section 13.16.435, and Parker cross-appealed for fees under Civil Rules 79(b) and 82(b).[32] On appeal, the supreme court held that under Alaska Statutes section 13.16.435 an estate claimant may recover attorney's fees upon satisfying three rules: (1) the claimant must be a personal representative or hold a nomination as such; (2) the suit must have been brought in good faith; and (3) the expenses must be necessary and attorney's fees reasonable.[33] Good faith ex-

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23. *Id.* at 168.
24. 81 P.3d 982 (Alaska 2003).
25. *Id.* at 983.
26. *Id.* at 982-83.
27. *Id.* at 985.
28. *Id.*
29. 66 P.3d 11 (Alaska 2003).
30. *Id.* at 17.
31. *Id.* at 12, 13.
32. *Id.*
33. *Id.* at 15 (citing ALASKA STAT. § 13.16.435 (Michie 2003)).

ists if the personal representative acted to benefit the named successors in the instrument she sought to uphold.[34] The supreme court denied Parker's cross-appeal, stating that claims for attorney's fees under Rules 79(b) and 82(b) do not apply if a specific statutory scheme for attorney's fees exists, such as section 13.16.435.[35]

In *Fuller v. City of Homer*,[36] the supreme court held that under certain circumstances, the city cannot raise the deliberative process privilege in order to withhold documents from public view.[37] Fuller brought suit against the City of Homer after the city refused her requests to inspect various documents relating to an annexation petition which was ultimately approved by the city council.[38] The city claimed that the documents were protected under the deliberative process privilege.[39] The court stated that in order to establish a deliberative process privilege, the government must show that the disputed document is an internal communication which is both predecisional and deliberative.[40] If the government meets these requirements, the opposing party can then rebut the presumption of privilege by showing that the public's interest in disclosure outweighs the government's interest in confidentiality.[41] Here, the court determined that the public's interest in disclosure did outweigh any governmental interest in confidentiality, because Fuller requested to view the documents after the proposed annexation was submitted to and approved by the city council.[42] In addition, while the city's interest in confidentiality, significantly waned after approval by the city council, the public's interest in disclosure grew significantly stronger.[43] The court concluded that the deliberative process privilege was not available at the time Fuller's request was made; therefore, the court reversed and remanded the case with directions to grant Fuller's request.[44]

In *Garner v. State, Department of Health and Social Services*,[45] the court of appeals held that the Department of Health and Social

34. *Id.* at 17.
35. *Id.* (citing ALASKA R. CIV. P. 79(b), 82(b)).
36. 75 P.3d 1059 (Alaska 2003).
37. *Id.* at 1065.
38. *Id.* at 1060-61.
39. *Id.* at 1061.
40. *Id.* at 1063.
41. *Id.*
42. *Id* at 1064.
43. *Id* at 1065.
44. *Id.*
45. 63 P.3d 264 (Alaska Ct. App. 2003).

Services had abused its discretion by failing to consider whether "undue hardship" would result from a refusal of Medicaid coverage for dental services to persons over twenty-one years of age.[46] John Garner, a mentally retarded thirty-five year old, was denied coverage for dental procedures because he failed to meet the regulatory requirement of being able to verbally express any "pain and acute infection."[47] Alaska's Medicaid regulations contain a provision allowing the Department of Health and Social Services to make exceptions to the requirement where undue hardship would result.[48] The court found that Garner had established a prima facie case for undue hardship and discrimination under the Americans with Disabilities Act.[49] Garner and the State disagreed as to what accommodation was reasonable to remedy such discrimination and undue hardship.[50] The court of appeals remanded the case to the superior court for further investigation.[51]

In *Greenpeace, Inc. v. State*,[52] the supreme court held that the Alaska Office of Management and Budget is not required to conduct an environmental analysis that utilizes standards under the National Environmental Policy Act in making a determination of whether a project is consistent with the Alaska Coastal Management Program ("ACMP").[53] Greenpeace appealed a determination by the Division of Governmental Coordination ("DGC") (an arm of the Alaska Office of Management and Budget) that British Petroleum's "Northstar" project to develop an offshore oilfield near Prudhoe Bay was consistent with ACMP.[54] Under ACMP,[55] projects impacting Alaska's coastline must undergo a review to determine the project's consistency with ACMP standards.[56] Greenpeace alleged that DCG had failed to assess the cumulative impacts of the Northstar project, and that DCG did not utilize adequate information in allowing certain aspects of the project to move forward.[57] In affirming the DCG's consistency determination, the supreme court held that the broad definition of "cumulative effects"

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46. *Id.* at 269.
47. *Id.* at 266.
48. ALASKA ADMIN. CODE tit. 7 § 43.080(a) (2003).
49. *Garner*, 63 P.3d at 266, 267.
50. *Id.* at 272.
51. *Id.*
52. 79 P.3d 591 (Alaska 2003).
53. *Id.* at 597-98.
54. *Id.* at 592.
55. ALASKA STAT. § 46.40.010 (Michie 2003).
56. *Greenpeace*, 79 P.3d at 592.
57. *Id.*

advocated by Greenpeace was not supported by prior case law, the state constitution, or the state attorney general's opinions.[58] Under Alaska Law, DCG was only required to conduct a "whole project analysis" to determine cumulative impacts, as opposed to a broader definition that would assess the likelihood of future impacts.[59] The court further held that the consistency review of the Northstar project was not improperly phased by the premature issuing of permits by DCG.[60] The court held that Alaska law did not require that the project be phased, and therefore the issuing of permits was not premature.[61]

In *Grimm v. Wagoner*,[62] the supreme court held that Senator-elect Wagoner's failure to disclose several financial interests did not violate an Alaska statute that required all candidates to disclose their financial affairs.[63] Alaska's Public Official Financial Disclosure Law[64] requires candidates for elected public office in Alaska to file disclosure reports with an "'accurate representation' of their financial affairs."[65] A candidate for the State Senate, Wagoner filed his financial statements in May 2002 and was elected in November of the same year.[66] Later that month, two voters sued to enforce the Public Official Financial Disclosure Law, alleging that Wagoner failed to disclose some of his financial affairs.[67] The superior court found in favor of Wagoner on two alternative theories.[68] First, if this case were treated as an election contest under Title 15, the plaintiffs' claim would fail because they did not show that Wagoner's omissions affected the election results.[69] In the alternative, the superior court held that Wagoner's statements satisfied the "substantial compliance" requirement and were thus satisfactory.[70] The supreme court affirmed, applying the substantial compliance standard.[71] Tracking the superior court's reasoning, the supreme court held that of Wagoner's eight omissions, only two

58. *Id.* at 594.
59. *Id.*
60. *Id.* at 599.
61. *Id.*
62. 77 P.3d 423 (Alaska 2003).
63. *Id.* at 438.
64. ALASKA STAT. § 39.50.030(a) (Michie 1998).
65. *Grimm*, 77 P.3d at 425.
66. *Id.*
67. *Id.*
68. *Id.* at 426.
69. *Id.*
70. *Id.*
71. *Id.* at 429.

were required disclosures; the supreme court found that these two disclosure violations were trivial, and thus that Wagoner substantially complied with the Public Official Financial Disclosure Law.[72]

In *Hamrick v. State*,[73] the court of appeals held that in order to revoke an inmate's probation for failure to join a court-ordered treatment program, the Department of Corrections must make it clear to the inmate that his failure to comply will violate his probation.[74] After being convicted of a sexual abuse charge, Floyd Hamrick was sentenced and offered probation if he successfully completed an approved sexual offender treatment program.[75] Hamrick filed an application with a treatment center which subsequently lost the application.[76] After the Department of Corrections transferred Hamrick to Arizona, a probation officer checked his application and informed him that it was misplaced and that he would need to file a second application.[77] Hamrick waited approximately nine months to file a new application, at which time there was not enough time left on his sentence to complete the program; therefore, his application was rejected.[78] Since Hamrick was unable to complete a court-ordered treatment program, the Department of Corrections filed a petition to revoke his probation.[79] The court of appeals stated that before the Department of Corrections could revoke Hamrick's probation, it had a duty to make clear to Hamrick that his noncompliance would result in termination of his probation.[80] Hamrick was never ordered to fill out the application or to submit it by a specific time, and he was never informed that his failure to apply for a treatment program would result in termination of his probation; therefore, the court of appeals reversed the superior court's order revoking Hamrick's probation.[81]

In *Ketchikan Gateway Borough v. Ketchikan Indian Corp.*,[82] the supreme court reversed a finding of implied federal preemption of borough taxes concerning uncommitted space in a building occupied by a federally-regulated Indian health clinic.[83] In 1997, the

72. *Id.* at 434-37.
73. 64 P.3d 175 (Alaska Ct. App. 2003).
74. *Id.* at 178-79.
75. *Id.* at 176.
76. *See id.* at 177.
77. *Id*.
78. *Id.*
79. *Id.*
80. *Id.* at 177-78.
81. *Id.* at 178-79.
82. 75 P.3d 1042 (Alaska 2003).
83. *Id.* at 1044.

United States transferred land in Ketchikan to the Ketchikan Indian Corporation ("KIC").[84] On appeal to the Borough Board of Equalization, the KIC was granted a sixty percent tax exemption for the five-story building it had constructed to house a federally-funded Indian Health Service clinic.[85] Questions of implied federal preemption with regard to the taxation of Native American property require a balancing of federal policy against state interests in taxation.[86] The supreme court held that: (1) the uncommitted space in the KIC building could not be considered part of any comprehensive and pervasive federal oversight because there had been no determination as to its use; and (2) the state's interests were not inconsequential because the taxes assessed would be in exchange for the governmental functions the state provides to the property in question.[87] The court remanded to determine a proper apportionment between clinic and non-clinic use for tax purposes.[88]

In *Kodiak Island Borough v. Mahoney*,[89] the supreme court held that clerks reviewing proposed ballot initiatives under Alaska Statutes section 29.26.110(a)(4) "must presume an initiative to be constitutional absent clear authority establishing its invalidity."[90] When Edward Mahoney attempted to file an initiative petition proposing mayoral term limits, the Kodiak Island Borough clerk refused to certify the application, primarily on the grounds that section 29.26.110(a)(4) prohibited her from doing so.[91] The statute provides that a clerk may only certify applications that "would be enforceable as a matter of law."[92] The Borough argued that because mayoral term limits had not yet been ruled constitutional in Alaska, the clerk could not conclude with certainty that the initiative proposed would be enforceable.[93] The superior court rejected the Borough's argument, holding that this interpretation of the statute would undermine the purpose of ballot initiatives, "depriv[ing] the voters of access to the initiative process for all issues of first impression."[94] The supreme court affirmed the lower court's decision, holding that under section 29.26.110(a)(4), a clerk

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84. *Id.*
85. *Id.*
86. *See id.* at 1046.
87. *Id.* at 1048.
88. *Id.* at 1049.
89. 71 P.3d 896 (Alaska 2003).
90. *Id.* at 900.
91. *Id.* at 898.
92. ALASKA STAT. § 29.26.110(a)(4) (Michie 2002).
93. *Kodiak Island Borough*, 71 P.3d at 898.
94. *Id.* at 899.

may only reject petitions that violate constitutional restrictions regarding initiatives or that propose substantive ordinances that are "clearly unconstitutional."[95]

In *Koyukuk River Basin Moose Co-Management Team v. Board of Game*,[96] the supreme court held that the decision of the Board of Game ("Board") to distribute up to four hundred general hunting permits in the Koyuk Controlled Use Area ("KCUA") was not subject to the limitations of Alaska's sustained yield requirements in Alaska Statutes section 16.05.258.[97] The Koyukuk River Basin Moose Co-Management Team brought this appeal against the Board, arguing that the Board's authorization of general permits violated Alaska's sustained yield requirements regarding the moose population in the KCUA.[98] The supreme court stated that sustained requirements only apply to game populations that have been designated as distinct game populations for management purposes.[99] The court then held that Alaska Administrative Code section 85.045 merely created a controlled use area by setting permit limits and did not designate a manageable game population.[100] The court further held that the decision not to manage moose in the KCUA as a distinct game population was within the Board's discretion.[101] Therefore, the Board was not subject to sustained yield requirements, and the lower court's decision in favor of the Board of Game was affirmed.[102]

In *Koyukuk River Tribal Task Force on Moose Management v. Rue*,[103] the supreme court held that an organization is a public interest litigant, which is not subject to paying awarded attorney's fees, when the organization can show that its members possess no economic interest in the organization's suit.[104] The Koyukuk River Tribal Task Force sued the Board of Game ("Board"), alleging that its allowance of increased moose hunting, which contributed to decreasing moose populations, violated the Alaska Constitution and selected statutes.[105] The superior court dismissed the case on summary judgment, noting that the Task Force had not exhausted

95. *Id.* at 900.
96. 76 P.3d 383 (Alaska 2003).
97. *Id.* at 388.
98. *Id.* at 387.
99. *Id.*
100. *Id.* at 388.
101. *Id.* at 389.
102. *Id.* at 390.
103. 63 P.3d 1019 (Alaska 2003).
104. *Id.* at 1022.
105. *Id.* at 1020.

all administrative remedies.[106] The Board then petitioned for partial costs and attorney's fees, which the Superior Court granted.[107] The Task Force contested the fees, stating that it was a public interest litigant, and therefore exempt.[108] Using the four-part public interest litigant analysis developed by the court in *Anchorage Daily News v. Anchorage School District*,[109] the supreme court found that the Task Force met the first three requirements, but its status under the fourth requirement was unclear.[110] Under the fourth requirement the Task Force must not have a "sufficient economic interest to file suit."[111] The supreme court therefore remanded the case, pending a determination of the Task Force's membership and the members' economic interests in suing the Board.[112]

In *Palmer v. Municipality of Anchorage*,[113] the supreme court held that the voting practices of the Police and Fire Retirement Board were valid and constitutional,[114] and that conflicting findings from a second board were not given preclusive effect.[115] Appellant Geoffrey Palmer applied for occupational disability benefits after heart problems that he deemed were related to his work as a police officer.[116] The Board twice denied his application, determining that his heart problems were not work-related.[117] Palmer challenged the Board's practice that five out of eight possible members were required to approve the award of benefits,[118] but the court applied the three-part test for procedural due process from *Mathews v. Eldridge*,[119] and determined that there was no deprivation of due process.[120] The court also held that the Alaska Workers' Compensation Board's determination that Palmer's problems were health-related did not warrant preclusive effect,[121] because the parties there were not in privity with the parties before the Police and Fire

106. *Id.*
107. *Id.*
108. *Id*.
109. 803 P.2d 402 (Alaska 1990).
110. *Koyukuk*, 63 P.3d at 1021-22.
111. *Id.* at 1021.
112. *Id.* at 1022.
113. 65 P.3d 832 (Alaska 2003).
114. *Id.* at 838.
115. *Id.* at 842.
116. *Id.* at 836.
117. *Id.* at 836-37.
118. *Id.* at 838.
119. 424 U.S. 319 (1976).
120. *Palmer*, 65 P.3d at 841.
121. *Id.* at 842.

Retirement Board.[122] Although there was a rebuttable presumption that Palmer's condition was work-related, the Board's findings were all supported by substantial evidence, so Palmer's challenge failed.[123] Reliance on a particular doctor's testimony was not a violation of the superior court's order, and it was also supported by substantial evidence.[124] Therefore, the court affirmed the Board's decision to deny Palmer occupational disability benefits.[125]

In *Wendte v. State Board of Real Estate Appraisers*,[126] the supreme court upheld suspension of a real estate license based on the Board of Real Estate Appraisers' finding that a theft conviction was a crime of moral turpitude that warranted such action.[127] Wendte was convicted of stealing over $250,000 from several non-profit sports organizations through his connections as a volunteer with financial services matters.[128] The Board found that Wendte's offense constituted "a crime of moral turpitude" under Alaska Statutes section 08.87.210(2) sufficient to suspend his real estate license.[129] The court rejected Wendte's defense of double jeopardy because suspension of a professional license is not considered "punishment," but rather serves to protect the public from being harmed by unfit professionals.[130] The court also rejected any argument that the Board failed to base its decision on relevant and current information, stating that Wendte's argument was misplaced.[131] Despite the fact that the theft was not in the course of Wendte's professional duties, the court found that the Board did have the authority and did properly sanction Wendte under section 08.87.210(2), which permits the use of disciplinary powers when a real estate appraiser is convicted of a crime of moral turpitude.[132]

In *Whalen v. Hanley*,[133] the supreme court upheld legislative immunity for legislators who were merely acting within the scope of their legislative duties.[134] Alaska Marine Highway System employee Ronald Whalen had been under investigation with regard to

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122. *Id.* at 843.
123. *Id.* at 843-44.
124. *Id.* at 846.
125. *Id.* at 849.
126. 70 P.3d 1089 (Alaska 2003).
127. *Id.* at 1097.
128. *Id.* at 1090.
129. *Id.*
130. *Id.* at 1094.
131. *Id.* at 1095.
132. *Id.* at 1091-92.
133. 63 P.3d 254 (Alaska 2003).
134. *Id.* at 258-259.

his eligibility status for cost-of-living-differential payments.[135] After state legislators, including Defendant Representatives Mark Hanley and Richard Foster, conducted a meeting of the House Finance Committee, Whalen alleged that previously dismissed cold payment claims against him were made public when an earlier memorandum discussing those claims was attached to the meeting's minutes.[136] Whalen sued Hanley and Foster for defamation, arguing that the legislators were acting outside the scope of their legislative duties when questioning the previous memorandum and therefore were not entitled to protection from suit through legislative immunity.[137] Because the state legislative immunity clauses were patterned after federal clauses, the supreme court employed the United States Supreme Court's broad interpretation of federal legislative immunity, which declines to impose liability regardless of whether the Court considers the legislative acts useful or necessary.[138] Because there was no showing here that the legislators acted outside the scope of their legislative duties, the supreme court affirmed the lower court's grant of summary judgment for the defendants.[139]

III. BUSINESS LAW

In *Froines v. Valdez Fisheries Development Ass'n*,[140] the supreme court held that the parol evidence rule did not bar the admission of evidence that would supplement, rather than contradict, an existing contract.[141] Froines was a fisherman who had entered into yearly contracts with the Valdez Fisheries Development Association ("Association") to be a member of its fleet.[142] The Association's Board of Directors refused to renew Froines' fishing contract for the 1998 season following his lack of participation in a strike protesting the prices offered by local processors.[143] Froines sued, alleging that the Association breached its policy of retaining all but the least productive vessel in the fleet.[144] The superior court held that the parol evidence rule prohibited admission of the Association's production policy for the purpose of determining whether

135. *Id.* at 255.
136. *Id.* at 256.
137. *Id.* at 257-58.
138. *Id.*
139. *Id.* at 258-59.
140. 75 P.3d 83 (Alaska 2003).
141. *Id.* at 89.
142. *Id.* at 85.
143. *Id.*
144. *Id.*

the fishing contract was renewable.[145] The parties agreed that this ruling effectively granted summary judgment to the Association, and the court entered a final judgment against Froines.[146] The supreme court reversed the superior court's grant of summary judgment for the Association, holding that proof of the renewal policy would supplement, rather than contradict, the terms of the vessel contract arrangement, and was therefore not necessarily subject to the parol evidence rule.[147] The court acknowledged that the lower court correctly conducted a three-part test that considered whether the contract was integrated, the meaning of the contract, and whether prior agreements conflicted with the integrated writing.[148] However, the court held that the lower court did not properly consider extrinsic evidence in addressing the first two issues: integration and meaning.[149] The lower court found that the fishing contract was a partial expression of the parties' agreement; therefore, Froines' extrinsic evidence of a renewal policy should have been initially considered because it was not inconsistent with the charter agreements.[150]

In *Hawken Northwest, Inc. v. State*,[151] the supreme court held that a bidder on a laboratory space was entitled to an award based on breach of contract.[152] After winning the construction bid for a new space[153] and commencing construction, Plaintiff Hawken signed two different releases, absolving the Department of Administration against any construction claims.[154] Later, however, Hawken argued that both releases were void due to the economic distress under which they were signed.[155] Economic distress supports invalidation of a contract when: (1) one party involuntarily accepted the terms of another; (2) circumstances permitted no other alternative; and (3) the circumstances were the result of coercive acts by the other party.[156] Arguments for the invalidation of the first release failed to prove the second prong, so it was upheld

145. *Id.* at 86.
146. *Id.*
147. *Id.*
148. *Id.* at 87.
149. *Id.*
150. *Id.* at 89.
151. 76 P.3d 371 (Alaska 2003).
152. *Id.* at 374.
153. *Id.*
154. *Id.* at 376.
155. *Id.* at 377.
156. *Id.*

as valid.[157] Arguments for the second release failed to prove the third prong so it was also upheld as valid.[158] Furthermore, no bad faith was proven to invalidate the contract.[159] Therefore, the supreme court upheld the department's award.[160]

In *Jerue v. Millett*,[161] the supreme court held that (1) neither the shareholders nor the directors of a corporation were prevailing parties in a derivative action, and, thus neither were entitled to attorney's fees; and (2) the directors were not entitled to indemnification from the corporation.[162] Ingalik, an Alaska Native village corporation, was involuntarily dissolved by the state because it failed to report or pay taxes.[163] The shareholders then filed a derivative action asking the court to compel the directors of Ingalik to hold an annual meeting to rectify the situation.[164] However, the shareholders did not make a formal request to the directors before filing suit.[165] Subsequently, the directors voluntarily reinstated the corporation.[166] After reinstatement, the superior court granted the motion to dismiss the action as moot.[167] The shareholders and directors then filed motions under Civil Rule 82 for recovery of attorney's fees, claiming that they were the prevailing party in the suit.[168] The directors also filed a motion for indemnification by the corporation.[169] The superior court awarded fees and indemnification to the directors and found that the shareholders were not prevailing parties.[170] The shareholders appealed.[171] The supreme court held that the shareholders and the directors were not prevailing parties because the shareholders had failed to make a demand to the directors before filing suit, as required by Alaska Statutes section 10.06.435(c), and had not met the exception to the statute.[172] The court also held that the directors were not prevailing parties because they did not demonstrate that their efforts to reinstate the

157. *Id.* at 378.
158. *Id.* at 381.
159. *Id.* at 382.
160. *Id.* at 383.
161. 66 P.3d 736 (Alaska 2003).
162. *Id.* at 751.
163. *Id.* at 739.
164. *Id.*
165. *Id.*
166. *Id.*
167. *Id.*
168. *Id*.
169. *Id.*
170. *Id.*
171. *Id.* at 740.
172. *Id.* at 751.

corporation were not the result of the suit.[173] Therefore, the supreme court refused to award attorney's fees to either party or to indemnify the directors.[174]

In *Quality Asphalt Paving, Inc. v. State, Department of Transportation and Public Facilities*,[175] the supreme court applied the substantial evidence standard to a decision made by a state commissioner concerning the exercise of a termination-for-convenience clause in a contract.[176] Quality Asphalt Paving, Inc. ("Quality") entered into a contract with the State Department of Transportation to widen a state road.[177] The contract included a termination-for-convenience clause that allowed the state to terminate the contract at will.[178] Shortly after the contract was issued, the project ran into an obstacle and the state exercised the clause.[179] Subsequently, Quality claimed that under the terms of the contract the state owed Quality over $4.5 million.[180] A commissioner from the Department of Transportation reviewed Quality's claims and awarded Quality roughly a third of what it had requested.[181] Quality appealed to the supreme court, which affirmed all but one of the commissioner's findings because the findings were based on substantial evidence.[182] The court commented that the commissioner's resolutions did not have to be the best solution in order to meet the substantial evidence standard.[183]

In *Skaflestad v. Huna Totem Corp.*,[184] the supreme court affirmed the superior court's judgment for Huna Totem.[185] Shareholders of Huna Totem filed a class action alleging that proxy information was materially misleading.[186] The superior court found that while there were some omissions, the information was not materially misleading on the whole.[187] First, the supreme court determined that the superior court applied the correct legal test.[188] Re-

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173. *Id.*
174. *Id.*
175. 71 P.3d 865 (Alaska 2003).
176. *Id.* at 869-70.
177. *Id.* at 868.
178. *Id.* at 868 n.1.
179. *Id.* at 868.
180. *Id.*
181. *Id.* at 869.
182. *Id.* at 869, 882.
183. *Id.* at 878.
184. 76 P.3d 391 (Alaska 2003).
185. *Id.* at 398.
186. *Id.* at 393-94.
187. *Id.* at 394.
188. *Id.* at 395.

lying on *Brown v. Ward*,[189] the supreme court held that proxy materials are materially misleading only if "there is a substantial likelihood that a reasonable shareholder would consider [them] important in deciding how to vote."[190] The supreme court found no merit to the shareholders' claims that the superior court wrongly imposed a scienter requirement.[191] Second, the supreme court affirmed the factual finding that the omissions were not materially misleading.[192] Accordingly, the judgment of the superior court was affirmed.[193]

In *Wyller v. Madsen*,[194] the supreme court held that a partner's own wrongful acts partially contributing to the partnership's dissolution prevented that partner from collecting damages for wrongful dissolution.[195] Wyller, along with Madsen and three other individuals, formed a partnership to manage a single office building.[196] The partnership authorized approximately $120,000 in improvements to the office building.[197] However, Madsen subsequently approved repairs in addition to those authorized, with the cost of improvements totalling $257,000.[198] In response, Wyller refused to authorize payment for any of the improvements, including those approved by the partnership.[199] Consequently, the contractor brought suit and the court ordered the partnership to dissolve.[200] The supreme court held that the superior court did not clearly err in finding Wyller partially responsible for the dissolution, as Wyller's unjustified denial of responsibility for the authorized improvements contributed to the contractor's suit and the subsequent dissolution of the partnership.[201] The fact that unauthorized improvements were made did not excuse Wyller from responsibility for those improvements the partnership had approved.[202] Therefore, as Wyller's own acts were partially responsible for the dissolu-

189. 593 P.2d 247 (Alaska 1979).
190. *Id.* at 251.
191. *Skaflestad*, 76 P.3d at 396.
192. *Id.* at 397.
193. *Id.* at 398.
194. 69 P.3d 482 (Alaska 2003).
195. *Id.* at 482.
196. *Id.* at 483.
197. *Id.*
198. *Id.* at 483-84.
199. *Id.* at 484.
200. *Id.*
201. *Id.* at 487.
202. *Id.* at 486.

tion, he could not collect damages from his partners for wrongful dissolution under Alaska Statutes section 32.05.330(b).[203]

IV. CIVIL PROCEDURE

In *Fletcher v. Trademark Construction, Inc.*,[204] the supreme court affirmed the dismissal of a contract action under Civil Rule 41(b).[205] Alaska Electric, a subcontractor, brought suit against Trademark, the general contractor, for an alleged $200,000 owed under a construction subcontract.[206] The trial judge granted Trademark's motion to dismiss, and Alaska Electric appealed.[207] Alaska Electric challenged the superior court's interpretation of Civil Rule 41(b) on two grounds. First, Alaska Electric argued that the superior court should have waited to rule until after Trademark had presented its case.[208] The court rejected this argument, holding that Civil Rule 41(b) imposes no such requirement.[209] Next, Alaska Electric argued that the trial court must construe evidence in the plaintiff's favor when ruling on a motion to dismiss under Civil Rule 41(b).[210] The court rejected this interpretation, holding that the superior court did not err in refusing to draw inferences in the plaintiff's favor.[211] Accordingly, the court affirmed the superior court's dismissal under Civil Rule 41(b).[212]

In *Alaska Wildlife Alliance v. State*,[213] the supreme court held that a second lawsuit brought by the Alliance was barred by res judicata.[214] The Alliance first sued the Alaska Board of Game claiming that the composition of the board members violated the Alaska Constitution.[215] The superior court dismissed the Alliance's claim; immediately thereafter, the Alliance filed another suit against the State.[216] Although the superior court did not issue a finding of fact or conclusions of law when it dismissed the Alliance's first claim, the supreme court found the dismissal still had

203. *Id.* at 488.
204. 80 P.3d 725 (Alaska 2003).
205. *Id.* at 733.
206. *Id.* at 727.
207. *Id.* at 729.
208. *Id.* at 732.
209. *Id.*
210. *Id.* at 732-33.
211. *Id*. at 733.
212. *Id.* at 724.
213. 74 P.3d 201 (Alaska 2003).
214. *Id.* at 209.
215. *Id.* at 203.
216. *Id.* at 204.

res judicata effect.[217] Next, the supreme court found that the superior court's dismissal was an adjudication on the merits.[218] Relying upon *Baker v. Carr*,[219] the court determined that the political question doctrine was a substantive basis for dismissal.[220] Finally, the court found that the two suits involved the same parties.[221] The court stated that the Alliance could not defeat res judicata by substituting one state entity for another when the claim is based on the same conduct.[222] Therefore, the supreme court affirmed the superior court's order granting the state's motion to dismiss on res judicata grounds.[223]

In *Brandner v. Agre*,[224] the supreme court held that the district court had jurisdiction over a case involving a contractor's substantial compliance with state licensing requirements.[225] Plaintiff Michael Brandner brought suit as a cross-claim to Defendant James Agre's suit seeking payment for construction work performed for Brandner.[226] Brandner claimed that since Agre was not a licensed contractor at the time they contracted for the work, he was barred from bringing an action for compensation; in response, Agre claimed that he was permitted to bring an action for compensation because he substantially complied with the contractor licensing statute.[227] The district court judge then referred the case to a superior court judge who appointed the district court judge to complete the trial.[228] Brandner argued that it was improper to resume the trial after its transfer to superior court.[229] The supreme court held that since resolving the question of Agre's substantial compliance was necessary and incidental to his compensation claim, it did not become an equitable action and, therefore, the district court had jurisdiction over the case.[230]

217. *Id.* at 206.
218. *Id.* at 207.
219. 369 U.S. 186 (1962).
220. *Alaska Wildlife Alliance*, 74 P.3d at 207.
221. *Id.* at 208.
222. *Id.*
223. *Id.* at 209.
224. 80 P.3d 691 (Alaska 2003).
225. *Id.* at 691-92.
226. *Id.* at 692.
227. *Id.*
228. *Id.*
229. *Id.* at 693.
230. *Id.* at 693-94.

