YEAR IN REVIEW

YEAR IN REVIEW 1998: CASES FROM ALASKA SUPREME COURT, ALASKA COURT OF APPEALS, U.S. COURT OF APPEALS FOR THE NINTH CIRCUIT, AND U.S. DISTRICT COURT FOR THE DISTRICT OF ALASKA

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I. INTRODUCTION

Year in Review contains brief summaries of selected decisions handed down in 1998 by the Alaska Supreme Court, the Alaska Court of Appeals, U.S. Court of Appeals for the Ninth Circuit, and the U.S. District Court for the District of Alaska. The summaries focus on the substantive areas of the law addressed, the statutes or common law principles interpreted, and the essence of each of the holdings. Attorneys are advised not to rely upon the information contained in this review without further reference to the cases cited.

The opinions have been grouped according to general subject matter rather than by the nature of the underlying claims. The summaries are presented alphabetically in the following eleven areas of the law: administrative, business, civil procedure, constitutional, criminal, employment, family, insurance, property, torts, and trusts and estates.

II. ADMINISTRATIVE LAW

A. Public Contracting

In *Walleri v. City of Fairbanks*,[1] the Alaska Supreme Court held that a challenge of the Fairbanks' sale of certain utilities, approved by popular vote, is not an "election contest" because the allegation goes to the validity of the contract and not the result of the election.[2] Walleri challenged the sale of utilities to private business interests on the ground that some of the terms of the contract were at odds with the terms disclosed to voters when the contract was submitted for public approval.[3] The lower court dismissed Walleri's claims, holding that each constituted an election contest, and that Walleri failed to meet the procedural requirements for election contests.[4] The supreme court disagreed, stating that none of Walleri's claims amounted to an election contest because they did not challenge the validity of the election result.[5] The court explained that the election result had a significance outside of the validity of the contract, and that if Walleri's challenge was successful, there was "no legal impediment" stopping the city from renegotiating its contract in a way that fully complied with the terms approved by the voters.[6] The court also held that Walleri's challenge was not a "nonjusticiable political question" because the challenge was centered on alleged procedural violations and breaches of duty, not the "rightness or wrongness" of the policy to sell utilities.[7]

In *Brady v. State*,[8] the supreme court rejected several claims brought by a disappointed applicant for the negotiated sale of dead and dying trees, holding that Brady's general grievances with the state's forest policies did not amount to any actionable claim.[9] The Department of Natural Resources ("DNR") decided to entertain

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1. 964 P.2d 463 (Alaska 1998).
2. *See id.* at 466.
3. *See id.* at 465.
4. *See id.*
5. *See id.* at 466.
6. *Id.* The court later rejected an argument raised by the City that because the contract preceded the election, Walleri could only have challenged the election. The court considered it irrelevant that the contract preceded the election. *See id.* at 467.
7. *Id.* at 467-68.
8. 965 P.2d 1 (Alaska 1998).
9. *See id.* at 6.

proposals for ways to deal with a beetle epidemic.[10] Brady made a proposal and received indications from DNR that it would enter a contract with Brady when certain regulatory issues were resolved.[11] To aid with the regulatory procedures, Brady performed some data collection work, which the state eventually used in developing a plan for the forest area in question.[12] Afterwards, DNR elected not to enter into the contract with Brady and refused to compensate the plaintiff for his expenditures in collecting the data.[13] The court rejected Brady's breach of contract claims, holding that there was no promise to sell, only a promise to negotiate a sale.[14] The court also rejected Brady's negligence claim. The court ruled that the state enjoys discretionary-function immunity for setting forest-management policy.[15]

B. Land Use and Resource Management

In *Bering Straits Coastal Management Program v. Noah*,[16] the Alaska Supreme Court upheld a decision by the Alaska Coastal Policy Council that a proposed trapping cabin is consistent with the Alaska Coastal Management Program ("ACMP") and the Bering Straits Coastal Management Plan.[17] The ACMP is a statewide regulatory scheme designed to protect the "use, management, restoration, and enhancement of the overall quality of the coastal environment,"[18] while the Bering Straits plan is a regional scheme incorporated into the ACMP. A dispute arose between the Bering Straits Coastal District, which oversees the Bering Straits plan,[19] and the Alaska Department of Natural Resources ("DNR"), which granted a permit for a private trapping cabin in the Koyuk River area.[20] Coastal District believed that the cabin did not conform to

10. *See id.*
11. *See id.*
12. *See id.* at 6-7.
13. *See id.* at 7.
14. *See id.* at 8.
15. *See id.* at 16. The court distinguished acts of policymaking, for which the state is immune from tort suits, from operational acts of implementation. Acknowledging that there is a "sometimes vague and wavering line" between the two, the court decided that most of the plaintiff's claims fell on the policymaking side, and that all other claims for which the state was not immune were meritless. *Id.* at 16-17.
16. 952 P.2d 737 (Alaska 1998).
17. *See id.* at 738.
18. *Id.* at 739 (quoting ALASKA STAT. § 46.40.010(a) (Michie 1996)).
19. *See id.* at 740.
20. *See id.* at 740-41.

its local standards for land use.[21] It appealed DNR's decision to the Alaska Coastal Policy Council, but the decision was upheld.[22]

On appeal to the supreme court, the issues were whether the Council failed to give due deference to Coastal District's comments during its hearing, and whether the Council's determination upholding the permit was reasonable.[23] The court ruled that the Council was justified in holding a *de novo* review of DNR's decision pursuant to the Administrative Procedure Act,[24] without giving special deference to Coastal District.[25] Also, the Council's decision was reasonable, because the proposed cabin was not in an important use area,[26] nor would it adversely affect subsistence use or wildlife in the area.[27]

In *Suydam v. State*,[28] the supreme court held that past participation points may be accrued for the purpose of qualifying for a Prince William Sound herring purse seine entry permit in seasons where the fisher does not actually attempt to harvest herring, so long as the fisher is present on the fishing grounds with an intent to harvest the resource.[29] The Alaska Commercial Fisheries Entry Commission had denied Suydam past participation points because he voluntarily chose not to fish while a fisher strike was underway.[30] However, the supreme court overruled the commission because Suydam had arrived on the grounds intending to fish even if he had never actually cast a net.[31]

In *Rutter v. State*,[32] the supreme court held that the Board of Fisheries is not required to treat "guided sport fishing" and "sport fishing" as separate categories for purposes of allocating fishery resources.[33] In 1994, the Board allocated twenty percent of the harvestable chinook salmon to the sports fishery and eighty percent to the commercial troll fishery, adjusting the previous allocation of seventeen percent and eighty-three percent, respectively.[34] In affirming a summary judgment upholding the new allocation, the court held that the reasonableness of the Board's classification of

21. *See id.* at 740.
22. *See id.* at 741.
23. *See id.* at 742-43.
24. ALASKA STAT. § 46.40.100(b) (Michie 1996).
25. *See Bering Straits*, 952 P.2d at 742.
26. *See id.* at 743.
27. *See id.* at 744.
28. 957 P.2d 318 (Alaska 1998).
29. *See id.* at 324-25.
30. *See id.* at 324.
31. *See id.* at 325.
32. 963 P.2d 1007 (Alaska 1998).
33. *See id.* at 1008.
34. *See id.* at 1007.

guided sport fishing as a type of sport fishing rather than commercial fishing did not constitute a question of fact for trial.[35] Additionally, the court held that, under Alaska Statutes section 16.05.251(e), the Board has discretion to treat sport fishing and guided sport fishing as separate categories for allocation, but that it is not required to do so.[36]

In *Baxley v. State*,[37] the supreme court held that the Alaska Department of Natural Resources Commissioner acted within his authority under the Alaska Land Act when he negotiated an amendment to the "net profit share" provision of a state oil and gas lease.[38] The state entered into a lease with Amerda Hess whereby Amerda would develop the Northstar Unit oil field and the state would receive eighty-nine percent of the net profits after expenses.[39] After Amerda sold its lease to British Petroleum, British Petroleum informed the state that it would be uneconomical to develop the field unless the "net profit share" was renegotiated.[40] The Commissioner negotiated a new rate, which was approved by the legislature and signed into law by the governor.[41] Baxley brought suit against the state, asserting standing as a citizen-taxpayer.[42] The court held that the Commissioner did not exceed his authority under Alaska Statutes section 38.05.180(g)[43] by re-negotiating a net profit share provision, subject to ultimate approval by the legislature.[44]

C. Administrative Procedure

In *Stalnaker v. Williams*,[45] the Alaska Supreme Court held that the Public Employees' Retirement Board had applied an incorrect standard in determining occupational disability eligibility,[46] and that the Board's practice of counting tie votes as votes to affirm did not deserve deference from a court.[47] Williams appealed the Board's decision to uphold a finding that she was not eligible for

35. *See id.* at 1008.
36. *See id.*
37. 958 P.2d 422 (Alaska 1998).
38. *See id.* at 422.
39. *See id.* at 426.
40. *See id.* at 427.
41. *See id.*
42. *See id.* at 428.
43. ALASKA STAT. § 38.05.180(j) (Michie 1996).
44. *See Baxley*, 422 P.2d at 431-32.
45. 960 P.2d 590 (Alaska 1998).
46. *See id.* at 594-95.
47. *See id.* at 597.

occupational disability benefits.[48] In order to receive occupational disability benefits, Williams was incorrectly required by the Board to prove that her disabling condition was permanent, instead of "presumably permanent," as required by Alaska Statutes section 39.35.680(26).[49] Further, the superior court did not have to defer to the Board's decision that a tie vote of its members effectively affirms the decision under review.[50] The Board's practice of affirming on tie votes was an informal and unwritten rule that was not embodied in any agency regulation.[51]

In *Lucas v. Anchorage Police & Fire Retirement Board*,[52] the supreme court held that a municipal retirement board periodically may examine benefit recipients to ensure that their disability continues.[53] The Board awarded Lucas non-occupational disability benefits in 1982, after a psychologist found that Lucas had a psychological disorder that made him incapable of working as a police officer.[54] The Board conducted periodic reviews of Lucas's eligibility after that date, and in 1993 terminated Lucas's benefits on the basis of another psychologist's conclusion that Lucas was no longer disabled.[55] Lucas argued that the Anchorage Municipal Code, which provides for periodic review of recipients whose condition can improve, did not give the Board the power "to revisit original findings of permanent disability."[56] The court determined that Lucas's interpretation was based on the faulty premise that a "permanent disability" is one that lasts forever.[57] The court agreed with the Board's interpretation of a "permanent disability" as one that continues for life or until the recipient is capable of resuming duties.[58] Because a "permanent disability" can be rehabilitated over time, the court found that it was proper for the Board periodically to review permanent disability benefits.[59]

In *McGhee v. State*,[60] the supreme court held that a change in the formal conviction date for a prior driving while intoxicated ("DWI") conviction did not entitle the driver to a shorter license

48. *See id.* at 592.
49. *Id.* at 593-95; *see also* ALASKA STAT. § 39.35.680(26) (Michie 1996).
50. *See Stalnaker*, 960 P.2d at 597.
51. *See id.* at 596-97.
52. 960 P.2d 1151 (Alaska 1998).
53. *See id.* at 1154.
54. *See id.* at 1152-53.
55. *See id.* at 1154.
56. *Id.* at 1155.
57. *See id.*
58. *See id.*
59. *See id.*
60. 951 P.2d 1215 (Alaska 1998).

revocation period for a subsequent DWI conviction.[61] McGhee's driver's license was revoked following his 1994 arrest for DWI.[62] At an administrative hearing, the Department of Motor Vehicles ordered a license revocation period of three years due to McGhee's two prior DWI convictions in 1985 and 1989.[63] Later, at a hearing regarding the 1994 charges, the district court granted McGhee's motion to vacate the 1989 conviction because the court had failed to advise McGhee expressly of his right to a jury trial.[64] McGhee immediately re-entered a no contest plea to the 1989 charge and pled no contest to the 1994 charge as well.[65] McGhee then sought a reduction of the three-year license revocation period, reasoning that because the re-entry of the 1989 no contest plea post-dated the 1994 charge, he now had only one DWI conviction that pre-dated the 1994 charge.[66] The court rejected this reasoning, observing that while the formal dates of convictions may have changed, McGhee remained convicted for the same two offenses at the time he sought the reduction.[67]

D. Miscellaneous

In *Board of Trade v. State Dep. of Labor*,[68] the Alaska Supreme Court held that the Department of Labor ("DOL") could extend the scope of the Little Davis-Bacon Act ("LDBA")[69] to cover "on-site" workers who do not work within the physical footprint of a public construction project,[70] but those workers must work in close proximity to the footprint for the LDBA to be applicable.[71] The LDBA provides that public construction workers must be paid the prevailing wage and requires that workers be "on-site" to qualify for such protection.[72] The DOL promulgated a regulation extending the definition to cover property "adjacent or nearby" the physical footprint of the construction project.[73] DOL

61. *See id.* at 1217.

62. *See id.*

63. *See id.* The period of revocation is 90 days for a first offense, one year for drivers with one DWI conviction within the previous 10 years, and three years for drivers with two DWI convictions within the previous 10 years. *See* ALASKA STAT. §§ 28.15.165(d), 28.15.181(c)(1)-(3), 28.35.030(o)(4)(A) (Michie 1996).

64. *See McGhee*, 951 P.2d at 1217.

65. *See id.*

66. *See id.*

67. *See id.* at 1219.

68. 968 P.2d 86 (Alaska 1998).

69. ALASKA STAT. §§ 36.05.010-110 (Michie 1996).

70. *See Board of Trade*, 968 P.2d at 92.

71. *See id.*

72. *See id.* at 90.

73. *Id.* (quoting ALASKA ADMIN. CODE tit. 8, § 30.910(a) (1996)).

then tried to apply this regulation to workers at a quarry thirteen miles from the site of the Nome airport project.[74] The court held that the regulation was sufficiently consistent with the LDBA to be valid.[75] It compared the LDBA to the federal Davis-Bacon Act and found that the Alaska version eliminated language present in the federal law that required workers to be directly on-site.[76] The court found this persuasive evidence of a legislative intent to broaden the coverage of the LDBA to include workers who would not be covered under the federal act.[77] After holding the regulation to be valid, the court nonetheless found that DOL interpreted its regulation incorrectly by applying it to the Nome quarry workers.[78] The court read the regulation, particularly the language "adjacent and nearby," as establishing a "geographical restriction for determining whether public construction is 'on-site.'"[79] The court recognized that it could not establish a bright-line rule for proximity, and laid out a factor test for the agency to consider in the future.[80]

In *United States v. Bering Strait School District*,[81] the United States Court of Appeals for the Ninth Circuit held that a school district did not qualify for a "state" exemption from the reimbursement provisions of the Indian Health Care Improvement Act.[82] The action was brought by the United States under 25 U.S.C. § 1621(e)(a)[83] for reimbursement of expenses incurred by the federal government in providing free health care to the school district's native employees.[84] Under the statute, health insurers are required to reimburse the United States for health care provided by the government to Native Americans who are covered by an insurance plan, just as the government would reimburse non-governmental providers.[85] The act originally exempted states and their political subdivisions, but later was amended to include only

74. *See id.* at 88.
75. *See id.* at 92.
76. *See id.* at 91.
77. *See id.*
78. *See id.* at 93.
79. *Id.* at 92.
80. *See id.* at 92-93. Some of the factors suggested were the normal meaning of the terms "on-site," "adjacent," and "nearby"; whether the activity could have been carried out at an alternative site closer to the construction; the physical lay of the land; and whether the land was developed or undeveloped. *See id.*
81. 138 F.3d 1281 (9th Cir. 1998).
82. *See id.* at 1284.
83. *See* 25 U.S.C. § 1621(e)(a) (1997).
84. *See Bering Strait School District*, 138 F.3d at 1282.
85. *See id.* at 1283.

states.[86] The court, citing the plain meaning of the statute and recognition of school districts as independent entities, held that school districts do not qualify as "states" under the Act.[87]

III. BUSINESS LAW

In Johnson v. Olympic Liquidating Trust,[88] the Alaska Supreme Court held that in cases where portions of a debt are found to be invalid due to fraud, the debtor may not avoid repaying the portion of the debt that is valid.[89] The appellants claimed that businessman Peter Zamarello fraudulently misrepresented the amount of debt owed to him during some of their business dealings.[90] The validity of some portions of the debt was not disputed.[91] The court acknowledged the general rule that a contract induced by fraud is voidable at the election of the defrauded party.[92] However, when only a severable portion of the contract is voidable due to fraud, that portion should be severed, and the remainder of the contract should be considered.[93] Therefore, appellants had no right to avoid the valid portions of the debt.[94]

In *Munn v. Thornton*,[95] the supreme court held that the parties had entered into an enforceable oral contract, that an implied covenant of good faith and fair dealing had not been breached, that a builder's lien on the home was enforceable, and that the contract did not fall under the Alaska Unfair Trade Practices Act.[96] Munn accepted Thornton's bid to rebuild a fire damaged house, but when costs significantly exceeded projections, Munn refused to pay and Thornton brought suit.[97] The supreme court considered testimony concerning contract formation, documentary evidence, the parties' prior dealings, and their subsequent words and actions. Based on this evidence, the supreme court held that the trial court's decision that Munn and Thornton had entered into an oral cost-plus agreement that provided a flat rate of $30 per hour for labor was not clearly erroneous.[98] Unless a contract expressly pro-

86. *See id.*
87. *See id.* at 1284.
88. 953 P.2d 494 (Alaska 1998).
89. *See id.* at 495.
90. *See id.* at 495-96.
91. *See id.* at 498.
92. *See id.* at 497.
93. *See id.*
94. *See id.* at 498.
95. 956 P.2d 1213 (Alaska 1998).
96. *See id.* at 1215.
97. *See id.* at 1215-17.
98. *See id.* at 1219.

vides that a fiduciary relation exists between a contractor and home owner, the court will not create such a relation.[99] While Thornton was bound by an implied covenant of good faith and fair dealing, no evidence indicated a breach of the covenant.[100] Thornton, as a provider of labor and materials, could enforce a paramount lien against Munn's home in spite of the homestead exemption granted by Alaska Statutes section 09.38.010(a).[101] Finally, the court held that Thornton's monthly billing for labor and expenses could not justify characterizing the contract as an installment sale, and thus the transaction did not fall under the Unfair Trade Practices Act.[102]

In *Pieper v. Musarra*,[103] the supreme court held that a deduction for a non-existent real estate commission should not be included in the calculation of each party's interest upon the dissolution of a partnership.[104] After several years of financial and interpersonal difficulties, Mussara sued Pieper to dissolve their partnership operating a recreational vehicle park.[105] The trial court found that Musarra should be allowed to purchase Pieper's interest and calculated the partnership value.[106] The judge's calculation included a reduction in value due to an estimated real estate commission, despite the lack of evidence that the property would be sold.[107] The court found that without a finding that the property would indeed be sold, it was erroneous to deduct an expense that the parties were not likely to incur.[108]

In *Alaska Tae Woong Venture v. Westward Seafoods, Inc.*,[109] the supreme court held that a jury's award should not have been subjected to remittitur[110] and that the non-breaching party in a contract dispute was entitled to a limited future damages award.[111] Alaska Joint Venture Seafoods ("AJVS") agreed to deliver king crab to Westward Seafoods' new plant in exchange for a guaranteed market for AJVS's pollock catch.[112] Delay in opening the

99. *See id.* at 1220.
100. *See id.* at 1221.
101. *See id.*; ALASKA STAT. § 09.38.010(a) (Michie 1996).
102. *See id.* at 1222; ALASKA STAT. §§ 45.50.471-.561 (Michie 1996).
103. 956 P.2d 444 (Alaska 1998).
104. *See id.* at 447.
105. *See id.*
106. *See id.*
107. *See id.* at 446.
108. *See id.*
109. 963 P.2d 1055 (Alaska 1998).
110. *See id.* at 1062.
111. *See id.* at 1064.
112. *See id.* at 1058.

plant caused AJVS to sustain substantial financial losses.[113] AJVS assigned its claim to Alaska Tae Woong Venture ("ATWV"), which sued Westward to recover the losses.[114] The jury awarded lost profit damages to ATWV in the amount of $568,964, the exact amount of net annualized average cash flow calculated by an expert witness.[115] Westward claimed that the jury had confused average cash flow with lost profit, and the trial judge ordered remittitur.[116] However, because remittitur cannot reduce an award below the maximum possible amount supported by the evidence and another expert testified that the company could have generated up to $700,000 in additional revenues, the trial court erred in ordering remittitur.[117] Furthermore, ATWV was entitled to recover future damages because it had been forced to sell one of its boats as a result of Westward's breach.[118] However, future damages were limited to lost profits claimed prior to the sale of the boat because after the sale, the head of the company voluntarily "wound down" the company's business.[119]

In *State Dept. of Revenue v. OSG Bulk Ships*,[120] the supreme court held that the Internal Revenue Code ("IRC") exemption of foreign shipping income from taxation implicitly is excepted from the Alaska Net Income Tax Act ("ANITA").[121] The Alaska Department of Revenue audited OSG Bulk Ships and assessed it additional taxes for excluding from gross income all income derived from vessels owned by its foreign subsidiaries.[122] OSG protested, arguing that Alaska had incorporated the IRC's exemption on shipping income.[123] Under Alaska Statutes section 43.20.021(a), only those IRC provisions that are not excepted to or modified by ANITA and other tax-related state legislation become incorporated into state law.[124] Although the court found no express exception to the IRC, it found an implied exception.[125] ANITA uses an apportionment factor to limit what foreign shipping income can be attributed to Alaska for tax purposes and prevents multiple taxa-

113. *See id.* at 1059.
114. *See id.* at 1057.
115. *See id.* at 1060.
116. *See id.*
117. *See id.* at 1061-62.
118. *See id.* at 1063.
119. *Id.* at 1064.
120. 961 P.2d 399 (Alaska 1998).
121. *See id.* at 404.
122. *See id.* at 401-02.
123. *See id.* at 402.
124. *See id*; ALASKA STAT. § 43.20.021(a) (Michie 1996).
125. *See id.* at 404.

tion.[126] According to the court, this provision respects federal legislators' intent of avoiding multiple taxation while still preserving a benefit for Alaska.[127] Conversely, allowing an exemption on state as well as federal tax returns would afford double protection to foreign shipping income.[128]

In *Kotzebue Lions Club v. City of Kotzebue*,[129] the supreme court held that charitable gaming activities are subject to city municipal sales tax.[130] Kotzebue amended its sales tax ordinance to expressly subject the Lions Club's pull tab and bingo operations to a municipal sales tax, rather than applying its general sales tax ordinance.[131] The court found that Kotzebue's sales tax ordinance is not preempted by state law because it is intended only to raise money and has no regulatory component.[132]

IV. CIVIL PROCEDURE

A. Costs and Attorney's Fees

In *Dansereau v. Ulmer*,[133] the Alaska Supreme Court held that where public interest litigants prevailed on only one of three issues, the trial court did not abuse its discretion in calculating reasonable attorney's fees.[134] The court upheld the superior court's conclusion that only 430 of the 1,135.7 hours claimed by public interest litigants were reasonable and thus compensable.[135] However, the superior court's apportionment of fees based on the number of issues prevailed upon was reversed.[136] While courts have discretion to apportion fees of prevailing public interest litigants, it should be exercised only in exceptional circumstances.[137]

In *Nielson v. Benton*,[138] the supreme court held that a trial court was within its discretion to award a prevailing party half of that party's attorney's fees under Alaska Civil Rule 82.[139] Rule 82(b)(2) mandates that a judge award twenty percent of attorney's

126. *See id.* at 404-05.
127. *See id.* at 405.
128. *See id.* at 406.
129. 955 P.2d 921 (Alaska 1998).
130. *See id*. at 922.
131. *See id*.
132. *See id*. at 923.
133. 955 P.2d 916 (Alaska 1998).
134. *See id.* at 920.
135. *See id.* at 918-19.
136. *See id.* at 920.
137. *See id.*
138. 957 P.2d 971 (Alaska 1998).
139. *See id.* at 973.

fees necessarily incurred to a prevailing party who recovers no money judgment.[140] However, the trial court may vary this fee award upon consideration of factors that include efforts to minimize fees, reasonableness of claims and defenses, work performed in relation to matter at stake, and other equitable factors.[141] The trial court awarded half of attorney's fees to the defendant based on these factors.[142] In addition, the mere fact that the plaintiff prevailed on some of the defendant's counterclaims was insufficient to reduce the award under an abuse of discretion standard.[143]

In *Walton v. Ramos Aasand & Co.*,[144] the supreme court held that the plaintiff's unsupported claims that he had been overcharged and billed for unnecessary work could not defeat a summary judgment motion, that there was no mutual assent to the terms of a settlement agreement, and that an award of attorney's fees was appropriate.[145] Walton retained Ramos Aasand & Co. ("RACO") to perform accounting work, but refused to pay on the ground that he had been overcharged and billed for unnecessary work.[146] He brought suit to examine RACO's records and RACO counterclaimed for the sum owed by Walton.[147] The court upheld summary judgment against Walton on the issue of his liability to RACO for services performed because RACO offered detailed evidence showing it had billed only for appropriate work performed.[148] No genuine issue of material fact existed because Walton offered no admissible evidence, offering only statements of belief and suspicion.[149] The court also upheld summary judgment against Walton on his claim that RACO had accepted a settlement agreement on RACO's counterclaims.[150] Because RACO believed that the settlement agreement disposed of all claims and Walton only intended to settle RACO's counterclaim, there was never mutual assent to the essential terms of the settlement agreement that RACO initially accepted.[151]

In *Mackie v. Chizmar*,[152] the supreme court held that Alaska Civil Rule 68 penalties do not apply to recoveries obtained through

140. *See* ALASKA R. CIV. P. 82.
141. *See id.*
142. *See Nielson*, 957 P.2d at 973.
143. *See id.*
144. 963 P.2d 1042 (Alaska 1998).
145. *See id.* at 1043.
146. *See id.*
147. *See id.*
148. *See id.* at 1044.
149. *See id.*
150. *See id.* at 1043-44, 1046.
151. *See id.* at 1046.
152. 965 P.2d 1202 (Alaska 1998).

alternative dispute resolution ("ADR").[153] Before trial, Mackie offered to settle Chizmar's claims for $25,000.[154] After ADR proceedings, Chizmar was awarded $15,000, and Mackie sought to recover attorney's fees and costs under Rule 68.[155] The court held that an offer of judgment generally remains valid after appeal and remand,[156] noting that this interpretation furthers the rule's purpose of encouraging settlement and is consistent with its federal analogue.[157] However, the court also held that Rule 68's penalties apply only to those who pursue traditional litigation instead of accepting a reasonable settlement, noting that this comports with the rule's purpose by encouraging dispute resolution methods that avoid litigation.[158]

In *Bobich v. Hughes*,[159] the supreme court held that Alaska Civil Rule 68 penalties do not apply to settlement offers that do not address claims for liquidated damages.[160] Alvie and Wanda Hughes sued Bobich seeking unpaid overtime wages and medical benefits.[161] In 1992, Bobich submitted offers of judgment of $10,000 for Alvie and $20,000 for Wanda "inclusive of all attorney's fees."[162] Three years later, Bobich submitted offers of judgment in the amount of $3,000 to Alvie and $9,000 to Wanda, specifying that it did not include "interest, liquidated damages, costs or attorney's fees."[163] The Hughes accepted and the court awarded attorney's fees.[164] Bobich argued that the award of attorney's fees violates Rule 68 because his original settlement offer exceeded the final judgment.[165] The court held that if the original offer might be read to exclude liquidated damages, it is ambiguous and unenforceable.[166] However, if the original offer is unambiguous, it must be read to include all damages, including liquidated damages.[167] Since the actual award of liquidated damages must be added to the

153. *See id.* at 1203.
154. *See id.*
155. *See id.* at 1203-04.
156. *See id.* at 1204.
157. *See id.* at 1205.
158. *See id.* at 1206.
159. 965 P.2d 1196 (Alaska 1998).
160. *See id.* at 1198.
161. *See id.* at 1197.
162. *Id.*
163. *Id.*
164. *See id.*
165. *See id.* at 1197-98.
166. *See id.* at 1199.
167. *See id.*

Hughes settlement for overtime wages, the awarding of attorney's fees was appropriate.[168]

In *State v. Johnson*,[169] the supreme court held that the superior court retained its jurisdiction to award attorney's fees even where it had relinquished jurisdiction over the property in a civil forfeiture proceeding.[170] The state had filed a complaint seeking civil forfeiture of $66,020 in cash pursuant to Alaska Statutes section 17.30.100.[171] Johnson petitioned for release of the currency because the state had held it for more than forty-eight hours without court authorization in violation of AS 17.30.114(a)(3).[172] Although the superior court ordered the release of the assets on this ground, the state ultimately released the currency to an I.R.S. agent who had a seizure warrant from the district court.[173] Johnson filed a motion for recovery of attorney's fees under Civil Rule 82(b)(3)(C).[174] The supreme court upheld the superior court's award of attorney's fees on the ground that it retained jurisdiction over the state even if it later relinquished its jurisdiction over the property by ordering the release of the currency.[175] The court further held that the designation of Johnson as a prevailing party for purposes of awarding attorney's fees under Rule 82 was not an abuse of discretion where the state was directed to release currency on account of its tardiness, even though the currency was ultimately seized by the federal government.[176]

In *Native Village of Venetie I.R.A. Council v. Alaska*,[177] the United States Court of Appeals for the Ninth Circuit held that the Indian Child Welfare Act ("ICWA")[178] created a federal right that was enforceable by private actions under section 1983, and therefore successful claimants are entitled to an award of attorney's fees.[179] The Native Alaskan villages of Venetie and Fort Yukon received declaratory relief for a claim under the ICWA and sought attorney's fees, an award accorded to relief granted under section 1983.[180] The court noted that even though a federal cause of action could be implied from the ICWA, the ICWA did not have a reme-

168. *See id.*
169. 958 P.2d 440 (Alaska 1998).
170. *See id.* at 443.
171. *See id.* at 441 (citing ALASKA STAT. § 17.30.100 (Michie 1996)).
172. *See id.* at 442 (citing ALASKA STAT. § 17.30.114(a)(3) (Michie 1996)).
173. *See id.*
174. *See id.* at 443 (citing ALASKA R. CIV. P. 82(b)(3)(C)).
175. *See id.*
176. *See id.* at 443-44.
177. 155 F.3d 1150 (9th Cir. 1998).
178. 25 U.S.C. § 1911(d) (1997).
179. *See Venetie*, 155 F.3d at 1153.
180. *See id.* at 1151-52.

dial scheme sufficiently comprehensive to preclude enforcement through section 1983.[181]

B. Summary Judgment

In *Himschoot v. Dushi*,[182] the Alaska Supreme Court held that summary judgment should not have been awarded on a breach of contract claim in the absence of any supporting materials admissible as evidence.[183] Dushi brought suit against Himschoot for the latter's failure to make cash payments agreed to as consideration for signing a noncompete covenant.[184] Dushi moved for summary judgment, submitting a memorandum of law without any supporting documents, relying instead upon assertions of fact in the pleadings and his legal memorandum.[185] The trial court granted the motion,[186] but the supreme court reversed, holding that Dushi was required to submit additional admissible evidence which supported a prima facie case for breach of contract.[187]

In *Parson v. Marathon Oil Co.*,[188] the supreme court held that an ex-wife was wrongfully denied relief under Rule 56(f).[189] Parson sued Marathon Oil for the wrongful death of her ex-husband Wilson, who died of a heart attack on an oil platform owned by Marathon.[190] After Marathon moved for summary judgment, Parson obtained several extensions of the supplemental briefing deadline and finally filed a motion to compel depositions and to reschedule briefing.[191] The trial court implicitly denied her motion by granting summary judgment to Marathon.[192] The supreme court observed, however, that requests made under Rule 56(f) should be granted freely, and should be denied only to lazy or dilatory parties.[193] Parson's motion to compel constituted a Rule 56(f) request, even though Parson did not initially characterize it as such. Parties need not identify specifically Rule 56(f) when seeking a continuance;[194]

181. *See id.* at 1152-53.
182. 953 P.2d 507 (Alaska 1998)
183. *See id.* at 509-10.
184. *See id.* at 508.
185. *See id.*
186. *See id.*
187. *See id.* at 509-10.
188. 960 P.2d 615 (Alaska 1998).
189. *See id.* at 616.
190. *See id.*
191. *See id.* at 618.
192. *See id.*
193. *See id.*
194. *See id.* at 619.

rather it is sufficient to explain "why the party cannot produce facts necessary to oppose summary judgment."[195]

In *Demmert v. Kootznoowoo, Inc.*,[196] the supreme court held that the superior court's conversion of a motion for judgment on the pleadings to a motion for summary judgment was proper, but found reversible error in the subsequent granting of the motion because the opposing party did not receive reasonable opportunity to oppose the converted motion.[197] The plaintiffs in this class action challenged the defendant corporation's practice of paying the travel costs of shareholders employed as longshoremen by a joint venturer of the corporation at a distant site.[198] Defendant Kootznoowoo moved for judgment on the pleadings, arguing that the complaint was in the nature of a derivative action, not discriminatory dividends, and thereby could not constitute a class action.[199] The superior court announced it would treat the motion for judgment on the pleadings as a motion for summary judgment, then ruled that the challenged payments were not dividends.[200] The supreme court found the conversion proper under Alaska Civil Rule 12(c), which requires conversion whenever matters outside the pleadings are presented to and not excluded by the court.[201] However, these circumstances did not trigger a plaintiff's duty to anticipate an unannounced conversion.[202] Rather, the plaintiffs were entitled to a reasonable opportunity to present matters pertinent to the converted motion before the judge ruled on it.[203] Because the plaintiffs received no such opportunity, the supreme court vacated the judgment and remanded the case for consideration as a motion for summary judgment with the attendant Rule 56 requirements.[204]

C. Timeliness of Prosecution and Appeal

In City of Fairbanks v. Amoco Chemical Co.,[205] the Alaska Supreme Court held that a municipality's claims for negligent and intentional misrepresentation did not accrue simultaneously and

195. *See id.* (quoting Gamble v. Northstore Partnership, 907 P.2d 477, 485 (Alaska 1995)).
196. 960 P.2d 606 (Alaska 1998).
197. *See id.* at 607.
198. *See id.*
199. *See id.* at 608.
200. *See id.* at 608-09.
201. *See id.* at 609.
202. *See id.* at 611.
203. *See id.* at 612.
204. *See id.* at 612-13.
205. 952 P.2d 1173 (Alaska 1996).

that the six-year statute of limitations governing claims by municipal corporations overrode the two-year statute of limitations set forth in the Alaska Unfair Trade Practices Act ("AUTPA").[206] Plastic pipes purchased by the city of Fairbanks from Amoco in 1974 began to collapse in 1978.[207] In 1986, the city discovered confidential Amoco documents about the pipes that it believed established Amoco's scienter and indicated intentional misrepresentation.[208] A year later, the city sued Amoco for intentional misrepresentation and violation of the AUTPA.[209] Amoco moved for summary judgment, claiming that the statute of limitations began to run with the collapse in 1978.[210] The federal district court certified questions to the supreme court, asking for its interpretation of Alaska Statutes section 09.10.120,[211] which set the six-year limitations period for suits brought by municipalities,[212] and its relation to the AUTPA.[213]

The supreme court interpreted the limitations statute to begin to toll only when there is actual notice of the elements of the cause of action.[214] Because scienter is an element of intentional misrepresentation but not negligent misrepresentation, it is possible that the period of limitations may toll at a different time for the two causes of action.[215] As to the second question, the supreme court interpreted the six-year limitations statute to override the AUTPA, because the six-year statute specifically applies to municipalities, and the AUTPA has no language specifying that its limitations period applies to municipalities.[216]

In *McDowell v. State*,[217] the supreme court held that when determining which statute of limitations to apply, the nature of the alleged injury, rather than the technical cause of action, controls.[218] After his land was contaminated by an oil spill, McDowell brought suit under Alaska Statutes section 09.10.050, which provides for a six-year statute of limitations for actions alleging trespass upon real property.[219] The State argued that the action actually was one

206. *See id.* at 1175.
207. *See id.*
208. *See id.* at 1176.
209. *See id.*
210. *See id.*
211. ALASKA STAT. § 09.10.120 (Michie 1996).
212. *See id.*
213. *Id.* § 45.50.471.
214. *See City of Fairbanks*, 952 F.2d at 1175.
215. *See id.* at 1178.
216. *See id.* at 1180-81.
217. 957 P.2d 965 (Alaska 1998).
218. *See id.* at 968.
219. *See id.* at 967; *see also* ALASKA STAT. § 09.10.050 (Michie 1996).

for trespass on the case, and consequently was governed by the two-year statute of limitations under AS 09.10.070.[220] The court held that, because common usage of the word "trespass" included all actions that allege an interference with property rights, the six-year limitation should control.[221] The court also expressed a preference for longer statutes of limitations, because the statute of limitations is a disfavored defense and because alleged injuries to property generally involve documentary evidence that remains reliable after the passage of time.[222]

In *Roach v. Caudle*,[223] the supreme court held that the six-year statute of limitations for legal malpractice claims begins to run when a person has sufficient information to prompt an inquiry into a cause of action.[224] Roach hired Caudle to appeal a federal bankruptcy court's decision, but the appeal was dismissed for failure to file a timely notice.[225] Caudle never informed Roach of the dismissal, and Roach did not learn of it until four years later.[226] Roach filed a legal malpractice suit within six years of this discovery but more than six years after the actual dismissal.[227] The court found that the statute of limitations began to run when Caudle discovered his potential cause of action, not when the dismissal actually occurred.[228]

In *Fred Meyer of Alaska, Inc. v. Adams*,[229] the supreme court held that the statute of limitations period was tolled from the date of an initial class complaint.[230] Adams filed a class action suit against Fred Meyer of Alaska, Inc. in 1991 claiming violations of the Alaska Wage and Hour Act.[231] An initial motion to certify three classes was denied without prejudice on the ground that further discovery might justify certification.[232] In 1994, Adams moved for certification of three reformulated classes and certification was granted to two of the classes.[233] Meyer appealed, arguing the two-year statute of limitations period for claims brought in this suit

220. *See McDowell*, 957 P.2d at 969; *see also* ALASKA STAT. § 09.10.070 (Michie 1996).
221. *See McDowell*, 957 P.2d at 970.
222. *See id.* at 971.
223. 954 P.2d 1039 (Alaska 1998).
224. *See id.* at 1041.
225. *See id.* at 1040.
226. *See id.*
227. *See id.*
228. *See id.* at 1041.
229. 963 P.2d 1025 (Alaska 1998).
230. *See id.* at 1026.
231. *See id.*
232. *See id.* at 1027.
233. *See id.*

should be calculated from the date of the second motion for certification because the first motion for certification was denied.[234] The statute of limitations for class action claims are tolled from the date of the filing of the class action until the court denies certification at which point class members may intervene to preserve their rights.[235] The court, however, noted that the superior court did not definitively deny certification to the classes.[236] Rather, because the superior court reserved the possibility of moving for certification after discovery revealed more evidence in its denial of the initial motion to certify, and because the second motion for certification was based on the original class complaint, the class action proceedings were viewed as ongoing.[237] Accordingly, the statute of limitations was properly tolled from the date of the original class complaint.[238]

D. Miscellaneous

In *Mundt v. Northwest Explorations, Inc.*,[239] the Alaska Supreme Court held that an intervenor may exercise the right to a peremptory change of judge even after an initial judgment.[240] Northwest and Ashbrook litigated over some parcels of land, including those that previously had been deeded to Mundt.[241] Northwest and Ashbrook entered into a settlement agreement that quieted title and voided the deed from Ashbrook to Mundt.[242] Mundt sought a change of judge under Alaska Civil Rule 42(c).[243] The court held that Mundt was entitled to seek a change of judge because her interests were different than those of Ashbrook.[244] Nothing in Rule 42(c) prevents intervenors from changing judges even if they have entered the case in the post-judgment stage,[245] and possibilities of prejudice to other parties does not alter the right to change judges.[246]

234. *See id.* at 1028.
235. *See id.*
236. *See id.* at 1029.
237. *See id.*
238. *See id.* at 1030.
239. 963 P.2d 265 (Alaska 1998).
240. *See id.* at 266.
241. *See id.* at 267.
242. *See id.*
243. *See id.*
244. *See id.* at 268.
245. *See id.* at 268-69.
246. *See id.* at 269-70.