In *Cizek v. Concerned Citizens of Eagle River*,[231] the supreme court upheld an award of enhanced partial attorney fee's under Civil Rule 82.[232] Concerned Citizens filed suit against landowners, including the Cizeks, for attempting to use their property as an airstrip under a right held by the former owner.[233] Concerned Citizens prevailed in the suit and then filed a motion to receive attorney fees.[234] The trial court granted the motion and awarded Concerned Citizens enhanced attorney's fees under Civil Rule 82(b)(3).[235] According to Civil Rule 82(b)(2), if a case goes to trial but does not result in money damages, the court is to award the prevailing party thirty percent of the "necessarily incurred" attorney fees.[236] However, the court can award more than thirty percent under Civil Rule 82(b)(3) if the court clearly states its reasons for doing so.[237] In this case, the trial court awarded Concerned Citizens more than thirty percent because Concerned Citizens had been "required to participate in extensive and sometimes unduly repetitive motion practice, most of it generated by the Cizek[s'] attorney."[238] The supreme court affirmed the trial court's decision because the trial court stated its reasons for the enhancement and did not abuse its discretion.[239]

In *Conservatorship Estate of K.H. v. Continental Insurance Co.*,[240] the supreme court held that actions for breach of fiduciary duty and fraud were not barred by the statute of limitations.[241] Defendants acted as conservators for K.H., a mentally ill veteran who inherited a significant sum of money.[242] When the Office of Public Advocacy ("OPA") took over as K.H.'s conservator, it discovered that his funds had been severely depleted.[243] OPA initiated suit against the defendants for fraud and breach of fiduciary duty.[244] OPA filed these claims over one year after it took over as conser-

231. 71 P.3d 845 (Alaska 2003).
232. *Id.* at 851, 854.
233. *Id.* at 848.
234. *Id.*
235. *Id.*
236. *Id.* at 850.
237. *Id.*
238. *Id.* at 848, 851.
239. *Id.* at 851.
240. 73 P.3d 588 (Alaska 2003).
241. *Id.* at 589.
242. *Id.* at 589-90.
243. *Id.* at 591.
244. *Id.*

vator.[245] The defendants moved for summary judgment, arguing that the six month statute of limitations had expired.[246] The superior court granted the motion and dismissed all claims.[247] On K.H.'s appeal, the supreme court found that the claims were not time barred because the defendants had not filed a final report disclosing all financial matters.[248] Accordingly, the court reversed the superior court's grant of summary judgment for the defendants.[249]

In *Crosby v. Hummell*,[250] the supreme court held that the lower court's ruling on a negligence per se claim did not need to be overturned on the basis of jury instructions, its summary judgment decision, or admittance of evidence.[251] Plaintiff Crosby appealed from a judgment denying a wrongful death claim for the loss of her son, which was based on the allegation that defendant Hummell had been negligent per se by permitting Crosby's son to drive in violation of Alaska Statutes section 28.15.281(b).[252] Crosby argued first that the lower court had committed error by listing all elements of negligence per se in its jury instruction instead of specifying that only one element of the claim was in dispute.[253] The supreme court upheld the lower court's instruction, reasoning that more than one element of the claim actually remained in dispute[254] and, even absent that fact, that a complete description of a claim only aids the jury in properly applying the facts before it.[255] The supreme court also rejected Crosby's second argument that a portion of Hummell's answer to Crosby's complaint constituted a binding judicial admission concerning the issue of permission, which necessitated summary judgment of the negligence claim in her favor.[256] The supreme court held that Hummell's answer was ambiguous and thus failed to qualify as a judicial admission,[257] which must be a "clear, deliberate, and unequivocal statement of fact."[258] In addition, the supreme court held that because Crosby litigated the issue at trial,

245. *Id*.
246. *Id.*
247. *Id.*
248. *Id.* at 592.
249. *Id.* at 596.
250. 63 P.3d 1022 (Alaska 2003).
251. *Id.* at 1028.
252. *Id.* at 1024.
253. *Id.* at 1025.
254. *Id.*
255. *Id.*
256. *Id.* at 1027.
257. *Id.* at 1028.
258. *Id.* at 1027-28.

the lower court had been entitled to apply Civil Rule 15(b), which allows courts to treat litigated issues as under dispute even if such issues are not disputed in the pleadings.[259]

In *Doxsee v. Doxsee*,[260] the supreme court held that a jury instruction on aggravation of injuries that does not specifically describe the plaintiff's burden of proof does not qualify as reversible error in an aggravation case.[261] In July 1996, Autumn Doxsee underwent neck surgery to alleviate her neck pain.[262] The next month, her husband Adrian Doxsee was driving Autumn to a doctor's appointment and rear-ended another vehicle.[263] Autumn suffered more neck pain and filed a negligence suit against Adrian and his insurer, Progressive Insurance Company.[264] The trial court held that, as admitted, Adrian was negligent, but awarded Autumn only $9,358 in damages.[265] After granting Progressive's motion for attorney's fees, the court entered a final judgment against Autumn for $24,763.53.[266] Autumn appealed, arguing that: (1) the trial court improperly failed to give a jury instruction explaining the standard of proof for claims of "aggravation of pre-existing injury;"[267] (2) the trial court "erroneously denied her motions for additur or a new trial;"[268] and (3) the attorney's fees award was erroneously large because it included Progressive's legal fees, and not just Adrian's.[269] After review by the court of appeals, the supreme court held that the jury instructions were sufficient and that Autumn's proposed instruction would not have affected the verdict.[270] The court also held that the trial court should not have granted her motion for additur because there was no abuse of discretion by that court,[271] and that the attorney's fees must include the costs of both Adrian's and Progressive's defenses.[272] The supreme court affirmed the trial court's defense verdict and award.[273]

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259. *Id.* at 1028.
260. 80 P.3d 225 (Alaska 2003).
261. *Id.* at 228-29.
262. *Id.* at 226.
263. *Id.*
264. *Id.* at 227.
265. *Id.* at 228.
266. *Id.*
267. *Id.*
268. *Id.* at 229.
269. *Id.* at 231.
270. *Id.* at 229.
271. *Id.* at 230.
272. *Id.* at 231.
273. *Id.*

In *Freitas v. Alaska Radiology Associates, Inc.*,[274] the supreme court held that a trial court did not abuse its discretion by admitting testimony at trial about a clinic's mammogram procedures.[275] The Freitases sued a radiology clinic for medical malpractice, claiming that it negligently failed to detect cancerous lesions on Mrs. Freitas' mammograms.[276] During trial, the judge admitted testimony by a doctor about breast positioning during mammograms at the clinic.[277] The Freitases argued that it was error to permit this testimony because it was opinion evidence that unfairly raised a new defense, and that the testimony should have been disclosed before trial.[278] The supreme court held that the superior court did not abuse its discretion, because the doctor's testimony was primarily factual and the expert opinions offered were not core liability issues in this case.[279] The Freitases further argued that the superior court erred when it gave a jury instruction that set out a potential basis for finding medical malpractice, claiming that the instruction was incomplete because it did not inform the jurors that they could find negligence if the doctor possessed the necessary knowledge and skill but acted in the wrong way.[280] The court held that there was no plain error because the Freitases failed to object at trial and the instruction was not misleading.[281]

In *Friends of Cooper Landing v. Kenai Peninsula Borough*,[282] the supreme court held that a ruling by a borough board of adjustment concerning a decision about land use by a local planning commission was a judicial decision and thus reviewable by a superior court.[283] Friends of Cooper Landing ("Friends") appealed the Kenai Peninsula Borough Planning Commission Plat Committee's ("Planning Commission") approval of a piece of land for development.[284] The decision was appealed to the Borough Board of Adjustment ("Board"), back to the Planning Commission, and subsequently back to the Board.[285] In each case the original decision was

274. 80 P.3d 696 (Alaska 2003).
275. *Id.* at 697.
276. *Id*.
277. *Id.*
278. *Id.* at 698.
279. *Id.* at 699-700.
280. *Id.* at 701.
281. *Id.* at 701-02.
282. 79 P.3d 643 (Alaska 2003).
283. *Id.* at 644.
284. *Id.* at 643.
285. *Id.* at 643-44.

upheld.[286] Friends then appealed the last decision by the Board to the superior court.[287] The superior court, however, dismissed the case, claiming that Friends lacked jurisdiction to bring the appeal because the Board's decision was legislative, not judicial.[288] According to *Cabana v. Kenai Peninsula Borough*,[289] a decision by a legislative body is only subject to review if the decision is quasi-judicial and not legislative.[290] However, on appeal to the supreme court, the court ruled that the purpose of the Board's review was to render an adjudicative response to the Planning Committee's decision; thus, the decision was quasi-judicial.[291] Therefore, the supreme court reversed and remanded the superior court's holding.[292]

In *Genaro v. Municipality of Anchorage*,[293] the supreme court held that a court has an obligation to inform a pro se litigant who clearly indicates her desire to withdraw deemed admissions of the proper procedures for doing so and should permit the litigant to withdraw those admissions.[294] Brenda Genaro, acting pro se, filed a lawsuit against the Municipality of Anchorage.[295] Subsequently, she declared bankruptcy and failed to respond to any court requests.[296] Believing that her bankruptcy trustee, who had previously been substituted as the real party in interest in the case before abandoning it, had already complied with the Municipality's discovery requests, Genaro failed to respond to the requests for admissions.[297] The superior court granted the Municipality's subsequent motion for summary judgment, stating that Genaro's failure to respond to the requests meant that the requests were deemed admitted.[298] While Genaro never made an express request of help from the superior court, the supreme court found that her timely opposition to the summary judgment motion and her numerous statements at pretrial conference sufficiently demonstrated her effective desire to withdraw her deemed admissions.[299] Therefore, it was an abuse of

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286. *Id.*
287. *Id.* at 644.
288. *Id.*
289. 21 P.3d 883 (Alaska 2001).
290. *Friends of Cooper Landing*, 79 P.3d at 644.
291. *Id.*
292. *Id.*
293. 76 P.3d 844 (Alaska 2003).
294. *Id.* at 847.
295. *Id.* at 844.
296. *Id.* at 845.
297. *Id.* at 846.
298. *Id.* at 845.
299. *Id.* at 846.

discretion not to inform her of the proper procedures for the action she was attempting to accomplish.[300] The supreme court reversed the grant of summary judgment and remanded to the superior court with direction to permit Genaro to withdraw her deemed admissions.[301]

In *Gilbert v. Nina Plaza Condo Ass'n*,[302] the supreme court held that it is an abuse of a court's discretion to dismiss a pro se litigant's case for failure to adhere to pretrial procedure if the court has not first explained the basics of the procedure to the litigant.[303] Gilbert, a resident at Nina Plaza Condominiums, filed a pro se law suit against the Nina Plaza Condominium Association and several of its residents for wrongfully excluding Gilbert from ownership privileges and decision-making because of Gilbert's sex and disability.[304] While preparing for trial, Gilbert made multiple attempts to obtain discovery documents from Nina Plaza, but the association did not comply with Gilbert's requests.[305] Gilbert informed the superior court on multiple occasions that Nina Plaza was withholding discovery.[306] When the case came before the superior court, the judge dismissed the case, finding that both parties had failed to comply with the pretrial scheduling order.[307] The superior court stated that Gilbert should have filed a motion to compel Nina Plaza to produce the discovery.[308] Gilbert asserted that she was "unaware of this legal procedure."[309] The supreme court reversed the superior court's holding.[310] The superior court had a duty to relax procedural requirements and to inform Gilbert of proper procedure because Gilbert was a pro se litigant and she had informed the superior court that she was having trouble with discovery.[311]

In *Inman v. Inman*,[312] the supreme court held that a court may relieve a party from a final divorce judgment that is void[313] and hold

300. *Id.* at 847.
301. *Id.*
302. 64 P.3d 126 (Alaska 2003).
303. *Id.* at 129.
304. *Id.* at 127.
305. *Id.* at 128.
306. *Id.*
307. *Id.* at 127.
308. *Id.* at 129.
309. *Id.*
310. *Id.*
311. *Id.*
312. 67 P.3d 655 (Alaska 2003).
313. *Id.* at 658.

a new trial to equitably divide the estate.[314] Homer Inman filed for divorce from Peggy Inman in November 1982, and a default divorce decree was entered in Peggy's absence.[315] In September 1999, Peggy filed a motion seeking partition of Homer's retirement benefits, which the trial court granted.[316] The Court upheld the judgment, reasoning that the 1982 divorce decree was void for want of personal jurisdiction and that therefore Peggy may be relieved from that judgment[317] under Civil Rule 60(b)(4).[318] The court further held that the trial court did not err by holding a new trial in order to equitably divide the estate after setting aside the divorce decree as void.[319] Despite the delay in filing Peggy's motion for relief, the court held that the trial court did not err in denying Homer's laches defense as a matter of equity.[320]

In *Lawson v. Helmer*,[321] the supreme court held that defamatory testimony of a witness in a judicial proceeding, which is relevant to the suit, is "absolutely privileged," and that such witnesses are immune from subsequent suits for libel or slander.[322] Ernie and Linda Helmer, former friends of Lawson, testified against Lawson in a custody proceeding concerning Lawson's child.[323] Later, Lawson filed a defamation suit against the Helmers, claiming that they had lied during their testimony in the earlier custody proceeding.[324] The supreme court affirmed the ruling of the lower court, holding that Lawson's claim failed as a matter of law.[325] The court reiterated the long-standing rule that "defamatory testimony is privileged, and the witness granted immunity," even if the testimony is intentionally false and malicious.[326] The court noted that good public policy favors this outcome, considering that the rule provides witnesses with the confidence to participate in a proceeding and allows them to speak freely and honestly in court.[327] On the other hand, the court found that parties are adequately protected

314. *Id.* at 659.
315. *Id.* at 657.
316. *Id.*
317. *Id.* at 658.
318. *Id.* at 664.
319. *Id.* at 659.
320. *Id.*
321. 77 P.3d 724 (Alaska 2003).
322. *Id.* at 727.
323. *Id.* at 725-26.
324. *Id.* at 726.
325. *Id.* at 725.
326. *Id.* at 727.
327. *Id.*

from "witness misconduct" by the devices of cross-examination and perjury claims.[328]

In *Marx v. Benzel*,[329] the supreme court held that an attorney who has discussed a legal issue with one party cannot represent the opposing party concerning that legal issue.[330] Marx sued Benzel seeking to set aside the deed of a house that Marx conveyed to Benzel.[331] Benzel's attorney, Brattain, had previously met with Marx concerning a different legal matter.[332] However, at that meeting, Marx also informed Brattain about her dispute concerning the house she conveyed to Benzel.[333] Subsequently, Brittain wrote a letter to both Marx and Benzel stating that in the event of an actual controversy regarding the conveyance of property, he would not represent either Marx or Benzel.[334] Nevertheless, Brittain represented Benzel when Marx brought suit.[335] The superior court denied a motion seeking to disqualify Brittain as counsel for Benzel.[336] The supreme court, applying Rule 1.9(a) of the Alaska Rules of Professional Conduct, held that Brittain should have been disqualified as Benzel's counsel.[337] "[A] lawyer may not represent a new client in a substantially related matter in which the new client's interests are materially adverse to the interests of the former client."[338] Even though Brittain was not retained as Marx's attorney, the supreme court held that the relationship was effectively the same as that covered by the rule.[339] Therefore, the supreme court reversed the superior court's order denying the motion for disqualification and remanded the case for further proceedings.[340]

In *Register v. State*,[341] the court of appeals affirmed the superior court's denial of the defendants' motions to withdraw their pleas.[342] The defendants were indicted for first-degree assault in connection with a stabbing.[343] As a result of a plea arrangement, they were al-

328. *Id.*
329. 66 P.3d 735 (Alaska 2003).
330. *Id.* at 736.
331. *Id.* at 735.
332. *Id.*
333. *Id.*
334. *Id.*
335. *Id.* at 736.
336. *Id.*
337. *Id.*
338. *Id.* (citing Griffith v. Taylor, 937 P.2d 297, 301 (Alaska 1997)).
339. *Id.*
340. *Id.*
341. 71 P.3d 337 (Alaska Ct. App. 2003).
342. *Id.* at 338.
343. *Id.*

lowed to plead no contest to second-degree assault.[344] The victim sued the defendants in civil court.[345] As a result of their no-contest plea, the defendants were estopped from contesting that they had assaulted the victim.[346] The defendants moved to withdraw their no-contest pleas, but the superior court denied their motions.[347] The defendants asserted that they had entered their pleas under a mistaken understanding that their pleas could not be used against them in civil litigation.[348] The record indicated conflicting testimony regarding whether or not the defendants' attorneys had informed them that their no-contest pleas could be used against them in civil litigation.[349] The superior court decided that the testimony of the attorneys that they had properly informed their clients was more credible.[350] Additionally, the superior court was unconvinced that the threat of civil liability would be enough to make the defendants reject the "rather lenient deal" offered to them in the plea arrangement.[351] The court of appeals found that these conclusions were not clearly erroneous.[352] Accordingly, the denial of the defendants' motions to withdraw their pleas was affirmed.[353]

In *Turner v. Alaska Communications Systems Long Distance, Inc.*,[354] the supreme court held that absent parties in a class action cannot be held liable for attorney's fees upon an adverse judgment.[355] Three former subscribers sued Defendants Alaska Communications Systems Long Distance, Inc. and Alaska Communications Systems Group, Inc. after they cancelled a long distance plan, claiming breach and fraud.[356] The court held that one factor limiting absent parties' liability is the fact that the potential recovery from a favorable judgment is so small.[357] Imposing liability would encourage opt-outs and "have a chilling effect on the important use of the class action device."[358] Furthermore, other jurisdictions'

344. *Id.*
345. *Id.*
346. *Id.*
347. *Id.*
348. *Id.*
349. *Id.* at 340.
350. *Id.*
351. *Id.* at 341.
352. *Id.*
353. *Id.* at 342.
354. 78 P.3d 264 (Alaska 2003).
355. *Id.* at 265.
356. *Id.*
357. *Id.* at 268.
358. *Id.*

rulings on this issue helped guide the decision here.[359] Overall, the court determined that holding such parties liable would create inefficiencies in the class action system.[360]

In *Williams v. Engen*,[361] the supreme court held that the purpose of Civil Rule 27 is to preserve known evidence, not to aid searches for causes of action.[362] Shortly after purchasing a home in Juneau, the Engens discovered cracks in the foundation and brought suit against the real estate agent, Williams, and the estate for misrepresentation.[363] The parties entered mediation on the matter and Williams offered to settle for $25,000.[364] Meanwhile, the estate settled and allowed the sale to be rescinded, stating that the Engens were still allowed to accept Williams' settlement.[365] Having second thoughts, however, the Engens agreed to purchase the home, and applied for refinancing.[366] After the refinancing on the home was completed,[367] Williams sought the letter from the engineer who certified the problem in the foundation, but the Engens refused to disclose the letter.[368] Williams then petitioned the Alaska superior court under Civil Rule 27 in order to compel the production of the letter, but was denied by the court.[369] On appeal, the supreme court upheld the decision, stating that Rule 27's purpose is to preserve evidence rather than be used as a tool to discover causes of action, and that Williams' case presented no exceptional reason to go beyond this purpose of preserving known evidence.[370]

In *Wyatt v. State*,[371] the supreme court held that an agreement reached in exchange for a stay of a wrongful death lawsuit was enforceable.[372] Appellant Wyatt was convicted of first-degree murder for the death of his wife.[373] The estate of Wyatt's late wife initiated a wrongful death suit against him.[374] As Wyatt appealed his crimi-

359. *Id.* at 269.
360. *Id.* at 270.
361. 80 P.3d 745 (Alaska 2003).
362. *Id.* at 746.
363. *Id.* at 745-46.
364. *Id.* at 746.
365. *Id.*
366. *Id.*
367. *Id.*
368. *Id.*
369. *Id.* at 746-47.
370. *Id.* at 747, 750.
371. 65 P.3d 825 (Alaska 2003).
372. *Id.* at 830.
373. *Id*. at 827.
374. *Id*.

nal conviction, he sought a stay of the civil proceedings against him.[375] The estate agreed to the stay, and in exchange Wyatt agreed to transfer all of the property to the estate if his criminal appeal was unsuccessful.[376] Wyatt's conviction was affirmed by the court of appeals and the supreme court.[377] The superior court then ordered that the property be transferred to the estate.[378] Wyatt objected on the grounds that the agreement did not encompass all of the property.[379] He also claimed that the written agreement did not accurately reflect the oral agreement reached in open court.[380] The superior court found against Wyatt on these points and denied his motion for reconsideration.[381] The supreme court examined the record and found that the oral agreement did encompass all of the property and was accurately reflected by the written agreement.[382] Accordingly, the court affirmed the superior court's decisions.[383]

V. CONSTITUTIONAL LAW

In *Anderson v. State*,[384] the supreme court held that Alaska Statutes section 09.17.020(j) is constitutional.[385] Anderson was awarded $600,000 in punitive damages in a wrongful discharge and defamation suit.[386] The state claimed it was owed half of the punitive damages award under Alaska Statutes section 09.17.020(j).[387] Anderson then filed a motion seeking that the statute be declared unconstitutional.[388] The court upheld the statute, holding specifically that the statute did not violate the takings clause or substantive due process.[389] The court found that there was no takings claim because Anderson's claim accrued after the date of the statute's enactment[390] and that she had no reasonable expectations to the whole punitive damages award since the statute was in effect at the

375. *Id.*
376. *Id.*
377. *Id.*
378. *Id.* at 828.
379. *Id.*
380. *Id.*
381. *Id.* at 828-29.
382. *Id*. at 829.
383. *Id*. at 832.
384. 78 P.3d 710 (Alaska 2003).
385. *Id.* at 714.
386. *Id.* at 712.
387. *Id.*
388. *Id.* at 714.
389. *Id.* at 714-20.
390. *Id.* at 714-15.

time her claim accrued.[391] The court found that the statute did not violate substantive due process because it was rationally related to several legitimate interests.[392]

In *Brandon v. State*,[393] the supreme court held that a prison disciplinary hearing conducted by a single hearing officer is not a violation of a prisoner's due process rights.[394] Brandon, a prison inmate, was charged with violating an administrative regulation against possession of tobacco.[395] A disciplinary hearing was held by a single officer, after which Brandon was found guilty and sentenced to punitive segregation.[396] Brandon argued that the hearing violated his due process rights because a single hearing officer cannot guarantee fair and impartial adjudication.[397] The court found no violation of due process under the principle that single hearing officers are not presumed to be biased in prison disciplinary proceedings.[398] Brandon further argued that the disciplinary hearing violated the final settlement agreement of *Cleary v. Smith*,[399] a class-action case settlement governing numerous aspects of prison conditions in Alaska. The court held that Brandon's hearing was not prejudiced by any violation of that agreement.[400]

In *Evans v. Native Village of Selawik IRA Council*,[401] the supreme court held that failure to provide notice to a parent prior to the resolution of adoption is a denial of the parent's due process rights.[402] Evans, an unwed father, was denied paternal rights over his son, K.D., when the Native Village of Selawik passed a resolution of adoption in favor of K.D.'s guardians without providing notice to Evans prior to the resolution.[403] The court held that notice to a parent whose parental rights may be terminated is an essential element of due process under the Alaska Constitution.[404]

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391. *Id.* at 715.
392. *Id.* at 718.
393. 73 P.3d 1230 (Alaska 2003).
394. *Id.* at 1231.
395. *Id.*
396. *Id.* at 1232.
397. *Id.* at 1233.
398. *Id.* at 1235.
399. 24 P.3d 1245 (Alaska 2003).
400. *Brandon*, 73 P.3d at 1248.
401. 65 P.3d 58 (Alaska 2003).
402. *Id.* at 60.
403. *Id.* at 59.
404. *Id.* at 60.

In *Herreid v. State*,[405] the court of appeals held that Alaska's Sex Offender Registration Act[406] ("SORA") does not constitute an improper infringement by the legislative branch into the duties of the judicial branch.[407] As part of a plea bargain, Herreid pled no contest to a misdemeanor count of attempted third-degree sexual assault.[408] Herreid was subsequently required to register as a sex offender for fifteen years because his offense was considered a "sex offense" under SORA.[409] Herreid contested the application of the Act to his situation, claiming that the registration requirement was a punishment and that it was therefore unconstitutional for the legislature not to allow the courts to modify the length of the registration requirement based on the circumstances of Herreid's offense.[410] However, the court of appeals followed recent rulings by the United States Supreme Court and held that the Act did not impose punishment but was a "civil regulatory measure."[411] Therefore, the court of appeals held that the Act did not "violate the separation of powers between the legislative and judicial branches."[412]

In *Holding v. Municipality of Anchorage*,[413] the supreme court held that a lessor prevented from advertising adult-oriented businesses by a code provision barring such advertising by those who did not own the businesses is not exempt from the provision if he leases space to parties authorized to advertise such businesses.[414] Anchorage issued five citations to Holding for advertising adult-oriented businesses that operated on premises owned by Holding but were leased by the business owners, who had the proper licenses and operated these businesses.[415] The supreme court held that the provision prohibiting non-owners from advertising applied to Holding for two reasons.[416] First, Holding did not have any "grandfather right" to advertise simply because he owned the premises.[417] Second, the provision did not deprive Holding of his

405. 69 P.3d 507 (Alaska Ct. App. 2003).
406. ALASKA STAT. § 12.63.100(6)(C)(i) (Michie 2002).
407. *Herreid*, 69 P.3d at 509.
408. *Id.* at 507.
409. *Id.* at 507-08.
410. *Id.* at 508.
411. *Id.*
412. *Id.* at 509.
413. 63 P.3d 248 (Alaska 2003).
414. *Id.* at 249.
415. *Id.*
416. *Id.*
417. *Id.* at 251.

constitutionally-protected right of commercial free speech because the law directly advances the interests of Anchorage in a manner that is not more restrictive than necessary.[418] Therefore, the citations issued by Anchorage were proper.[419]

In *Holz v. Nenana City Public School District*,[420] the Ninth Circuit reversed the district court's finding that the School District ("District") was an "arm of the state" and therefore entitled to Eleventh Amendment immunity.[421] Rather, the District was akin to a municipal corporation or other political subdivision without Eleventh Amendment protection.[422] Holz, an Alaskan Native, applied for a job with the Nenana City Public School as a classroom aide.[423] "The position was funded partially by an Indian Education grant that included an Indian employment preference requirement."[424] Although Holz was considered the best qualified applicant by the classroom teacher, the position went to the wife of the School Board President and a non-Alaskan native.[425] Holz subsequently filed suit against the District and its officials, alleging that they violated the Federal Indian Self-Determination and Education Assistance Act and federal and state civil rights laws by failing to hire her for several school district positions.[426] The district court granted summary judgment in favor of the defendants, finding that the District satisfied the five-factor test articulated in *Mitchell v. Los Angeles Community College District*[427] and was immune from suit.[428] The Ninth Circuit's application of the *Mitchell* factors yielded a different result. Regarding the first and most important factor (whether a money judgment will be satisfied out of state funds) the court noted that the relevant inquiry was whether Alaska would be legally liable for money judgments against the District.[429] Because Alaska state law explicitly provides that the State is not responsible for judgments against school districts, the court found that the first *Mitchell* factor weighed against finding

418. *Id.* at 254.
419. *Id.* at 249.
420. 347 F.3d 1176 (9th Cir. 2003).
421. *Id.* at 1177.
422. *Id*. at 1177, 1180.
423. *Id.* at 1177.
424. *Id.*
425. *Id.*
426. *Id.*
427. 861 F.2d 198 (9th Cir. 1988).
428. *Holz*, 347 F.3d at 1178.
429. *Id.* at 1182.

the District to be an arm of the state.[430] The court also found that the district court went "too far" in holding that under the second *Mitchell* factor (whether the District performs central government functions), education is an essential state function in Alaska.[431] The duty to operate public schools and thus to provide education is not the duty of the state but is the duty of home rule cities such as Nenana.[432] The last three *Mitchell* factors (whether the District has the power to sue and be sued, whether the District has the power to take property in its own name, and whether the District is an entity distinct from the state) weighed against a determination that the District was an arm of the state.[433] The court thus concluded that the District was not entitled to Eleventh Amendment immunity.[434]

In *Jacobus v. State*,[435] the court of appeals evaluated the constitutionality of certain amendments to Alaska Statutes section 15.13.010 *et seq.*, which prescribe Alaska's election campaign finance laws,[436] and held that the statutes' restriction on soft money contributions to political parties by both individuals and corporations is constitutional,[437] but that the statute's limitation of volunteer professional services by individuals is an unconstitutional infringement of First Amendment rights.[438] The Alaska legislature enacted amendments to the law of campaign finance in 1996 in order to "restrict the influence of money on politics and prevent easy evasion of the barriers set up by the reforms."[439] Party activists later filed suit, challenging the constitutionality of the new limitations imposed by the amendments on campaign contributions.[440] The court of appeals first held that the amendments' limitation of an individual's right to contribute soft money to a political party is not an unconstitutional infringement of First Amendment rights.[441] The court held that the state has a sufficiently important governmental interest in "preventing corruption, avoiding the appearance of corruption, and averting the circumvention of provisions intended to combat corruption," and that the amendments were

430. *Id.* at 1185.
431. *Id.*
432. *Id.* at 1187.
433. *Id.* at 1188-89.
434. *Id.* at 1189.
435. 338 P.3d 1095 (Alaska Ct. App. 2003).
436. *Id.* at 1099.
437. *Id.* at 1105-06.
438. *Id.* at 1099.
439. *Id.*
440. *Id.* at 1098.
441. *Id.* at 1105.

closely tailored to further that interest.[442] Second, the court held that the amendments' prohibition of corporate soft money contributions was constitutional because it was a closely tailored solution to the governmental interests of avoiding the "danger of corruption and the corrosive effects of wealth accumulated with the aid of the corporate structure."[443] Finally, the court held that the amendments' limitation of volunteer professional services by individuals to political parties was unconstitutional because the State provided no sufficient governmental interest to override individuals' First Amendment rights.[444]

In *Malabed v. North Slope Borough*,[445] the Ninth Circuit held that an ordinance granting preference in employment to members of federally recognized Indian tribes violated the Alaska Constitution's guarantee of equal protection.[446] The North Slope Borough, a political division of the State of Alaska, enacted an ordinance giving preference in employment to Native Americans.[447] The non-native plaintiffs claimed they were denied employment because of this ordinance.[448] The Ninth Circuit asked the supreme court to determine whether the ordinance violated the Alaska Constitution.[449] The supreme court held that the ordinance violated the Alaska Constitution's guarantee of equal protection because the borough lacked "a legitimate governmental interest" and because the preference was "not closely tailored to meet its goals."[450] The Ninth Circuit thus declared the ordinance invalid and declined to reach plaintiffs' federal constitutional claims.[451]

In *Myers v. Alaska Housing Finance Corp.*,[452] the supreme court held that selling the right to receive future revenue from a tobacco lawsuit settlement is constitutional.[453] Alaska settled its claims against tobacco manufacturers in exchange for annual payments.[454] The legislature then sold the rights to this revenue stream

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442. *Id.* at 1110.
443. *Id.* at 1122.
444. *Id.* at 1124-25.
445. 335 F.3d 864 (9th Cir. 2003).
446. *Id.* at 874.
447. *Id.* at 866.
448. *Id.* at 866-67.
449. *Id.* at 867-68.
450. *Id.* at 868 (citing Malabed v. North Slope Borough, 70 P.3d 416 (Alaska 2003)).
451. *Id.*
452. 68 P.3d 386 (Alaska 2003).
453. *Id.* at 394.
454. *Id.* at 387.

for its present value and appropriated the proceeds for school improvements.[455] Myers, a taxpayer, sought a declaratory judgment that this action violated the anti-dedication clause of the state constitution.[456] The superior court held that the legislature's action was constitutional, and the supreme court affirmed.[457] However, the court did hold that the revenue from the tobacco settlement was subject to the anti-dedication clause.[458] The court then held that the legislature's sale of the right to this revenue stream was not an unconstitutional dedication.[459] The court found the legislature's action permissible for four reasons.[460] First, the lawsuit settlement was non-recurring, unlike other traditional sources of state revenue.[461] Second, the periodic nature of the settlement was a matter of chance.[462] A lump sum settlement would have freed the legislature to appropriate the funds.[463] Third, lawsuit settlements are considered to be assets unlike taxes or licenses.[464] Finally, the legislature must be allowed to manage these assets so as to control risk.[465]

In *Smith v. Doe I*,[466] the Supreme Court of the United States held that the Alaska Sex Offender Registration Act ("SORA"),[467] which applies retroactively, is nonpunitive, and thus does not violate the Ex Post Facto Clause of the United States Constitution.[468] Respondents John Doe I and John Doe II were convicted of sexual abuse and were later required to register under SORA even though they were convicted prior to its passage.[469] SORA requires a convicted sex offender to register personal and identifying information with the State Department of Corrections or local law enforcement authorities.[470] The State Department of Public Safety then makes much of the information public via the Internet, including the offender's name, place of employment, and crime for

455. *Id.* at 388.
456. *Id*. at 389.
457. *Id*. at 388, 393.
458. *Id.* at 390.
459. *Id*. at 391.
460. *Id.*
461. *Id*. at 392.
462. *Id.*
463. *Id.*
464. *Id.*
465. *Id.*
466. 538 U.S. 84 (2003).
467. ALASKA STAT. § 12.63.010 (Michie 2000).
468. *Smith*, 538 U.S. at 105-06.
469. *Id.* at 91.
470. ALASKA STAT. §§ 12.63.010(a), (b).

which the offender was convicted.[471] Writing for the Court, Justice Kennedy applied the rule that a retroactively-applied law violates the Ex Post Facto Clause if either its purpose is punitive or its effects are so punitive as to negate the legislature's nonpunitive intent.[472] The Court first concluded that the legislature's intent in enacting SORA was to protect the public from sex offenders, which is a civil and nonpunitive purpose.[473] Then, in determining whether SORA's effects are punitive, the Court referred to various factors outlined in *Kennedy v. Mendoza-Martinez*.[474] In particular, the Court focused on whether the regulatory scheme: (1) has been historically regarded as a punishment; (2) imposes an affirmative disability or restraint; (3) promotes the traditional aims of punishment; (4) has a rational connection to a nonpunitive purpose; or (5) is excessive with respect to this purpose.[475] The Court resolved each of these issues in favor of a finding that SORA's effects are nonpunitive.[476] Accordingly, the Court reversed the Ninth Circuit's decision and held that SORA does not violate the Ex Post Facto Clause.[477]

In *State, Commercial Fisheries Entry Commission v. Carlson*,[478] the supreme court held that Alaska's practice of charging nonresidents more than residents for commercial fishing licenses does not violate the United States Constitution.[479] The supreme court also held, however, that the formula for determining the rate charged to non-residents should consider the revolving loan fund that supports developing fish enhancement projects: the "hatchery loan fund subsidy."[480] This class action was brought by a group of non-resident commercial fishers who complained that they were being charged three times the price for a commercial fishing permit as were resident commercial fishers.[481] The supreme court explained that "[t]he class has failed to present any valid arguments as to why we should reconsider" the position that residents and non-residents can be charged unequally for permits.[482] The supreme court ad-

471. *Smith*, 538 U.S. at 90-91.
472. *Id.* at 92.
473. *Id.* at 93, 96.
474. 372 U.S. 144 (1963).
475. *Smith*, 538 U.S. at 97.
476. *Id.* at 97-105.
477. *Id.* at 105-06.
478. 65 P.3d 851 (Alaska 2003).
479. *Id.* at 875.
480. *Id.* at 867.
481. *Id.* at 853-54.
482. *Id.* at 875.

justed the previously adopted formula used to calculate the rate charged to non-residents to include consideration of the hatcheries loan fund subsidy.[483]

VI. CRIMINAL LAW

A. Procedure

In *Baxter v. Alaska*,[484] the court of appeals upheld the allowance of certain evidence at trial, which was used to convict defendants of conspiracy to manufacture drugs, reasoning that such evidence was legally obtained.[485] Johnson was stopped by police for driving with a burnt-out headlight and gave police permission to search her car and person.[486] The police discovered drugs in Johnson's pockets, but arrested her only for driving without a license.[487] At the police station, the police again searched Johnson and examined her wallet, in which it found a piece of paper containing a list of items needed to manufacture methamphetamine.[488] Based on this evidence, the police obtained a search warrant for Johnson's home, where the police found a methamphetamine lab.[489] At trial for conspiracy to manufacture methamphetamine, Johnson and her co-defendants argued first that the evidence was barred because Johnson had not "knowingly and voluntarily" consented to the search when stopped by the police.[490] The court of appeals ruled that based on the "totality of the circumstances," Johnson validly consented to the search.[491] The defendants next argued that even if consent had been given, Johnson later withdrew her consent when she hesitated before emptying her pockets for police.[492] The court of appeals denied this argument as well, holding that "[o]nce voluntary consent has been given . . . the person's 'lack of objection to subsequent closely related entries and searches' implies that the defendant's consent was not withdrawn."[493] The defendants also argued that the police's search of Johnson's wallet following her arrest was invalid because Johnson was arrested for driving without a

483. *Id.*
484. 77 P.3d 19 (Alaska Ct. App. 2003).
485. *Id.* at 21-22.
486. *Id.* at 21.
487. *Id.*
488. *Id.* at 22.
489. *Id.*
490. *Id*.
491. *Id.* at 23.
492. *Id.* at 25.
493. *Id.* (quoting Phillips v. State, 625 P.2d 816, 818 (Alaska 1980)).

license and searches "incident to arrest [are] limited to . . . evidence of the crime for which the arrest was made."[494] The court ruled, however, that police are not limited to searching for evidence of only the particular crime for which the defendant is arrested, but also for "any crime for which the police have probable cause," and thus, this search was valid.[495] Finally, the court held that the police also had authority to read the paper inside Johnson's wallet because the police had reason to believe that the item contained evidence of drug possession; specifically, the court held that the police could validly search for evidence identifying the source of the drugs.[496]

In *Bingaman v. State*,[497] the court of appeals held that though Evidence Rule 404(b)(4) allows the admission of character evidence in domestic violence trials, a trial judge is still to act as a gatekeeper to ensure that the proffered evidence is not irrelevant or prejudicial.[498] Bingaman was charged with assaulting his live-in companion and sexually abusing her daughter.[499] At trial, the judge admitted, under Rule 404(b)(4), evidence of sixty prior instances of Bingaman's misconduct.[500] However, only twenty percent of the instances dealt with the acts for which he was charged (assault and sexual abuse of a minor), while the remainder dealt with unrelated acts, such as degradation and intimidation of women.[501] On appeal, the court held that the trial judge violated Evidence Rules 402 and 403 by admitting irrelevant evidence and evidence of which its probative value is outweighed by its prejudicial harm.[502] Accordingly, the decision of the superior court was reversed.[503]

In *Black v. State*,[504] the court of appeals held that a challenge is not filed when it is mailed, but rather when it is received by the clerk of court.[505] Black was charged with driving under the influence of alcohol.[506] Before his trial he tried to file a peremptory challenge by mailing it within the five day window required by

494. *Id.*
495. *Id.* at 26.
496. *Id.* at 28-29.
497. 76 P.3d 398 (Alaska Ct. App. 2003).
498. *Id.* at 401.
499. *Id.*
500. *Id.*
501. *Id.* at 402.
502. *Id.*
503. *Id.* at 417.
504. 76 P.3d 417 (Alaska Ct. App. 2003).
505. *Id.* at 418.
506. *Id.*

Criminal Rule 25(d)(2), but the court rejected the attempt, stating that it was untimely.[507] The appellate court upheld the ruling, citing the Alaska common law rule that a document is filed only when received by the court.[508]

In *Carter v. State*,[509] the court of appeals held that a hotel guest who fails to meet the check-out deadlines suffers diminution of privacy only with respect to the right of the hotel management, not the police independently, to enter the room.[510] Carter and three other individuals occupied a hotel room.[511] Police officers legally entered the hotel room to arrest one of the other individuals.[512] However, two officers investigating Carter remained behind in the room and ordered Carter to vacate the room, as it was one o'clock, the hotel's stated check-out deadline.[513] While observing Carter gather his belongings, the police observed illicit drug paraphernalia.[514] The court of appeals held that, depending on both the hotel's customary check-out policy and the specific factual circumstances of the individual situation, a hotel guest may suffer a diminution of his expectation of privacy with respect to the right of hotel management to enter the room.[515] However, the guest neither loses all expectation of privacy nor does the guest suffer a diminution of privacy with respect to police, independently.[516] Here, the hotel policy was to provide guests with leeway after the one o'clock deadline, the clerk had specifically granted Carter such leeway, and Carter continued to have a reasonable expectation of privacy in the hotel room after one o'clock.[517] Therefore, the police officers remained in the hotel room without proper authority.[518] The evidence was therefore discovered illegally and could not be justified under the plain view doctrine.[519] The court ordered the evidence suppressed and the conviction reversed.[520]

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507. *Id.*
508. *Id.* at 419.
509. 72 P.3d 1256 (Alaska Ct. App. 2003).
510. *Id.* at 1260.
511. *Id.* at 1257.
512. *Id.* at 1258.
513. *Id.*
514. *Id.*
515. *Id.* at 1260.
516. *Id.*
517. *Id.* at 1261-62.
518. *Id.* at 1262.
519. *Id.* at 1263.
520. *Id.* at 1257.

In *Cole v. State*,[521] the court of appeals held that for an attorney to be found incompetent, a prima facie case must be made demonstrating that she acted unreasonably in comparison with other attorneys skilled in criminal law and that her incompetence contributed to her client's conviction.[522] Cole was convicted of first-degree murder.[523] Subsequently, Cole applied for post-conviction relief on the grounds that his lawyer was incompetent in two ways: (1) she did not retain a forensic pathologist to explain the victim's death; and (2) she did not explain the parole he might have had if he had instead pled guilty to second-degree murder.[524] The superior court found that, by neglecting to obtain a pathologist, Cole's lawyer had made a tactical choice which did not prejudice Cole's case; consequently, it was no abuse of discretion for the superior court to deny Cole's ineffective counsel claim.[525] Also, the court held that an attorney is not required to advise a client about the eligibility for parole under different plea options, and thus Cole failed to establish his attorney's incompetence in this regard as well.[526]

In *Coles v. State*,[527] the court of appeals found that there was sufficient evidence in the record to support the sentencing judge's finding that the defendant was a "worst offender" and, therefore, merited the maximum sentence for felony driving while intoxicated ("DWI").[528] A judge may only impose a maximum sentence on an offender when there is sufficient evidence to find that the offender is a "worst offender."[529] Evidence regarding the present offense and prior similar offenses determine when a defendant is a "worst offender."[530] Based on Coles' nine DWI convictions within a ten-year period, the court of appeals found that the sentencing judge was authorized to invoke the maximum sentence of five years in prison.[531]

In *Copeland v. State*,[532] the court of appeals rejected a defendant's evidentiary claims and upheld his sentence as a valid exer-

521. 72 P.3d 322 (Alaska Ct. App. 2003).
522. *Id.* at 323.
523. *Id.* at 322.
524. *Id.* at 322-23.
525. *Id.* at 323-24.
526. *Id.* at 324.
527. 64 P.3d 149 (Alaska Ct. App. 2003).
528. *Id.* at 149.
529. *Id.*
530. *Id.* at 151.
531. *Id.* at 151-52.
532. 70 P.3d 1118 (Alaska Ct. App. 2003).

cise of judicial discretion.[533] Copeland was convicted of contributing to the delinquency of a minor and nine counts of second-degree sexual abuse of a thirteen-year-old girl.[534] On appeal, Copeland first challenged five evidentiary rulings from the lower court.[535] Three of these claims were not raised at trial and failed plain-error review by the court of appeals.[536] Of the remaining claims, Copeland argued that the trial court erred by denying his request for access to the whole of the minor's diary.[537] The court of appeals affirmed the lower court's ruling, finding that Copeland was unable to prove that the lack of access to the full diary was prejudicial to him.[538] The court also noted that Copeland had rejected the trial court's offer of an alternative way to check the diary for physical tampering.[539] Copeland also argued that the trial court erred by refusing to allow evidence from a previous trial that the minor may have falsely accused someone of a similar crime.[540] Applying *Morgan v. State*,[541] the court of appeals held that "before evidence of a prior false accusation of sexual misconduct can be admitted, the proponent of this evidence must convince the trial judge by a preponderance of the evidence that the prior accusation was both actually and knowingly false."[542] The court found that although the defendant had been acquitted in the earlier trial, the evidence of a false accusation was still insufficient under this standard to allow the testimony.[543] Finally, the court of appeals upheld the lower court's sentence.[544] Though the sentence exceeded the *State v. Jackson*[545] benchmark range, the court found that the longer sentence was reasonable considering the unusual seriousness of Copeland's offense.[546]

In *Crawford v. State,*[547] the court of appeals held that a search of a car's center console cannot be justified as a search incident to

533. *Id.* at 1120.
534. *Id.* at 1127.
535. *Id.* at 1120.
536. *Id.* at 1122-27.
537. *Id.* at 1120.
538. *Id.* at 1121.
539. *Id.*
540. *Id.* at 1124.
541. 54 P.3d 332 (Alaska Ct. App. 2002).
542. *Copeland*, 70 P.3d at 1124.
543. *Id.*
544. *Id.* at 1128.
545. 776 P.2d 320 (Alaska Ct. App. 1989).
546. *Copeland*, 70 P.3d at 1127-28.
547. 68 P.3d 1281 (Alaska Ct. App. 2003).

arrest, as the console is not associated with the defendant's person.[548] Such a search is only justified if it is a search for hidden weapons.[549] During a traffic stop for reckless driving, the police searched Crawford's car and found a controlled substance in the center console.[550] This led to a charge of fourth-degree misconduct involving a controlled substance.[551] Crawford moved to suppress the evidence found in the console, arguing that the search was not a lawful search incident to the arrest.[552] The superior court denied the motion.[553] The court of appeals held that, because the console was a closed container not associated with Crawford's person, it could only be opened if the police reasonably believed it contained weapons or evidence of the crime for which Crawford was arrested.[554]

In *Crouse v. Municipality of Anchorage*,[555] the court of appeals held that a trial judge did not err in allowing a jury to revise its verdict when it had mistakenly filled out the wrong jury form.[556] Crouse was mistakenly convicted for reckless driving instead of a more severe charge of driving under the influence because the jury filled out the wrong verdict form.[557] Upon receiving the form, the judge immediately recognized this error and sent the jury back with the correct forms.[558] Crouse argued that the court erred in inquiring into the jurors' intent.[559] She further argued that allowing the court staff to contact the jury regarding the verdict form deprived her of her constitutional right to be present at every stage of her trial.[560] The court held that the district court did not err because a trial court has discretion to question a jurors' intent to ensure that the judgment accurately reflects the jury's verdict.[561] The court therefore declined to reverse the decision.[562]

548. *Id.* at 1283.
549. *Id.*
550. *Id.* at 1282.
551. *Id.*
552. *Id.* at 1283.
553. *Id.*
554. *Id.*
555. 79 P.3d 660 (Alaska. Ct. App. 2003).
556. *Id.* at 661-62.
557. *Id.* at 661.
558. *Id.*
559. *Id.*
560. *Id.*
561. *Id.* at 663-64.
562. *Id.* at 665.