In *Gates v. City of Tenakee Springs*,[247] the supreme court held that a properly appointed pro tempore judge was a de facto judge with authority to enter findings on remand, even if he failed to meet state residency requirements.[248] Gates claimed that because Judge Schultz had been a resident of California for three years, his service as an Alaska pro tempore judge was inappropriate.[249] However, the court stated that an acting judge who has colorable authority due to his appointment is a de facto officer whose acts have binding authority if done within the scope and by the apparent authority of his office, even though the judge's actual authority suffers from procedural defect.[250]

In *Sykes v. Melba Creek Mining, Inc.*,[251] the supreme court held that an order precluding the use of expert witnesses is an improper sanction for failure to file witness lists in a timely fashion.[252] Sykes, a defendant in a breach of contract action, wished to call expert and non-expert witnesses to support his defense of incapacity, but he did not meet the trial court's deadlines for filing his witness list.[253] The trial court issued an order precluding the use of expert witnesses, an action that "amounted to a sanction" in the eyes of the supreme court.[254] The supreme court did not question whether Sykes' conduct was sanctionable, but instead decided that the chosen sanction was improper.[255] Typically, a trial court has broad discretion in choosing a sanction, but that discretion is more limited when the sanction's effect is to decide the outcome of a central issue in the case.[256] In these instances, the sanction is proper only if applied to a party that willfully fails to comply with the court order.[257]

In *Parker v. State*,[258] the supreme court held that an Alaskan court may exercise personal jurisdiction over a nonresident for purposes of a paternity and child support action where that person had engaged in intercourse with an Alaskan resident while in Alaska.[259] Parker, a California resident, challenged an Alaskan court's exercise of personal jurisdiction over him in a suit con-

247. 954 P.2d 1035 (Alaska 1998).
248. *See id.* at 1039.
249. *See id.* at 1037.
250. *See id* at 1038.
251. 952 P.2d 1164 (Alaska 1998).
252. *See id.* at 1171.
253. *See id.* at 1166.
254. *Id.* at 1169.
255. *See id.* at 1171.
256. *See id.* at 1169.
257. *See id.*
258. 960 P.2d 586 (Alaska 1998).
259. *See id.* at 588-89.

cerning a child he conceived with an Alaskan resident while stationed in Alaska with the coast guard.[260] The court found specific jurisdiction because Parker purposefully had directed his activities at a resident of the court's state, and he therefore should have anticipated possible litigation resulting from those activities.[261]

In *Tope v. Christianson*,[262] the supreme court held that an environmental remediation claim not preserved in a prior bankruptcy proceeding was barred by res judicata.[263] Tope Equipment Company became delinquent on a promissory note to Christianson for two property lots on which leaking storage tanks had been discovered.[264] Christianson sued for the amount owed on the note, while Tope sought environmental remediation costs in a counterclaim.[265] Subsequently, Tope filed for bankruptcy.[266] The bankruptcy action involved the same parties as the remediation claim, and the court found that the confirmation of a reorganization plan that concluded the bankruptcy action constituted a final judgment.[267] The remediation claim and the bankruptcy action both arose out of the same transaction involving the same factual issues: The date of property purchase, price, condition of the land at the time of purchase, and knowledge of the tanks.[268] Furthermore, policy reasons supported the decision that res judicata bars raising the remediation claim after the bankruptcy proceedings: "Adequate information regarding the assets of the estate in the plan of reorganization and disclosure statement is important to creditors who vote on the plan."[269]

In *Christensen v. NCH Corp.*,[270] the supreme court held that an attorney's submission of a document listing categories of withheld documents provided the plaintiff with sufficient notice of the nature of the documents and the basis for withholding them. The court also held that no grounds justify requiring a court to conduct a more extensive *in camera* review of the withheld documents and that no genuine issues of material fact existed as to whether defendants intentionally interfered with an employee's medical treatments in regard to work related injuries.[271] Christensen had diffi-

260. *See id.* at 587.
261. *See id.* at 588.
262. 959 P.2d 1240 (Alaska 1998).
263. *See id.* at 1241.
264. *See id.*
265. *See id.*
266. *See id.*
267. *See id.* at 1243.
268. *See id.* at 1244.
269. *Id.*
270. 956 P.2d 468 (Alaska 1998).
271. *See id.* at 473-74, 476.

culties getting authorization for back surgery following a work-related back injury and alleged that his employer and insurer conspired to delay medical treatment and that his insurer's attorney impeded discovery.[272] The court found that the attorney's submission of a list of document categories withheld from discovery satisfied the superior court's demand that a list of withheld documents be supplied.[273] Further, no grounds supported the contention that the superior court was required to make a more extensive *in camera* review of the withheld documents than it did or that it should have ordered disclosure of the withheld documents.[274] Although Christensen's insurer did contact some of Christensen's examining physicians, that was insufficient to support a claim of intentional interference with his medical treatment.[275]

In *Collins v. Arctic Builders*,[276] the supreme court held that a judge must notify a pro se litigant of the specific defects in his notice of appeal and provide an opportunity to remedy these defects.[277] The court reaffirmed previous holdings that pro se litigants should be held to less stringent standards than lawyers.[278] Furthermore, the court recognized a distinction between a pro se litigant who files defective materials and one who files none at all.[279] Where pro se litigants have failed to file at least a defective pleading, judges are not required to warn them on aspects of procedure.[280]

In *Moudy v. Superior Court*,[281] the Alaska Court of Appeals held that the attorney-client privilege did not shield a lawyer from divulging whether she or other lawyers in her office conversed with the client regarding his trial date.[282] The superior court asked Moudy, an assistant public defender, whether she or other lawyers in the public defender's office informed her client about the trial date, which he missed.[283] Moudy refused to answer, invoking the attorney-client privilege, and was found to be in contempt.[284] The court of appeals rejected Moudy's claim of privilege on two separate grounds. First, the court held that a conversation regarding

272. *See id.* at 471, 473.
273. *See id.* at 473.
274. *See id.* at 474.
275. *See id.* at 475.
276. 957 P.2d 980 (Alaska 1998).
277. *See id.* at 982.
278. *See id.* (citing Breck v. Ulmer, 745 P.2d 66 (Alaska 1987)).
279. *See Collins*, 957 P.2d at 983.
280. *See id.* at 982 (citing Bauman v. State, 768 P.2d 1097 (Alaska 1989)).
281. 964 P.2d 469 (Alaska Ct. App. 1998).
282. *See id.* at 471.
283. *See id.* at 469-70.
284. *See id.*

the date of trial is not a "confidential conversation made for the purpose of facilitating the rendition of professional legal services to the client."[285] Second, the court held that the privilege does not protect a lawyer from divulging information about the fact of whether a conversation occurred.[286]

V. CONSTITUTIONAL LAW

A. Due Process

In *State v. Bowen*,[287] the Alaska Supreme Court held that the Alaska Personnel Act ("APA") does not entitle a terminated Alaska National Guard employee to a pretermination hearing, but the due process clause of the Alaska Constitution does require such a hearing.[288] Bowen claimed that he was deprived of a property interest in full severance pay plus a liberty interest in his reputation and opportunity for future employment after he was terminated from the Alaska National Guard.[289] Bowen argued that a pretermination hearing was required by both the APA,[290] which provides certain protections to terminated state employees, and the due process clause of the Alaska Constitution, which provides that "no person shall be deprived of life, liberty or property without the due process of law."[291] While the court found that Bowen was a state employee, it did not find that this conferred APA protection, because Alaska Statutes sections 26.05.340 and 26.05.060 specify that Alaska National Guard employees are subject to federal laws and regulations.[292]

Turning to the constitutional issue, the court agreed that Bowen was deprived of a liberty interest in his reputation.[293] The court was persuaded that "every time [Bowen] seeks future employment or attempts to pursue his chosen profession[,] . . . he may be obliged to explain why a previous termination of employment was for acts of 'misconduct.'"[294] It found that "misconduct" was a

285. *Id.* at 470 (quoting ALASKA R. EVID. 503).
286. *See id.* at 471.
287. 953 P.2d 888 (Alaska 1998).
288. *See id.* at 901.
289. *See id.* at 891.
290. *See* ALASKA STAT. § 39.25.010 (Michie 1996).
291. *See Bowen*, 953 P.2d at 891; ALASKA CONST. art. I, § 7 (1997).
292. *See id.* at 899-900; *see also* ALASKA STAT. §§ 26.05.340, 26.05.060 (Michie 1996).
293. *See Bowen*, 953 P.2d at 901.
294. *Id.* at 900.

sufficiently stigmatizing reason for termination to implicate a liberty interest triggering due process protection.[295]

In *Leisnoi, Inc. v. Stratman*,[296] the supreme court held that the superior court was responsible for providing the hearing procedures and due process required by a lease administered by a native village corporation.[297] Stratman held a grazing lease for land originally owned by the federal government but eventually conveyed to Leisnoi, Inc., the corporation for the Native Village of Woody Island.[298] Although Stratman's rights under the federal grazing lease were maintained in the conveyance document, Leisnoi assumed the duty of administering the lease.[299] Accordingly, when Leisnoi sought a writ of forcible entry and detainer against Stratman based on lease violations, the superior court dismissed, finding that the lease could not be terminated without providing due process.[300] The supreme court remanded, finding that Stratman's due process rights under the Alaska Constitution could be met by providing a hearing before the superior court regarding whether Leisnoi may properly end the lease.[301]

B. Double Jeopardy

In *State v. Esmailka*,[302] the Alaska Court of Appeals held that where a convicted criminal defendant challenges the constitutionality of an administrative penalty arising out of the same offense, the proper remedy may be revocation of the penalty, but may not be reversal of the criminal conviction.[303] Esmailka was arrested and eventually convicted of underage consumption of alcohol.[304] In addition to the normal criminal penalty for this offense (a fine of $100 or more), the Department of Public Safety is authorized to revoke the offender's driver's license or, as in Esmailka's case, issue an order preventing the offender from obtaining a license.[305] Esmailka claimed that the administrative penalty violated the double jeopardy clauses of the state and federal constitutions and argued that her conviction should be overturned.[306] The court

295. *See id.* at 901.
296. 960 P.2d 14 (Alaska 1998).
297. *See id.* at 17-18.
298. *See id.* at 16.
299. *See id.*
300. *See id.*
301. *See id.* at 18.
302. 961 P.2d 432 (Alaska Ct. App. 1998).
303. *See id.* at 435.
304. *See id.* at 433.
305. *See id.*
306. *See id.*

found her position to be logically flawed, because one cannot challenge the legitimacy of one penalty while asking for the revocation of another penalty whose legitimacy is not questioned.[307] In doing so, the court disavowed its earlier suggestion in *Rexford v. State*[308] that an unconstitutional administrative revocation of a person's driver's license would immunize the offender from prosecution for the underlying criminal offense.[309]

C. Right to Jury Trial

In *State v. Dutch Harbor Seafoods Ltd.*,[310] the Alaska Supreme Court held that entities charged with strict liability commercial fishing violations were not entitled to a jury trial.[311] Dutch Harbor was charged with unlawful failure to register a vessel under 5 Alaska Administrative Code 28.020(a) and (c) and unlawful possession of fish taken by an unregistered vehicle under code section 39.197.[312] The court held that Dutch Harbor was not entitled to a jury trial under Article I, section 11 of the Alaska Constitution because strict liability fishing violations are not criminal prosecutions.[313] Applying the three-part test of *Baker v. Fairbanks*,[314] the court concluded that neither the fine nor the connotation of criminal conduct was sufficient to qualify it as a criminal prosecution.[315] In addition, the court held that prosecutions for strict liability commercial fishing violations are not civil cases, so the right to a jury trial under Article I, Section 16 of the Alaska Constitution did not apply.[316]

D. Miscellaneous

In *In re K.A.H.*,[317] the Alaska Supreme Court held that lawyers cannot advance living expenses to their clients and that this rule does not unconstitutionally interfere with a litigant's access to the courts.[318] Markham, the appellant, represented the estate of the minor child K.A.H. in a wrongful death suit.[319] After the case

307. *See id.* at 435.
308. 941 P.2d 906 (Alaska Ct. App. 1997).
309. *See Esmailka*, 961 P.2d at 436.
310. 965 P.2d 738 (Alaska 1998).
311. *See id.* at 739.
312. *See id.* at 739-40.
313. *See id.* at 743.
314. 471 P.2d 386 (Alaska 1970).
315. *See Dutch Harbor*, 965 P.2d at 742-43.
316. *See id.* at 744.
317. 967 P.2d 91 (Alaska 1998).
318. *See id.* at 92.
319. *See id.*

was settled, Markham unsuccessfully applied to the court to use the settlement to reimburse himself for loans he paid to K.A.H.'s mother for living expenses.[320] The lower court ruled that Alaska Rule of Professional Conduct 1.8(e) prohibits the advance, and the supreme court agreed.[321] The court found the rule's language to be "unambiguous" on the subject of living expenses.[322] Since the loans did not fit into one of the exceptions to Rule 1.8(e)'s prohibition of financial assistance, they were forbidden.[323] The court then held that Rule 1.8(e) does not unconstitutionally deny a plaintiff's access to the courts and that no fundamental family concern was at stake.[324]

In *Sonneman v. State*,[325] the supreme court upheld the constitutionality of a statutory amendment that ended the practice of rotating the order of candidates' names on election ballots and replaced it with a random and fixed determination of the order of names.[326] A citizen-taxpayer claimed that the amendment impermissibly burdened the right to vote and violated the state constitutional requirement that elections be based on the will of the people.[327] In analyzing the right to vote claim, the court declined to use strict scrutiny because the state "only impose[d] a minimal, reasonable, and nondiscriminatory burden" on the right to vote.[328] The court concluded that the state's interest in reducing the cost of printing ballots and preventing voter confusion was legitimate and important, and thus did not impermissibly burden the right to vote.[329] With respect to the second claim, the court rejected the citizen-taxpayer's argument that allocating full positional advantage to one candidate could determine the outcome of an election and would thwart the concept of election by the will of the people.[330] The court found that the concept of the people's will "encompasse[d] all who vote, those who are careless and uninformed as well as those who are more thoughtful and knowledgeable."[331]

320. *See id.*
321. *See id.* at 94.
322. *Id.* at 93.
323. *See id.* at 93.
324. *See id.* at 94-95.
325. 969 P.2d 632 (Alaska 1998).
326. *See id.* at 634.
327. *See id.*
328. *Id.* at 639.
329. *See id.* at 640.
330. *See id.*
331. *Id.* at 640-41.

In *Kenai Peninsula Borough v. Arndt*,[332] the supreme court held that post-assessment changes in the ownership, value, and situs of taxed property "require[d] no change in tax for the corresponding assessment year."[333] Arndt owned a boat that he sold in May 1991.[334] Because he owned the boat as of the assessment date, the borough sent him a tax bill for the full year.[335] Arndt refused to pay the bill and argued that the borough's failure to apportion violated the Due Process Clause and the Commerce Clause of the United States Constitution.[336]

The court held that the Due Process Clause only bars taxation of personal property that is permanently outside the jurisdiction of the taxing authority and does not require states to limit their tax assessments to the portion of the year in which the property is located within the boundaries of the state.[337] The assessment at issue was governed by Alaska Statutes section 29.45.110, which requires assessment to be based on property values and ownership as of January 1 of any tax year.[338] Consequently, the tax "accrues" in full on January 1 of each year and apportionment is not required.[339]

The court noted that the limitations to the tax system imposed by the Commerce Clause require only that a tax not discriminate against interstate commerce, and that this doctrine is violated only by a showing that property taxed in one jurisdiction could be taxed elsewhere.[340] The tax assessment at issue did not violate the Commerce Clause because it retained the need to establish a valid tax situs, a nexus between the property and the borough.[341] Furthermore, the threat of multiple taxation is minimized because a similar rule for tax assessment prevails nationwide.[342]

In *Laborers Local # 942 v. Lampkin*,[343] the supreme court held that Fairbanks North Star Borough's decision to require successful bidders on a construction project to enter into a project labor agreement ("PLA") with local labor unions did not violate the Alaska Constitution or the Borough procurement code.[344] The

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332. 958 P.2d 1101 (Alaska 1998).
333. *Id.* at 1105.
334. *See id.* at 1102.
335. *See id.*
336. *See id.*
337. *See id.* at 1103.
338. *See id.* (citing ALASKA STAT. § 29.45.110 (Michie 1996)).
339. *See id.* at 1104.
340. *See id.* at 1103 (citing Gulf Oil Corp. v. State, 755 P.2d 372, 383 n.33 (Alaska 1998)).
341. *See id.* at 1104.
342. *See id.* at 1105.
343. 956 P.2d 422 (Alaska 1998).
344. *See id.* at 438.