In *Dague v. State*,[563] the supreme court held that a trial court erred in prohibiting a criminal defendant from reexamining the State's expert witness as to whether she had acted knowingly in the death of a child.[564] Dague admitted that she was responsible for the death of a ten-month old child in her care; the issue at trial was whether she acted knowingly.[565] At trial, the superior court refused to allow the defense to recall the State's expert witness to substantiate his earlier testimony about how abusive situations arise.[566] The court of appeals remanded to allow questioning of the state expert as to whether he was qualified to answer the defense's questioning and what he would have answered at trial.[567] After receiving the superior court's findings, the court of appeals determined that the exclusion of his testimony was harmless error because it would have only provided marginal support to the defense.[568] On appeal, the supreme court held that the mere fact that another witness testified on an issue does not foreclose the defendant's right to introduce substantiating testimony.[569] Therefore, the court reversed the decision of the court of appeals, reasoning that the exclusion of the state expert's testimony was reversible error because of its potential to appreciably affect the jury's verdict.[570]

In *Fowler v. State*,[571] the court of appeals held that an amendment to Alaska law making driving while intoxicated a felony with two prior offenses within the past ten years was effective the day after the governor signed it when the date specified by the legislature had already passed.[572] The Alaska legislature passed an amendment to the driving while intoxicated statute that increased the "look back" period to ten years; the amendment was to become effective on the specified date of July 1, 2001.[573] Under Alaska law, a bill takes force on the ninetieth day after the governor signs it, unless the legislature specifies otherwise.[574] The governor, however, did not sign the bill until July 3, two days after the legislature's

563. 81 P.3d 274 (Alaska 2003).
564. *Id.* at 275.
565. *Id.*
566. *Id.* at 277.
567. *Id.* at 279.
568. *Id.* at 281.
569. *Id.* at 282.
570. *Id.* at 284.
571. 70 P.3d 1106 (Alaska Ct. App. 2003).
572. *Id.* at 1109.
573. *Id.* at 1107 (citing ALASKA STAT. § 28.35.030(n) (Michie 2002)).
574. *Id.* (citing ALASKA STAT. § 01.10.070(a) (Michie 2002)).

specified date.[575] The next day, July 4, Fowler was arrested for driving while intoxicated; he had two prior offenses within the preceding ten years but none within the preceding five years.[576] His offense would be a felony if the bill were effective on or before July 4. Fowler argued that because the governor did not sign the bill until after the date specified by the legislature, the bill did not take effect until the ninetieth day after the governor signed it.[577] The court noted that when the legislature intended the law to be enacted on a specified date, it normally could anticipate that the governor would sign the law with time to spare, thus eliminating the need for the ninety-day forewarning period.[578] When the specified date has already transpired by the time the governor signed the bill, the court believed it was reasonable to assume that the legislature would want the law to take force as soon as possible.[579] This conclusion was consistent with the later-enacted Alaska Statutes section 01.10.070(d), which was amended to say "if the specified . . . effective date is in or before the day the governor signs the Act, . . . the Act becomes effective at 12:01 a.m., Alaska Standard Time, on the day after the governor signs the Act. . . ."[580] Thus, the law took effect at 12:01 A.M. on July 4, 2001, and governed Fowler's offense.[581]

In *Grinols v. State*,[582] the supreme court held that a defendant has a constitutional right to effective counsel in a first application for post-conviction relief and therefore must be given the opportunity to challenge the effectiveness of counsel in a second petition for post-conviction relief.[583] Grinols, convicted for sexual abuse of a minor, claimed he received ineffective assistance of counsel when he litigated his first application for post-conviction relief.[584] The supreme court held that the due process clause of the Alaska Constitution requires the right to counsel in a first application for post-conviction relief.[585] Therefore, as the right to counsel would be meaningless if that counsel was ineffective, the supreme court held that the due process clause also requires that a defendant be given

575. *Id.*
576. *Id*.
577. *Id.*
578. *Id.* at 1108-09.
579. *Id.* at 1109.
580. *Id.* at 1108.
581. *Id.* at 1109.
582. 74 P.3d 889 (Alaska 2003).
583. *Id*. at 896.
584. *Id.* at 891.
585. *Id.* at 894.

a chance to challenge the effectiveness of counsel in a second petition for post-conviction relief.[586] Furthermore, the court held that as the right to effective counsel is based in the Alaska Constitution, not the United States Constitution, the reach of the federal due process clause was irrelevant to the case at hand.[587]

In *Hart v. State*,[588] the court of appeals affirmed an earlier decision that it was unnecessary for a pre-sentence investigator to obtain permission from the superior court before using records of informal involvement with the juvenile justice system to prepare a pre-sentence report.[589] Hart was convicted of third-degree assault, and he had previous contacts with the juvenile justice system that did not lead to formal adjudications of delinquency.[590] His pre-sentence report included information regarding these informal complaints.[591] Hart argued that on the basis of Alaska Statutes section 47.12.310(a), which states that all agency records concerning a minor "are privileged and may not be disclosed . . . without a court order," it was improper for his pre-sentence report to include juvenile records.[592] The court noted that the statute contains exceptions; for example, a minor's records must be disclosed "to any federal, state, or municipal law enforcement agency when those records are pertinent to a 'specific investigation being conducted by that agency.'"[593]

In *James v. State*,[594] the court of appeals held that a defendant validly invoked his Fifth Amendment protection against self-incrimination and had a Fifth Amendment privilege not to be required to discuss the details surrounding charges of which he was convicted.[595] James was on probation for convictions of sexual abuse of a minor in the second degree and second-degree sexual assault.[596] He was required, as a condition of his probation, to participate in sex offender treatment during his incarceration.[597] While the denial of James' application for post-conviction relief was on appeal, James' probation officer attempted to revoke his probation

586. *Id.* at 895.
587. *Id.*
588. 75 P.3d 1073 (Alaska Ct. App. 2003).
589. *Id.*
590. *Id.*
591. *Id.* at 1073-74.
592. *Id.*
593. *Id.* (citing ALASKA STAT. § 47.12.310(b)(1) (Michie 2003)).
594. 75 P.3d 1065 (Alaska Ct. App. 2003).
595. *Id.* at 1066.
596. *Id.* at 1067.
597. *Id.*

because he failed to participate in the sex offender therapy program.[598] James invoked the Fifth Amendment, declining to discuss the charges in therapy because his case was on appeal.[599] The Office of the Attorney General declared that the privilege against self-incrimination did not excuse James from participating in the therapy.[600] The court of appeals held that James did have a Fifth Amendment right to refuse to discuss the charges of which he was convicted.[601] Due to James' collateral attack on his conviction, he demonstrated a valid reason to believe that his compelled statements might incriminate him.[602] His Fifth Amendment right trumped the state's interest in enforcing a condition of his probation.[603] Therefore, his probation could not be revoked when he refused to discuss the charges.[604]

In *Jones v. State*,[605] the court of appeals held that a defendant's admission, if given after an officer's guarantee that the conversation is "off the record," is involuntary.[606] Jones was arrested for multiple counts of sexual assault and abuse of a minor.[607] Officers questioned Jones unsuccessfully until one of the officers agreed with Jones that the conversation was "off the record."[608] After that agreement, Jones admitted that he had had sex with the victim and that he knew she was fourteen years old.[609] The supreme court held that the totality of the circumstances showed that Jones' statements were induced by the agreement with the officer and thus were involuntary.[610] Consequently, the supreme court reversed Jones' conviction.[611]

In *Larson v. State*,[612] the court of appeals held that the admissibility of jurors' affidavits as evidence turned on the type of impropriety alleged of the jurors, not the timing of that impropriety.[613] Larson was convicted of two counts of first-degree murder and one

598. *Id.*
599. *Id.*
600. *Id.*
601. *Id.* at 1068.
602. *Id.* at 1068-69.
603. *Id.* at 1069.
604. *Id.* at 1072.
605. 65 P.3d 903 (Alaska Ct. App. 2003).
606. *Id.* at 909.
607. *Id.* at 904.
608. *Id.* at 905.
609. *Id.*
610. *Id.* at 909.
611. *Id.* at 910.
612. 79 P.3d 650 (Alaska Ct. App. 2003).
613. *Id.* at 653.

count of burglary, after which he petitioned for post-conviction relief, alleging misconduct by the jury at his trial.[614] The superior court dismissed his petition, concluding that Larson's allegations did not constitute a valid exception to Evidence Rule 606(b)'s prohibition of juror affidavits as admissible evidence.[615] On appeal, Larson argued that the juror affidavits were admissible because they described misconduct that occurred before the jury's formal deliberations.[616] He also alleged that the jurors' misconduct deprived them of their status as jurors under Rule 606(b) and that the alleged misconduct was so egregious that it constituted an obstruction of justice and a denial of due process.[617] The court of appeals affirmed the holding of the superior court,[618] reasoning that Rule 606(b) applied to Larson's allegations of juror misconduct even though the misconduct occurred before the jury commenced formal deliberations.[619] The court further held that jurors who engage in misconduct do not forfeit their status as jurors[620] and that Rule 606(b) did not violate Larson's constitutional rights.[621]

In *Magee v. State*,[622] the court of appeals held that a contingent search warrant was unconstitutional, violating the Fourth Amendment of the United States Constitution because the triggering event was not defined precisely enough to ensure judicial control over the search process.[623] When police were attempting to investigate a possible methamphetamine laboratory at Donald Wares' residence, they applied for a "contingent" warrant to search Magee's property.[624] The proposed warrant allowed for a search of Magee's property upon the finding of any evidence of illegal drug activity at Wares' residence.[625] In allowing such anticipatory warrants, the triggering event must be strictly and precisely defined,[626] in order to prevent "premature" execution of the warrant.[627] Such warrants must be drawn such that the judicial officer's "role in de-

614. *Id.* at 652.
615. *Id.*
616. *Id.*
617. *Id.* at 652-53.
618. *Id.* at 660.
619. *Id.* at 655.
620. *Id.* at 659.
621. *Id.*
622. 77 P.3d 732 (Alaska Ct. App. 2003).
623. *Id.* at 733.
624. *Id.*
625. *Id.*
626. *Id.* at 734.
627. *Id.* at 735.

tecting the occurring of [the triggering] event is essentially ministerial."[628] Because the warrant here did not clearly define the triggering event, it was unconstitutional.[629] The police were given too much discretion, rendering the warrant unlawful.[630]

In *McGee v. State*,[631] the court of appeals held that the police do not have reasonable suspicion to remove a package from the normal stream of commerce if the State does not present evidence explaining why the package was singled out for removal.[632] On January 11, 1999, a policeman intercepted a suspicious package addressed to McGee at a Federal Express facility, tested it, and discovered traces of a controlled substance on it.[633] The officer then obtained a search warrant, opened the package, and found seven ounces of cocaine inside.[634] Convicted at his first trial, McGee then appealed and won a remand and a reversal in a trial court. The State then appealled McGee's second trial.[635] The State explained that the policeman intercepted the package because he thought that the name "Sam McGee" was comical and likely fictitious, the double-wrapping of the package looked suspicious, and, among other things, the airbill, addressed by hand, had no phone number on it.[636] The trial judge, however, concluded that the police's reasons to find this package suspicious were not sufficient to give the police reasonable suspicion to test the package.[637] The court of appeals affirmed the trial court's reversal of McGee's earlier conviction, holding that the record provided no evidence "to support a rational inference that the package contained contraband."[638]

In *McGuire v. State*,[639] the court of appeals held that cocaine found during a pat-down for weapons was admissible.[640] A police officer responded to a fight outside of a bar and patted down several people for weapons.[641] When McGuire was patted down, the police officer felt a plastic bag and rectangular corners of a con-

628. *Id.*
629. *Id.* at 736.
630. *Id.* at 737.
631. 70 P.3d 429 (Alaska Ct. App. 2003).
632. *Id.* at 432.
633. *Id.* at 431.
634. *Id.* at 430-31.
635. *Id.*
636. *Id.* at 431.
637. *Id.*
638. *Id.* at 432.
639. 70 P.3d 1114 (Alaska Ct. App. 2003).
640. *Id.* at 1115.
641. *Id.*

tainer traditionally used to carry narcotics.[642] The police officer was "absolutely certain" that McGuire possessed narcotics.[643] McGuire stated that it was marijuana, so the officer seized what was later found to be cocaine.[644] At trial, McGuire moved to suppress the cocaine, arguing that the search exceeded the permissible scope of a pat-down for weapons.[645] The State argued that the search was permissible under the "plain feel" doctrine.[646] The State then filed a notice of supplementary authority citing *Minnesota v. Dickerson*,[647] a United States Supreme Court case endorsing the plain feel doctrine.[648] The superior court denied McGuire's motion to suppress.[649] The superior court also denied a second motion asking the court to reconsider on the grounds that *Dickerson* had not been made known to McGuire prior to the hearing.[650] On appeal, the court of appeals affirmed the decision to admit the cocaine as evidence.[651] The court stated that McGuire's admission that he possessed a narcotic justified the police officer's search.[652] The court also upheld the denial of the motion to reconsider because *Dickerson* had been decided more than five years before the hearing, and the State had informed the defendant that it would rely on the plain feel doctrine.[653] Thus, the decision to deny reconsideration was not an abuse of discretion, and the decision of the superior court was affirmed.[654]

In *Nelson v. State*,[655] the supreme court held that the superior court did not abuse its discretion when it refused to dismiss an entire jury panel after one juror was dismissed during the selection process after admitting her distrust of the defense attorney.[656] During jury selection for Nelson's trial, a juror stated that she had a "very strong opinion" of the defense attorney.[657] The juror explained that she felt the defense attorney distorted the facts in a

642. *Id*.
643. *Id.*
644. *Id.*
645. *Id.* at 1114.
646. *Id.* at 1115.
647. 508 U.S. 366 (1993).
648. *McGuire*, 70 P.3d at 1115.
649. *Id.*
650. *Id.* at 1116.
651. *Id.*
652. *Id.* at 1117.
653. *Id.*
654. *Id.*
655. 68 P.3d 402 (Alaska 2003).
656. *Id.* at 405.
657. *Id.* at 403.

previous trial for which she had been a juror.[658] The juror was dismissed.[659] Nelson then moved to dismiss the entire panel, arguing that it was "tainted" by the dismissed juror's comments.[660] The court denied Nelson's motion.[661] The supreme court upheld this decision, stating that the entire panel was not prejudiced by the comments, and the defense could have easily objected.[662] The superior court's provision of a limiting instruction was held to be an appropriate control on any prejudice.[663]

In *Perrin v. State*,[664] the court of appeals overruled the trial court's decision to bar a defendant's defense testimony on the reasoning of *Gerlach v. State*,[665] which precludes a necessity defense in custodial interference cases.[666] The court of appeals held that, even if the trial court was concerned that the defendant would claim necessity without meeting the requirements of the affirmative defense, it could have instructed the jury that the defendant would have to utilize obtainable legal remedies before assuming unlawful self-help.[667] After he left the state for approximately three months with his daughter without notifying the child's mother, who had primary physical custody of the child, Perrin was indicted for custodial interference.[668] To obtain a custodial interference conviction, the State had to prove that the defendant was a relative of the child, and, knowing that he had no right to do so, took or kept the child from his or her lawful custodian with the intent to withhold the child for a protracted period.[669] At trial, Perrin intended to introduce evidence that he took his daughter out of state because he feared his daughter was being abused by her mother's companion.[670] The trial court concluded that self-help was not an acceptable defense for custodial interference because to allow self-help in to demonstrate lack of intent essentially established the necessity defense.[671] Barring Perrin's testimony denying he had the requisite

658. *Id.*
659. *Id*.
660. *Id.* at 404.
661. *Id.*
662. *Id.* at 405.
663. *Id.*
664. 66 P.3d 21 (Alaska Ct. App. 2003).
665. 699 P.2d 358 (Alaska Ct. App. 1985).
666. *Perrin*, 66 P.3d at 25.
667. *Id*.
668. *Id.* at 22-23.
669. *Id.* at 24.
670. *Id*.
671. *Id*.

intent to withhold his daughter for a protracted period both relieved the State of its burden of proof as to that element of the crime and deprived Perrin of his constitutional right to testify in his own behalf.[672] For these reasons, the court of appeals reversed Perrin's conviction.[673]

In *Phillips v. State*,[674] the court of appeals held that a defendant had not been unfairly convicted of murder, escape, robbery, assault, and vehicle theft, but remanded the case for re-sentencing, finding that the murder sentence was in error.[675] Phillips committed a series of crimes the day after being released from prison.[676] Phillips stole a cab in his escape attempt following commission of an armed robbery, and, on later being discovered and pursued by a police officer, engaged in a struggle with the officer that led to the officer's death.[677] On appeal, Phillips argued that his trial had been unfair and that his resulting sentence was excessive.[678] The court held that evidence of crimes that Phillips committed at the beginning of the sequence of events did not improperly prejudice the jury's findings on later crimes.[679] The court of appeals further held that, although the presence of a number of uniformed officers at the beginning of the trial may have affected the jury, the lower court did not abuse its discretion by denying Phillips' requests for a mistrial or for a complete ban on the officers' presence in the courtroom.[680] Addressing another claim that the trial had been unfair, the court of appeals held that although the introduction of the deceased officer's widow to the jury may have been erroneous, it did not prejudice the proceeding.[681] Finally, reviewing Phillips' challenge that his sentence was excessive, the court of appeals held that the lower court had incorrectly applied *Gustafson v. State*[682] in its determination of the sentence for second-degree murder.[683] Accordingly, the court vacated the sentence and remanded the case for re-sentencing.[684]

672. *Id.* at 25.
673. *Id.* at 26.
674. 70 P.3d 1128 (Alaska Ct. App. 2003).
675. *Id.* at 1145.
676. *Id.* at 1130.
677. *Id.*
678. *Id.* at 1130-31.
679. *Id.* at 1135.
680. *Id.* at 1138.
681. *Id.* at 1140.
682. 854 P.2d 751 (Alaska Ct. App. 1993).
683. *Phillips*, 70 P.3d at 1145.
684. *Id.*

In *Porterfield v. State*,[685] the court of appeals upheld the admission to evidence of recorded statements made to a third party by a criminal defendant's wife implicating her and her husband's involvement in the commission of a crime.[686] Todd Porterfield was convicted of first-degree murder and first-degree arson based on recordings of statements made by his wife Michele to a third party.[687] Todd argued that the lower court abused its discretion because Michele's statements were inadmissible as statements against interest, and such admission violated his confrontation rights.[688] The court of appeals held that the statements by Michele were admissible under Evidence Rule 804(b)(3) because, in the context of all her statements, her admission "tended to subject her to criminal liability" as an accomplice, and "a reasonable person in [her] position would not have made the statement unless believing it to be true."[689] The court of appeals further held that Todd's confrontation rights were not violated because nothing in the circumstances of the statements indicated why Michele would falsely implicate herself, and the third party offering the testimony was subject to cross-examination at trial.[690]

In *Register v. State*,[691] the court of appeals affirmed the superior court's denial of defendants' motions to withdraw their pleas.[692] The defendants were indicted for first-degree assault in connection with a stabbing, but were allowed to plead no contest to second-degree assault.[693] The victim sued the defendants in civil court.[694] As a result of their no contest plea, the defendants were estopped from contesting that they had assaulted the victim.[695] The defendants moved to withdraw their no contest pleas, but the superior court denied their motions.[696] The defendants asserted that they had entered their pleas under a mistaken understanding that their pleas could not be used against them in civil litigation.[697] The record indicated conflicting testimony regarding whether or not the

685. 68 P.3d 1286 (Alaska Ct. App. 2003).
686. *Id.* at 1288.
687. *Id.* at 1287.
688. *Id.* at 1288.
689. *Id.*
690. *Id.* at 1291.
691. 71 P.3d 337 (Alaska Ct. App. 2003).
692. *Id.* at 338.
693. *Id.*
694. *Id.*
695. *Id.*
696. *Id.*
697. *Id.*

defendants' attorneys had informed them that their no contest pleas could be used against them in civil litigation.[698] The superior court decided that the testimony of the attorneys that they had properly informed their clients was more credible.[699] Additionally, the superior court was unconvinced that the threat of civil liability would be enough to make the defendants reject the "rather lenient deal" offered to them in the plea arrangement.[700] The court of appeals found that these conclusions were not clearly erroneous.[701] Accordingly, the denial of the defendants' motions to withdraw their pleas was affirmed.[702]

In *Smith v. State*,[703] the court of appeals held that a non-appearing witness' statements must be separated into inculpatory and non-inculpatory segments, and only the inculpatory segments of the testimony are admissible under the "declarations against interest" exception to the hearsay rule.[704] Smith was convicted of murder, robbery, and assault, based on an alleged incident in which Smith and an accomplice invaded the trailer of a man and four friends.[705] Zachary Brown had made statements to his girlfriend that Smith and his accomplice had borrowed his shotgun and returned the gun with blood on it.[706] When the gun was returned, Brown removed the gun's handle and cleaned off the blood.[707] At trial, Brown's statements were admitted as statements against interest, which are allowed under the hearsay rule if the statements are against the declarant's interests or may submit him to criminal or civil liability.[708] Brown exercised his Fifth Amendment right not to testify and thus incriminate himself based on his cleaning of the gun.[709] In holding that admission of Brown's entire statement constituted reversible error, the court of appeals held that a court must evaluate a declarant's statements and sever the non-inculpatory portion.[710] Brown's statements were only admissible under the hearsay exception (and thus did not violate the Confrontation

698. *Id.* at 340.
699. *Id.*
700. *Id.* at 341.
701. *Id.* at 341-42.
702. *Id.* at 342.
703. 81 P.3d 304 (Alaska Ct. App. 2003).
704. *Id.* at 308.
705. *Id.* at 305-06.
706. *Id.* at 307.
707. *Id.*
708. *Id.*
709. *Id.*
710. *Id.* at 308.

Clause of the federal and Alaska State constitutions) if they were "reliable" (i.e., firmly rooted in a hearsay rule exception).[711] The court held that Brown's statements were not sufficiently reliable to be admitted without violating Smith's right to cross-examine Brown under oath.[712] Smith's convictions were therefore reversed.[713]

In *Sproates v. State*,[714] the court of appeals held that a criminal defendant was entitled to be released from custody when no preliminary examination was held and the State presented no evidence that the defendant committed an offense.[715] Sproates, a criminal defendant charged with first-degree sexual abuse of a minor, was denied a preliminary examination as to whether he should remain in custody because he had already been indicted by a grand jury.[716] The State argued that the district court can refuse to schedule a preliminary examination so long as the decision is made within ten days of the defendant's initial appearance.[717] The court of appeals held that Sproates was unlawfully detained and therefore entitled to release.[718]

In *State v. Jack*,[719] the court of appeals held that Alaska Statutes section 44.03.010 does not grant Alaska criminal jurisdiction over Canadian territorial waters.[720] Jack was indicted by an Alaskan grand jury for committing sexual assault aboard an Alaskan ferry traveling through Canadian territorial waters.[721] The superior court dismissed the case, holding that Alaska did not have jurisdiction.[722] The State appealed, arguing that section 44.03.010 granted it jurisdiction over the incident.[723] The statute provides that Alaska jurisdiction extends to "water offshore from the coast of the state," including "the marginal sea" and "the high seas to the extent claimed by the United States" or recognized by international law.[724] The court of appeals held that the "marginal sea" does not include

711. *Id.* at 309.
712. *Id.* at 310.
713. *Id.* at 320.
714. 81 P.3d 301 (Alaska Ct. App. 2003).
715. *Id.* at 302.
716. *Id.*
717. *Id.* at 303.
718. *Id.* at 302.
719. 67 P.3d 673 (Alaska Ct. App. 2003).
720. *Id.* at 677.
721. *Id.* at 674.
722. *Id.*
723. *Id.* at 675.
724. ALASKA STAT. § 44.03.010 (Michie 2002).

Canadian territorial waters, and thus Alaska did not have jurisdiction under this clause.[725] The State argued that "high seas" should be interpreted to include "all the ocean offshore of Alaska up to the low-water mark of all countries."[726] The court rejected this interpretation of the statute, finding it overly broad and beyond the "water offshore" contemplated by the statute.[727] Instead, the court held that even if the United States possessed jurisdiction over crimes committed in foreign waters, Alaska jurisdiction did not necessarily extend this far.[728] Accordingly, the court affirmed the decision of the superior court in favor of the defendant.[729]

In *State v. Simpson*,[730] the court of appeals held that a defendant's prior convictions for driving while intoxicated are admissible, even if those convictions occurred in other states where independent chemical tests are not available.[731] Simpson was charged with felony driving while intoxicated.[732] Though such an offense is normally a misdemeanor, it can be elevated to felony status with evidence of prior similar convictions.[733] The right of a defendant to an independent blood alcohol level test is protected by due process in Alaska.[734] Though guarded, the right to this independent test is not absolute and does not merit the same protection as the right to counsel or right to a jury trial.[735] Further, practical considerations limit the extent of this right, in that situations which make such a test impractical or exceedingly burdensome can justify its omission.[736] Here, because the prior convictions were only challenged on the basis that the other states did not provide an independent test, they could be admitted to elevate the current charge from misdemeanor to felony.[737]

In *State v. Wagar*,[738] the supreme court held that "an officer conducting a pat-down search for weapons during an investigatory stop who feels an object that he reasonably believes might be used

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725. *Jack*, 67 P.3d at 676.
726. *Id.*
727. *Id.*
728. *Id.* at 677.
729. *Id.*
730. 73 P.3d 596 (Alaska Ct. App. 2003).
731. *Id.* at 600.
732. *Id.* at 597.
733. *Id.*
734. *Id.*
735. *Id.* at 599.
736. *Id.* at 599-600.
737. *Id.* at 600.
738. 79 P.3d 644 (Alaska 2003).

as a weapon may examine the object to confirm that it is not a potential weapon."[739] During a sting operation, a police officer frisked Wagar and, upon feeling an unidentifiable object, discovered a glass vial containing cocaine.[740] At trial, the judge denied Wagar's motion to suppress the cocaine seized by the officer on grounds that his search was unjustified, and Wagar was convicted.[741] The court of appeals reversed Wagar's conviction on the grounds that the police officer "exceeded the allowable scope of a pat-down search for weapons when [he] looked into [the defendant's] t-shirt pocket in order to determine what the unknown object was."[742] The court of appeals also required specific facts to show that the officer's suspicion was reasonable.[743] The supreme court reversed the court of appeals, affirming Wagar's convictions by refining the test for determining whether a further examination is justified.[744] The court held: "[W]hat is needed to justify a further examination of an unknown object felt in a frisk for weapons is a reasonable belief on the part of the officer, based on 'specific and articulable facts . . . taken together with rational inferences from those facts,' that the object may be used as a weapon."[745]

In *Stavenjord v. State*,[746] the court of appeals held that the superior court had not abused its discretion in denying the defendant's motions to suppress evidence and change venue.[747] Stavenjord was convicted of first-degree murder in a jury trial.[748] Stavenjord appealed, claiming that the superior court should have granted his motion to suppress certain evidence, which he claimed had been acquired using search warrants that should not have been issued.[749] In deciding Stavenjord's motion, the superior court applied the test outlined in *State v. Malkin*.[750] After finding that certain misstatements or omissions had been made in the application for the search warrants, the superior court found that none had been an intentional attempt to mislead the court.[751] Identifying cer-

739. *Id.* at 645.
740. *Id.* at 646.
741. *Id.* at 646-47.
742. *Id.*
743. *See id.* at 648.
744. *Id.*
745. *Id.* (quoting Terry v. Ohio, 392 U.S. 1, 21 (1968)).
746. 66 P.3d 762 (Alaska Ct. App. 2003).
747. *Id.* at 764.
748. *Id.*
749. *Id.*
750. 722 P.2d 943 (Alaska 1986).
751. *Stavenjord*, 66 P.3d at 766.

tain misstatements or omissions that may have been reckless, the superior court found that none of these had been material to the decision to grant the warrant, and thus the court denied Stavenjord's motion.[752] The court of appeals found that the superior court had not abused its discretion in making this decision.[753] Stavenjord also appealed the superior court's denial of his motion to change venue, claiming that pre-trial publicity may have prejudiced the jury.[754] The court of appeals found that the lower court could have reasonably concluded, under the "substantial likelihood" test outlined in *Mallot v. State*,[755] that the pretrial publicity did not threaten Stavenjord's right to a fair trial.[756] The court of appeals thus affirmed the superior court's decision.[757]

In *Strumsky v. State*,[758] the court of appeals held that a ten-year-old's out of court statements to others indicating that she had been sexually abused by the defendant were not hearsay and that the defendant had not been barred from putting his own admission in context.[759] Strumsky was accused of sexually abusing a ten-year-old girl in October 2000.[760] Before trial, Strumsky told the girl's father that the girl would never lie.[761] At trial, the prosecution was allowed, over Strumsky's objections, to call witnesses who had heard the victim describe her assault.[762] The prosecution also played a tape that showed Strumsky saying about the victim, "No, she doesn't lie."[763] Strumsky appealed, arguing that the witnesses who heard the victim describe her assault should have been prevented from testifying because their testimony was inadmissible hearsay.[764] The court of appeals affirmed the trial court's ruling, explaining that the trial judge properly concluded that the evidence had sufficient probative value as prior-consistent-statement evidence from a child sexual abuse victim to outweigh its prejudicial impact.[765] Strumsky also argued that he was entitled to play the en-

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752. *Id.*
753. *Id.* at 767.
754. *Id.* at 764.
755. 608 P.2d 737 (Alaska 1980).
756. *Stavenjord*, 66 P.3d at 770.
757. *Id.*
758. 69 P.3d 499 (Alaska Ct. App. 2003).
759. *Id.* at 505.
760. *Id.* at 501.
761. *Id*.
762. *Id.* at 502-03.
763. *Id.* at 504.
764. *Id.* at 501.
765. *Id.* at 504.