Borough undertook a massive renovation of a local high school and included the PLA as a bid specification for the project.[345] First, the court held that even if the PLA impaired the rights of nonunion workers to engage in economic endeavors, it did not violate their equal protection rights under the Alaska Constitution.[346] Using a sliding scale approach to evaluate this purported loss of equal protection rights, the court identified an important governmental interest in ensuring that the project be completed on schedule and within budget, particularly since the project involved a school and its effect on 1,400 students.[347] The court was satisfied with the nexus between that interest and the challenged PLA.[348]

The court also held that the PLA did not violate the Borough's procurement code.[349] The procurement code expresses a policy of encouraging "maximum practicable competition."[350] However, such a policy does not require "unfettered competition."[351] To the contrary, the procurement code observes that encouraging maximum open competition must be weighed against satisfying the borough's minimum needs, which can include school construction with the least disruption possible.[352] The question became whether the Borough had a reasonable basis to use the PLA, and the court found that it did due to the unique issues raised by the school construction project.[353]

In *Methvin v. Bartholomew*,[354] the supreme court held that an employee's letters addressing personal conflicts with his supervisors did not raise issues of public concern and thus did not implicate First Amendment protections.[355] Methvin, an employee of the State Department of Transportation and Public Facilities, wrote letters to the Governor and Lieutenant Governor of Alaska recommending that his supervisors be fired.[356] Methvin's claim, upon being terminated, that he had engaged in protected whistleblower activity was discounted because the court found the letters to be part of an internal office dispute.[357]

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345. *See id.* at 427.
346. *See id.* at 432.
347. *See id.* at 429-31.
348. *See id.* at 431.
349. *See id.* at 432.
350. *Id.* (quoting Fairbanks North Star Borough Code § 16.35.010 (1993)).
351. *Id.* at 434.
352. *See id.*
353. *See id.* at 435.
354. 971 P.2d 151 (Alaska 1998).
355. *See id.* at 156.
356. *See id.* at 153.
357. *See id.* at 155.

In *Vaska v. State*,[358] the Alaska Court of Appeals held that where a judge's law clerk is found to have either actual bias or a reasonable appearance of bias with regard to the outcome of a case, any of the court's rulings in which that clerk is shown to have participated significantly are presumptively invalidated.[359] Vaska appealed a conviction for sexual abuse of a minor, claiming the judge's rulings were tainted by a law clerk who was discovered both to have passed a memorandum expressing partisanship to the district attorney and to have had sexual relations with an assistant district attorney.[360]

VI. CRIMINAL LAW

A. Constitutional Protections

1. *Search and Seizure.* In *Cowles v. State*,[361] the Alaska Court of Appeals held that a theater box office does not provide a reasonable expectation of privacy to someone who works there.[362] Cowles, a box office manager at the University of Alaska-Fairbanks, was convicted of theft for taking funds from the box office for her personal use.[363] Acting on a tip from university officials, police installed video cameras inside the box office that taped Cowles committing the theft.[364] Cowles argued that the use of video equipment was an unreasonable search violating Article I, Section 14 and Article I, Section 22 of the Alaska Constitution.[365] To determine whether Cowles was protected from unreasonable government intrusion under the circumstances, the court applied the test established in *State v. Page*,[366] which protects a person's privacy only when that person's subjective expectation of privacy is reasonable.[367] The court gave two reasons for its holding that the box office did not provide a reasonable expectation of privacy. First, the box office had a large window in front and a door that was usually open, and was frequented by other employees throughout the day.[368] Second, the box office was a place where

358. 955 P.2d 943 (Alaska Ct. App. 1998).
359. *See id.* at 947.
360. *See id.* at 944.
361. 961 P.2d 438 (Alaska Ct. App. 1998).
362. *See id.* at 443.
363. *See id.* at 441.
364. *See id.*
365. *See id.* at 442.
366. 911 P.2d 513 (Alaska Ct. App. 1996).
367. *See Cowles*, 961 P.2d at 442 (citing *Page*, 911 P.2d at 515-16).
368. *See id.* at 443-44.

money was exchanged and stored, and these activities often are accompanied by security measures, including videotaping.[369]

In *State v. Prater*,[370] the court of appeals held that an investigative stop made by a police officer in reliance upon a dispatcher's bulletin is justified if the dispatcher who broadcast the information had a reasonable suspicion of imminent public danger justifying the stop.[371] Officers had stopped Prater after hearing from a dispatcher of a Report Every Drunk Driver Immediately ("REDDI") report regarding a driver in a car whose description matched that of Prater's.[372] The officers making the stop did not possess additional information known to the dispatcher, including that Prater was driving with a suspended license and that he had previous arrests for driving while intoxicated.[373] The court held that information known by a police dispatcher may be imputed to a police officer who is making an arrest, even if the police are not part of the same "police team" as the arresting officer.[374]

In *Snider v. State*,[375] the court of appeals held that a police officer has probable cause to conduct a warrantless search of a person for narcotics where the officer reasonably believed that the person was intoxicated or where a search incidental to the arrest revealed the likelihood that the suspect possessed narcotics.[376] An officer responded to a report that Snider was waving a handgun on a public road and appeared to be hallucinating.[377] Upon arresting Snider for possession of a gun while intoxicated, the officer conducted a search to discover whether Snider possessed any other weapons.[378] During this search, he discovered a crack pipe and a small box that, upon examination, contained crack cocaine.[379] The court held that the discovery of the pipe during the weapons search rendered reasonable a search of Snider's person for drugs incident to the arrest.[380] Alternatively, since the officer's observations of Snider's behavior provided probable cause for the belief that Snider was using cocaine, and since Snider ultimately was arrested for posses-

369. *See id.* at 444.
370. 958 P.2d 1110 (Alaska Ct. App. 1998).
371. *See id.* at 1113 (citing United States v. Hensley, 469 U.S. 221 (1985)).
372. *See id.* at 1111.
373. *See id.*
374. *Id.*
375. 958 P.2d 1114 (Alaska Ct. App. 1998).
376. *See id.* at 1118.
377. *See id.* at 1114-15.
378. *See id.* at 1115.
379. *See id.*
380. *See id.* at 1118.

sion of a weapon while intoxicated, the officer objectively was justified in conducting a drug search.[381]

In *Michel v. State*,[382] the court of appeals held that "no trespassing" signs do not manifest a homeowner's intent to keep away all visitors.[383] The Michels were visited by state troopers acting on a tip that the Michels were growing marijuana.[384] They claimed that the troopers unreasonably intruded on their property, arguing that the "no trespassing" signs posted on their property created a reasonable expectation in their minds that police would not enter their property.[385] The court disagreed, finding guidance from an Alaska Supreme Court decision, *Pistro v. State*.[386] The court interpreted *Pistro* to suggest that "no trespassing" signs would not, by themselves, insulate homeowners from all unsolicited visits by the public; specifically, they would not exclude visitors who enter the property for a legitimate purpose.[387]

In *State v. James*,[388] the court of appeals held that the conditions of a probationer's agreement authorized warrantless home searches by the probation officer.[389] James's probation agreement stated that "[u]pon the request of a probation officer, [James must] submit to a search of [his] . . . residence . . . for the presence of contraband."[390] After smelling marijuana from within James's home, James's probation officer conducted a home search over James's objection.[391] The court rejected James's argument that if the probationer breaks the promise to waive all Fourth Amendment rights, then the probation can be revoked, but no warrantless search can be conducted.[392] Instead, the court found that the provision authorizes probation officers to conduct searches even if the probationer refuses to consent at the time of the search.[393]

2. *Miscellaneous.* In *Titus v. Alaska*,[394] the Alaska Supreme Court held that jury deliberations involving pre-existing juror knowledge of facts not presented at trial concerning an alleged

381. *See id.*
382. 961 P.2d 436 (Alaska Ct. App. 1998).
383. *See id.* at 438.
384. *See id.* at 437.
385. *See id.*
386. 590 P.2d 884 (Alaska 1979).
387. *See Michel*, 961 P.2d at 437.
388. 963 P.2d 1080 (Alaska Ct. App. 1998).
389. *See id.* at 1084.
390. *Id.* at 1081.
391. *See id.*
392. *See id.* at 1083.
393. *See id.*
394. 963 P.2d 258 (Alaska 1998).

crime may constitute extraneous prejudicial information for purposes of finding juror misconduct.[395] Titus was convicted of sexual assault by a jury drawn from a small community in which he was generally known.[396] Jury deliberations involved discussion of his drinking habit, an issue not raised at trial, and several jurors suggested Titus was drinking when the alleged crime occurred.[397] Alaska Rule of Evidence 606(b) disallows juror testimony about jury deliberations except where such deliberations involved extraneous prejudicial information.[398] The court concluded that the extraneous prejudicial information exception should include "only knowledge of specific facts surrounding the alleged crime and the defendant's connection to it"[399] in order to protect the defendant's constitutional right to confrontation over specific allegations.[400] General knowledge of the defendant or charge does not come within the exception because it would undermine the ability of small communities to hold jury trials.[401] Because it was unclear whether the jurors claimed to know Titus was drinking or were merely speculating based on general knowledge, the court remanded to the superior court for further proceedings.[402]

In *Hosier v. State*,[403] the Alaska Court of Appeals held that a court abuses its discretion when it releases a defendant on bail during a merit appeal if the same defendant would be ineligible for release during a sentence appeal.[404] Hosier challenged the superior court's denial of bail during his merit appeal in accordance with Alaska Statutes section 12.30.040(b),[405] which denies bail in merit appeals following a class A felony conviction.[406] Since he would have been eligible for release on bail if he had filed a sentence appeal, Hosier argued that the law penalizes defendants who file merit appeals in violation of the equal protection clause of the Alaska Constitution.[407]

The court reaffirmed its holding in *Debrova v. State*[408] that, in the absence of a constitutional provision or governing statute, the

395. *See id.* at 255-59.
396. *See id.* at 259.
397. *See id.*
398. *See id.* at 260.
399. *Id.* at 263.
400. *See id.* at 262.
401. *See id.* at 263.
402. *See id.* at 264.
403. 957 P.2d 1360 (Alaska Ct. App. 1998).
404. *See id.* at 1365.
405. ALASKA STAT. § 12.30.040(b) (Michie 1996).
406. *See id.*
407. *See Hosier*, 957 P.2d at 1362.
408. 694 P.2d 157 (Alaska 1985).

judiciary retains its power to declare the common law and promulgate rules to govern litigation.[409] However, the court found that a trial court abuses its discretion and violates equal protection where it exercises its common law power of bail in a manner that treats merit-appeal defendants less favorably than sentence-appeal defendants.[410] Furthermore, AS 12.55.120(c) reflects a legislative intention that defendants who cannot obtain bail during merit-appeals under AS 12.30.040(b) should not gain any advantage by attacking their sentence on appeal.[411] Consequently, when a defendant requests bail release during a sentence appeal, the court must not release the defendant if he would be barred from obtaining bail during a merit appeal.[412]

In *State v. Ladd*,[413] the court of appeals held that Alaska Statutes section 47.12.030(a),[414] requiring juveniles charged with a serious felony but convicted of a lesser offense to prove amenability to juvenile treatment,[415] does not violate the equal protection clause of the Alaska Constitution.[416] Ladd originally was charged with first-degree assault, a felony that placed him within the scope of the statute.[417] He was acquitted of that charge but was convicted of fourth-degree assault, a misdemeanor.[418] Under Alaska juvenile delinquency laws, a juvenile charged with and convicted of fourth-degree assault does not have to prove amenability.[419] The court acknowledged that AS 47.12.030(a) makes a distinction between groups that are similarly situated at the time of sentencing and subjects them to different treatment.[420] However, the court found that juveniles charged with a serious felony may be distinguished because a grand jury made a determination that they probably committed the felony, while those charged only of the lesser offense "never provided reason to believe that they committed one of the serious felonies listed in the statute."[421]

In *Billman v. Anchorage*,[422] the court of appeals held that the calculation for Alaska's speedy trial rule, Criminal Rule 45, re-

409. *See Hosier*, 957 P.2d at 1362.
410. *See id.* at 1364.
411. *See id.* at 1365.
412. *See id.*
413. 951 P.2d 1220 (Alaska Ct. App. 1998).
414. ALASKA STAT. § 47.12.030(a) (Michie 1996).
415. *See id.*
416. *See Ladd*, 951 P.2d at 1226.
417. *See id.* at 1221.
418. *See id.*
419. *See id.* at 1221-22.
420. *See id.* at 1222.
421. *Id.* at 1223.
422. 954 P.2d 1380 (Alaska Ct. App. 1998).

started the day following the court order to return jurisdiction over the case to the district court.[423] That order came in the aftermath of *State v. Zerkel*,[424] which held that administrative suspension or revocation of a driver's license does not constitute a punishment for double jeopardy purposes.[425] The court order instructed that all cases held in abeyance pending a final decision in *Zerkel* should be remanded to the trial courts.[426] Restarting the speedy trial clock at day one, upon remand, resulted in Billman being scheduled for trial within the time limits of Rule 45.[427]

In *Mustafoski v. State*,[428] the court of appeals held that Alaska Criminal Rule 45's speedy trial clock started anew when the defendant announced his renewed intention to go to trial rather than enter a plea.[429] For purposes of Rule 45, the court drew no distinction between a defendant withdrawing a formally entered plea and a defendant merely announcing that he no longer intended to change his plea.[430] In either case, the Rule 45 clock should restart at day one.[431]

In *Jacobs v. State*,[432] the court of appeals held that use of a paid informant does not violate due process, even when the informer's fee is contingent upon the outcome of the case.[433] The court drew a distinction between paying an informant to provoke criminal activity, as opposed to paying an informant to investigate ongoing criminal activity by people already known to have a willingness to break the law, and placed Jacobs's situation in the latter category.[434] With respect to informant credibility, the court preferred to leave the matter to the jury and pointed to the traditional safeguard of cross-examination.[435]

In *Nao v. State*,[436] the court of appeals upheld the constitutionality of a statute which declares that delinquency laws do not apply to sixteen- and seventeen-year-olds who commit serious felonies.[437]

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423. *See id.* at 1383.
424. 900 P.2d 744 (Alaska Ct. App. 1995).
425. *See id.*
426. *See Billman*, 954 P.2d at 1382.
427. *See id.* at 1383.
428. 954 P.2d 1042 (Alaska Ct. App. 1998).
429. *See id.* at 1044.
430. *See id*.
431. *See id*.
432. 953 P.2d 527 (Alaska Ct. App. 1998).
433. *See id.* at 532.
434. *See id.* at 531.
435. *See id.* at 532-33.
436. 953 P.2d 522 (Alaska Ct. App. 1998).
437. *See id.* at 524.

Nao claimed that Alaska Statutes section 47.12.030(a)[438] is unconstitutional because it was procedural and conflicted with the Delinquency Rules promulgated by the Alaska Supreme Court.[439] The court first rejected the notion that the statute was procedural. It ruled that the statute was substantive in that it altered the scope of the Delinquency Rules, and further stated that "it is the legislature's province to decide which prosecutions shall be governed by the normal criminal laws and which shall be governed by the juvenile delinquency laws."[440] As a substantive statute affecting the scope of the rules, AS 47.12.030(a) does not conflict with the rules, which themselves declare that their coverage may be modified by other laws.[441]

In *Mute v. State*,[442] the court of appeals held that Mute's relationship with his court-appointed attorney had not deteriorated to the point where the attorney was incapable of effective communication or objective decision-making.[443] Furthermore, even if the relationship suffered a breakdown, it did not invalidate Mute's waiver of his right to testify.[444] The decision whether to testify or remain silent at trial resides with the defendant.[445] To this end, the Alaska Supreme Court established the *LaVigne* rule,[446] which requires the trial judge to advise the defendant personally that regardless of the defense attorney's advice, the choice whether to testify ultimately rests with the defendant.[447] The court acknowledged the conundrum that arises from requiring an on-record, voluntary waiver of the right to testify, namely what to do with defendants who are not willing to relinquish knowingly either the right to testify or the right to remain silent.[448] Judges cannot compel defendants to testify.[449] To avoid this conundrum, the court concluded that a judge need not question the defendant closely about his decision not to testify or order the defendant to testify, even if the judge is convinced that the defendant's decision is ill-advised.[450] The record below showed that Mute understood that he held this

438. ALASKA STAT. § 47.12.030(a) (Michie 1996).
439. *See Nao*, 953 P.2d at 524.
440. *Id.* at 525.
441. *See id.* at 526.
442. 954 P.2d 1384 (Alaska Ct. App. 1998).
443. *See id.* at 1385.
444. *See id.* at 1386.
445. *See id.*
446. *See* LaVigne v. State, 812 P.2d 217 (Alaska 1991).
447. *See* Mute, 954 P.2d at 1386.
448. *See id.* at 1387.
449. *See id.*
450. *See id.*

choice, and in fact he affirmatively asserted his right not to testify, so his underlying reasons were immaterial.[451]

In *Nathan v. Municipality of Anchorage*,[452] the court of appeals held that a deaf defendant knowingly waived his right to an independent blood test after being arrested for driving while intoxicated.[453] Even though Nathan read at a third-grade level and had only limited ability to read lips,[454] he possessed a basic understanding of English. Additionally, when presented with a pen and paper, Nathan made no indication that he did not understand, nor did he request assistance.[455] Because the lower court found that effective communication took place between Nathan and the arresting officers, no violation of the Americans with Disabilities Act ("ADA") occurred as a result of the absence of an interpreter to accommodate Nathan's hearing and speech impairment.[456] The court further noted that even if Nathan could establish an ADA violation, exclusion of the breath test results would not be an appropriate remedy.[457]

In *Newby v. Alaska*,[458] the court of appeals held that where the claim concerns a conflict of interest between clients in unrelated cases, the defendant has the burden of proving counsel had a conflict of interest and that the conflict affected representation.[459] Newby appealed a murder conviction alleging conflict of interest and ineffective assistance of counsel.[460] His attorney, Madson, rented office space to a second attorney, Covell, who stood in for Madson on a number of occasions during Newby's case in exchange for rent deductions.[461] Covell, in turn, represented Wood who was suing the state for possession of money kept on the premises of the man Newby was charged with murdering.[462] Newby claimed Madson and Covell neglected defense theories that might have had the effect of implying that the money on the victim's premises did not belong to Wood.[463] Because Newby's conflict of interest claim involved clients in unrelated cases, even where that conflict was brought explicitly to the trial judge's attention, *LaPi-*

451. *See id.* at 1388.
452. 955 P.2d 528 (Alaska Ct. App. 1998).
453. *See id.* at 532.
454. *See id.* at 529.
455. *See id.* at 531.
456. *See id.* at 532.
457. *See id.* at 533.
458. 967 P.2d 1008 (Alaska Ct. App. 1998).
459. *See id.* at 1014.
460. *See id.* at 1009.
461. *See id.*
462. *See id.* at 1010.
463. *See id.*

erre v. Alaska[464] determines the allocation of the burden of proof.[465] Thus, Newby had to show that his lawyer had a conflict of interest with Wood via Covell and that this conflict affected the representation Newby received.[466]

Although the court found that the details of the relationship between Madson and Covell appeared to indicate they did not constitute a firm, Newby's claims failed for other reasons as well.[467] The record showed that Madson had considered and investigated all the theories Newby felt were neglected before deciding upon a defense strategy.[468] There was no indication of a potential conflict of interest.[469] Similarly, a claim of ineffective assistance of counsel failed because nothing suggested Madson did not act competently or make sound tactical choices in defending Newby.[470]

In *Laverty v. State*,[471] the court of appeals held that neither the collateral estoppel doctrine nor double jeopardy rights prohibited Texas's second attempt to extradite a fugitive from Alaska.[472] Texas sought to extradite Laverty from Alaska for violating his conditions of probation on a conviction for driving while intoxicated.[473] An Alaska district court judge found the extradition request to be deficient and granted Laverty's application for habeas corpus after 165 days in custody.[474] Laverty was later arrested and charged in Alaska for driving while intoxicated.[475] Texas filed new extradition documents, which Laverty challenged on two grounds: collateral estoppel and double jeopardy.[476] Laverty's collateral estoppel argument failed because the district court's grant of Laverty's habeas corpus application, based merely on deficient extradition papers, was an interlocutory order, rather than a final judgment, and therefore not subject to collateral estoppel.[477] The double jeopardy claim also failed because such claims can be made only after a trial on the merits.[478]

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464. 734 P.2d 1997 (Alaska Ct. App. 1987).
465. *See Newby*, 967 P.2d at 1014.
466. *See id.*
467. *See id.* at 1015.
468. *See id.* at 1016.
469. *See id.* at 1015.
470. *See id.* at 1016.
471. 963 P.2d 1076 (Alaska Ct. App. 1998).
472. *See id.* at 1078-79.
473. *See id.* at 1077.
474. *See id.*
475. *See id.* at 1077-78.
476. *See id.* at 1078.
477. *See id.* at 1079.
478. *See id.*

B. General Criminal Law

1. *Criminal Procedure.* In *Pearce v. State*,[479] the Alaska Court of Appeals held that a trial court judge abused his discretion in refusing to grant the defense attorney's request to reopen peremptory challenges before jurors had been sworn.[480] After each side waived its remaining peremptory challenges and accepted the twelve selected jurors, but before the jurors had been sworn, the defense attorney received an anonymous tip alleging that one juror had been dishonest during voir dire.[481] Although the court acknowledged a trial judge's discretion over whether to allow an attorney to retract waiver of remaining peremptory challenges, it stated that a judge should release attorneys from such waivers if there is good cause for doing so.[482] The court found that the defense attorney acted in good faith and for good cause in seeking to reopen the peremptory challenges.[483] Furthermore, reopening the peremptory challenges would not have disrupted or delayed the trial.[484]

In *Bailey v. Municipality of Anchorage*,[485] the court of appeals held that receipt of the "Order and Conditions of Release" form at an arrestee's initial appearance before a magistrate does not constitute a charging document and therefore does not trigger the running of time for trial.[486] Although Bailey was arrested and brought before a magistrate who signed an "Order and Conditions of Release" form, a criminal complaint was not filed by the Municipality of Anchorage for over two months.[487] Bailey argued that the form constituted a charging document under Criminal Rule 45(c)(1)[488] and therefore triggered the running of time for bringing her to trial.[489] However, the court held that a person's arrest and initial appearance before a magistrate does not trigger the running of time for trial, defining a proper charging document as a "criminal complaint, indictment, information, or citation - a docu-

479. 951 P.2d 445 (Alaska Ct. App. 1998).
480. *See id.* at 447.
481. *See id.* at 446.
482. *See id.* at 447.
483. *See id.*
484. *See id.*
485. 955 P.2d 947 (Alaska Ct. App. 1998).
486. *See id.* at 948.
487. *See id.*
488. *See* ALASKA CRIM. R. 45(c)(1).
489. *See Bailey*, 955 P.2d at 948.

ment that is legally sufficient to initiate a criminal lawsuit and support the ensuing issuance of process."[490]

In *Fathke v. State*,[491] the court of appeals held that a criminal court may not refuse to subpoena finger and palm prints of the employee of a store that was robbed where the evidence could lead to a change in the verdict.[492] Fathke was convicted of robbing a store of $80 and a meatball sandwich even though his palm print did not match the print on the sandwich bag.[493] At trial, the court refused Fathke's motion to subpoena the store clerk who wrapped the sandwich to produce finger and palm prints, so that the prints could be compared with those on the sandwich bag.[494] Fathke argued that if the print on the bag did not belong to the clerk or to himself, then it must belong to an unknown third person.[495] The court of appeals agreed that discovering the prints of a third person on the bag would have reduced the probability that Fathke was the robber.[496] The evidentiary value of unidentified prints heavily outweighed any possible embarrassment to the store clerk or intrusion of her privacy.[497] The court concluded that the evidence could have led to a change in the verdict, noting that there were enough inconsistencies in the state's case that the error was not harmless.[498]

In *Seibold v. State*, [499] the court of appeals held that a defendant is entitled to an instruction on the necessity defense where he presents some evidence in support of its three elements.[500] Seibold had been engaged in a dispute with one of his neighbors immediately following an accident involving their vehicles.[501] During the altercation, the neighbor's wife approached carrying a handgun.[502] Seibold was able to take the weapon from her and he destroyed it on the spot.[503] He was convicted of criminal mischief of the third degree for destroying the handgun after the judge refused to instruct the jury on the necessity defense.[504]

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490. *Id.* at 949.
491. 951 P.2d 1226 (Alaska Ct. App. 1998).
492. *See id.* at 1231.
493. *See id.* at 1227.
494. *See id.* at 1228.
495. *See id.*
496. *See id.* at 1230.
497. *See id.*
498. *See id.* at 1231.
499. 959 P.2d 780 (Alaska Ct. App. 1998).
500. *See id.* at 782 (citing Degler v. State, 741 P.2d 659, 661 (Alaska Ct. App. 1987)).
501. *See id.* at 781.
502. *See id.*
503. *See id.*
504. *See id.* at 782.

To establish a defense of necessity under Alaska law, a defendant must show that he reasonably believed that the charged act was done to prevent a significant evil, that he reasonably believed that no adequate alternative existed, and that the harm caused was not disproportionate to the harm avoided.[505] The court held that a defendant is entitled to a jury instruction on the defense if he presents some evidence in support of each of the three elements.[506] The court also noted that a trial judge should err on the side of giving the instruction so as to avoid a needless appeal where the case for self-defense is weak.[507] The case raised the question of whether it was necessary for Seibold to destroy the weapon in order to avoid the possibility of its use in an assault.[508] Since this turns on the specific facts of the case, the jury should have been allowed to determine the sufficiency of this defense.[509]

In *Kailukiak v. State*,[510] the court of appeals held that a judge's decision to allow a witness to testify by telephone at a pre-trial evidentiary hearing was harmless error.[511] When first suspected of sexual assault, Kailukiak had come in for an interview with a state trooper and a village public safety officer.[512] Kailukiak later sought to have his statements in this interview excluded because he had not been advised of his Miranda rights.[513] The public safety officer was on National Guard maneuvers in Hawaii and could not attend the hearing, but was allowed by the judge to testify by telephone.[514]

Telephone participation by witnesses is allowed at omnibus hearings, bail hearings, at trial with the consent of the defendant and the prosecution, and in other hearings at the discretion of the court.[515] The court held that the evidentiary hearing constituted an "omnibus hearing" for purposes of the rule and that the superior court was not authorized to allow telephone testimony over the objection of the defense.[516] However, since the testimony of witnesses suggested that the trial judge would have denied the motion

505. *See id.* (citing Bird v. Anchorage, 787 P.2d 119, 120-21 (Alaska Ct. App. 1990)).
506. *See id.*
507. *See id.*
508. *See id.* at 783.
509. *See id.*
510. 959 P.2d 771 (Alaska Ct. App. 1998).
511. *See id.* at 776.
512. *See id.* at 774.
513. *See id.*
514. *See id.*
515. *See id.* (citing ALASKA CRIM. R. 38.1).
516. *See id.* at 775.

to suppress regardless of the testimony of the public safety officer, the admission of the telephone testimony was harmless error.[517]

2. *Evidence.* In *Calapp v. State*,[518] the Alaska Court of Appeals held that a defendant's prior convictions must bear a relevant factual similarity to the offense charged before they can be admitted to prove intent, knowledge, or absence of accident or mistake in the current charge.[519] Calapp was convicted of second degree theft on the theory that he had concealed, received, or disposed of stolen property with the intent to appropriate the property of another and with reckless disregard that the property had been stolen.[520] The trial judge admitted evidence of Calapp's three previous convictions for theft and forgery to rebut his claim that the disposition and receipt of the property was the result of a mistake or accident.[521]

Under Alaska Evidence Rules 403 and 404(b)(1), in order to be admissible a judge must determine that evidence of prior bad acts is relevant for purposes other than showing criminal propensity, and that its probative value exceeds its potential for unfair prejudice.[522] The state did not attempt to explain how Calapp's prior convictions bore any relevance to whether Calapp knew that the property in the present case was stolen.[523] Consequently, the jury could have used the evidence only to conclude that Calapp had a general propensity to lie and steal, and the admission of such evidence was an abuse of discretion.[524]

In *Sakeagak v. State*,[525] the court of appeals upheld a first degree murder conviction and ninety-nine-year prison sentence, holding that it was proper to allow the jury to hear testimony by a police investigator that he believed the defendant to be guilty before he interviewed him.[526] The court recognized the rule stated in *Flynn v. State*,[527] that personal opinions of a defendant's guilt or innocence may not be given.[528] The court then distinguished the instant case from *Flynn*, in that the investigator's testimony clearly was given in the context of resolving the peripheral issue of why

517. *See id.*
518. 959 P.2d 385 (Alaska Ct. App. 1998).
519. *See id.* at 388.
520. *See id.* at 386-87.
521. *See id.* at 387.
522. *See id.* at 387-88.
523. *See id.* at 388.
524. *See id.*
525. 952 P.2d 278 (Alaska Ct. App. 1998).
526. *See id.* at 282.
527. 847 P.2d 1073 (Alaska Ct. App. 1993)
528. *See id.* at 1075-76.

the investigator adopted a confrontational strategy in the interview.[529] In addition, the court noted that other evidence showed what facts the investigator was aware of at the time of the interview, so that the jurors would be able to determine for themselves whether the investigator's suspicion was reasonable.[530]

In *Ballard v. State*,[531] the court of appeals held that the horizontal gaze nystagmus ("HGN") test is grounded in generally accepted scientific theory and thus is admissible as scientific evidence indicating a person potentially is intoxicated, provided that the test is not used to show a specific blood-alcohol level or degree of impairment.[532] In order for a police officer's testimony regarding a person's performance of the HGN test to be admissible, however, it must be shown that the officer has been trained adequately to administer and assess the test.[533] Although Ballard's arresting officer deviated from proper testing procedures, the deviation was not significant enough to prevent a jury from finding the test would yield relevant test results.[534] The arresting officer's testimony that Ballard's test performance indicated he was "very impaired" might have been an impermissible attempt to correlate test results with the degree of impairment or intoxication, but because the HGN test was only one of a battery of tests presented as evidence of Ballard's intoxication, any such error this statement might have caused would have been harmless.[535]

In *Clark v. State*,[536] the court of appeals held that evidence of a defendant's proclivity to assault women was inadmissible where the prior acts were not similar enough to the instant case to draw a reasonable inference of the defendant's intent.[537] The trial court convicted Clark of attempted kidnapping, attempted sexual abuse of a minor, assault, and other crimes for an incident in which he harassed two young girls and chased them home in his truck.[538] At trial, the court admitted the testimony of three women whom Clark had sexually assaulted in the past.[539] Each woman was an adult, and each had encountered Clark at or around a bar.[540] The court of appeals found that this distinguished the three prior cases

529. *See Sakeagak*, 952 P.2d at 282.
530. *See id*.
531. 955 P.2d 931 (Alaska Ct. App. 1998).
532. *See id.* at 940.
533. *See id.* at 941.
534. *See id.* at 942.
535. *Id.* at 942-43.
536. 953 P.2d 159 (Alaska Ct. App. 1998).
537. *See id.* at 162.
538. *See id.* at 161.
539. *See id.* at 161-62.
540. *See id.*

from the instant case enough that the evidence could not be used to demonstrate Clark's intent toward the young girls.[541] Instead, the only purpose of the evidence was to show Clark's propensity to engage in similar misconduct, which made the evidence inadmissible under Alaska Rule of Evidence 404(b)(1).[542]

In *Sivertsen v. Alaska*,[543] the court of appeals held that admission of evidence concerning a warning call police received about a defendant was harmless error, that oral statements taken from a witness shortly before trial need not have been disclosed in discovery, that comments by a prosecutor indicating that intent may be inferred from a person's actions were appropriate, and that a composite sentence in excess of the maximum sentence for any of the individual charges must be vacated where the sentence is not justified as necessary to protect the public.[544] Sivertsen was convicted of second degree burglary and second degree theft after being discovered breaking out of the Merchant Wharf building in Juneau with cash equal to an amount missing from a cruise line office during the early morning hours.[545] He had been followed the entire night as a result of a warning phone call made by the Ketchikan Police Department to the Juneau Police Department.

The admission of evidence concerning the phone call from the Ketchikan police department was appropriate because it was accompanied by a limiting instruction that the jury was only to consider it to explain why the police followed Sivertsen the night of the crime,[546] and even if inappropriate, it was harmless.[547] Sivertsen's motion for a mistrial when the prosecutor introduced testimony not made available during discovery was properly denied because Alaska Criminal Rule 16(b)(1)(i) does not mandate disclosure of a witness' oral statements made during trial preparation close to trial commencement.[548] Finally, comments by the prosecutor asserting that intent can be inferred by actions did not impermissibly shift the burden of proof because they merely instructed the jury with regard to what it was permitted to infer.[549] Nevertheless, Sivertsen's sentence was vacated because his six-year composite sentence exceeded the five-year maximum term for either crime, and a composite sentence can exceed the maximum sen-

541. *See id.* at 162-63.
542. *See id.*
543. 963 P.2d 1069 (Alaska Ct. App. 1998).
544. *See id.* at 1071-74.
545. *See id.* at 1070.
546. *See id.* at 1070-71.
547. *See id.* at 1071.
548. *See id* at 1072.
549. *See id.*

tence for the defendant's most serious crime only where such a sentence is necessary to protect the public.[550]

In *Hazelwood v. State*,[551] the court of appeals held that the erroneous admission of an oil tanker captain's statements and evidence of his intoxication during an accident was harmless beyond a reasonable doubt.[552] A jury convicted Hazelwood of negligent discharge of oil, but some of the evidence was admitted erroneously under the inevitable discovery doctrine.[553] With respect to Hazelwood's erroneously admitted statements, the court found them to be cumulative of similar admissible evidence and thus to have had a negligible evidentiary impact.[554] As to evidence of Hazelwood's intoxication, the jury acquitted him on the charge of operating a vessel while intoxicated, and Hazelwood's conviction for negligent discharge of oil did not require a showing of intoxication.[555] Thus, the court found no reasonable possibility that the evidence affected the jury's decision.[556]

In *Patterson v. State*,[557] the court of appeals held that Evidence Rule 901(a) does not require the government to rule out all possibility of tampering or produce all persons who had contact with the evidence.[558] At Patterson's trial for drug possession, the state sought admission of drugs taken from Patterson.[559] Patterson objected on the ground that the state failed to identify the employee who packaged the evidence for transport to the lab and the officer who took the evidence to the lab.[560] The court held that for purposes of a prosecution for drug possession, Evidence Rule 901 requires only that the government prove to a reasonable certainty that the substance identified as a controlled substance is the same substance that was in the defendant's possession earlier and that the substance was not altered before testing.[561]

3. *Sentencing.* In *Scroggins v. State*,[562] the Alaska Court of Appeals held that a defendant's prior conviction for lewd and lascivious acts upon a child in another state was not a prior felony

550. *See id.* at 1074.
551. 962 P.2d 196 (Alaska Ct. App. 1998).
552. *See id.* at 198.
553. *See id.* at 197.
554. *See id.* at 199.
555. *See id.* at 200-01.
556. *See id.* at 201.
557. 966 P.2d 553 (Alaska Ct. App. 1998).
558. *See id.* at 555.
559. *See id.* at 555-56.
560. *See id.* at 555.
561. *See id.*
562. 951 P.2d 442 (Alaska Ct. App. 1998).

conviction for purposes of Alaska's presumptive sentencing statute.[563] Scroggins had a prior conviction in California for lewd or lascivious acts upon a child.[564] His subsequent Alaska conviction resulted in the imposition of an aggravated sentence under Alaska Statutes section 12.55.145(a)(1)(B),[565] which provides for an aggravated presumptive sentence where an offender has a prior conviction of "an offense having elements similar to those of a felony defined as such under Alaska law."[566] The California statute that Scroggins previously had been convicted of violating prohibited mere contact with a child for the purpose of sexual gratification.[567] However, the analogous Alaska statute, AS 11.81.900(b)(51), prohibited the touching of specific body parts of a child for the purpose of sexual gratification.[568] As a result, the prior California conviction was not sufficiently similar to the analogous Alaska felony for a presumptive sentence to be imposed.[569]

In *Hodari v. State*,[570] the court of appeals held that a sentence of fifty-five years of imprisonment was excessive for two counts of sexual assault in the first degree, robbery in the first degree, and assault in the second degree.[571] The court agreed with the trial judge's finding that Hodari had committed technical kidnapping[572] and applied the sentencing guidelines of *Williams v. State*.[573] While the court conceded that Hodari's behavior was more aggravated than Williams' and merited more than a thirty-year sentence, the court found Hodari's behavior to be less aggravated than other conduct that received sentences of forty years or more.[574] Thus, the court refused to approve a sentence greater than forty years.[575]

In *Cragg v. State*,[576] the court of appeals held that sentencing courts must strike from a presentence report allegations that have

563. *See id.* at 444.

564. *See id.* at 443.

565. ALASKA STAT. § 12.55.145(a)(1)(B) (Michie 1996).

566. *Id.*

567. *See Scroggins*, 951 P.2d at 443-44; *see also* CAL. PENAL CODE § 288(a) (West 1988).

568. *See Scroggins*, 951 P.2d at 444.

569. *See id.*

570. 954 P.2d 1048 (Alaska Ct. App. 1998).

571. *See id.* at 1049-52.

572. *See id.* at 1050 n.3.

573. *See id.* at 1051-52; *see also* Williams v. State, 800 P.2d 955 (Alaska Ct. App. 1990), *on rehearing*, 809 P.2d 931 (Alaska Ct. App. 1991).

574. *See Hodari*, 954 P.2d at 1051-52.

575. *See id.* at 1052.