tire tape to put his comments about the victim's truthfulness into context without having testified.[766] The court of appeals held that the trial judge gave Strumsky an opportunity to have the tape played in full when he testified; since Strumsky did not ask to have the tape played then, he did not preserve this issue for appeal.[767]

In *Thompson v. State*,[768] the court of appeals held that where criminal defendants are held jointly and severally liable for restitution to an assault victim, a single defendant's ability to pay should be judged by the entire amount due to the victim.[769] Thompson and three accomplices were convicted of assault, and were held jointly and severally liable for restitution to the victim.[770] Thompson argued that he would be unable to pay the entire restitution amount, and asked for a reduction of the amount under Alaska Statutes 12.55.045(f), given his inability to pay.[771] The superior court held that Thompson had failed to prove by clear and convincing evidence that he would be unable to pay his one-fourth share of the restitution amount.[772] The court of appeals vacated the superior court's restitution order, holding that Thompson's ability to pay must be judged against the entire restitution amount.[773] The court held that on remand Thompson could be held jointly and severally liable only if the superior court set a payment schedule based on Thompson's foreseen ability to pay, or if the court found that Thompson failed to prove by clear and convincing evidence that he was unable to pay the full restitution amount.[774]

In *Tipikin v. Municipality of Anchorage*,[775] the court of appeals held that a composite long sentence for a defendant with both a conviction for assault and a history of violence was justified.[776] Tipikin was convicted of assault for slapping his step-daughter and of disorderly conduct for fighting with his wife, and was sentenced to 730 days in prison.[777] Tipikin argued that there was insufficient evidence for his conviction and that his sentence was excessive.[778] The

766. *Id.* at 505.
767. *Id.*
768. 64 P.3d 132 (Alaska Ct. App. 2003).
769. *Id.* at 135.
770. *Id.* at 133.
771. *Id.*
772. *Id.*
773. *Id.* at 135.
774. *Id.*
775. 65 P.3d 899 (Alaska Ct. App. 2003).
776. *Id.* at 903.
777. *Id.* at 900.
778. *Id.* at 901.

court of appeals held first that there was sufficient evidence for Tipikin's conviction, determining that he slapped his step-daughter out of anger and not because it was "reasonably necessary and appropriate."[779] The court of appeals then held that the composite sentence was not excessive because of Tipikin's history of domestic violence, his conduct in committing the current offenses, and his repeated failures to rehabilitate himself.[780]

In *Tuttle v. State*,[781] the court of appeals held that the trial court applied the incorrect standard of proof on the issue of whether a defendant possessed a firearm during the commission of a robbery for purposes of determining his presumptive term.[782] At trial, Tuttle was found guilty of robbery, and at sentencing the court announced that it applied the "preponderance of the evidence" standard of proof in deciding that Tuttle carried a firearm during the robbery.[783] Thus, Tuttle was sentenced to a seven year presumptive term, rather than a five year presumptive term, under Alaska Statutes section 12.55.125(c).[784] The court of appeals reversed, finding that the trial judge erred in applying this standard. While the legislature had specified the "beyond the reasonable doubt" standard for proving a defendant's prior felonies, the legislature had not specified the appropriate burden of proof when the presumptive term determination rests on other factors, such as the defendant's possession of a firearm during the offense.[785] In *Huf v. State*,[786] the court reasoned that the legislature must have intended the reasonable doubt standard to apply to these other situations.[787] Therefore, the State was required to prove beyond a reasonable doubt that the defendant possessed a firearm during the robbery.[788]

In *Vaska v. State*,[789] the court of appeals held that a sexual abuse victim's statements identifying her attacker are admissible hearsay even if the victim does not remember the events at the time of the trial.[790] At defendant Vaska's sexual abuse trial, the victim testified that she could not remember the alleged assault, nor

779. *Id.* at 902.
780. *Id.*
781. 65 P.3d 884 (Alaska Ct. App. 2003).
782. *Id.* at 891.
783. *Id.* at 888.
784. *Id*.
785. *Id*.
786. 675 P.2d 268 (Alaska Ct. App. 1984).
787. *Tuttle*, 65 P.3d at 888.
788. *Id.* at 891.
789. 74 P.3d 225 (Alaska Ct. App. 2003).
790. *Id.* at 230.

anything else that had happened more than a year earlier.[791] However, testimony from the victim's mother and the doctor who examined the victim immediately after the alleged assault supported the allegations against Vaska.[792] Vaska appealed his conviction on the grounds that allowing the statements of the mother and doctor was an erroneous admission of hearsay[793] and that the admission violated his rights under the Confrontation Clause of the Sixth Amendment to the United States Constitution.[794] The court of appeals held that the statements were hearsay, yet were properly admissible as prior inconsistent statements.[795] The court also held that, because the Confrontation Clause only requires that the accused be allowed to confront and cross-examine the declarant,[796] not necessarily the original speaker, Vaska's right to confrontation was not violated.[797] Therefore, the court affirmed Vaska's conviction.[798]

In *Waters v. State*,[799] the court of appeals held that the defendant's confession was voluntary, that the prior conviction of a state witness was not admissible, and that a defendant's sentence was not excessive.[800] Waters participated in the robbery of a community store and was convicted of second-degree burglary, second-degree theft, and second-degree criminal mischief.[801] The court of appeals first upheld the superior court's ruling that Waters' confession was voluntary, in part because Waters' cell was heated, Waters slept the night before the confession, and Waters, not the officer, introduced the option for a deal.[802] Second, the court of appeals upheld the superior court's decision not to admit evidence that the State's witness had a criminal conviction ten years ago, noting that the record did not show that the evidence was required for a fair trial.[803] Third, the court of appeals upheld the superior court's enhance-

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791. *Id.* at 226.
792. *Id.* at 226-27.
793. *Id.* at 227.
794. *Id.* at 226.
795. *Id.* at 228.
796. *Id*.
797. *Id.* at 229.
798. *Id.* at 230.
799. 64 P.3d 169 (Alaska Ct. App. 2003).
800. *Id.* at 172-73, 175.
801. *Id.* at 170.
802. *Id.* at 171-72.
803. *Id.* at 172-73.

ment of Waters' sentence because the superior court's findings showed that Waters was a threat to public.[804]

In *Watt v. State*,[805] the court of appeals reversed the superior court's decision that a criminal defendant's challenge to remove a superior court judge was untimely.[806] Watt was charged with first-degree sexual abuse of a minor.[807] Watt appeared before Judge Bolger and reached a plea agreement with the prosecution in which he would waive indictment and plead guilty in superior court to two counts of sexual abuse for a limited sentence.[808] On August 30, 2002, Watt filed a request to preempt Judge Bolger in further superior court proceedings under Criminal Rule 25(d), which provides peremptory disqualification procedures within five days after a judge is first assigned to a case.[809] Judge Bolger denied the challenge as untimely because he was first assigned to the case on July 7.[810] Alaska Statutes section 22.20.022 grants a party the substantive right to disqualify a judge peremptorily; a party must exercise that right "within five days after the case is at issue upon a question of fact, or within five days after the issue is assigned to a judge, whichever event occurs later."[811] The court of appeals held that, under the statute, an issue is under a question of fact when jurisdiction of the case is transferred to the superior court for a defendant's plea upon return of the indictment.[812] Therefore, Watt's challenge was timely and his right to a peremptory challenge upon entry of a plea in superior court was not extinguished.[813]

In *Wilson v. State*,[814] the court of appeals held that there was insufficient evidence to warrant a court-ordered search of the appellant's home.[815] Wilson appealed the district court's authorization of a warrant leading to the seizure of marijuana, claiming that the evidence presented in the search warrant application did not establish probable cause.[816] The evidence provided by the State comprised of statements from three individuals, two of whom were

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804. *Id.* at 175.
805. 61 P.3d 446 (Alaska Ct. App. 2003).
806. *Id.* at 448.
807. *Id.* at 446.
808. *Id.*
809. *Id.* at 447.
810. *Id.*
811. ALASKA STAT. § 22.20.022 (Michie 2002).
812. *Watt*, 61 P.3d at 447.
813. *Id.* at 448.
814. 82 P.3d 783 (Alaska Ct. App. 2003).
815. *Id.* at 787.
816. *Id.* at 783.

known informants while the third was an unknown friend of one of the informants.[817] The court noted that the State's one credible informant had no first-hand knowledge of the appellant's allegedly criminal activities.[818] Instead, that informant was simply relaying information he received from a friend whose identity he would not disclose.[819] The court refused to treat the unidentified friend as a credible informant because he did not know that his statements were against his penal interest.[820] Therefore, the court reversed the district court's granting of a search warrant and deemed the evidence seized thereunder suppressed.[821]

In *Winfrey v. State*,[822] the court of appeals held that the district court did not err in including as evidence the results of a breath test after state troopers interfered with a defendant's right to make a phone call, or in excluding as evidence a decision by the troopers to stop videotaping breath-testing procedures.[823] Winfrey was arrested for driving while intoxicated after failing two sobriety tests and a breathalyzer test.[824] During his trial, Winfrey argued that the district court erred when it included the results of the breathalyzer test because state troopers had violated Winfrey's right to make a phone call under Alaska Statutes section 12.25.150(b).[825] The court of appeals rejected this argument, holding that Winfrey failed to prove that the denial of his right to make a phone call interfered with his constitutional right to prepare a defense.[826] Winfrey further argued that the district court erred when it excluded evidence that the state troopers had made a policy decision to stop videotaping subjects during breath-test processing because such videotapes made it harder to prosecute alleged drunk drivers.[827] The court of appeals held that such evidence was relevant but that the exclusion was harmless in this case.[828]

In *Young v. State*,[829] the court of appeals held that the police had illegally searched a defendant's property, where the police had

817. *Id.* at 783-84.
818. *Id.* at 785.
819. *Id.* at 786.
820. *Id.*
821. *Id.* at 787.
822. 78 P.3d 725 (Alaska Ct. App. 2003).
823. *Id.* at 726-27.
824. *Id.* at 727.
825. *Id.*
826. *Id.* at 730.
827. *Id.*
828. *Id.* at 730-31.
829. 72 P.3d 1250 (Alaska Ct. App. 2003).

no search warrant and the defendant's conduct constituted an attempt to conceal, rather than an actual abandonment of, the property.[830] While investigating an unconnected disturbance at a hotel, a police officer observed Young shoved a small object underneath a locked closet door.[831] The officer subsequently removed the object from under the door, and, upon discovering it to be a bundle of crumbled tissue paper, opened the tissue to discover an illegal controlled substance.[832] The court of appeals first noted it was likely the officer did not have authority to reach under the door and seize Young's property, as the officer did not first have probable cause.[833] Moreover, the officer had no authority to open the tissue bundle without a warrant, unless the officer knew that the bundles were "distinctive, single-purpose containers used for carrying illicit drugs."[834] The court of appeals rejected the State's contention that issues of search and seizure were irrelevant, as Young had "abandoned" the property.[835] The court noted that abandonment requires that a person's conduct objectively manifest the intent to give up any and all expectation of privacy in that property.[836] Neither a person's temporary relinquishment of possession or control of an object nor a person's actions to conceal the property sufficiently demonstrates abandonment.[837] Here, Young's placement of the bundles under the door indicated an intent to conceal rather than to abandon them.[838] Further, Young's denial of his having placed any object under the door was not equivalent to an express denial of ownership, as required for abandonment.[839] Therefore, as the property had been illegally opened, the court ordered the evidence suppressed and Young's conviction reversed.[840]

B. Substantive Law

In *Alto v. State*,[841] the court of appeals held that an individual who is found not guilty by reason of insanity could be convicted of escape for fleeing the custody of the psychiatric institute to which

830. *Id.* at 1250-51.
831. *Id.* at 1251.
832. *Id.*
833. *Id.* at 1252.
834. *Id.*
835. *Id.*
836. *Id.* at 1253.
837. *Id.* at 1254.
838. *Id.*
839. *Id.* at 1255.
840. *Id.* at 1251.
841. 64 P.3d 141 (Alaska Ct. App. 2003).

the individual had been committed.[842] Alto was found not guilty of murder by reason of insanity and was committed to the Alaska Psychiatric Institute, from which he successfully escaped.[843] The court of appeals held that Alto could properly be convicted of escape under Alaska Statutes section 11.56.310(a)(1)(B).[844] The court found that a verdict of not guilty by reason of insanity contains within it the finding that the defendant had actually committed the crime beyond a reasonable doubt.[845] Therefore, as Alto's detention was clearly connected with the commission of a felony offense, Alto had removed himself from "official detention for a felony" as required under section 11.56.310(a)(1)(B).[846] Additionally, the court of appeals affirmed the lower court's jury instructions, finding that Alto had waived any objection to a stipulation voluntarily entered into at trial[847] and that the State did not need to prove Alto was aware that the offense resulting in his detention was a felony.[848] Finally, the court held that Alto's sentence of six years was not excessive, because the murder for which he was found not guilty by reason of insanity was properly considered an aggravating factor for sentencing.[849]

In *Anchorage Police & Fire Retirement System v. Gallion*,[850] the supreme court upheld a finding of indirect criminal contempt against the Board of Trustees of the Anchorage Police & Fire Retirement System ("Board").[851] In 2000, the superior court approved both a class action settlement with regard to the use of surplus fund monies and an award of attorney's fees to class counsel.[852] Due to criticisms of the award of attorney's fees, the court explicitly explained its reasons for rejecting objections and the calculation of fees.[853] Furthermore, the court ordered the Board to send a written copy of the court's oral order to all members when it distributed the funds.[854] The court subsequently found the Board in criminal contempt due to its actions in resisting the court order and its three

842. *Id.* at 142.
843. *Id.*
844. *Id.* at 145.
845. *Id.* at 144.
846. *Id.* at 145.
847. *Id.* at 146.
848. *Id.* at 147.
849. *Id.* at 148.
850. 65 P.3d 876 (Alaska 2003).
851. *Id.* at 877.
852. *Id.* at 878.
853. *Id.*
854. *Id.*

week delay in distributing the order after funds were paid.[855] The supreme court upheld this ruling based on a finding that failure to follow the trial court's unambiguous order was sufficient for a showing of a willful failure to comply.[856] Moreover, the court found that despite the absence of an explicit analysis of the reasonable doubt standard of proof as applied to the facts of the case, the trial court ruling should be affirmed.[857]

In *Bertilson v. State*,[858] the court of appeals held that the State, in a prosecution for driving while intoxicated, must prove a defendant is either impaired or has the prohibited blood alcohol level at the time the vehicle was being operated by or under the control of the defendant.[859] After being alerted by a phone call describing a possible drunk driver, the police stopped Bertilson and administered typical field sobriety tests.[860] Bertilson was convicted of felony driving while intoxicated.[861] The court of appeals reversed Bertilson's conviction, as it was based on incorrect jury instructions that improperly asserted that Bertilson's guilt hinged on the test results and not on his actual blood alcohol level at the time he was driving.[862] The court held that under Alaska Statutes section 28.35.030(a)(2), an individual's guilt for driving while intoxicated must hinge on the blood alcohol content at the time of operating or controlling the vehicle.[863] Therefore, the court reversed Bertilson's conviction.[864]

In *Brandon v. State*,[865] the supreme court held that a prison disciplinary hearing conducted by a single hearing officer is not a violation of a prisoner's due process rights.[866] Brandon, a prison inmate, was charged with violating an administrative regulation against possession of tobacco.[867] A disciplinary hearing was held by a single officer, after which Brandon was found guilty and sentenced to punitive segregation.[868] Brandon argued that the hearing

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855. *Id.* at 879.
856. *Id.* at 882.
857. *Id.* at 884.
858. 64 P.3d 180 (Alaska Ct. App. 2003).
859. *Id.* at 186.
860. *Id.* at 181-82.
861. *Id.* at 182.
862. *Id.* at 183.
863. *Id.* at 182.
864. *Id.* at 186.
865. 73 P.3d 1230 (Alaska 2003).
866. *Id.* at 1247.
867. *Id.* at 1232.
868. *Id.*

violated his due process rights because a single hearing officer cannot guarantee fair and impartial adjudication.[869] The court found no violation of due process under the principle that single hearing officers are not presumed to be biased in prison disciplinary proceedings.[870] Brandon further argued that the disciplinary hearing violated the final settlement agreement of *Cleary v. Smith*,[871] a class-action settlement governing numerous aspects of prison conditions in Alaska. The court held that Brandon's hearing was not prejudiced by any violation of that agreement.[872]

In *Cruz-Reyes v. State*,[873] the court of appeals held that the elements of theft of services are satisfied if the alleged thief has mere access to the services, even if he did not use them.[874] Alaska State Troopers found an electronic device in Cruz-Reyes' residence that allowed him to view premium cable channels even though he only paid for standard service.[875] At trial, the judge instructed the jury that, to find Cruz-Reyes guilty of third-degree theft of services, it would have only to find that he had access to the extra channels and not that he had actually used them.[876] Because a subscriber's fee depends on the channels available to him, not the channels he actually watches, the court held that the jury instruction was correct and that the evidence was sufficient to convict Cruz-Reyes even though it only showed that he had access to the premium channels, not that he actually watched them.[877] Therefore, the court affirmed Cruz-Reyes' conviction.[878]

In *Dailey v. State*,[879] the court of appeals held that a defendant is required to sign quarterly reports under the Alaska Sex Offender Registration Act ("SORA") and that the statute is not unconstitutionally vague.[880] Daily was a convicted sex offender and as such was required under SORA to file quarterly reports.[881] Nevertheless, Dailey refused to sign three such reports and he was convicted

869. *Id.* at 1235.
870. *Id.*
871. 24 P.3d 1245 (Alaska 2003).
872. *Brandon*, 73 P.3d at 1248.
873. 74 P.3d 219 (Alaska Ct. App. 2003).
874. *Id.* at 222.
875. *Id.* at 220.
876. *Id.* at 221.
877. *Id*. at 222.
878. *Id.* at 225.
879. 65 P.3d 891 (Alaska Ct. App. 2003).
880. *Id.* at 894-95.
881. *Id.* at 893.

of criminal offenses for non-compliance.[882] Daily claimed that the charges should be dismissed because failure to sign the reports did not constitute a criminal offense and because the statute was unconstitutionally vague.[883] The court of appeals affirmed the conviction.[884] The court held that Alaska Statutes section 12.63.010 requires that the quarterly reports be signed, and that the statue was not unconstitutionally vague.[885]

In *Dandova v. State*,[886] the court of appeals found that the defendant was not entitled to a "heat of passion" defense for the attempted murder of her former lover, because on the day of the shooting the victim had not provoked the defendant sufficiently to create a serious provocation to cause such a violent response.[887] Dandova attempted to kill her former lover by shooting him and was consequently indicted for attempted murder and first degree assault.[888] During her trial, Dandova asked to have the jury instructed on a defense of heat of passion, which is codified in Alaska Statutes sections 11.41.115(a) and (f).[889] The trial judge denied Dandova's request.[890] Under the Alaska statute, a defendant must have acted in the heat of passion, resulting from serious provocation, when there had not been reasonably sufficient time for the passion to cool.[891] On appeal, the court first stated that the defense of heat of passion is available for those indicted of attempted murder.[892] However, the court also found that the Alaska statute, in codifying the common law, does not extend the heat of passion defense to "extreme emotional disturbance"; instead it uses a more restrictive "heat of passion" methodology.[893] Under this more restrictive process, the court found that the events that had provoked Dandova had occurred too far in the past, thus allowing a reasonable person time to cool.[894] Furthermore ,the court found that the alleged provoking actions immediately preceding the crime were

882. *Id.*
883. *Id.*
884. *Id.* at 899.
885. *Id.* at 895.
886. 72 P.3d 325 (Alaska Ct. App. 2003).
887. *Id.* at 326-27.
888. *Id.* at 326.
889. *Id.*
890. *Id.* at 326-27.
891. ALASKA STAT. § 11.41.115(a)(1) (Michie 2002).
892. *Dandova*, 72 P.3d at 332.
893. *Id.* at 334.
894. *Id.* at 335.

not directed toward the defendant; therefore, they did not count as provocation under the statute.[895]

In *J.R. v. State*,[896] the court of appeals held that a juvenile who induces another juvenile to commit homicide with a firearm should not be judged by an adult standard of care.[897] Evan Ramsey brought a shotgun to his high school and murdered the principal and a fellow student.[898] J.R., who taught Ramsey how to use the gun and encouraged Ramsey to carry out his plan, was convicted on two counts of murder on the theory that "J.R. had knowingly engaged in conduct manifesting an extreme indifference to the value of human life."[899] The state argued that because J.R. was involved in an adult activity, the use of a firearm, he should be held to an adult standard of care in determining his recklessness.[900] The court rejected the State's argument because J.R. did not actually use the firearm, but instead incited another to do so.[901] The court therefore reversed J.R.'s convictions, holding that J.R. could not be held to an adult standard of care based on his conversations and actions showing Ramsey how to use the shotgun, because doing so would effectuate a broad usage of the adult standard of care in juvenile cases.[902]

In *Lee v. Municipality of Anchorage*,[903] the court of appeals held that under Alaska Municipal Code section 8.65.060, the Municipality must show that a defendant knowingly maintained premises on which prostitution occurred and that the defendant intended for such prostitution to occur on such premises.[904] Lee was charged with "knowingly maintain[ing] or operat[ing] a place, building, structure or part thereof, . . . for the purpose of prostitution. . . ."[905] The trial judge applied only the "knowingly" mental state, and Lee was convicted, despite Lee's argument that the ordinance has two mental states, "knowingly" and "intentionally."[906] On appeal, Lee claimed that the language "for the purpose of" required specific intent and that the Municipality had to prove two

895. *Id.* at 338-39.
896. 62 P.3d 114 (Alaska Ct. App. 2003).
897. *Id.* at 119.
898. *Id.* at 114.
899. *Id.*
900. *Id.* at 115 (citing Ardinger v. Hummell, 982 P.2d 727 (Alaska 1999)).
901. *See id.* at 119.
902. *Id.*
903. 70 P.3d 1110 (Alaska Ct. App. 2003).
904. *Id.* at 1113.
905. *Id.* at 1111.
906. *Id.*

elements: (1) that she knowingly operated a place of prostitution; and (2) that she intended prostitution to occur in the place.[907] The court of appeals reversed, agreeing with Lee.[908] The court noted that federal courts have held, when interpreting statutory language, that knowledge and intent are two separate mental elements, with purpose denoting intent.[909] Reasoning that, under the Model Penal Code and majority views of accomplice liability, an alleged accomplice would have to "seek by [her] action to make it succeed," thus requiring a showing of intent, the court of appeals concluded that the trial judge erred in applying only the "knowingly" standard in Lee's case.[910]

In *Morton v. State*,[911] the court of appeals held that a criminal defendant cannot be convicted of possession of burglary tools merely for possessing ordinary tools that have not been adapted.[912] Morton was convicted of several crimes, including possession of burglary tools under Alaska Statutes section 11.46.315, for possession of an ordinary screwdriver and rubber mallet.[913] Since the tools had not been adapted or designed for use in committing a burglary, they did not qualify as "burglary tools" under section 11.46.315; therefore, the prosecution confessed error and the court of appeals vacated the conviction.[914]

In *Olson v. State*,[915] the court of appeals reversed an inmate's conviction for violation of a long-term domestic violence protective order, holding that because he had never received notice of the hearing for the petition for a protective order, his conviction was void.[916] Olson was convicted of violating a long-term domestic violence protective order by coming within three hundred feet of Larry Jackson's residence.[917] The court agreed with Olson that under Alaska Statutes section 18.66.100, which governs long-term domestic violence protective orders and requires notice and an opportunity to be heard, Olson's conviction was void.[918] Olson was not required to obey the protective order despite being aware of its

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907. *Id*.
908. *Id*.
909. *Id.* at 1112.
910. *Id.* at 1112-13.
911. 68 P.3d 1285 (Alaska Ct. App. 2003).
912. *Id.* at 1286.
913. *Id.*
914. *Id.*
915. 77 P.3d 15 (Alaska Ct. App. 2003).
916. *Id.* at 19.
917. *Id.* at 16.
918. *Id.* at 17.

terms, because a person need not comply with an order that issued ex parte if that person had no notice before the order was issued.[919] Finally, the court stated that the statutory language regarding requirements for issuing long-term domestic violence orders should have alerted Olson's attorney that any order issued without notice would be void.[920] The court concluded that Olson's attorney provided ineffective assistance of counsel for failing to challenge the lack of jurisdiction to issue the order.[921]

In *Parrott v. Municipality of Anchorage*,[922] the court of appeals held that a prospective customer can be prosecuted for prostitution.[923] Parrott was convicted of soliciting prostitution, after, according to him, an undercover police officer initially approached his vehicle.[924] The evidence that Parrott invited the officer into his vehicle for oral sex sufficiently supported the finding that Parrott did in fact "solicit" prostitution as the applicable statute requires.[925] Though Parrott attempted to raise defenses of entrapment, due process violation and equal protection, none of these were considered because they were raised too late.[926] Lastly, the court held that the sentence imposed, including a fine and required essay, was appropriate to effect rehabilitation and did not impose upon a right against self-incrimination.[927]

In *State v. Combs*,[928] the court of appeals reversed a superior court ruling that upheld a supplemental order barring the Department of Corrections from housing a defendant in the same correctional facility as another inmate who had previously assaulted him.[929] Upon conviction for attempted first-degree assault and the approval of Combs' motion for special housing, the Department of Law challenged the order, arguing that the Department of Corrections had sole discretion in determining where to house prisoners.[930] Despite the fact that there was no mandate regarding which particular facility Combs was to be housed in, the court of appeals found that the separation of powers would be violated were the ju-

919. *Id.* at 18.
920. *Id.* at 19.
921. *Id.*
922. 69 P.3d 1 (Alaska Ct. App. 2003).
923. *Id.* at 3.
924. *Id.* at 2.
925. *Id.* at 4-5.
926. *Id.* at 5.
927. *Id.* at 6.
928. 64 P.3d 135 (Alaska Ct. App. 2003).
929. *Id.* at 137.
930. *Id.* at 136-37.

dicial branch permitted to interfere in a determination over which the Department of Corrections had sole executive discretion.[931] Further, the court found that the doctrine of collateral estoppel did not preclude a challenge to the superior court's order because the Department of Corrections was not in privity with the prosecutor's office when he assented to Combs' original motion.[932]

In *State v. Strane*,[933] the supreme court held that the Alaska statute criminalizing violations of domestic violence restraining orders[934] did not require proof of the defendant's actual knowledge that his actions were illegal.[935] Rather, the statute required the State to show only that the defendant knew of the order's existence and contents and recklessly disregarded a substantial and unjustifiable risk that his conduct violated such order.[936] Police stopped Strane for speeding and discovered a domestic violence victim in his car, two weeks after the victim obtained an order restraining Strane from having any contact with her.[937] Strane attempted to defend by stating that the victim had consented to be in his presence.[938] The supreme court held that a restraining order's no-contact restrictions apply regardless of the protected person's consent to have contact.[939] The court rejected the interpretation that the statute's culpable mental state of "knowingly" extended in scope to require that Strane must understand that the order prohibited his actions, citing a sister provision to the statute which expressly provided that the protected person's willingness to have contact with the defendant did not nullify or waive the order.[940] Further, Strane's order warned that any invitation to contact the victim would not invalidate the order.[941]

VII. EMPLOYMENT LAW

In *Alaska State Employees Ass'n v. State*,[942] the supreme court held that an arbitrator's ruling that a public employee's termination was not for just cause could be vacated on appeal if it was deter-

931. *Id.* at 137.
932. *Id.* at 140.
933. 61 P.3d 1284 (Alaska 2003).
934. ALASKA STAT. § 11.56.740(a) (Michie 2002).
935. *Strane*, 61 P.3d at 1292.
936. *Id.*
937. *Id.* at 1285.
938. *Id.* at 1285, 1286.
939. *Id.* at 1292.
940. *Id.* at 1288.
941. *Id.*
942. 74 P.3d 881 (Alaska 2003).

mined that the arbitrator made an obvious and significant mistake in applying the facts of the case to the arbitrator's own definition of "just cause."[943] An administrative clerk of the Alaska Child Support Enforcement Division was fired after her employer learned that she had recently pled guilty to felony theft of public money.[944] The Alaska State Employees Association filed a grievance seeking reinstatement of the clerk.[945] Per a collective bargaining agreement between the state and the employer, the dispute was submitted to an arbitrator, who ruled that the clerk was not terminated for just cause, and ordered that the grievance be reinstated.[946] Upholding the vacation of the arbitrator's award, the supreme court held that the arbitrator committed gross error in applying her own definition of just cause.[947] The court refused to decide whether the arbitrator was obligated to follow state law precedent on the definition of just cause, as suggested by the superior court decision, and instead held that the arbitrator committed gross error under her own definition of just cause.[948] Given the clerk's position of trust, access to confidential information, and conviction of a felony, the court held that substantial evidence existed to show just cause for the employee's termination.[949]

In *Alyeska Pipeline Service Co. v. DeShong*,[950] the supreme court held that if an employee presents clear and convincing evidence that she has not reached medical stability, then she is eligible for Temporary Total Disability ("TTD"), provided that she reimburses any unemployment benefits received during that time.[951] Further, an employee does not waive "procedural rights to seek compensation" unless she is fully appraised of her rights.[952] DeShong, an employee of Alyeska, alleged that job-related computer use resulted in right elbow joint pain and filed a report of occupational injury or illness with the Alaska Workers Compensation Board ("Board").[953] DeShong consulted a doctor, who prescribed physical therapy.[954] Further, this doctor had her evaluated by a

943. *Id.* at 884.
944. *Id.* at 881.
945. *Id.*
946. *Id.*
947. *Id.* at 884.
948. *Id*.
949. *Id.* at 885.
950. 77 P.3d 1227 (Alaska 2003).
951. *Id.* at 1228.
952. *Id.* at 1233.
953. *Id.* at 1228.
954. *Id.*

hand surgeon, who found her to have reached "medical stability."[955] In December 1998, DeShong was laid off by Alyeska.[956] In August 1999, DeShong received a second opinion, without Alyeska's permission.[957] Alyeska alleged that DeShong was not entitled to a second opinion without its approval, further arguing that she had already seen a specialist.[958] The second doctor recommended surgery, which was later successfully performed.[959] After being laid off, DeShong was paid unemployment benefits, but later received TTD benefits after the surgery.[960] In July 1999, De Shong filed for TTD from the time of being laid off through that date, and stated that she wanted to repay the unemployment benefits.[961] Alyeska denied this request, stating that she was ineligible for TTD, as she had reached medical stability.[962] However, the Board found otherwise, and held that if she repaid the unemployment benefits, she would be eligible for TTD.[963] On appeal, the supreme court held that DeShong produced clear and convincing evidence that she had not attained medical stability before surgery, thus entitling her to TTD.[964] Further, the court held that Alyeska's referral of DeShong to a specialist did not constitute a second opinion, and that any delay in her seeking such opinion was a result of her not being clearly informed of her rights.[965] Lastly, the court held that an employee is not barred from receiving TTD if she repays any unemployment benefits she received in the interim.[966]

In *Crawford & Co. v. Baker-Withrow*,[967] the supreme court held that an employer was obligated to pay workers' compensation payments for all treatments provided after a plan was submitted, as well as treatments made within fourteen days of submission.[968] Baker-Withrow was injured while working for Crawford in 1990, and after eight years of psychotherapy, she began Eye Movement

955. *Id.* at 1229.
956. *Id.*
957. *Id.* at 1230.
958. *Id.* at 1229-30.
959. *Id.* at 1230.
960. *Id.*
961. *Id.*
962. *Id.*
963. *Id.* at 1231.
964. *Id.* at 1231-32.
965. *Id.* at 1232-33.
966. *Id.*
967. 73 P.3d 1227 (Alaska 2003).
968. *Id.* at 1228.

Desensitization and Reprocessing therapy.[969] Crawford refused to pay for this therapy, claiming that a treatment plan had not been submitted punctually.[970] Such a treatment plan is outlined under Alaska Statutes section 23.30.095(c), requiring a health care provider to notify the employer regarding the treatment within fourteen days following treatment.[971] Based on the statute's purpose, the court held that a plan submitted more than fourteen days after treatment may bar coverage for any treatment received before the submission, and that such a policy is consistent with the statutory purpose.[972] However, the court also held that it would be too severe to ban coverage for all post-plan treatment due to untimely submission of a plan.[973] The only treatments that should be banned for late submission are those past treatments deemed to be overly frequent.[974] Therefore, the court held that since the employer submitted a plan as soon as it realized the need, treatments received after and within fourteen days of submission were the responsibility of the employer, and the specific date of submission was to be determined on remand.[975]

In *Denuptiis v. Unocal Corp.*,[976] the supreme court held that an employer's claim for reimbursement of benefits based on fraud was subject to a preponderance of the evidence standard of proof, and that such a standard was constitutional.[977] Unocal alleged in a controversion notice to the Alaska Worker's Compensation Board ("Board") that its employee, Denuptiis, had falsely exaggerated claims of injury in order to obtain disability pay.[978] Unocal argued that because the Alaska statutes imposing civil and criminal liability for false statements made in connection with worker's compensation cases did not specify a standard of proof,[979] the Board should apply a preponderance standard, as opposed to a higher clear and convincing standard.[980] The Administrative Procedure Act,[981] which applies to the Board, calls for a default preponderance standard in

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969. *Id.*
970. *Id.*
971. ALASKA STAT. § 23.30.095(c) (Michie 2000).
972. *Crawford*, 73 P.3d at 1229.
973. *Id.* at 1230.
974. *Id.*
975. *Id.*
976. 63 P.3d 272 (Alaska 2003).
977. *Id.* at 280.
978. *Id.* at 275.
979. ALASKA STAT. §§ 23.30.250(a), (b), 23.30.170(b) (Michie 2002).
980. *Denuptiis*, 63 P.3d at 275.
981. ALASKA STAT. § 44.62.460(e) (Michie 2002).

the absence of an expressly provided standard.[982] The court held that, because no standard of proof exists, the Board's application of a clear and convincing standard was not a reasonable interpretation of the governing law.[983]

In *Duncan v. Retired Public Employees of Alaska, Inc.*,[984] the supreme court held that the Alaska constitutional protection for state employee accrued benefits encompassed health insurance but that, unlike other retirement benefits which are contractual rights, health insurance policy changes should be analyzed with regard to advantages and disadvantages by focusing on the entire group of employees.[985] Retirees filed suit against the State alleging that changes made to the group health insurance plan for retired public employees violated Article XII, section seven of the Alaska Constitution by diminishing accrued benefits.[986] The trial court granted the retiree's motion for summary judgment and held that the changes violated the Alaska Constitution.[987] On appeal, the supreme court affirmed the lower court's summary judgment decision in favor of the retirees based on the holding that health insurance benefits were protected by the State constitution.[988] Both Alaska case law and the plain-meaning rule suggested that Article XII, section seven's "accrued benefits" should be broadly defined to include benefits provided by state retirement systems.[989] The supreme court reversed the lower court's summary judgment decision in favor of the retirees, however, insofar as it held that the comparative analysis of disadvantages and compensating advantages of health insurance policy changes was to focus on individuals rather than on the entire group of retirees.[990]

In *Robinson v. Municipality of Anchorage*,[991] the supreme court held that in workers' compensation cases, the claiming party must establish such claims by a preponderance of the evidence once the employer has rebutted the presumption that the injuries are work-related with substantial evidence.[992] Robinson, a bus driver for the Municipality of Anchorage, filed an application with

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982. *Denuptiis*, 63 P.3d at 278.
983. *Id.*
984. 71 P.3d 882 (Alaska 2003).
985. *Id.* at 888, 891-92.
986. *Id*. at 884.
987. *Id*. at 886.
988. *Id*. at 888.
989. *Id*.
990. *Id*. at 892.
991. 69 P.3d 489 (Alaska 2003).
992. *Id.* at 499.

the Alaska Workers' Compensation Board ("Board") for medical expenses and "time loss" arising out of on-the-job accidents in 1992 and 1995.[993] Robinson was also injured in an auto accident in 1993, which led to a settlement in his favor for $47,000.[994] Anchorage argued that Robinson had failed to establish that the work-related injuries were a substantial factor in his ongoing back problems.[995] In affirming the superior court's ruling that the Board properly rejected Robinson's claim, the supreme court applied the three-part presumption analysis it established in *Temple v. Denali Princess Lodge*.[996] First, the employee must establish a link between the injury and the employment, which creates a rebuttable presumption in favor of the employee.[997] Second, the employer may rebut this presumption with substantial evidence that provides either an alternative explanation for the injury or eliminates any reasonable possibility that the injury was work-related.[998] Third, once the presumption has been rebutted, the employee can prevail only if his claims are proven by a preponderance of the evidence.[999] Reviewing the Board's decision to determine whether there was substantial evidence for it, the court held that in the case of both injuries, the Municipality had successfully rebutted the presumption of validity, and that Robinson had failed to overcome the presumption by a preponderance of the evidence.[1000] Under a "clear error" standard, the court also held that the Board did not err in denying Robinson's motion for reconsideration of his claims.[1001]

In *University of Alaska v. Alaska Community Colleges Federation of Teachers*,[1002] the supreme court held that the arbitrator erred in finding a violation of a collective bargaining agreement's nondiscrimination clause when there was no evidence of illegal discrimination.[1003] Pursuant to a commissioned study's findings regarding underpaid employees, the University of Alaska authorized a pay adjustment for non-union workers to remedy salary disparities between union and non-union employees.[1004] In response, the union

993. *Id.* at 492.
994. *Id.* at 490.
995. *Id.*
996. 21 P.3d 813 (Alaska 2001).
997. *Robinson*, 69 P.3d at 494.
998. *Id.*
999. *Id.*
1000. *Id.* at 499.
1001. *Id.*
1002. 64 P.3d 823 (Alaska 2003).
1003. *Id.* at 827.
1004. *Id.* at 824.

filed a grievance alleging that the university violated its collective bargaining agreement's non-discrimination clause by failing to include union members in the study and resulting salary increases.[1005] After arbitration and subsequent appeal, the university was ordered to undertake a separate but similar study of union faculty and apply the pay increase to correct any identified inequalities.[1006] The supreme court, in finding error, left open the question of the appropriate standard of review for compulsory arbitration decisions, holding that even the more deferential "gross error" standard was met.[1007] Violation of the agreement depended on a finding of discrimination as prohibited by law; however, differing treatment based on union membership was not prohibited by law absent any anti-union animus.[1008] Because the arbitrator found no such animus or discrimination in the university's acts, it was gross error to find a violation of the nondiscrimination clause.[1009]

In *Witt v. State, Department of Corrections*,[1010] the supreme court held that making a public employee's permanent employment contingent on a probationary period does not transform the employment contract from an at-will contract into one in which the employee can only be dismissed for good cause.[1011] Witt was hired by the Department of Corrections in the summer of 1998 and put on six months' probation.[1012] A collective bargaining agreement between the Alaska Public Employees Association, of which Witt was a member, and the Department of Corrections, restricted the state's ability to contract with private vendors if such a contract would lead to layoffs of Department employees.[1013] The day following Witt's last day of work, the Department accepted a bid for services from an outside contractor to perform some of the functions that Witt had fulfilled for the Department.[1014] The supreme court affirmed summary judgment for the Department, holding that because Witt's contract of employment did not explicitly require performance evaluations, Witt was an at-will employee during the initial probationary period.[1015] The court further held that

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1005. *Id*.
1006. *Id.* at 825.
1007. *Id.* at 826.
1008. *Id*.
1009. *Id.* at 827.
1010. 75 P.3d 1030 (Alaska 2003).
1011. *Id.* at 1033.
1012. *Id.* at 1032.
1013. *Id.*
1014. *Id.*
1015. *Id.*

Witt failed to present material facts to establish that the Department had violated the covenants of good faith and fair dealing in hiring him.[1016] The court therefore affirmed the superior court's grant of summary judgment, holding that Witt had failed to raise any genuine issues of material fact.[1017]

VIII. FAMILY LAW

In *In re Adoption of L.E.K.M.*,[1018] the supreme court held that the grant of primary physical and legal custody of an orphan to friends of the child's mother and not to her biological grandparents or aunt and uncle was proper.[1019] Lucy M. was orphaned at three months of age when her mother was shot and killed.[1020] Friends of Lucy's mother, Elsa and Dillon C., took custody of her and proceeded to file a petition for adoption.[1021] Lucy's family members on cross-petition for adoption argued that Alaska Statutes section 47.14.100(e)(1), which prohibits foster placement when relatives are willing to take custody of a child, should apply.[1022] The court found that Alaska Statutes section 25.23.120(d), which provides that adoption procedures need only look to what is in the best interests of the child and give no preference to blood-relatives, was the only appropriate and applicable statute.[1023] As such, the court reviewed several criteria and found that there had been no abuse of discretion by the trial court in determining that Elsa and Dillon C. should be awarded full custody and that Lucy's relatives should be given continued visitation rights.

In *A.J. v. State*,[1024] the supreme court held that it was appropriate for the superior court to take all of a parent's past conduct into account when determining whether children have been subjected to conduct or conditions warranting the termination of parental rights under Alaska Statutes section 47.10.011.[1025] Ann Jackson's parental rights over her daughters were terminated on the dual bases of her history of substance abuse and her failure to protect her children from sexual abuse.[1026] Jackson claimed that the supe-

1016. *Id.* at 1036.
1017. *Id.* at 1037.
1018. 70 P.3d 1097 (Alaska 2003).
1019. *Id.* at 1099.
1020. *Id.* at 1100.
1021. *Id.*
1022. *Id.* at 1101.
1023. *Id*.
1024. 62 P.3d 609 (Alaska 2003).
1025. *Id*. at 613.
1026. *Id.* at 611.

rior court should not have relied on events prior to the termination proceedings in making a determination under section 47.10.011(a)(1)[1027] and that termination of parental rights should rest upon a determination that the children are in need of aid.[1028] The court held that consideration of a mother's past conduct is appropriate and adequate in terminating parental rights.[1029]

In *Bailey v. Bailey*,[1030] the supreme court held that the superior court's calculations of arrearages and the prospective support obligation were clearly erroneous.[1031] Raymond Bailey appealed the superior court's order excusing Charmaine Bailey from paying child support arrearages.[1032] Raymond argued that the superior court should not have retroactively modified Charmaine's child support obligation.[1033] The supreme court disagreed, stating that the structure of the original order provided for discretion in future calculations of child support.[1034] Raymond also argued that the superior court's calculation of Charmaine's arrearage was clearly erroneous.[1035] The supreme court agreed, pointing out mathematical and factual errors in the superior court's calculation.[1036] Lastly, Raymond argued that the superior court failed to consider evidence of his earnings in calculating his prospective obligation.[1037] The supreme court agreed that this was erroneous.[1038] Accordingly, the supreme court vacated the superior court's order regarding these calculations and remanded for appropriate findings and recalculation of the amount due.[1039]

In *Connor v. Connor*,[1040] the supreme court held that retirement benefits must be separated from disability benefits in a divorce proceeding.[1041] Jerry Connor contested the lower court's division of assets in his divorce from Margaret.[1042] The court reasoned that retirement benefits are earned during the marriage, thus be-

1027. *Id*. at 612.
1028. *Id*. at 613.
1029. *Id*.
1030. 63 P.3d 259 (Alaska 2003).
1031. *Id.* at 260.
1032. *Id.*
1033. *Id.* at 262.
1034. *Id.*
1035. *Id.* at 263.
1036. *Id.*
1037. *Id*.
1038. *Id.* at 264.
1039. *Id.*
1040. 68 P.3d 1232 (Alaska 2003).
1041. *Id.* at 1235.
1042. *Id.* at 1234.

coming marital property, while disability benefits are regarded as the separate property of the spouse.[1043] The court also held that these retirement benefits could be considered mature on Jerry's fiftieth birthday,[1044] because the United States Code holds the age of fifty to be one way to reach retirement benefit eligibility.[1045] This calculation has been found to protect the nonemployee spouse adequately.[1046] Furthermore, the court held that rehabilitative support, given to assist a spouse in acquiring employable skills, may be appropriate in this proceeding.[1047]

In *Corbin v. Corbin*,[1048] the supreme court addressed the issue of the calculation of child support when some of the children are being cared for by third parties.[1049] The parties in this action had three children; upon separating, the two oldest children were cared for by their grandparents and the youngest child was jointly cared for by the mother and father.[1050] The father appealed a calculation by the trial court that both parents owed child support based on a fifty-fifty shared custody agreement for all three children.[1051] The supreme court found that the trial court's calculation of support based on shared custody of all three children was incorrect.[1052] Civil Rule 90.3(i)(2) directs the court to "calculate the support obligation without consideration of the third party custodian *or any children in the custody of the third party custodian.*"[1053] Therefore, the trial court should have used the shared custody method for one child found in Rule 90.3(i)(2).[1054] The supreme court reversed the trial court's calculations and remanded the case with directions to follow the new calculations.[1055]

In *Duffus v. Duffus*,[1056] the supreme court held that a party must object to a master's calculation of child support at trial in order to preserve the argument for appeal.[1057] The court further held

1043. *Id.* at 1235.
1044. *Id.* at 1236.
1045. 5 U.S.C. § 8412(e) (2002).
1046. *Connor*, 68 P.3d at 1237.
1047. *Id.*
1048. 68 P.3d 1269 (Alaska 2003).
1049. *Id.* at 1270.
1050. *Id.*
1051. *Id.* at 1271.
1052. *Id.*
1053. *Id.* (emphasis added).
1054. *Id.*
1055. *Id.* at 1274.
1056. 72 P.3d 313 (Alaska 2003).
1057. *Id.* at 319.

that the prohibition of retroactive modification of child support awards under Civil Rule 90.3(h) does not apply when no "final child support award" yet exists.[1058] Juliann Duffus divorced Kenneth Duffus in 1990 but did not file a motion to establish child support until 1999.[1059] The standing master calculated the amount owed by Kenneth for back child support for 1990 and recommended that this amount should apply to all intervening years until 1999, when Juliann's motion was filed, in order to comply with Rule 90.3(h).[1060] Juliann did not object to the trial court's 1990 calculation, but did object to freezing that amount for all payments owed until 1999.[1061] The supreme court held that under Civil Rule 53(d)(2), Juliann's failure to object to the master's 1990 calculation at trial precluded her from raising the issue on appeal.[1062] However, the supreme court found that the superior court did err in its application of Rule 90.3(h).[1063] Because no final child support award was entered until 1999, calculations of amounts owed before that date did not qualify as prohibited "retroactive modifications" of an award.[1064]

In *Erica A. v. DFYS*,[1065] the supreme court upheld the lower court's decision to terminate the plaintiff's parental rights to her two children under Alaska Statutes section 47.10.088, finding that the superior court had committed no clear error.[1066] In May 2000, DFYS filed a petition to terminate Erica A.'s parental rights with regard to her two children, Kevin and Amy.[1067] DFYS had a lengthy and well-documented history assisting Erica A., who was first reported to it in 1989 for the abuse and neglect of previous children and later for mistreatment of Kevin and Amy.[1068] The supreme court ruled that for a court to terminate parental rights, it must find by clear and convincing evidence that the parent had failed, within a reasonable time, to remedy conditions that placed a child at risk.[1069] A court must also find by a preponderance of the evidence that DFYS had made reasonable efforts to assist and re-

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1058. *Id.* at 320.
1059. *Id.* at 315.
1060. *Id.* at 315-16.
1061. *Id.* at 316.
1062. *Id.* at 318.
1063. *Id.* at 320.
1064. *Id.*
1065. 66 P.3d 1 (Alaska 2003).
1066. *Id.* at 2.
1067. *Id.* at 6.
1068. *Id.* at 2-5.
1069. *Id.* at 6.

unite the family but that termination of parental rights was subsequently in the children's best interests.[1070] The supreme court applied a "clearly erroneous" standard of review to the superior court's findings regarding the DFYS's reasonable efforts and the best interests of the children and found that no error had occurred.[1071] Accordingly, the lower court's decision was affirmed.[1072]

In *Ford v. Ford*,[1073] the supreme court held that the results of a divorce mediation session were binding on a plaintiff because he participated meaningfully and was not ill during the session.[1074] Both parties were represented by counsel and the parties recorded a settlement at the conclusion of the mediation session, without the presence of court personnel.[1075] In this settlement, the plaintiff agreed to vacate his marina by December 21, 2000.[1076] Upon the plaintiff's failure to vacate the marina, the defendant moved to enforce the settlement agreement.[1077] The plaintiff opposed this motion, arguing that he was not aware that the settlement agreement was binding and that had he been in good health, he would have "vigorously opposed" the sale of the marina.[1078] The superior court concluded that the mediation had produced a binding settlement.[1079] The supreme court affirmed the enforcement of the settlement agreement for two reasons. First, the court rejected the plaintiff's claim that his illness prevented him from meaningfully participating in the mediation.[1080] Second, although the mediator did not ask the parties whether the agreement was entered into voluntarily, the court rejected the plaintiff's claim that he was unaware that the mediation constituted a binding agreement.[1081]

In *G.C. v. DFYS*,[1082] the supreme court held that due to evidence of child abandonment, there were sufficient grounds to terminate the father's parental rights.[1083] Gary Carson never saw, had contact with, or supported his ten-year-old son Daniel, and upon

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1070. *Id.* at 6-7.
1071. *Id.* at 7-9.
1072. *Id.* at 11.
1073. 68 P.3d 1258 (Alaska 2003).
1074. *Id.* at 1267.
1075. *Id.* at 1261.
1076. *Id.* at 1262.
1077. *Id.*
1078. *Id.*
1079. *Id.*
1080. *Id.* at 1265.
1081. *Id.* at 1266.
1082. 67 P.3d 648 (Alaska 2003).
1083. *Id.* at 655.

his incarceration in Colorado, DFYS filed a petition to terminate his parental rights.[1084] First, the court affirmed the superior court's determination that the child had been abandoned and was in need under Alaska Statutes section 47.10.011(1), based on clear and convincing evidence that Carson's actions demonstrated a willful disregard of his parental responsibility.[1085] Second, the court affirmed the finding that DFYS had made reasonable efforts to reunify Gary and Daniel to prevent out-of-home placement.[1086] Due to Carson's incarceration, reasonable efforts were limited to contacting the Colorado Department of Corrections and requesting that any available classes and services be provided to him.[1087] Accordingly, statutory requirements for parental rights termination were satisfied.[1088] The court affirmed the trial court's decision that it was in the best interests of the child to terminate Carson's parental rights.[1089]

In *Gurney v. Franks*,[1090] the supreme court held that the trial court had not abused its discretion when it ordered that property obtained during a voided marriage should be divided equally between the husband and wife.[1091] Here, the wife had been married previously and did not know whether that marriage had been dissolved before she married her new husband.[1092] The trial court therefore held the new marriage void and moved on to the issue of division of property.[1093] The trial court ruled that the property obtained during the "cohabitation" should be divided equally between the husband and wife because it perceived that their intent had been to share ownership of such property.[1094] The trial court did not find that the wife had committed fraud.[1095] The supreme court held that the trial court's refusal to find fraud was not clearly erroneous and thus that the division of property in this manner was not an abuse of the court's discretion.[1096]

1084. *Id.* at 650.
1085. *Id.* at 651-52.
1086. *Id.* at 653-54.
1087. *Id.* at 654.
1088. *Id.* at 655 (citing ALASKA STAT. § 47.10.088 (Michie 2002)).
1089. *Id.*
1090. 80 P.3d 223 (Alaska 2003).
1091. *Id.* at 224-25.
1092. *Id.* at 224.
1093. *Id.*
1094. *Id.*
1095. *Id.*
1096. *Id.* at 225.