576. 957 P.2d 1365 (Alaska Ct. App. 1998).

been litigated and resolved in the defendant's favor.[577] The state sought to revoke Cragg's probation on grounds that he failed to report to his probation officer and was found in possession of narcotics.[578] While the judge at the adjudication hearing determined that the state had not proven the narcotics allegations, the probation officer's opinion regarding the alleged possession was included in the presentencing report.[579] The court of appeals held that only verified allegations of misconduct could be included in a presentence report, even if the judge had determined that he would disregard these unproven allegations at sentencing.[580]

In *Gilley v. State*,[581] the court of appeals held that sentencing judges have no authority under Alaska Statutes section 12.55.145(a)[582] to ignore prior felony convictions and treat third felony offenders as second felony offenders.[583] Gilley, relying on the commentary to AS 12.55.145, contended that the statute gives a sentencing court the discretion to disregard felony convictions that are more than ten years old.[584] However, the statute itself makes no such distinction.[585] Furthermore, the statute's legislative history illustrates the legislature's intent to design a presumptive sentencing framework to ensure uniformity and predictability in sentencing.[586] Allowing sentencing judges to ignore a defendant's prior convictions would undermine this legislative intent.[587]

In *Pickard v. State*,[588] the court of appeals held that a defendant's history of violence against the victim and the failure of past rehabilitative efforts support a sentence more severe than the presumptive one for a first felony offender.[589] Pickard pled no contest to third degree felony assault after beating his ex-wife and threatening to kill her with a knife.[590] He previously had been convicted of fourth degree assault and third degree criminal mischief in separate assaults on his ex-wife.[591] While the presumptive term for second felony offenders is only two years, the superior court, citing

577. *See id.* at 1367.
578. *See id.* at 1366-67.
579. *See id.* at 1367.
580. *See id.* at 1368 (citing ALASKA CRIM. R. 32.2(a)(3)).
581. 955 P.2d 927 (Alaska Ct. App. 1998).
582. ALASKA STAT. § 12.55.145(a) (Michie 1996).
583. *See Gilley*, 955 P.2d at 931.
584. *See id.* at 929.
585. *See id.*
586. *See id* at 930.
587. *See id.*
588. 965 P.2d 755 (Alaska Ct. App. 1998).
589. *See id.* at 755.
590. *See id.* at 757.
591. *See id.* at 758.

numerous aggravating factors, imposed a sentence of five years with one suspended, and Pickard appealed.[592] The court of appeals held that the substantial sentence did not violate the "principle of parsimony," the notion that a sentence should be no more severe than necessary to achieve the sentencing objectives codified in Alaska Statutes section 12.55.055.[593] Although the sentence was severe for a first time felony offender, the case record adequately supported the sentence and was not clearly mistaken.[594]

In *Andrews v. State*,[595] the court of appeals held that for purposes of finding sentencing aggravators, "prior criminal history" includes acts committed as a juvenile,[596] but that two felony convictions stemming from the same criminal episode can be counted only as one prior felony conviction for the purposes of finding a sentencing aggravator.[597] Andrews was convicted on two counts of second degree robbery for crimes involving the seizure of a pair of scissors and a can of soda.[598] Because Andrews was a third-time felony offender, he received a total term of twelve years for two convictions, onto which two more years were added based on the sentencing court's finding of three aggravators.[599] The court found the "aggravator" under Alaska Statutes section 12.55.155(c)(8), which covers instances of "assaultive behavior" in a defendant's "prior criminal history," encompassed acts committed as a juvenile even though such acts are not technically crimes.[600] Because Andrews had murdered his adoptive parents as a juvenile, (c)(8) applied.[601] Andrews's challenge to aggravator AS 12.55.155(c)(10) was dismissed because it had not been preserved for appeal.[602] However, aggravator AS 12.55.155(c)(15), that the defendant has three prior felony convictions, did not apply.[603] Andrews's 1988 felony convictions for burglary and theft arose from a single criminal episode and resulted in concurrent sentences, and thus, under AS 12.55.145(a)(1)(C), the convictions could be treated only as a single felony conviction for sentencing purposes.[604] Because Andrews' sentence was lengthy for two class B felonies, and because

592. *See id.* at 759.
593. *Id.* at 760-61.
594. *See id.* at 762.
595. 967 P.2d 1016 (Alaska Ct. App. 1998).
596. *Id.* at 1019.
597. *See id.* at 1021.
598. *See id.* at 1017.
599. *See id.*
600. *Id.* at 1019.
601. *See id.*; *see also* ALASKA STAT. § 12.55.155(c)(8) (Michie 1996).
602. *See Andrews*, 967 P.2d at 1020.
603. *See id.* at 1020-21.
604. *See id.* at 1020.

the circumstances presented "mitigated instances of robbery," the case was remanded for resentencing on the basis of the overturned aggravator.[605]

In *Wilson v. State*,[606] the court of appeals held that a statute requiring juveniles convicted of lesser felonies to assume the burden of proving amenability to treatment as juveniles is constitutional, and that, for purposes of presumptive sentencing, a youth counselor could be considered a correctional officer.[607] Wilson, an inmate at a juvenile facility, was convicted of second degree assault for attacking a youth counselor in the process of an attempted escape.[608] Wilson's challenges to the constitutionality of Alaska Statutes section 47.12.030(a) failed because *State v. Ladd*[609] affirmed that the statute does not violate the equal protection and due process clauses of the Alaska Constitution.[610] The court also rejected Wilson's challenge to a two-year presumptive sentence term based on his assault on a correctional officer carrying out her duties.[611] The court found that the youth counselor Wilson assaulted bore the same responsibilities and risks working at a juvenile institution that correctional officers working at adult facilities faced and thus should be considered a correctional officer for purposes of the sentencing statute.[612]

In *White v. State*,[613] the court of appeals held that a defendant can be classified as a "worst offender" based on either the defendant's criminal history, the circumstances surrounding the present offense, or both.[614] White was arrested for driving while intoxicated ("DWI"), released, ordered not to drive for twenty-four hours, and then arrested again for the same offense two hours later.[615] During his ride to the police station, White kicked an officer in the face.[616] White had twelve prior DWI convictions and had three prior assault convictions, two involving police officers.[617] He was convicted of DWI and, based on White's criminal history, the superior court found that two aggravators under Alaska Statutes

605. *Id*. at 1021.
606. 967 P.2d 98 (Alaska Ct. App. 1998).
607. *See id*. at 105.
608. *See id*. at 99.
609. 951 P.2d 1220 (Alaska Ct. App. 1998).
610. *See Wilson*, 967 P.2d at 100.
611. *See id*. at 103.
612. *See id*. at 105.
613. 969 P.2d 646 (Alaska Ct. App. 1998).
614. *See id*. at 648.
615. *See id*. at 647.
616. *See id*.
617. *See id*. at 647-48.

section 12.55.155(c) applied.[618] The court deemed White a "worst offender" for sentencing purposes, and gave him the maximum sentence.[619] The court of appeals affirmed, holding that a finding of "worst offender" need not be based on a defendant's present offense and that White's record clearly supported a finding that he is a "worst offender."[620]

4. *Miscellaneous.* In *LaParle v. State*,[621] the Alaska Court of Appeals held that there was reversible error where a jury was instructed that showing recklessness on the part of a defendant would suffice to convict for scheme to defraud and that it is possible for a spouse to commit theft of marital property.[622] LaParle helped his client conceal money from the client's wife in a divorce proceeding and was consequently charged and convicted of scheme to defraud, first degree theft, and perjury.[623] Because the crime of scheme to defraud requires a showing of intent, instructing the jury that LaParle could be convicted if he either intended to defraud or acted recklessly with regard to a scheme to defraud his client's wife was a reversible error.[624] With regard to the charge of theft, LaParle claimed that because the money hidden in his client's undisclosed bank account was jointly owned by his client and his wife, his client could not steal it and LaParle, accordingly, could not steal it either under a complicity theory.[625] However, the court held that it is possible for a spouse to commit theft of jointly owned property where one spouse infringes upon another's interest in marital property without privilege to do so.[626] Concealing property to prevent it from being inventoried at the end of a marriage constitutes such an unprivileged infringement.[627]

In *State v. ABC Towing*,[628] the court of appeals held that a sole proprietorship is not an organization and thus may not be prosecuted as an organization under Alaska's vicarious liability statute.[629] ABC Towing, a sole proprietorship, was charged with violating an anti-pollution statute under the theory of vicarious liability when one of its employees dumped gasoline on the

618. ALASKA STAT. § 12.55.155(c) (Michie 1996).
619. *See White*, 969 P.2d at 647-48.
620. *See id.* at 648.
621. 957 P.2d 330 (Alaska Ct. App. 1998).
622. *See id.* at 332, 335, 336.
623. *See id.* at 332.
624. *See id.*
625. *See id.* at 333.
626. *See id.* at 333-34.
627. *See id.* 335.
628. 954 P.2d 575 (Alaska Ct. App. 1998).
629. *See id.* at 576.

ground.[630] The state charged ABC as an "organization," which is defined by statute as "a legal entity . . . or any other group of persons organized for any purpose."[631] The trial court ruled that a sole proprietorship is not a legal entity because it has "no legal significance apart from its sole proprietor."[632] The court of appeals agreed, noting that "[i]n a sole proprietorship, all of the proprietor's assets are completely at risk, and the sole proprietorship ceases to exist upon the proprietor's death."[633] The court also rejected the state's claims that a sole proprietorship becomes an organization by hiring employees as did ABC, arguing that employees do not direct the conduct of the business and do not become partners by being hired.[634]

In *State v. District Court*,[635] the court of appeals held that the offense of custodial interference in the first degree does not require that a child first be removed from the state.[636] In July 1997, B.R. traveled to California for scheduled visitation with his mother.[637] She did not return B.R. as scheduled, but instead abandoned her residence, quit her job, and fled to an unknown destination with B.R.[638] Under Alaska Statutes section 11.41.330(a), custodial interference is committed when a relative of a child keeps the child from a lawful custodian, "if the relative knows that they have no legal right to do so."[639] Under AS 11.41.320(a), violations of AS 11.41.330 become first degree custodial interference, a felony, if the offender causes the child to be removed from the state.[640] The court held that the two elements of first degree custodial interference need not be committed in any particular sequence.[641] The offense is proven where the offender committed custodial interference and causes the child to be removed from Alaska.[642]

In *Whitescarver v. State*,[643] the court of appeals held that a defendant's claim of ownership did not justify or excuse an attempt

630. *See id.*
631. ALASKA STAT. § 11.81.900(b)(39) (Michie 1996).
632. *ABC Towing*, 954 P.2d at 577.
633. *Id.* at 578.
634. *See id.* at 578-79.
635. 962 P.2d 895 (Alaska Ct. App. 1998).
636. *See id.* at 896.
637. *See id.*
638. *See id.*
639. *Id.*
640. *See id.*
641. *See id.*
642. *See id.* at 897.
643. 962 P.2d 192 (Alaska Ct. App. 1998).

to recover property by assault.[644] In the early hours of the morning, Whitescarver and four friends entered his grandmother's house intending to take possession of his Alaska Permanent Fund dividend check.[645] While Whitescarver's friends guarded the door brandishing a shotgun, Whitescarver argued with his grandmother, who claimed she did not have the check and asked him to return the following day.[646] Whitescarver appealed his robbery and assault convictions, contending that the jury should have been instructed to acquit him if they found he acted under the honest belief that he was recovering a check that belonged to him.[647] The court rejected his "claim of ownership" defense to robbery.[648] That defense is limited to three specific types of extortion and is not allowed in cases of extortion by threat of future injury.[649] Because robbery is most closely analogous to extortion by threat of future injury, the court found it "inconceivable" that the legislature intended to allow the defense in the more aggravated circumstances of robbery.[650] Furthermore, the court found Whitescarver's purported good-faith belief that the check belonged to him irrelevant because the belief that the property taken from a victim is the property of another is not an element of robbery.[651]

In *Webb v. Alaska Dep't of Corrections*,[652] the court of appeals held that a parole board anticipatorily can revoke a scheduled parole.[653] A sentencing judge ordered Webb to complete a sex offender treatment program while serving an eight-year sentence for sexual abuse of a minor.[654] Webb participated for a year and a half and then withdrew against the advice of his treatment team.[655] The board, finding that Webb had violated the treatment order, decided to revoke Webb's scheduled parole.[656] Webb challenged the decision, arguing that the board could not revoke parole until Webb formally became a parolee.[657] The court of appeals rejected that argument, reasoning that since the sentencing court has

644. *See id.* at 193.
645. *See id.*
646. *See id.*
647. *See id.* at 194.
648. *Id.* at 195.
649. *See id.* at 194.
650. *Id.* at 195.
651. *See id.*
652. 963 P.2d 1074 (Alaska Ct. App. 1998).
653. *See id.* at 1075.
654. *See id.*
655. *See id.*
656. *See id.* at 1076.
657. *See id.*

authority to revoke the probation of defendants who formally have not begun probation, the board by analogy has similar power.[658]

In *Gwalthney v. State*,[659] the court of appeals held that the state parole board anticipatorily may revoke the scheduled parole release of sex offenders who fail to complete court-ordered sex offender treatment.[660] In doing so, the court reaffirmed its holding in *Webb v. Dep't of Corrections*.[661] In *Webb*, the court held that the parole board anticipatorily can revoke the scheduled mandatory parole release for those prisoners who "engage in behavior that would warrant revocation of their parole."[662] The court rejected Gwalthney's argument that he was never required to undergo the sex offender treatment.[663] The statute providing the authority to mitigate his presumptive prison term[664] requires the three-judge panel to order Gwalthney to complete appropriate rehabilitative treatment.[665]

In *Eppenger v. Alaska*,[666] the court of appeals held that a defendant could not be convicted of vehicle theft of the first or second degree where he had oral permission to use the vehicle.[667] Eppenger was convicted of first degree vehicle theft for possession of a car, even though the owner apparently had given Eppenger permission to use the car for a few hours in exchange for what the owner believed was cocaine.[668] Eppenger was found guilty of a class C felony for driving a vehicle he had no right to possess. If Eppenger had been given written, instead of oral, permission to use the vehicle, Eppenger could have been found guilty of only a class A misdemeanor.[669] The court found this result unreasonable and found that the legislative history of the applicable statutes revealed that the legislature did not intend to criminalize the conduct of a person who obtained a vehicle under the authority of a verbal agreement.[670]

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658. *See id.*
659. 964 P.2d 1285 (Alaska Ct. App. 1998).
660. *See id.* at 1286.
661. 963 P.2d 1074 (Alaska Ct. App. 1998).
662. *Gwalthney*, 964 P.2d at 1286 (quoting Webb v. Dep't of Corrections, 963 P.2d at 1075).
663. *See id.* at 1289.
664. *See* ALASKA STAT. § 12.55.175(e)(2) (Michie 1996).
665. *See Gwalthney*, 964 P.2d at 1289.
666. 966 P.2d 995 (Alaska Ct. App. 1998).
667. *See id.* at 998.
668. *See id.* at 995.
669. *See id.* at 995-96.
670. *See id.* at 996, 998.

In *Allridge v. State*,[671] the court of appeals held that a defendant could be charged with both first degree theft and first degree vehicle theft.[672] Allridge stole a vehicle and was indicted for first degree theft and first degree vehicle theft.[673] Allridge claimed that only the vehicle theft indictment should apply.[674] The court rejected Allridge's argument that the theft statutes do not apply to motor vehicles, based on statutory language and legislative intent.[675] Allridge argued in the alternative that the crime of vehicle theft is a specific form of theft generally, and only the vehicle theft statute should apply.[676] The court again disagreed, finding that the two crimes are distinct and require proof of elements not necessary to prove the other.[677] First degree vehicle theft, or "joyriding," involves taking a vehicle without permission but not necessarily with an intent to deprive the owner of possession permanently, whereas first degree theft includes an intent to appropriate possession as one of its elements.[678]

In *Veeder v. Municipality of Anchorage*,[679] the court of appeals held that Alaska Evidence Rule 101(c)(2), which precludes the application of other evidentiary rules to proceedings relating to probation, applies to probation revocation hearings in misdemeanor cases.[680] Veeder faced revocation of his probation for an alleged domestic assault.[681] At the hearing, Veeder objected that certain statements introduced by the prosecution were inadmissible hearsay.[682] Alaska Evidence Rule 101(c)(2) provides that other evidence rules are not applicable to "[p]roceedings relating to extradition or rendition; sentencing, probation, or parole."[683] The court found this language to be "clear and unambiguous," and placed a heavy burden on Veeder to establish that the rule was not intended to apply in misdemeanor cases.[684] Veeder based his position on the commentary to Rule 101(c)(2), which the court found insufficient to demonstrate a contrary intent.[685]

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671. 969 P.2d 644 (Alaska Ct. App. 1998).
672. *See id.* at 645-46.
673. *See id.* at 645.
674. *See id.*
675. *See id.*
676. *See id.*
677. *See id.* at 645-46.
678. *See id.* at 645.
679. 969 P.2d 642 (Alaska Ct. App. 1998).
680. *See id.* at 644.
681. *See id.* at 643.
682. *See id.*
683. ALASKA R. EVID. 101(c)(2).
684. *Veeder*, 969 P.2d at 643.
685. *See id.*

VII. EMPLOYMENT LAW

A. Workers' Compensation

In *Hodges v. Alaska Constructors, Inc.*,[686] the Alaska Supreme Court held that a petition for modification of a Workers' Compensation Board decision concerning a worker's job-related lower back injuries properly was rejected. However, the court also held that the Board improperly denied the claimant reimbursement for travel costs.[687] Hodges was awarded permanent disability benefits as a result of suffering a job-related back injury and sought a variety of modifications of the Board's order.[688] The court held that Hodges's application for adjustment was both timely and appropriately treated as a petition for modification.[689] However, Hodges was denied compensation for upper back injuries because evidence linking those injuries to work could have been introduced at the original Board hearing.[690] Hodges also was denied reimbursement for medication he failed to purchase from a Board-specified, mail-order drug company.[691]

In *Hammer v. City of Fairbanks*,[692] the supreme court upheld a Worker's Compensation Board penalty for late payment of permanent partial impairment ("PPI") benefits.[693] In doing so, it ruled that a dispute between the employer and employee over guidelines to use in calculating benefits did not justify the late payment where the employer controverted the employee's claim privately but not with the Board.[694] Alaska Statutes section 23.30.155[695] requires an employer receiving notice of a PPI claim to make payment to the employee within twenty-one days unless the employer controverts the claim by official notice to the Board.[696] The City disputed Hammer's initial request for PPI benefits on the ground that Hammer's doctor used the wrong edition of the medical guidelines to calculate benefits.[697] However, the City did not file a controversion;[698] rather, it disputed the claim privately with Hammer's doc-

686. 957 P.2d 957 (Alaska 1998).
687. *See id.* at 958-59.
688. *See id.* at 959.
689. *See id.* at 960-61.
690. *See id.* at 961.
691. *See id.* at 962-63.
692. 953 P.2d 500 (Alaska 1998).
693. *See id.* at 502.
694. *See id.* at 506-07.
695. ALASKA STAT. § 23.30.155 (Michie 1996).
696. *See id.*
697. *See Hammer*, 953 P.2d at 502.
698. *See id.* at 505.

tor and did not make payment within twenty-one days.[699] The court ruled that to allow an employer to dispute the PPI claim privately would thwart the policy of AS 23.30.155, "to promote prompt payment by the employer to the injured employee."[700] The court rejected the City's contention that it was not bound to make payment until it received a claim using the proper guidelines, on the ground that the City should have controverted the PPI lump sum payment by filing a notice of controversion with the Board while it sought clarification of the claim.[701]

B. Grievance Claims

In *Ross v. City of Sand Point*,[702] the Alaska Supreme Court held that a mayor's refusal to reinstate a city employee despite the decision of a grievance committee violated the employee's employment contract and constituted wrongful discharge as a matter of law.[703] After having been fired by the mayor, Public Works Director Ross filed a grievance pursuant to the city's personnel manual.[704] The grievance committee ruled in Ross's favor and ordered his reinstatement.[705] The mayor, however, refused.[706] The court found that neither state nor municipal law invested the mayor with authority to override the grievance process that had been incorporated into the employment contract.[707]

In *Nyberg v. University of Alaska*,[708] the supreme court held that an employee who has filed a grievance related to her supervisor's conduct cannot be found insubordinate by the Statewide Grievance Council merely because she refused the supervisor's order to discuss with her the problem included in her grievance.[709] An employee's intentional refusal to comply with reasonable written and oral directives issued by the supervisor will support a finding of insubordination.[710] Nyberg requested that any communications about her specific grievance with her supervisor go through her attorney.[711] This request prompted her supervisor to discharge

699. *See id.* at 503.
700. *Id.* at 506.
701. *See id.*
702. 952 P.2d 274 (Alaska 1998).
703. *See id.* at 276-77.
704. *See id.* at 275.
705. *See id.* at 275-76.
706. *See id.* at 276.
707. *See id.* at 277.
708. 954 P.2d 1376 (Alaska 1998).
709. *See id.* at 1380.
710. *See id.* at 1378.
711. *See id.*

Nyberg for insubordination, and the Grievance Council and University President agreed.[712] However, because the supervisor failed to clarify that Nyberg was not required to discuss the grievance specifically, nor did she specify the non-grievance issues she wished to discuss, the supervisor's oral directives were not sufficiently clear to support a finding of insubordination.[713]

In *State v. Beard*,[714] the supreme court held that an employee's failure to exhaust his administrative remedies was not excused by his union's failure to pursue his grievance.[715] Beard had complained to his union representative that Beard's supervisors were harassing him and making his work environment intolerable.[716] After being informed by the representative that this conduct was outside the grievance procedure because the substance of the complaint fell within management's prerogative under the collective bargaining agreement, Beard resigned and brought suit.[717]

Under Alaska law, employees first must exhaust administrative remedies before they can pursue judicial action against their employers.[718] However, the employee may be excused from exhausting remedies if his union failed to participate in the grievance process or if the process is tainted.[719] Beard asked the union to grieve his work conditions several months before he resigned, and he never asked the union to grieve his resignation as a termination or a constructive discharge.[720] The court held that where an ongoing pattern of workplace harassment leads to the employee's resignation, the employee must attempt to grieve the termination even if the union previously had been unresponsive to the harassment complaints.[721] Consequently, Beard's failure to exhaust his remedies was not excused.[722]

In *Linstad v. Sitka School District*,[723] the supreme court held that a school board's bill of particulars, coupled with a clarifying letter from the board's attorney, fairly apprised a teacher of the basis for her non-retention.[724] Linstad, a tenured special education teacher, was not retained by the Sitka School District after re-

712. *See id.*
713. *See id.* at 1380.
714. 960 P.2d 1 (Alaska 1998).
715. *See id.* at 8.
716. *See id.* at 2.
717. *See id.*
718. *See id.* at 5.
719. *See id.*
720. *See id.* at 6-7.
721. *See id.* at 7.
722. *See id.*
723. 963 P.2d 246 (Alaska 1998).
724. *See id.* at 248.

peated warnings of the need to improve her teaching performance.[725] The supreme court held that the bill of particulars required by Alaska Statutes section 14.20.180(a) need not include all specific allegations of improper performance, because Linstad had been given actual notice of the allegations at issue.[726]

C. Wages

In *Ganz v. Alaska Airlines, Inc.*,[727] the Alaska Supreme Court held that a work schedule of fourteen twelve-hour days followed by fourteen days off under a collective bargaining agreement was exempt from the overtime provisions of the Alaska Wage and Hour Act ("AWHA").[728] Alaska Airlines and the union representing customer service agents, mechanics, and ramp workers entered into a collective bargaining agreement under which Prudhoe Bay employees work for fourteen consecutive twelve-hour days followed by fourteen days off.[729] The employees later filed an AWHA complaint when the airlines refused to pay overtime for work in excess of forty hours a week or eight hours a day.[730] In reaching its decision, the court was required to interpret Alaska Statutes section 23.10.060(d)(13),[731] which allows an exemption from the overtime provisions where work is performed under a flexible work arrangement as part of a collective bargaining agreement.[732] The court examined the exemption in AS 23.10.060(d)(14), contrasting it with the language used in subsection (d)(13), to determine that "subsection (d)(13) unambiguously exempts the employees' work schedule from AWHA's overtime requirements."[733]

In *Piquniq Management Corp. v. Reeves*,[734] the supreme court held that "a court converting annual salary to a regular rate of hourly pay under 8 Alaska Administrative Code 15.100(a)(2) must use the regular rate as a basis for computing total earnings for all hours actually worked."[735] Reeves was paid an annual salary to work a schedule of two weeks of 12-hour days followed by two

725. *See id.* at 246-47.
726. *See id.* at 247-48.
727. 963 P.2d 1015 (Alaska 1998).
728. *See id.* at 1015.
729. *See id.* at 1016.
730. *See id.*
731. *See* ALASKA STAT. § 23.10.060(d)(13) (Michie 1996).
732. *See Ganz*, 963 P.2d at 1017.
733. *Id.* at 1019.
734. 965 P.2d 755 (Alaska 1998).
735. *Id.* at 738.

weeks off.[736] After working an average of 98-hour weeks but receiving no overtime pay, Reeves sued Piquniq Management for overtime wages.[737] The superior court calculated an overtime rate based on Reeves's salary as straight-time wages at 52 weeks of forty hours per week and awarded Reeves the full amount of calculated overtime as damages.[738] The supreme court reversed, holding that a salaried worker's award for unpaid overtime should be calculated by (1) determining the employee's weekly salary; (2) assuming that a week of salary represents pay for a week of straight-time work; (3) using this amount to determine the worker's total compensation for all the hours which were worked; and (4) deducting all amounts of salary paid from this amount.[739] Since Reeves only worked half the weeks of the year, the trial court's decision to treat all earned overtime pay as unpaid overtime pay would yield Reeves twice his regular rate for straight-time hours actually worked.[740]

D. Miscellaneous

In *Moody-Herrera v. State Dep't of Natural Resources*,[741] the Alaska Supreme Court held that an employer's failure to provide reasonable accommodation to a disabled employee can amount to an actionable disability discrimination claim under the Alaska Human Rights Act ("AHRA"), but upheld the lower court's determination that the plaintiff failed to make a prima facie showing of discrimination.[742] Moody claimed that the Department of Natural Resources ("DNR") discriminated against her by failing to provide reasonable accommodation for her hearing problems.[743] The court was asked to interpret Alaska Statutes section 18.80.220[744] to determine if the legislature intended to impose a duty of reasonable accommodation on employers.[745] Though the AHRA does not explicitly impose a duty of reasonable accommodation, the court felt that the legislative history and purpose of the statute suggested a legislative intent to impose such a duty.[746] The court considered the fact that the legislature previously considered

736. *See id.* at 733.
737. *See id.*
738. *See id.* at 733-34.
739. *See id.* at 737.
740. *See id.* at 738.
741. 967 P.2d 79 (Alaska 1998).
742. *See id.* at 80.
743. *See id.* at 81.
744. ALASKA STAT. § 18.20.220 (Michie 1996).
745. *See Moody-Herrera*, 967 P.2d at 82.
746. *See id.* at 85-86.

adopting legislation that would have eliminated the duty of reasonable accommodation.[747] The court nonetheless agreed with the trial court that Moody did not present a prima facie case for discrimination because the record showed that DNR made "extraordinary efforts" to accommodate Moody.[748]

In *University of Alaska v. University of Alaska Classified Employees Association*,[749] the supreme court held that a union waived its right to bargain on policies within the scope of a collective bargaining agreement where the agreement's language, scope and history suggested that the agreement had been fully bargained.[750] The union representing University of Alaska employees assented to a collective bargaining agreement ("CBA") with the university shortly after the university refused the union's request to bargain the university's restrictive smoking policy.[751] The final agreement included a clause stating that the union waived its right to bargain over policy decisions by agreeing to the CBA.[752] The court applied this clause to the instant case.[753] The CBA also contained a management-rights clause reserving the university's right "to issue, amend and revise policies," and a zipper clause stating that the agreement was the entire agreement between the parties.[754] These clauses, as well as the fact that the union was represented by an experienced negotiator, bolstered the court's opinion that the union knew, or should have known, that it had contractually waived its right to bargain the smoking policy by agreeing to the CBA.[755]

In *Bliss v. Bobich*,[756] the supreme court held that a retaliatory discharge claim properly was submitted to a jury[757] and that an overtime damages award properly was limited to two years.[758] Patrick and Barbara Bliss sued Bobich for overtime violations and retaliatory harassment and discharge, and both parties appealed a number of issues from the lower court ruling.[759] Because the evidence surrounding the discharge of the Blisses was disputed, the Blisses' retaliatory discharge claim was a matter for the jury.[760]

747. *See id.*
748. *Id.* at 88.
749. 952 P.2d 1182 (Alaska 1998).
750. *See id.* at 1187.
751. *See id.* at 1184.
752. *See id.* at 1186.
753. *See id.*
754. *Id.*
755. *See id.*
756. 971 P.2d 141 (Alaska 1998).
757. *See id.* at 145-46.
758. *See id.* at 146.
759. *See id.* at 143.
760. *See id.* at 145-46.

However, the award of two years overtime damages, instead of three, was appropriate because no evidence indicated that Bobich's failure to pay overtime for the third year at issue was willful.[761]

VIII. FAMILY LAW

A. Child Custody

In *West v. Lawson*,[762] the Alaska Supreme Court held that when one parent moves to a distant locale, it should be presumed that a six-month alternating custody schedule is not in the best interests of a young child.[763] In 1994, West and Lawson separated and agreed to share custody of their daughter on an alternating week basis.[764] Lawson then moved to Nevada and sought to modify the custody schedule to alternate custody every six months.[765] The superior court held a hearing and approved the modified custody schedule,[766] but the supreme court vacated and remanded.[767] It ruled that the lower court abused its discretion by placing too much weight on the prior agreement[768] and by not focusing its determination on the key fact of Lawson's move.[769] The supreme court noted that prevailing opinion among experts was that a stable environment is crucial for a child's healthy development[770] and such stability would be thwarted by relocating to a new community every six months.[771]

In *Gaston v. Gaston*,[772] the supreme court held that a mother was estopped from relying on a custody agreement's time limits as a basis for refusing to abide by a dispute resolution provision.[773] The custody agreement contained a dispute resolution provision that either party could invoke within one year.[774] Nine months after signing the custody agreement, the parents agreed to try a new

761. *See id.* at 146.
762. 951 P.2d 1200 (Alaska 1998).
763. *See id.* at 1206.
764. *See id.* at 1202.
765. *See id.*
766. *See id.*
767. *See id.* at 1206.
768. *See id.* at 1203.
769. *See id.*
770. *See id.* at 1204.
771. *See id.* at 1206.
772. 954 P.2d 572 (Alaska 1998).
773. *See id.* at 574.
774. *See id.* at 573.

visitation schedule.[775] Approximately one year later, Mrs. Gaston sought to return to the original schedule.[776] In response, Mr. Gaston invoked the dispute resolution clause, but Mrs. Gaston refused to comply because more than one year had passed since the original agreement.[777] The court reasoned that Mr. Gaston should be allowed to invoke the dispute resolution clause, because his failure to do so within one year of the agreement stemmed from his reliance on his ex-wife's agreement to the new custody schedule.[778]

In *Lashbrook v. Lashbrook*,[779] the supreme court held that an earlier hearing in a domestic violence proceeding did not satisfy notice and hearing requirements for a child custody modification proceeding.[780] Gary Lashbrook was denied a hearing in a custody modification proceeding awarding full custody of his children to their mother when the superior court consolidated that proceeding with an earlier domestic violence proceeding.[781] Although the custody modification and domestic violence proceedings both stemmed from the same incident, the court found the two proceedings to be distinct and directed to different objectives such that the due process requirements of one could not be satisfied by the other.[782]

In *Acevedo v. Liberty*,[783] the supreme court held that a father made a sufficient showing of changed circumstances to warrant an evidentiary hearing to consider modifying visitation rights in the child's best interests.[784] Acevedo alleged a change of circumstances that resulted from his former wife and daughter's move from Bethel to Fairbanks, making supervised visitation impractical.[785] In addition, Acevedo had moved out of a living situation involving three male roommates and had completed an anger management program.[786]

In *I.J.D. v. D.R.D.*,[787] the supreme court held that a trial court acted within its discretion in awarding sole custody of a child to the father, based on the mother's personality disorder and her continued efforts to interfere with the child's relationship with his fa-

775. *See id.*
776. *See id.*
777. *See id.*
778. *See id.* at 574.
779. 957 P.2d 326 (Alaska 1998).
780. *See id.* at 328-29.
781. *See id.* at 328.
782. *See id.* at 329-30.
783. 956 P.2d 455 (Alaska 1998).
784. *See id.* at 458.
785. *See id.* at 457.
786. *See id.*
787. 961 P.2d 425 (Alaska 1998).

ther.[788] The father, D.R.D., faced difficulties visiting his son who lived with his mother, I.J.D., and I.J.D.'s daughter from a previous marriage.[789] While both parents suffered from mental health problems, I.J.D.'s personality disorder and emotional instability were deemed more likely to impair her capacity to meet the child's needs than would D.R.D.'s depression.[790] Although granting D.R.D. custody would separate the child from his mother and sister, the trial court concluded that D.R.D. would make efforts to ease the transition while sustaining the relationship between the children.[791] I.J.D.'s efforts to prevent a relationship from developing between D.R.D and his son influenced the award of sole custody.[792]

In *C.R.B. v. C.C.*,[793] the supreme court held that a parent must show a substantial change in circumstances in order to modify a custody order even where the order awarded custody to a nonparent.[794] Roberto divorced Catherine, leaving her as legal custodian of their two children.[795] Catherine's drug problems led her parents to move for and gain custody of the children.[796] Roberto sought to acquire custody, alleging a substantial change in circumstance based on, among other things, the stability of his second marriage and business, his renewed contact with his children, and the discovery of a 1980 Child in Need of Aid ("CINA") investigation involving Catherine's mother.[797] The superior court dismissed Roberto's motion without a hearing.[798]

On appeal, Roberto argued that a parent need not show as substantial a change in circumstances in cases involving nonparents in comparison with cases involving parents only.[799] Although parental custody is preferred over non-parental custody, once custody has been transferred to a non-parent, the interest in meeting a child's need for stability supports applying the substantial change of circumstance standard for custody modification.[800] The court found that Roberto's resumed contact with his children, the stability of his marriage and business, and the disclosure of the

788. *See id*. at 429, 431.
789. *See id*. at 427.
790. *See id*. at 429.
791. *See id*. at 430.
792. *See id*. at 431.
793. 959 P.2d 375 (Alaska 1998).
794. *See id*. at 377.
795. *See id*.
796. *See id*.
797. *See id*.
798. *See id*. at 378.
799. *See id*. at 379.
800. *See id*. at 379-81.

CINA case fell short of a finding of substantial change in circumstances.[801]

In *J.R. v. J.W.*,[802] the supreme court held that, in a custody dispute between a parent and a nonparent, custody must be awarded to the parent unless such custody is "clearly detrimental to the child."[803] That the child's best interests would be served by remaining with her stepfather was insufficient grounds for denying custody to her natural father, absent a showing that the father had abandoned the child, was unfit, or that the child's welfare required that the nonparent receive custody.[804] The court concluded that the Indian Child Welfare Act ("ICWA")[805] applied to the lower court's proceedings.[806] The provisions of 25 U.S.C. § 1912(e)[807] prohibit the removal of a child from the custody of a parent or Indian custodian absent clear and convincing evidence that continued custody would result in clear emotional or physical damage. These provisions apply even where the father previously did not have physical custody of the child.[808] While a stepparent is not considered a parent for purposes of the ICWA, the superior court may deem a stepparent an "Indian custodian" under 25 U.S.C. § 1903(6).[809] Since section 1912(e) does not express a preference between parents and Indian custodians, it will not favor either.[810] Instead, the Alaska standard for disputes between parents and nonparents should apply.[811] However, absent a finding that the stepfather is an Indian custodian, section 1912(e) will create a statutory preference for the father.[812]

In *Siekawitch v. Siekawitch*,[813] the supreme court held that although a scheduled hearing in the lower court ostensibly determined visitation times, the father had adequate notice for procedural due process purposes of the potential consequences of a hearing altering the physical custody arrangements of the children.[814] When Amy and Daniel Siekawitch divorced, they agreed that Daniel would have physical custody of the children while visi-

801. *See id.* at 384.
802. 951 P.2d 1206 (Alaska 1998).
803. *Id.* at 1210.
804. *See id.* at 1211.
805. 25 U.S.C. § 1901 (1997).
806. *See J.R.*., 951 P.2d at 1213.
807. 25 U.S.C. § 1912(e) (1997).
808. *See J.R.*, 951 P.2d at 1213.
809. *See id.* at 1214 (citing 25 U.S.C. § 1903(6) (1997)).
810. *See id.* at 1215.
811. *See id.*
812. *See id.*
813. 956 P.2d 447 (Alaska 1998).
814. *See id.* at 449-50.

tation times would be worked out amicably in the future.[815] Failure to arrive at a mutually agreeable visitation schedule led to a hearing to resolve the issue.[816] Daniel challenged the court order granting Amy custody of the children half of the time on the grounds that he had no notice the court would decide anything other than a visitation schedule.[817] However, the court ruled that even if the time Amy sought was not characterized as physical custody, Daniel had notice that Amy sought equal time with the children through her memorandum in support of a specific custody schedule and because the issue had been raised at the hearing.[818]

In *In the Matter of J.A.*,[819] the supreme court held that *de novo* review was the appropriate standard for appellate review of a trial court's probable cause determination with respect to Child in Need of Aid ("CINA") petitions for temporary child custody.[820] Joseph A. had an automobile accident while his minor child J.A. was in the car.[821] After failing a field sobriety test, Joseph A. was arrested for driving while intoxicated and J.A. was taken into emergency custody.[822] The Department of Health and Social Services filed a CINA petition.[823] The superior court dismissed the petition and ordered J.A.'s return to his parents' custody, ruling that although probable cause existed to believe that J.A. was a CINA at the time of the accident, probable cause ceased upon Joseph A.'s release.[824] The supreme court reviewed the CINA probable cause determination *de novo*, as it would a criminal probable cause determination.[825] It justified use of the *de novo* standard upon the need for appellate courts to maintain control of legal principles. It also considered the court's consistent use of the *de novo* standard in recent CINA cases.[826] Furthermore, the court interpreted probable cause as "substantial chance."[827] Applying this standard to the "totality of the circumstances,"[828] which included a history of domestic violence and alcohol abuse by the parents, the court concluded that probable cause continued to exist at the time of the hearing to be-

815. *See id.* at 448.
816. *See id.* at 449.
817. *See id.*
818. *See id.* at 450.
819. 962 P.2d 173 (Alaska 1998).
820. *See id.*
821. *See id.* at 174.
822. *See id.* at 175.
823. *See id.*
824. *See id.*
825. *See id.*
826. *See id.* at 175-76.
827. *Id.* at 176.
828. *Id.* at 179.

lieve that J.A. was a CINA.[829] Two strong dissents urged that the court review CINA probable cause determinations under a "clearly erroneous" standard and that probable cause be interpreted as "more likely than not."[830]

In *Karen L. v. State*,[831] the supreme court held that state workers owed no duty of care to a mother at risk of losing her child in a Child in Need of Aid ("CINA") proceeding to prevent psychological and emotional injury.[832] State youth officials determined Karen L.'s son to be a CINA based on the boy's claims that Karen abused him.[833] This determination eventually caused Karen to lose custody of her son for a period of about seven months.[834] Karen brought several claims against the officials, including negligent and intentional infliction of emotional distress.[835] The court applied the multi-factor *D.S.W.* test for determining whether a duty of care exists.[836] The key factor for the court was the foreseeability of harm to the plaintiff.[837] The court did not reject Karen's assertion that it was foreseeable that a parent undergoing CINA proceedings would experience distress over the well-being of her child; instead, the court ruled that this was insufficient to establish a duty.[838] Noting that the duty to prevent emotional distress is normally imposed only in cases involving accidents, the court reiterated that an actionable distress claim can lie only if the parent contemporaneously observes the child's injury or trauma.[839] In this case, the child did not suffer the type of injury that normally generates acute shock, nor was there an allegation that the parent contemporaneously observed such an injury.[840]

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829. *See id.* at 178-79.