In *Harrower v. Harrower*,[1097] the supreme court held that the required elements of the theory of transmutation or the theory of appreciation must be individually demonstrated in order to show that a spouse's separately owned property had become marital property.[1098] During divorce proceedings, Delores Harrower claimed that stock separately acquired by her husband, James Harrower, was marital property.[1099] The superior court found for Delores, holding that the stock was marital property in its entirety.[1100] The supreme court, however, held that the superior court's finding was in error, because the lower court failed to address whether the necessary elements of either transmutation or active appreciation were met, improperly blurring the two separate theories.[1101] The record did not support a finding that transmutation had occurred because there was no evidence of intent to transmute the stock or evidence of significant managerial involvement by both spouses.[1102] However, the court found that the record may support active appreciation and remanded for further proceedings.[1103] In so doing, the supreme court explicitly adopted the majority rule that the spouse in opposition to the finding of active appreciation bears the burden of showing an absence of causation, while the spouse in favor of active appreciation retains the burden of showing marital contribution and appreciation.[1104]

In *Hixson v. Sarkesian*,[1105] the supreme court held that a modification of child support in response to a reduction in the parent's income, when the reduced income remained above the specified cap amount, should be calculated according to the terms of the existing settlement agreement, rather than the income cap under Civil Rule 90.3.[1106] Hixson and Sarkesian divorced and subsequently entered into a settlement agreement.[1107] Several years later, Sarkesian filed a motion to modify the child support payments based upon a decline in his income.[1108] The superior court found that Sarkesian's decrease in income exceeded the fifteen percent

1097. 71 P.3d 854 (Alaska 2003).
1098. *Id.* at 858.
1099. *Id.* at 856.
1100. *Id.*
1101. *Id.* at 858-60.
1102. *Id.* at 858-59.
1103. *Id.* at 860.
1104. *Id.* at 859.
1105. 66 P.3d 753 (Alaska 2003).
1106. *Id.* at 759.
1107. *Id.* at 756.
1108. *Id.*

requirement under Rule 90.3(h)(1); consequently, the court imposed the $84,000 income cap specified under the Rule.[1109] On appeal, the supreme court held that the modification of child support should not have been based on the income cap, but rather on the terms of Hixson's and Sarkesian's settlement agreement.[1110] Specifically, the court held that when an existing settlement agreement waived the income cap and provided for child support above the Rule's requirement, a fifteen percent change in income does not necessarily result in imposition of the income cap.[1111] As Sarkesian's reduced income remained above the cap, the fact that the income was close to the cap was irrelevant.[1112] The court remanded for determination of child support based on Sarkesian's actual reduced income, rather than the income cap.[1113]

In *In re Adoption of Bernard A.*,[1114] the supreme court held that in weighing the interests of an adopted child, it is not an abuse of discretion for a lower court to weigh the length that the adoptee was with foster parents more heavily than other factors.[1115] Bernard A., an Indian child, was born in 1999 and was quickly thereafter removed from the care of his biological parents and placed with two foster parents.[1116] Both Bernard's grandparents and his parents filed petitions to adopt Bernard in 2001.[1117] A Special Master reported that it would be in Bernard's best interests for his foster parents legally to adopt Bernard, based on their parenting skills and the fact that Bernard had been with them between ages seven months and three years.[1118] In affirming the lower court's adoption of the Special Master's recommendation, the supreme court held that the lower court gave proper weight to the amount of time that Bernard had spent with his foster parents.[1119] While one factor may not outweigh all others in a "best-interests" analysis, a court may choose within its discretion to give more weight to certain factors.[1120]

1109. *Id.* at 756-57.
1110. *Id.* at 759.
1111. *Id.*
1112. *Id.*
1113. *Id.* at 762.
1114. 77 P.3d 4 (Alaska 2003).
1115. *Id.* at 5.
1116. *Id.*
1117. *Id.* at 6.
1118. *Id.* at 7.
1119. *Id.* at 8.
1120. *Id.*

In *In re Adoption of Keith M.W.*,[1121] the supreme court affirmed the adoption of an Indian child by non-Indian parents, as the biological Indian mother's consent to the adoption constituted good cause to deviate from the Indian Child Welfare Act's ("ICWA") placement preferences.[1122] Andrea, a member of the Native Village of Napaimute, initially agreed to the adoption of her son, Keith, by the Wilsons, a non-Indian family.[1123] However, before the adoption was finalized, Andrea withdrew consent, but then subsequently reaffirmed her consent for the adoption to occur.[1124] In affirming the lower court's decree of adoption, the supreme court found that Andrea's consent, ultimately reaffirmed after an initial change of mind, along with the open nature of the adoption and the already established bond between the child and the adoptive parents, constituted good cause to deviate from ICWA's placement preferences for Indian parents.[1125]

In *Inman v. Inman*,[1126] the supreme court held that a court may relieve a party from a final divorce judgment that is void and hold a new trial to equitably divide the estate.[1127] Homer Inman filed for divorce from Peggy Inman in November 1982, and a default divorce decree was entered in Peggy's absence.[1128] In September 1999, Peggy filed a motion seeking partition of Homer's retirement benefits, which the trial court granted.[1129] The court upheld the judgment,[1130] reasoning that the 1982 divorce decree was void for want of personal jurisdiction and therefore Peggy may be relieved from that judgment under Civil Rule 60(b)(4).[1131] The court further held that the trial court did not err in holding a new trial in order to equitably divide the estate.[1132] Despite the delay in filing Peggy's motion for relief, the court held that the trial court did not err in denying Homer's laches defense as a matter of equity.[1133]

1121. 79 P.3d 623 (Alaska 2003).
1122. *Id.* at 632.
1123. *Id.* at 624.
1124. *Id.* at 625.
1125. *Id.* at 630-32.
1126. 67 P.3d 655 (Alaska 2003).
1127. *Id.* at 658-59.
1128. *Id.* at 657.
1129. *Id.*
1130. *Id.* at 664.
1131. *Id.* at 658.
1132. *Id.* at 659.
1133. *Id.* at 658-59.

In *Jack C. v. DFYS*,[1134] the supreme court upheld the lower court's decision to terminate the plaintiff's parental rights to his two children, finding that the return of the children would place them at risk of harm.[1135] Jack C. was reported to DFYS for sexual abuse of his two daughters in 1999[1136] and was incarcerated for such behavior in 2001.[1137] In November 2001, DFYS filed a petition for termination of Jack C.'s parental rights.[1138] The superior court ruled for the state, and Jack C. appealed, claiming that DFYS had not proven by "clear and convincing evidence" that he had failed to remedy the conduct placing his children at risk within a reasonable time under Alaska Statutes section 47.10.088.[1139] The supreme court considered the lower court's findings that Jack C. had failed to complete any of the programs proposed by DFYS and remained "essentially untreated."[1140] Applying a "clearly erroneous" standard of review, the supreme court ruled that the superior court had not clearly erred in ruling that Jack C. had failed to remedy his conduct or in terminating his parental rights.[1141] Accordingly, the lower court's decision was affirmed.[1142]

In *Koller v. Reft*,[1143] the supreme court vacated the trial court's determination of a prospective child support award when the father's obligation was based on past earnings and not his current income.[1144] Unable to establish an amicable relationship with Reft, his child's mother, for visitation, Koller sought primary custody of his son.[1145] He initially filed a child support guidelines affidavit which reflected his earnings as a physician in New Mexico, although he was living in Alaska and underemployed.[1146] The court granted joint custody and ordered Koller to pay $1,000 per month in child support, plus attorney's fees and court costs.[1147] Koller appealed on grounds that the court lacked sufficient evidence to make the child support obligation determination and that the court

1134. 68 P.3d 1274 (Alaska 2003).
1135. *Id.* at 1275.
1136. *Id.*
1137. *Id.* at 1277.
1138. *Id.* at 1278.
1139. *Id.* at 1278-79.
1140. *Id.* at 1280.
1141. *Id.* at 1281.
1142. *Id.*
1143. 71 P.3d 800 (Alaska 2003).
1144. *Id.* at 811.
1145. *Id.* at 803.
1146. *Id*.
1147. *Id.*

erred in awarding costs and fees to Reft.[1148] The court struck down the child support award for lack of the evidentiary support required by Civil Rule 90.3(c), given Koller's changed employment circumstances.[1149] The matter was remanded for consideration of additional evidence concerning local job availability, earnings of similarly situated doctors, and Koller's historical and actual earnings.[1150] Because the issues so closely resembled a divorce case, the court upheld the fees and costs award to Reft, which was based on the relative economic situations and earning powers of both parties.[1151]

In *Martin v. State*,[1152] the supreme court upheld a superior court ruling that an incarcerated father's parental rights were properly terminated under Alaska Statutes section 47.10.088.[1153] Petitioner Martin was incarcerated for attacking the mother of his child.[1154] A superior court eventually ruled that Martin's parental rights to his daughter should be terminated.[1155] The supreme court reviewed the decision and stated that it would only overrule the superior court's findings if they were clearly erroneous.[1156] The supreme court held that: (1) Martin put the child in substantial risk of physical harm; (2) Martin did not make sufficient progress in controlling his anger; (3) the state made reasonable efforts to provide support services to Martin; and (4) the termination of Martin's rights were in the child's best interest.[1157] In particular, the supreme court stated that Martin's violent behavior did not have to be directed at the child to be considered and that the superior court's consideration of placement with one of Martin's relatives was irrelevant to the termination proceedings.[1158]

In *McElroy v. Kennedy*,[1159] the supreme court held that a nonbiological father's second action seeking to vacate a Child Support Enforcement Division ("CSED") order to recover such previously paid child support was barred according to the principle of *res judi-*

1148. *Id*. at 803-04.
1149. *Id*. at 805.
1150. *Id*. at 811.
1151. *Id*. at 809-10.
1152. 79 P.3d 50 (Alaska 2003).
1153. *Id.* at 57.
1154. *Id.* at 51.
1155. *Id.* at 53.
1156. *Id*.
1157. *Id.* at 53-56.
1158. *Id.* at 54, 57.
1159. 74 P.3d 903 (Alaska 2003).

cata.[1160] When Kennedy found that he was not the biological father of McElroy's son, he attempted to terminate his legal obligations for support and obtain reimbursement for those monies previously paid.[1161] The trial court legally terminated Kennedy's future paternity and custody obligations, but refused to grant reimbursement from McElroy or to set aside a CSED order, dismissing Kennedy's action with prejudice.[1162] Subsequently, Kennedy instituted a second action to vacate the CSED order and gain restitution of all child support monies previously paid.[1163] *Res judicata* bars subsequent claims when "the prior judgment was: (1) a final judgment on the merits; (2) from a court of competent jurisdiction; [and] (3) in a dispute between the same parties (or their privies) about the same cause of action."[1164] Therefore, the court found that Kennedy's second claim for restitution was barred from litigation.[1165]

In *O'Connell v. Christenson*,[1166] the supreme court held that the trial court's failure to make specific findings justifying its determination to impute income to a father rendered the question of whether the trial court erred impossible.[1167] O'Connell appealed a court order that imputed income to him and thereby modified his child support obligation to Christenson.[1168] Relying upon Civil Rule 90.3, the trial court imputed an income of $43,550.13 to O'Connell, despite his claim that his adjusted annual income was $8,185.38.[1169] Civil Rule 90.3 permits a trial court to calculate child support on a determination of the potential income of a parent who voluntarily and unreasonably is unemployed or underemployed.[1170] This determination should be based upon the parent's work history, qualifications, and job opportunities.[1171] The supreme court stated that the trial court has a duty to enter findings adequate for rational appellate review when it sets a child support obligation.[1172] The court then determined that the trial court did not provide any rationale

1160. *Id.* at 904.
1161. *Id.* at 905.
1162. *Id.*
1163. *Id.* at 906.
1164. *Id.* at 907.
1165. *Id.* at 909.
1166. 75 P.3d 1037 (Alaska 2003).
1167. *Id.* at 1041.
1168. *Id.* at 1038.
1169. *Id.*
1170. ALASKA R. CIV. P. 90.3.
1171. *O'Connell*, 75 P.3d at 1039.
1172. *Id.* at 1040.

for its decision as to the amount of imputed income.[1173] Since the trial court did not provide any rationale for imputing income, the supreme court could not effectively determine whether the trial court had erred; therefore, the supreme court vacated the child support award and remanded the question of imputed income.[1174]

In *Richard B. v. State*,[1175] the supreme court held that the superior court abused its discretion in allowing a law firm to represent a child's mother at trial, even though the same firm had represented the child's father in an earlier criminal trial.[1176] The law firm represented Richard in a sexual assault case in 2000.[1177] The same firm represented Leslie, the mother of Richard's children, when the State successfully petitioned to terminate Leslie's and Richard's parental rights.[1178] The supreme court remanded the case, holding that the court must determine if Richard was adversely affected by the firm's representations of Leslie because the firm was conflicted and Leslie's interests were adverse to Richard's.[1179]

In *Riddell v. Edwards*,[1180] the supreme court held that, despite a finding that Riddell had "ingratiated himself" to the deceased with an underlying motive to attain her assets, it was inequitable for the superior court to establish a constructive trust and deprive Riddell of his statutory rights to marital property on mere moral grounds.[1181] The court held that athough the deceased had suffered from Alzheimer's-related dementia, was physically isolated and abused by Riddell, and had snuck away to marry him secretly, these facts were legally insufficient for a post-mortem claim to invalidate the marriage on grounds of gross fraud.[1182] Because Riddell's unconscionable conduct neither invalidated the marriage nor proximately caused the statutory benefits of the marriage to vest, the supreme court held that the superior court's establishment of a constructive trust did not vest in proper legal grounds.[1183] Moreover, the supreme court found that upholding the establishment of a constructive trust would be inequitable on the grounds that it

1173. *Id.* at 1041.
1174. *Id.*
1175. 71 P.3d 811 (Alaska 2003).
1176. *Id.* at 833.
1177. *Id.* at 815.
1178. *Id.*
1179. *Id.* at 818-21, 824.
1180. 76 P.3d 847 (Alaska 2003).
1181. *Id.* at 849.
1182. *Id.* at 849, 851.
1183. *See id.* at 855.

"would impermissibly expand the court's equitable powers at the expense of established positive law."[1184]

In *Sherry R. v. DFYS*,[1185] the supreme court upheld a termination of parental rights because Sherry R. continued to place her children at substantial risk of harm by failing to remedy her conduct or the conditions under which they lived.[1186] Sherry R. had a long history of choosing abusive partners, succumbing to substance abuse, and demonstrating an inability to comply with substance abuse treatment programs.[1187] The trial court agreed with DFYS that Sherry R.'s children had not only suffered developmental disorders as a result of their mother's detrimental behavior, but that they would be placed at substantial risk of experiencing further emotional or physical harm if they were permitted to remain in Sherry R.'s custody.[1188] The supreme court affirmed, basing its decision on the facts that: (1) a mere one year period of sobriety was insufficient to prove that substance abuse was no longer a problem; (2) the continued romantic involvement with an individual convicted of child sexual assault demonstrated poor judgment; and (3) there existed evidence that Sherry was unable to care for her children's special needs.[1189] The court upheld the trial court's determination that Sherry R. had failed to change her lifestyle within a reasonable period of time.[1190]

In *Smith v. Weekley*,[1191] the court held that a decision regarding child custody was presumptuous and that the lower court improperly relied on just one factor in its placement determination.[1192] Sivers and Weekley split custody of their child, Dalton, in Anchorage for most of his life.[1193] After Sivers decided to move to Wasilla, Weekley filed for permanent custody.[1194] Before receiving a reply from Sivers, the superior court judge granted Weekley interim custody, which was affirmed a month later after an evidentiary hearing, and again five months later after trial.[1195] Because the later findings were based on "stability" that developed in Dalton's living

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1184. *Id.*
1185. 74 P.3d 896 (Alaska 2003).
1186. *Id.* at 903.
1187. *Id.* at 898-01.
1188. *Id.* at 901.
1189. *Id.* at 902-03.
1190. *Id.* at 903.
1191. 73 P.3d 1219 (Alaska 2003).
1192. *Id.* at 1227.
1193. *Id.* at 1220.
1194. *Id.*
1195. *Id.* at 1221-22.

arrangement with Weekley after the superior court judge's decision, and Sivers never had a chance to reply to the original complaint, the supreme court found error in the use of "stability" acting as a driving factor.[1196] The supreme court held that the relevant statutory factors should have also been considered to determine the best interest of the child.[1197] Therefore, the court remanded the case for a new determination on Dalton's custody.[1198]

In *Teseniar v. Spicer*,[1199] the supreme court held that a court must follow Civil Rule 90.3 when setting the amount of child support owed by a defendant and that the court cannot, except in special circumstances, retroactively modify a child support order.[1200] Spicer had moved to modify the child support agreement she had with Teseniar concerning their two children.[1201] The superior court granted the increase basing the new calculation on Teseniar's child support obligations for two children from a previous marriage.[1202] In addition, the court awarded retroactive child support for a period before Spicer had filed her motion.[1203] The supreme court reversed the superior court's modification of child support because the superior court had abused its discretion when it did not follow Rule 90.3 in calculating the increase.[1204] The supreme court noted that it was "unlikely that Teseniar's obligation to his two children with Spicer would be identical to the children from his earlier marriage. . . ."[1205] In addition, the supreme court held that the change in child support should only have been effective from the time that Spicer filed her motion.[1206]

In *Vivian P. v. DFYS*,[1207] the supreme court held that the trial court did not err in terminating parental rights when it determined that the child was in need of aid and that reasonable efforts to reunite the family were unnecessary.[1208] DFYS assumed emergency custody of a child who was hospitalized for a third time for mental

1196. *Id.* at 1224.
1197. *Id.* at 1227.
1198. *Id.*
1199. 74 P.3d 910 (Alaska 2003).
1200. *Id.* at 915.
1201. *Id.* at 912.
1202. *Id.*
1203. *Id.*
1204. *Id.* at 915.
1205. *Id.*
1206. *Id.*
1207. 78 P.3d 703 (Alaska 2003).
1208. *Id.* at 710.

and physical harm.[1209] The mother challenged the trial court's determination that her child was in need of aid and that DFYS made reasonable efforts to reunite the family, or in the alternative, was not required to do so.[1210] The supreme court held that there was clear and convincing evidence supporting the trial court's determination that the child was in need of aid.[1211] The court further held that, although DFYS did not make reasonable efforts to reunite the family and should have sought the court's approval before doing so, the trial court did not err in determining that reasonable efforts were unnecessary because of the physical and mental harm to which the child was subjected.[1212]

IX. INSURANCE LAW

In *Blood v. Kenneth Murray Insurance*,[1213] the supreme court found that Blood neither waived his claim to arbitration by filing suit over an insurance claim nor impliedly waived his coverage.[1214] However, the court did find that it was proper for the trial court to rule against Blood at summary judgment over his policy coverage, as an issue of fact.[1215] Blood was injured in an auto accident and filed a claim with his insurance company.[1216] The insurer denied Blood coverage, stating that his coverage had lapsed.[1217] Furthermore, the company denied his arbitration request, claiming that Blood waived the option.[1218] Blood then sued the insurance company and agent, claiming that the company was negligent in handling his policy renewal and that the coverage was not terminated.[1219] The trial court found for the insurance company.[1220] The supreme court found that Blood did not waive arbitration because a failure to plead arbitration is not equivalent to a waiver.[1221] Also, Blood did not impliedly waive arbitration because such a waiver must be direct and unequivocal enough to indicate waiver to a rea-

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1209. *Id.* at 705.
1210. *Id.* at 706.
1211. *Id.*
1212. *Id.* at 708-10.
1213. 68 P.3d 1251 (Alaska 2003).
1214. *Id.* at 1255.
1215. *Id.* at 1258.
1216. *Id.* at 1255.
1217. *Id.*
1218. *Id.*
1219. *Id.*
1220. *Id.*
1221. *Id.*

sonable person.[1222] Additionally, the court found that the district court properly decided the issue of coverage at summary judgment, because though a jury could find the insurer negligent in handling the policy renewal and cancellation, this is a factual determination that a judge can make at summary judgment.[1223]

In *Bradbury v. Chugach Electric Ass'n*,[1224] the supreme court held that Dennis Bradbury's wife did not die from injuries caused by her employment, and therefore he could not collect workers' compensation for her death.[1225] While working at Chugach, Linda Bradbury died from a ruptured cyst in her liver that caused a fatal anaphylactic reaction.[1226] Her husband filed for worker's compensation, stating that the rupture was caused by her employment activities, but was denied by the Workers' Compensation Board, which held that the injuries were not work-related.[1227] The supreme court held that in order for Chugach to successfully dispute a claim for workers' compensation by Bradbury for his wife's death, the Workers' Compensation Association must: (1) rebut the presumption for compensation with substantial evidence eliminating the worker's employment as a cause of injury; and (2) survive an attempt by the injured employee to prove her claim by a preponderance of the evidence.[1228] Chugach overcame this presumption both by providing sustainable alternative explanations for Linda Bradbury's injury, and by presenting substantial evidence that her injuries were caused by reasons other than those given by Dennis Bradbury.[1229] Furthermore, Dennis Bradbury failed to prove his claim by a preponderance of the evidence.[1230]

In *Coughlin v. Government Employees Insurance Co.*,[1231] the supreme court held that an injured driver's claims against the opposing driver's insurance company will be considered exhausted where the injured driver negotiates a settlement equal to the face value of the opposing driver's coverage.[1232] Coughlin, who was insured by GEICO for $10,000 in medical payments and $50,000 in underinsured motorist coverage, was injured in an automobile ac-

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1222. *Id*.
1223. *Id.* at 1258.
1224. 71 P.3d 901 (Alaska 2003).
1225. *Id.* at 909.
1226. *Id.* at 903.
1227. *Id.* at 904.
1228. *Id.* at 905-07.
1229. *Id.* at 906-08.
1230. *Id.* at 909.
1231. 69 P.3d 986 (Alaska 2003).
1232. *Id.* at 989.

cident with Babosky, who had a $50,000 policy with Colonial Insurance.[1233] GEICO paid $10,000 of Coughlin's medical expenses, which created a lien for that amount against any recovery that Coughlin garnered against Babosky and Colonial.[1234] Coughlin filed suit against Babosky, and ended up settling the action against Babosky and Colonial for $40,000 cash and responsibility for the $10,000 medical lien granted to GEICO.[1235] GEICO settled its $10,000 subrogated claim for Coughlin's medical expenses with Colonial for $5,000.[1236] Coughlin later requested that GEICO pay the $50,000 due to her under her underinsured motorist coverage, and filed suit when GEICO refused.[1237] Alaska Statutes section 28.20.445(e)(1) requires that a claimant exhaust the underlying policy limits before pursuing underinsured motorist benefits.[1238] GEICO argued that Coughlin did not exhaust Babosky's policy limits, because the settlement of the medical lien for $5,000 meant that Colonial only paid out $45,000 of the $50,000 policy.[1239] GEICO argued alternatively that Colonial was required to pay costs, interest and attorney's fees, and that because Couglin received none of these, the policy limit was not exhausted.[1240] In reversing the superior court's grant of summary judgment, the court dismissed both arguments and held that the limits of liability referred to in the statute refer only to the face value of coverage.[1241]

In *Great Divide Insurance Co. v. Carpenter ex rel. Reed*,[1242] the supreme court upheld a jury verdict awarding compensatory damages to an insured's assignee, but reversed an award of punitive damages.[1243] In September 1993, Carpenter suffered serious permanent injuries and brain damage as the result of being struck by a tree.[1244] Subsequently, Carpenter asserted a claim to recover damages against Dan Gowdy, joint owner of Gowdy & Sons ("Gowdy"), for actions of his employee in negligently felling trees.[1245] Settlement via arbitration ensued.[1246] However, Great Di-

1233. *Id.* at 987.
1234. *Id.*
1235. *Id.*
1236. *Id.*
1237. *Id.* at 988.
1238. ALASKA STAT. § 28.20.445(e)(1) (Michie 2002).
1239. *Coughlin*, 71 P.3d at 989.
1240. *Id.*
1241. *Id.* at 992.
1242. 79 P.3d 599 (Alaska 2003).
1243. *Id.* at 602.
1244. *Id.*
1245. *Id.*

vide disagreed as to Gowdy's coverage and sought declaratory judgment that it was not liable to Carpenter under Gowdy's insurance plan.[1247] A jury found against Great Divide.[1248] The supreme court found that the jury's verdict was legally and factually supported in finding that the accident was covered by the policy as part of Gowdy's business "operations"[1249] and that Great Divide failed to fulfill its obligations to defend its policyholder.[1250] However, the court reversed an award of punitive damages based on a finding that Great Divide was prejudiced by a lack of fair notice in the pleadings and an abuse of discretion in instructing the jury to consider the issue.[1251]

In *In re Life Insurance Co. of Alaska*,[1252] the supreme court held that the "automatic approval-by-inaction rule" of Alaska Statutes section 21.78.293(b) only applies to insurance claims that have already been approved by the receiver.[1253] The Life Insurance Company of Alaska ("LICA") was involuntarily dissolved by the State in 1994, and in 2001 Carpenter Financial filed a claim against the company for $500,000 for repayment of a surplus note.[1254] The Alaska Division of Insurance, which had been appointed as the receiver of LICA, denied the claim, and Carpenter Financial filed for reconsideration in April 2001.[1255] The receiver filed a report with the superior court on July 13, 2001, and before the court had ruled on the issue, Carpenter Financial filed a motion for summary judgment.[1256] Carpenter Financial argued in its motion that under section 21.78.293(b), the claim must be automatically approved, because the court had not ruled on the claim within 120 days after the report was filed.[1257] The supreme court upheld the superior court's denial of the motion, holding that subsection (b) of the statute only applies to claims that have already been approved by the receiver, whereas the receiver in the present case had denied

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1246. *Id.* at 604.
1247. *Id.*
1248. *Id.* at 605.
1249. *Id.* at 606.
1250. *Id.* at 610.
1251. *Id.* at 613.
1252. 76 P.3d 366 (Alaska 2003).
1253. *Id.* at 370.
1254. *Id.* at 367.
1255. *Id.*
1256. *Id.* at 368.
1257. *Id.*

Carpenter Financial's claim before submitting its report to the court.[1258]

In *O'Connor v. Star Insurance Co.*,[1259] the supreme court held that there is no duty on licensing bond sureties to independently investigate third-party claims against bonded contractors.[1260] Star Insurance Co. ("Star") issued a licensing bond to Homestead Builders, Inc. ("Homestead") to satisfy the state registration requirement for general contractors, which mandates the provision of a bond or cash deposit.[1261] The O'Connors, unhappy with Homestead's construction work on their home, sued Homestead and Star.[1262] Subsequently, according to their indemnity agreement, Star tendered defense of the suit to Homestead.[1263] The O'Connors then sued Star, claiming (1) that Star, as the surety, owed them a legal duty to fairly, fully, and impartially investigate their claim against the bond;[1264] and (2) that Star's tendering of the defense to Homestead, without conducting its own investigation, violated this duty in bad faith.[1265] In rejecting the O'Connors' claim, the court first distinguished licensing bonds from performance and payment bonds, which have a duty of good faith and fair dealing.[1266] The court also noted that no such duty is statutorily imposed upon licensing bond sureties.[1267] Therefore, as licensing bond sureties have no duty to independently investigate third-party claims against bonded contractors, the court rejected the O'Connors' bad faith claim against Star.[1268]

In *Therchik v. Grant Aviation, Inc.*,[1269] the supreme court held that an insurance company's endorsement limiting coverage of attorney's fees not preapproved by the director of the Alaska Division of Insurance ("Division") is unenforceable unless it is nearly identical to the model form adopted by the Division.[1270] Therchik and four other plaintiffs sued Grant Aviation after an airplane owned by the company crashed, killing members of the plaintiffs'

1258. *Id.* at 369.
1259. No. S-10500, 2003 Alas. LEXIS 162 (Alaska Dec. 26, 2003).
1260. *Id.* at *17-18.
1261. *Id.* at *2-4.
1262. *Id.* at *4.
1263. *Id.* at *5.
1264. *Id.*
1265. *Id.* at *12.
1266. *Id.* at *15.
1267. *Id.* at *18.
1268. *Id.* at *21.
1269. 74 P.3d 191 (Alaska 2003).
1270. *Id.* at 196.

families.[1271] A provision of the insurance policy that Houston Casualty Company had issued to Grant Aviation made Houston Casualty potentially liable for unlimited attorney's fees awarded in the suit under Civil Rule 82.[1272] Grant Aviation, on behalf of Houston Casualty, argued that a provision in the insurance policy limited its liability, including attorney's fees, to the facial limits of the policy.[1273] Therchick argued that the provision limiting attorney's fees was unenforceable because it did not include the exact language of Notice A, a model form provided by the Division, and thus violated Alaska Administrative Code section 26.550.[1274] Under section 26.550, if Houston Casualty did not obtain written approval from the director of the Division, the policy would have to conform with Notice A.[1275] The supreme court reasoned that since the alternative to conforming with Notice A was preapproval by the director of the Division, the standard for conforming with Notice A must be "very close to identical."[1276] The court therefore reversed the superior court, holding that the insurance policy did not conform with Notice A because it altered the model form's language in ways that were more than "minute deviations."[1277]

X. PROPERTY LAW

In *Carr-Gottstein Properties v. Benedict*,[1278] the supreme court upheld the validity of a liquidated damages clause in a covenant.[1279] The clause imposed a twenty-five dollar per day fine on property owners who failed to complete construction within one year.[1280] The superior court held that the liquidated damages clause was an impermissible penalty under *Kalenka v. Taylor*.[1281] The supreme court disagreed, holding that this liquidated damages clause was valid because it met the two-part test adopted by the Restatement of Contracts.[1282] First, construction delays that cause injuries that are difficult to quantify.[1283] Second, the clause imposed a fine that

1271. *Id.* at 191.
1272. *Id.*
1273. *Id.*
1274. *Id.* at 192-93.
1275. *Id.* at 195.
1276. *Id.* at 196.
1277. *Id.*
1278. 72 P.3d 308 (Alaska 2003).
1279. *Id*. at 313.
1280. *Id.* at 310.
1281. *Id.* (citing 896 P.2d 222 (Alaska 1995)).
1282. *Id.* at 311.
1283. *Id.*

was a "reasonable forecast of the damages."[1284] Therefore, the supreme court found that the clause was not a penalty.[1285] Accordingly, the court reversed the superior court's grant of summary judgment for Benedict and awarded liquidated damages to Carr-Gottstein.[1286]

In *Holding v. Municipality of Anchorage*,[1287] the supreme court held that a lessor prevented from advertising adult-oriented businesses by Alaska Municipal Code section 10.40.050, which bars such advertising by those who do not own the businesses, is not exempt from the provision if he leases space to parties authorized to advertise such businesses.[1288] Anchorage issued five citations to Holding for advertising adult-oriented businesses that operated on premises owned by Holding but leased to business owners, who had the proper licenses to operate these businesses.[1289] The supreme court held that the provision prohibiting non-owners from advertising applied to Holding for two reasons.[1290] First, Holding did not have any "grandfather right" to advertise simply because he owned the premises.[1291] Second, the provision did not deprive Holding of his constitutionally-protected right of commercial free speech because the law furthered substantial interests of Anchorage in a manner that was not more restrictive than necessary.[1292]

In *National Bank of Alaska v. Ketzler*,[1293] the supreme court held that a non-titled spouse may invalidate deeds or conveyances under Alaska Statutes section 34.15.010 as long as the spouse has an interest in the property separate from the statute and either files suit in court or records his interest in a timely manner.[1294] Nancy Ketzler's husband, Donald, executed a deed on their house to the National Bank of Alaska in return for a loan, and forged Nancy's required signature.[1295] Donald died approximately six months later, and the bank sought to foreclose on the Ketzler's home.[1296] In response, Nancy filed suit to have the deed declared void, and the

1284. *Id.*
1285. *Id.*
1286. *Id.* at 313.
1287. 63 P.3d 248 (Alaska 2003).
1288. *Id.* at 249.
1289. *Id.*
1290. *Id.*
1291. *Id.* at 251.
1292. *Id.* at 249.
1293. 71 P.3d 333 (Alaska 2003).
1294. *Id.* at 336.
1295. *Id.* at 333-34.
1296. *Id.* at 334.

superior court ruled in her favor.[1297] In affirming the superior court's holding, the supreme court found that, under section 34.15.010(d), the failure of a titled spouse to join in the conveyance of the family home automatically invalidates the deed.[1298] However, the failure of a non-titled spouse to join in the conveyance of a family home does not automatically invalidate the deed; rather, the deed is valid unless the non-titled spouse, possessing an interest acquired independent of section 34.15.010, either files suit to set the deed aside or files a notice of interest in the property within one year.[1299] Therefore, because Nancy had a separate interest in the family home and filed suit to set aside the deed within one year, the supreme court affirmed the invalidation of the deed.[1300]

In *Price v. Eastham*,[1301] the supreme court reversed a superior court determination that under a repealed federal statute, Revised Statute ("RS") 2477,[1302] a right-of-way existed over Price's land, but affirmed the finding that a prescriptive easement both existed and superceded Price's mere agricultural interests in the land.[1303] Eastham and ninety-one other plaintiffs claimed a right to a prescriptive easement over a trail located on Price's property that had been used since 1956 for recreational purposes such as hunting and camping.[1304] Upon review of the superior court's ruling, the supreme court made two findings. First, because neither party had noticed that an RS 2477 right-of-way was at issue, the superior court's *sua sponte* finding that such a right-of-way existed violated Price's due process rights.[1305] Second, because Price did not own the land in fee simple absolute and because Alaska Statutes section 38.95.010 precludes a prescriptive easement over government property, a prescriptive easement was only valid against Price, but could be terminated in the future if the government chose to terminate Price's interests.[1306]

In *Rausch v. Devine*,[1307] the supreme court held that a transfer of a defendant's property by two quitclaim deeds was valid and re-

1297. *Id.*
1298. *Id.* at 336.
1299. *Id.*
1300. *Id.* at 337.
1301. 75 P.3d 1051 (Alaska 2003).
1302. Revised Statute § 2477 (codified at 43 U.S.C. § 932) (repealed 1976).
1303. *Price*, 75 P.3d at 1059.
1304. *Id.* at 1053.
1305. *Id.* at 1056.
1306. *Id.* at 1057-58.
1307. 80 P.3d 733 (Alaska 2003).

fused to impose trusts in his favor.[1308] Rausch, an attorney, delivered two quitclaim deeds to Devine for properties in Anchorage and Iowa during a ten-year relationship in which they lived together and had one child.[1309] The couple separated in 2000, and Devine filed suit, requesting that Rausch vacate the house in Anchorage and that the other property in Iowa and Anchorage be distributed.[1310] The trial court ruled in Devine's favor, and Rausch appealed.[1311] Rausch first challenged the validity of the deeds, claiming that there had been no delivery because he did not truly intend to transfer title to Devine.[1312] The supreme court held that "a recorded deed gives rise to a presumption of valid delivery that may be rebutted by the party challenging delivery by clear and convincing evidence."[1313] Here, the court upheld the trial court's finding that Rausch did not provide clear and convincing evidence to surmount the presumption of validity.[1314] The supreme court also rejected Rausch's argument that a resulting trust in his favor should be found because he did not intend to transfer the property.[1315] Instead, the court upheld the trial court's finding that the transfer had been a gift and that a trust had thus not been formed.[1316] Finally, the supreme court refused to impose a constructive trust on the properties in Rausch's favor.[1317] The court held that constructive trusts are appropriate only to prevent unjust enrichment and affirmed the trial court's findings that Devine was not unjustly enriched by the transfer.[1318]

In *Reynolds v. Sisco Group, Inc.*,[1319] the supreme court held that a creditor may enforce an execution or levy against a deceased party's estate if the execution or levy was formally made before the party's death.[1320] Reynolds obtained a judgment in another suit against Sisco Group ("Sisson") and began to collect the judgment by attempting to seize vans owned by Sisson.[1321] Sisson transferred

1308. *Id.* at 735.
1309. *Id.* at 735-36.
1310. *Id.* at 736.
1311. *Id.* at 736-37.
1312. *Id.* at 737.
1313. *Id.* at 739.
1314. *Id.* at 740.
1315. *Id.* at 742.
1316. *Id.* at 742-43.
1317. *Id.* at 744.
1318. *Id.*
1319. 70 P.3d 388 (Alaska 2003).
1320. *Id.* at 390.
1321. *Id.* at 397.

two of the vans to a friend who then sold them.[1322] Reynolds then attempted to seize the payments made by the person who bought the vans.[1323] During this process Sisson died, and his estate attempted to regain possession of the vans and the payments under Alaska Statutes section 13.16.505.[1324] The superior court granted the estate's request, and Reynolds appealed. The supreme court held that section 13.16.505 did not apply to the van that Reynolds had seized, and that Reynolds was therefore entitled to the van, because the van was seized before Sisson died.[1325] The supreme court also held that there was still an issue as to whether the writ of attachment to seize the payments was delivered to the party that bought the two vans before Sisson died.[1326] If Sisson died before the writ was served, then the estate was entitled to the payments.[1327] The supreme court remanded to the superior court to make a finding of fact.[1328]

In *Spinell Homes, Inc. v. Municipality of Anchorage*,[1329] the supreme court held that a municipality is within its authority to impose conditions on a developer prior to the issuance of construction and occupation permits.[1330] Spinell was in the business of constructing homes on acquired property, and then selling the homes to third parties.[1331] The Municipality of Anchorage required Spinell to obtain a building permit prior to constructing the homes, and a certificate of occupancy prior to transferring the properties to third parties.[1332] The Municipality conditioned Spinell's receipt of the permits on a variety of tasks, including public improvements, landscaping easements, and approval of a homeowner's association.[1333] The Municipality also maintained that improvements required of the subdivider that sold the properties to Spinell ran with the land, and thus required Spinell to complete the improvements.[1334] Spinell received all building permits, but afterward filed suit, alleging that the Municipality's conditional permits violated

1322. *Id.* at 389.
1323. *Id.*
1324. *Id.* at 398.
1325. *Id.* at 391
1326. *Id.* at 392.
1327. *Id.*
1328. *Id.*
1329. 78 P.3d 692 (Alaska 2003).
1330. *Id.* at 694.
1331. *Id.*
1332. *Id.*
1333. *Id.* at 695.
1334. *Id.*

Spinell's substantive due process and equal protection rights, and effected a taking for which Spinell should be accorded compensation.[1335] In affirming the superior court's holding, the supreme court held that the Municipality, in imposing conditions on the issuance of permits, was acting fully within its powers under the Anchorage Municipal Code.[1336] The court also held that the municipal code empowered the city to enforce the conditions placed on the previous owner against Spinell.[1337] After determining that the Municipality was permitted to issue such permits, the court concluded that Spinell's constitutional claims had no merit.[1338] Because the Municipality was under no mandatory duty to issue an unconditioned permit, Spinell did not have a property interest that was protected under substantive due process.[1339] The court also held that the conditions imposed by the permits did not effect a taking, because (1) the municipality did not invade Spinell's property, (2) there was no showing that the Municipality's actions adversely affected the value of Spinell's property, and (3) Spinell did not show that the exactions were not proportional to the properties' potentially adverse impact.[1340]

In *Stanek v. Kenai Peninsula Borough*,[1341] the supreme court upheld a borough taxation ordinance excluding a portion of residential property used as the owner's permanent residence.[1342] Stanek, an Anchorage resident, challenged this ordinance on constitutional and statutory grounds as discriminatory against nonresidents of the borough.[1343] Under an equal protection analysis, the supreme court determined that the legitimate reason basis is used to determine if the distinction drawn is justifiable.[1344] Here, the distinction between owner-occupied homes and second homes was legitimate to promote home ownership.[1345]

In *Tush v. Pharr*,[1346] the supreme court held that the trial court erred in granting summary judgment against the defendants because genuine issues of material fact existed with regard to each of

1335. *Id.*
1336. *Id.* at 696
1337. *Id.* at 697.
1338. *Id.* at 702.
1339. *Id.*
1340. *Id.* at 702-03.
1341. 81 P.3d 268 (Alaska 2003).
1342. *Id.* at 269.
1343. *Id.*
1344. *Id.* at 270.
1345. *Id.* at 271.
1346. 68 P.3d 1239 (Alaska 2003).

the various legal malpractice claims asserted.[1347] As landlord for several properties, Tush brought a claim for eviction against a tenant.[1348] In the action, the tenant prevailed and was awarded a judgment of over $1.6 million for counterclaims of multiple intentional torts.[1349] After Tush's insurance company refused to pay for the claim because it was not tendered on a timely basis, Tush sued her attorneys on several theories of malpractice: professional negligence, breach of fiduciary duty, and breach of contract.[1350] On appeal of summary judgment, the supreme court found that several issues of fact remained such that summary judgment was precluded. First, the court stated that the "ambiguous nature" of Tush's responses to questions of insurance coverage *may* be cause for malpractice if her attorney had a duty under the circumstances to investigate further.[1351] Second, the court agreed with Tush that questions of fact remained as to whether insurance coverage would still have been denied as a result of (1) her own actions in misrepresenting insurance application information, or (2) under the "intentional acts exclusion" clause of her insurance policy.[1352] Finally, the court found that disputed issues existed as to whether Tush's insurance would have covered her claims regardless of her untimely submission.[1353]

In *Vukmir v. Vukmir*,[1354] the supreme court held that a will provision providing a purchase option on the testator's home clearly provided that the heirs were not responsible for the mortgage debt if the option was exercised.[1355] Louis Vukmir's will provided his daughter, Linda, with an option to purchase his home by paying $80,000 to his estate, which would in turn be divided among his four children.[1356] Linda timely exercised her option, subsequently using the $80,000 payment to pay the home's outstanding mortgage and then depositing the remainder into the estate's account for division among the heirs.[1357] However, the lower court found that, under the language of the will, Linda alone should be responsible for the mortgage, and the full $80,000 should be di-

1347. *Id.* at 1251.
1348. *Id.* at 1241.
1349. *Id.* at 1243.
1350. *Id.*
1351. *Id.* at 1246.
1352. *Id.* at 1247-49.
1353. *Id.* at 1251.
1354. 74 P.3d 918 (Alaska 2003).
1355. *Id.* at 922.
1356. *Id.* at 920.
1357. *Id.* at 919.

vided among the children.[1358] The supreme court affirmed the lower court's finding that the words of the will itself clearly expressed Louis Vukmir's intent to give Linda an option to purchase his home in exchange for a gift of $80,000 to his four children.[1359] Therefore, Linda was responsible for the mortgage.[1360]

XI. TORT LAW

In *Dayton v. State*,[1361] the court of appeals upheld a superior court decision to deny reconsideration of a restitution claim, but directed the superior court to reduce the amount of the award.[1362] Dayton pled guilty to third-degree assault for breaking and entering the home of West and subsequently injuring her and destroying her property.[1363] Dayton argued that the superior court erred in awarding restitution for the full original price of the hardware and software,[1364] ordering restitution for software installed on the computer,[1365] and denying Dayton's motion for reconsideration.[1366] The court of appeals held that the restitution price should have been discounted because of the age of the system and therefore directed the superior court to reduce the award.[1367] It further held that the superior court properly awarded restitution on the software because it was necessary to make West whole.[1368] Finally, the court of appeals affirmed the superior court's denial of Dayton's motion for reconsideration because Dayton had ample opportunity to produce evidence during West's cross-examination.[1369]

In *Fletcher v. South Peninsula Hospital*,[1370] the supreme court held that hospitals do not have a non-delegable duty to provide non-negligent surgeons outside the emergency room context.[1371] In 1997, Fletcher underwent unsuccessful medical treatment for abdominal pains from Dr. Rene Alvarez at South Peninsula Hospital

1358. *Id.*
1359. *Id.* at 922.
1360. *Id.*
1361. 78 P.3d 270 (Alaska Ct. App. 2003).
1362. *Id.* at 271.
1363. *Id.* at 271-72.
1364. *Id.* at 272-73.
1365. *Id.* at 273.
1366. *Id.* at 274.
1367. *Id.* at 273.
1368. *Id.*
1369. *Id.* at 274.
1370. 71 P.3d 833 (Alaska 2003).
1371. *Id.* at 837.

before being treated properly by another surgeon.[1372] Fletcher sued the hospital, claiming that it had a non-delegable duty to provide non-negligent physician care.[1373] The supreme court held that the hospital only had a non-delegable duty to provide non-negligent physician care in situations in which a patient seeks services at the hospital as an institution and is treated by a physician that the patient did not select.[1374] As Fletcher specifically sought out Alvarez and was looking to him, as opposed to the hospital itself, for help, the non-delegable duty did not apply.[1375]

In *Getchell v. Lodge*,[1376] the supreme court held that a driver who is negligent per se as a result of committing a traffic violation can be excused for such negligence if the driver's conduct is precipitated by an emergency that is independent of the driver's conduct.[1377] Getchell was injured when Lodge, in an attempt to avoid a moose on an icy highway, hit her brakes and veered into oncoming traffic.[1378] Getchell brought a personal injury action against Lodge, who was found not negligent by the jury.[1379] Getchell appealed following a denial of her motion for judgment notwithstanding the verdict.[1380] Getchell argued on appeal that Lodge's violation of traffic regulations, as a result of her crossing the center lane of traffic, constituted negligence per se, thereby shifting the burden of proof to Lodge to show that her conduct was excused, and that reasonable jurors could not have concluded from the evidence that Lodge met her burden.[1381] In *Ferrel v. Baxter,*[1382] the supreme court adopted the Restatement (Second) of Torts' position on excused violation of traffic regulations, which allows an excuse for violation of traffic regulations when the actor is confronted by an emergency that is not due to his misconduct.[1383] Therefore, the court held that reasonable jurors could have found that Lodge met the burden of proof for excuse, given that Lodge was confronted with an emergency situation.[1384]

1372. *Id.* at 836.
1373. *Id.* at 837.
1374. *Id.* at 839.
1375. *Id.*
1376. 65 P.3d 50 (Alaska 2003).
1377. *Id.* at 52.
1378. *Id.*
1379. *Id.*
1380. *Id.*
1381. *Id.* at 53.
1382. 484 P.2d 250 (Alaska 1971).
1383. RESTATEMENT (SECOND) OF TORTS §288(A) (1965).
1384. *Getchell*, 65 P.3d at 55.

In *Kiokun v. State*,[1385] the supreme court held that the decision whether to initiate a search and rescue is protected by discretionary function immunity.[1386] Kiokun sued the State after three members of her family died from freezing temperatures after their car was stuck in deep snow.[1387] Before the bodies were found, Alaska State Troopers were notified of the abandoned vehicle beside which the word "HELP" and an arrow were stamped in the snow.[1388] The Alaska State Troopers decided not to initiate a search and rescue operation until temperatures rose.[1389] To determine whether the state's actions were immune from a tort claim, the supreme court distinguished between planning activities and operational activities, which are not immune.[1390] The court found that here, because planning to delay the search and rescue operation until temperatures rose was sufficiently based on resource allocation and public policy considerations, it was better left to the immediate discretion and expertise of the state officials.[1391] Similarly, the supreme court found that Alaska Statutes section 18.60.120 did not create a mandatory duty to initiate a search and rescue operation regardless of the circumstances.[1392] Therefore, finding that the Alaska State Troopers' decision not to immediately initiate a search was protected by discretionary function immunity, the supreme court reversed the lower court's judgment, vacated the jury verdict, and remanded for entry of judgment for the state.[1393]

In *Kodiak Island Borough v. Roe*,[1394] the supreme court, applying pre-1997 law, held that damages did not have to be apportioned between intentional and negligent tortfeasors.[1395] Roe sued the Borough after two of its employees with criminal backgrounds had intercourse with and impregnated Roe's developmentally challenged daughter while under the Borough's care.[1396] The supreme court held that the Borough was not entitled to have damages stemming from these intentional torts apportioned.[1397] Since

1385. 74 P.3d 209 (Alaska 2003).
1386. *Id.* at 211.
1387. *Id.* at 211-12.
1388. *Id.* at 211.
1389. *Id.* at 212.
1390. *Id.* at 213.
1391. *Id.* at 213, 218.
1392. *Id.* at 219.
1393. *Id.*
1394. 63 P.3d 1009 (Alaska 2003).
1395. *Id.* at 1014.
1396. *Id.* at 1011.
1397. *Id.* at 1015.

the torts occurred in 1991, the supreme court relied upon the apportionment statutes that were applicable at that time.[1398] These statutes were silent on the apportionment of damages arising from intentional conduct;[1399] therefore, the supreme court applied the common law of the time, which stated that "a person who is liable to another based on a failure to protect the other from the specific risk of an intentional tort is jointly and severally liable for the share of comparative responsibility assigned to the intentional tortfeasor. . . ."[1400] The supreme court then concluded that the Borough was in fact negligent in failing to protect Roe's daughter from its employees' intentional torts and therefore could be held wholly liable for the damages.[1401] The supreme court also found that the trial court did not err in allowing the jury to award damages for the extraordinary costs associated with raising Roe's granddaughter.[1402]

In *Marine Solution Services v. Horton*,[1403] the supreme court held that *The Pennsylvania* rule,[1404] which shifts the burden of proof to a marine vessel to show a lack of causation where the vessel is in violation of a statutory duty, applies in non-collision cases if there is a nexus between the statutory violation and the injury caused.[1405] Horton, president of Marine Solution Services ("MSS"), was injured while helping move one of MSS's barges.[1406] Horton filed suit against MSS and the MSS employee operating the tugboat, alleging five causes of action, including Jones Act claims based on Horton's status as a seaman.[1407] At trial, Horton was found fifteen percent at fault, and awarded compensatory damages.[1408] The supreme court held that Horton, despite his ownership of forty-nine percent of MSS's stock, was not an alter ego of the corporate entity, and that he could therefore bring suit against MSS.[1409] MSS also alleged that Horton was not a seaman, and that therefore he should not have been able to bring claims under the Jones Act.[1410] The supreme

1398. *Id.* at 1011-12.
1399. *See* Former ALASKA STATUTES §§ 09.17.080, 09.17.080 (Michie 1991).
1400. RESTATEMENT (THIRD) OF TORTS: APPORTIONMENT OF LIABILITY § 14 (2000).
1401. *Kodiak*, 63 P.3d at 1015.
1402. *Id.* at 1018.
1403. 70 P.3d 393 (Alaska 2003).
1404. *The Pennsylvania*, 86 U.S. 125 (1873).
1405. *Horton*, 70 P.3d at 407.
1406. *Id.* at 399.
1407. *Id*. at 400-01.
1408. *Id.* 401.
1409. *Id.* at 402.
1410. *Id.*

court disagreed, holding that a bright line rule requiring that an individual spend thirty percent of his time at sea to be considered a seaman was not appropriate, and that the question of seaman status was properly left to the jury.[1411] MSS also alleged that *The Pennsylvania* rule was improperly applied.[1412] The rule provides that where a vessel is in violation of a statutory duty intended to prevent collisions, the burden of proof shifts to the vessel to show that the violation was not the cause of the accident.[1413] The supreme court disagreed with MSS's contention that the rule should only be applied in collision cases, and held that the rule applies if there is a nexus between the statutory violation and the injury suffered.[1414]

In *State v. Sandsness*,[1415] the supreme court held that DFYS has no duty to use due care in deciding whether to petition a court for extension of a juvenile offender's commitment.[1416] Darrel Whitaker shot and killed Sandsness shortly after being released from a juvenile detention center.[1417] The plaintiffs, Sandsness' widow and daughter, subsequently sued DFYS for negligently failing to properly evaluate Whitaker before his release and to supervise him adequately after his release.[1418] The supreme court held that section 319 of the Restatement (second) of Torts did not impose a tort duty on DFYS to seek a court-ordered extension of Whitaker's detention period.[1419] The court's reasoning was based on the rationale that successful rehabilitation of juveniles requires the earliest possible reintegration of the juvenile with his family and community.[1420] Furthermore, the court pointed to Alaska Statutes section 47.12.260, which permits DFYS to release juveniles when there is a reasonable probability that the minor will not violate the law.[1421] Therefore, the supreme court reversed and remanded the case for entry of summary judgment for the state.[1422]

1411. *Id.* at 405.
1412. *Id.* at 406.
1413. *Id.* at 405 n.33.
1414. *Id.* at 407.
1415. 72 P.3d 299 (Alaska 2003).
1416. *See id.* at 308.
1417. *Id.* at 300.
1418. *Id.*
1419. *Id.* at 305.
1420. *Id.* at 303.
1421. *Id.*
1422. *Id.* at 308.

In *State Farm Fire & Casualty Co. v. White-Rodgers Corp.*,[1423] the supreme court held that the state's six-year statute of limitations for trespass actions governed the claims of an insurer seeking indemnification from third parties whose actions allegedly caused property damage to two insureds.[1424] After a natural gas explosion destroyed the home of William and Sally Brook, State Farm, their insurer, paid the property damages.[1425] Nearly six years later, State Farm filed a complaint seeking to recover such payments, alleging that the explosion was caused by a natural gas leak that State Farm traced to products manufactured, sold, or supplied by defendants White-Rodgers Corporation, State Industries, Inc., and Semco Energy.[1426] Defendants moved for summary judgment, arguing that State Farm's claims were barred by the two-year statute of limitations governing tort claims.[1427] The federal district court certified the question to the supreme court whether State Farm's claims would be governed by the two-year tort statute of limitations or the six-year trespass statute of limitations.[1428] Relying on *Fernandes v. Portwine*,[1429] the court examined the injuries claimed, rather than the cause of action pled, finding that State Farm's claim for property damages alleged a substantial interference with the Brooks' right to possess and use their property and that such alleged interference was unlawful.[1430] The court concluded that the six-year "trespass" statute of limitations governed State Farm's claims.[1431]

In *Zaverl v. Hanley*,[1432] the supreme court held that the defendant could not testify at trial on topics he refused to discuss at his deposition.[1433] Zeverl's estate sued *inter alia*, Defendant Borden for negligently diagnosing and failing to treat Zeverl, ultimately causing her death.[1434] As instructed by his attorney, Borden refused to answer questions at his deposition regarding his opinion as to a specific medical treatment.[1435] Borden's attorney stated that Borden was not an expert and would not be offered as an expert re-

1423. 77 P.3d 729 (Alaska 2003).
1424. *Id.* at 730.
1425. *Id.*
1426. *Id.*
1427. *Id.*
1428. *Id.*
1429. 56 P.3d 1, 5-6 (Alaska 2002).
1430. *State Farm*, 77 P.3d at 731.
1431. *Id.* at 731-32.
1432. 64 P.3d 809 (Alaska 2003).
1433. *Id.* at 811.
1434. *Id.*
1435. *Id.* at 812-13.

garding the specific medical treatment.[1436] At trial, however, the court allowed Borden to testify as to his opinion.[1437] The jury found for the defendants. The supreme court held that Borden could not testify at trial regarding topics he refused to discuss at his deposition because the inconsistent positions, without fair notice of the changed testimony, thwarted the purposes of discovery.[1438] The supreme court remanded to the trial court for determination of whether Borden's testimony in question was harmless or not.[1439]

Keith A. Rogers[1440]

1436. *Id.*
1437. *Id.* at 814.
1438. *Id.* at 815.
1439. *Id.* at 816.
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