830. *See id.* at 181.

831. 953 P.2d 871 (Alaska 1998).

832. *See id.* at 872.

833. *See id.*

834. *See id.* at 872-73.

835. *See id.* at 873.

836. *See* D.S.W. v. Fairbanks N. Star Borough Sch. Dist., 628 P.2d 554, 555 (Alaska 1981) (holding that the existence of a duty of care rests on, among other things, "[t]he foreseeability of harm to the plaintiff, the degree of certainty that the plaintiff suffered injury, the closeness of the connection between the defendant's conduct and the injury suffered, the moral blame attached to the defendant's conduct, the policy of preventing future harm, the extent of the burden to defendant and consequences to the community of imposing a duty [of] care . . . and the availability, cost and prevalence of insurance for the risk involved").

837. *See Karen L.*, 953 P.2d at 875-76.

838. *See id.*

839. *See id.* at 876.

840. *See id.*

In *L.H. v. Y.M.*,[841] the supreme court held that where a father seeking custody failed to assert his constitutional right against self-incrimination before the superior court, he could not raise it on appeal.[842] When L.H. and Y.M. were divorced in 1992, Y.M. received custody of their daughter, R.H.[843] Y.M. later sought to terminate L.H.'s visitation with R.H. following accusations of sexual abuse by another of L.H.'s children, C.C.[844] L.H. failed to comply with discovery requests and court orders for production of psychological records.[845] After the deadline passed and Y.M. moved for sanctions, L.H. asserted his privilege against self-incrimination.[846] The court granted Y.M.'s motion for sanctions and terminated visitation.[847] In the present case, L.H. brought a change-of-custody motion seeking legal custody of R.H. following a recantation by C.C.[848]

The court upheld the superior court's denial of the motion for several reasons. First, the original order denying custody was not a punishment for asserting a constitutional privilege, but rather a sanction for disregard of discovery orders and failure to assert the privilege in a timely fashion.[849] Second, L.H.'s disregard of the court's order to establish his basis for resisting discovery in the original proceeding amounted to a waiver of any claim of privilege.[850] Finally, L.H. did not mention his psychological records and again failed to assert his self-incrimination privilege in his change-of-custody motion until his appeal.[851]

In *Coleman v. Coleman*,[852] the supreme court upheld an award of attorney's fees in a child custody case, holding that the superior court had authority to award fees based on relative need rather than prevailing-party status,[853] and that this authority existed despite the silence of the parties' custody agreement regarding fees.[854] The first issue was whether the superior court was required to apply the prevailing-party rule.[855] The court held that it was not, on

841. 961 P.2d 414 (Alaska 1998).
842. *See id.* at 416.
843. *See id.*
844. *See id.*
845. *See id.*
846. *See id.*
847. *See id.*
848. *See id.*
849. *See id.* at 417.
850. *See id.*
851. *See id.* at 417-18.
852. 968 P.2d 570 (Alaska 1998).
853. *See id.* at 573.
854. *See id.* at 576-77.
855. *See id.*

the ground that the Michigan divorce made the litigants unmarried people litigating an initial custody dispute.[856] Prior case law established that in this situation the court should use the relative need rule it applies in custody disputes.[857] The second issue was whether the motion was timely, given that it was filed after the custody dispute was settled.[858] The court held that it was timely because the mother requested fees in her original complaint, thus satisfying the requirement that an application for attorney's fees be filed during the pendency of the action.[859]

In *Tompkins v. Tompkins*,[860] the supreme court held that it is proper for a court determining custody to consider evidence of a parent's relationship with a stepchild after the parents were separated.[861] The superior court awarded custody of Eric Tompkins's three natural children to his ex-wife Delynn, on the ground that Eric was less able to meet the children's emotional needs.[862] The court pointed to Eric's failure to have any meaningful contact with Delynn's daughter from a previous marriage after their separation.[863] The supreme court affirmed, declining to make a general rule that a parent's relationship with a stepchild is never relevant to a custody dispute over a parent's natural children.[864] Instead, the court declared that the proper methodology "is to consider the factual circumstances underlying the parent-stepchild relationship in assessing its relevance."[865] The court then noted the absence of evidence that the rift between Eric and his stepdaughter was caused by her own wrongdoing or any external factor, and concluded that the rift could be considered indicative of Eric's parenting skills.[866]

In *Walker v. Walker*,[867] the supreme court held that the superior court must conduct an evidentiary hearing before granting an opposed motion to modify a child custody and support decree.[868] The Walkers incorporated a custody and support decree into their divorce settlement.[869] Six years later, the father filed a motion to

856. *See id.*
857. *See id.*
858. *See id.* at 573-74.
859. *See id.* at 574.
860. 961 P.2d 419 (Alaska 1998).
861. *See id.* at 423.
862. *See id.*
863. *See id.*
864. *See id.*
865. *Id.*
866. *See id.*
867. 960 P.2d 620 (Alaska 1998).
868. *See id.* at 622.
869. *See id.* at 621.

modify custody, alleging his wife's voluntary relinquishment of custody and her drug habit.[870] The mother responded with an affidavit contesting the allegations, and she requested a continuance to obtain counsel.[871] The superior court extended the mother's time to file any supplemental opposition, but the mother missed the deadline because the court sent the order to the wrong address.[872] After the deadline passed, the court granted the father's motion.[873] The supreme court reversed, finding that once the wife opposed the motion by submitting her affidavit, she was not obligated to present any further opposition to earn a right to an evidentiary hearing.[874]

B. Child Support

In *Dunn v. Dunn*,[875] the Alaska Supreme Court held that Individual Retirement Account ("IRA") dividends may be considered as income for the purposes of calculating child support.[876] Larry Dunn challenged the superior court's decision to include IRA earnings in calculating his income for the purpose of paying child support.[877] The court noted that this was an issue requiring its independent judgment, and that it would consider the rule "that is most persuasive in light of precedent, reason, and policy."[878] It found that other jurisdictions calculate IRA earnings for the purpose of child support,[879] and that the Alaska Rules of Civil Procedure consider many similar types of benefits as income.[880]

In *Marine v. Marine*,[881] the supreme court held that Alaska Civil Rule 90.3(b)(2) allowed a superior court to vary its award of child support where the percentage of time that each parent has physical custody does not correspond to the percentage of the child's expenses that each parent will pay.[882] The factual findings of the trial court in a child support proceeding are reviewed under a "clearly erroneous" standard and will not be set aside unless the

870. *See id.*
871. *See id.*
872. *See id.*
873. *See id.*
874. *See id.* at 622.
875. 952 P.2d 268 (Alaska 1998).
876. *See id.* at 272.
877. *See id.* at 270.
878. *Id.* at 271.
879. *See id.* at 272.
880. *See id.*
881. 957 P.2d 314 (Alaska 1998).
882. *See id.* at 318.

appellate court is left with "a definite and firm conviction that a mistake has been made."[883]

In *Rowen v. Rowen*,[884] the supreme court held that the lower court abused its discretion in altering a provision of a child custody and support agreement that was unrelated to the father's refusal to disclose his financial information.[885] Under their custody agreement, Robert and Sandra Rowen shared custody of their three children. Sandra had custody during the school year and Robert had custody during vacations and paid the children's transportation costs.[886] In addition, at age fourteen, each child could elect to live with whichever parent they desired.[887] If a child chose to live with Robert, the transportation costs would shift to Sandra.[888] When the eldest child decided to live with his father, Robert sought to modify the support agreement but refused to disclose his income because he was under investigation by the Internal Revenue Service.[889] Robert offered to have his income calculated based upon the $60,000 cap under Rule 90.3(c)(2), but the superior court refused to shift transportation costs to Sandra, citing Robert's failure to disclose income.[890] The supreme court reversed the superior court, holding that because transportation costs were covered by the previous custody agreement, the failure to disclose financial information was irrelevant.[891]

In *Hendren v. State*,[892] the supreme court held that a parent is not liable to the state for public assistance paid to the child when that parent is not obligated to pay child support under a court order.[893] When David Hendren divorced Vallrie, he received custody of their child while Vallrie paid child support.[894] Later, the child lived with Vallrie, who collected Aid to Families with Dependent Children grant payments.[895] The Child Support Enforcement Division sought reimbursement from David.[896] However, according to Alaska Statutes section 25.27.120(a), only a parent obligated to pay

883. *Id.* at 316 (quoting Nass v. Seaton, 904 P.2d 412, 414 (Alaska 1995)).
884. 963 P.2d 249 (Alaska 1998).
885. *See id.* at 255-56.
886. *See id.* at 251.
887. *See id.*
888. *See id.*
889. *See id.* at 252.
890. *See id.*
891. *See id.* at 256.
892. 957 P.2d 1350 (Alaska 1998).
893. *See id.* at 1353.
894. *See id.* at 1351.
895. *See id.*
896. *See id.*

child support pursuant to a court order can be obligated to reimburse public assistance.[897]

In *Monette v. Hoff*,[898] the supreme court held that the lower court must calculate the child support obligations of a non-custodial parent *de novo*, and may not deferentially review the Child Support Enforcement Division's prior calculation of such an obligation.[899] The court affirmed previous holdings that it reviews a trial court's custody award under an abuse of discretion standard and that the trial court has the discretion to assess witness credibility.[900] Furthermore, the court affirmed that the trial court has the discretion to require supervised visitation when credible evidence suggests that unsupervised visitation is contrary to the child's best interests and that such decisions will be reviewed under an abuse of discretion standard.[901]

In *Beard v. Morris*,[902] the supreme court held that the superior court should have provided calculations to show the basis for its decision not to modify an ex-husband's child support payments.[903] The superior court failed to describe the method it used to arrive at its conclusion that Beard's decision to move into Coast Guard barracks and lose his housing allowance did not result in a material change in financial circumstances.[904] The supreme court determined that on remand, the trial court should include a determination as to whether Beard had a valid economic reason, other than reducing his child support obligation, for choosing to move and forgoing his housing allowance payment from his employer.[905]

In *Robinson v. Robinson*,[906] the supreme court remanded a lower court's modification of child support payments on the grounds that further findings were needed in support of the modification.[907] Cynthia Robinson brought three objections to the superior court's order reducing her husband Dennis's child support obligation: (1) the court failed to consider all of Dennis's sources of income; (2) the court should have considered potential rather than actual earnings; and (3) the court failed to consider the parties'

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897. *See id.*; *see also* ALASKA STAT. § 25.27.120(a) (Michie 1996).

898. 958 P.2d 434 (Alaska 1998).

899. *See id.* at 437.

900. *See id.* at 436 (citing Holl v. Holl, 815 P.2d 379 (Alaska 1991); Hanlon v. Hanlon, 871 P.2d 229, 232 (Alaska 1994)).

901. *See id.* at 436-37.

902. 956 P.2d 418 (Alaska 1998).

903. *See id.* at 420.

904. *See id.*

905. *See id.*

906. 961 P.2d 1000 (Alaska 1998).

907. *See id.* at 1003.

understanding about cost of living differences in their initial agreement.[908]

The court found merit with Cynthia's first argument, holding that the lower court failed to consider two sources of income.[909] This is consistent with the language of Alaska Rule of Civil Procedure 90.3,[910] which exempts income used to pay child support and alimony from prior relationships, but does not exempt income used to pay arrears for the same child.[911] Further, the court suggested that where a party voluntarily reduces income by underemployment, lowering child support may be inappropriate.[912] Finally, the court supported Cynthia's last argument, stating that the lower court must consider the parties' initial intent when the award reflects differences in cost of living for the parents.[913]

In *Robinson v. Robinson*,[914] the supreme court held that a child support agreement involving an amount greater than that required by Civil Rule 90.3 must include an explanation of the parties' intentions and/or expectations of contingent future events.[915] In the absence of such findings, a court cannot deny as a matter of law a petition to modify the award on the ground of changed circumstances.[916] In this case, Jim Robinson agreed to pay his ex-wife an amount greater than that required, at a time when he was under investigation for fraud.[917] Jim eventually was incarcerated for ten months, during which time he attempted to reduce his child support obligation.[918] The superior court denied Jim's request, but the supreme court remanded for findings regarding the parties' assumptions underlying the original agreement.[919] Finding that an agreement above the minimum is "essentially a contract,"[920] the court ruled that the circumstances surrounding the contract must be known before the court can decide on a motion for modification.[921]

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908. *See id.* at 1001.
909. *See id.* at 1003.
910. ALASKA R. CIV. P. 90.3(a)(1).
911. *See Robinson*, 961 P.2d at 1003.
912. *See id.* at 1004.
913. *See id.*
914. 953 P.2d 880 (Alaska 1998).
915. *See id.* at 885.
916. *See id.* at 886.
917. *See id.* at 882-83.
918. *See id.* at 883.
919. *See id.* at 887.
920. *Id.* at 884.
921. *See id.* at 885.

In *Hilderbrand v. Hilderbrand*,[922] the supreme court held that the rental value of an owner-occupied apartment is not counted in determining a parent's income for child support purposes[923] and that depreciation deductions for such property are not allowed where such deductions would not be allowed for federal tax purposes.[924] When Joe and Deborah divorced, Joe was given title to and continued to live in the apartment the couple had jointly owned when married.[925] In general, the rental value of an apartment occupied by the owner is not counted in determining income for child support purposes absent good cause.[926] In order to find good cause, the obligor must be found to be acting in bad faith to shield his or her income.[927] Joe was found not to be living in the apartment solely to reduce his child support payments.[928] Because Joe could not deduct an amount from his income for tax purposes based on annual depreciation of the property, he was disallowed from deducting depreciation from income calculations for child support purposes.[929]

In *Hermosillo v. Hermosillo*,[930] the supreme court held that Child Insurance Benefit ("CIB") payments made on a child's behalf should be incorporated in the calculation of a parent's support arrears and that visitation sanctions cannot be offset against support arrears.[931] Richard and Mary Hermosillo had one child, Paul, before divorcing.[932] Richard was ordered to pay $150 per month in child support but failed to do so.[933] In 1984, Paul became eligible for CIB payments when Richard became disabled.[934] Additionally, Mary refused to return Paul for visitation with Richard, for which she incurred $12,000 in sanctions.[935] The court held that social security benefits paid to the child should be credited toward Richard's support arrearage.[936] In addition, the court held that under Alaska Statutes section 25.27.080 a non-custodial parent's support

922. 962 P.2d 887 (Alaska 1998).
923. *See id.* at 888.
924. *See id.* at 890.
925. *See id.* at 888.
926. *See id.*
927. *See id.* at 889.
928. *See id.*
929. *See id.* at 890.
930. 962 P.2d 891 (Alaska 1998).
931. *See id.* at 892.
932. *See id.*
933. *See id.*
934. *See id.*
935. *See id.* at 892-93.
936. *See id.* at 893-94 (citing Miller v. Miller, 890 P.2d 574, 577 (Alaska 1995)).

obligation may not be reduced due to a custodial parent's interference with visitation rights.[937]

In *Boone v. Boone*,[938] the supreme court held that a child's change in residence constituted a material change in circumstances that justified modification of a child support order and entitled the father to recover child support arrearages.[939] After Larry and Rebecca Boone divorced, Rebecca had sole legal custody of their two children and Larry paid her $700 a month in child support.[940] Six years later, the children moved into Larry's home, and Larry sought a modification of support in the form of arrearages.[941] The superior court may modify a child support award upon a showing of a "material change of circumstance."[942] The court found that the children's move, though not ordered by the court, was sufficiently permanent to constitute a material change in circumstance.[943]

In *Bendixen v. Bendixen*,[944] the supreme court held that incarceration did not amount to voluntary unemployment for purposes of child support payments.[945] The commentary to Alaska's Civil Prodecure Rule 90.3, which governs child support awards, expressly endorses imputing income in certain situations involving voluntary unemployment.[946] Voluntary unemployment arises where a parent acts with the purpose of becoming or remaining unemployed.[947] Implicit in the commentary is the presupposition that the parent has some actual prospect of earning income.[948] Unemployed incarcerated parents rarely have actual job prospects, however, nor can they alter their situations.[949] Furthermore, although they made a conscious decision to engage in criminal activity, rarely do they desire incarceration and the enforced unemployment that accompanies it.[950] Due to these "significant, real-life distinctions" between unemployed parents who are incarcerated and those who are not, the court refused to equate incarceration with voluntary unemployment.[951]

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937. *See id.* at 894.
938. 960 P.2d 579 (Alaska 1998).
939. *See id.* at 583.
940. *See id.* at 581.
941. *See id.*
942. ALASKA R. CIV. P. 90.3(h)(1).
943. *See Boone*, 960 P.2d at 583.
944. 962 P.2d 170 (Alaska 1998).
945. *See id.* at 171.
946. *See id.*
947. *See id.* at 172.
948. *See id.*
949. *See id.* at 173.
950. *See id.*
951. *Id.*

In *State ex rel. Gause v. Gause*,[952] the supreme court held that the statute of limitations on actions set out in Alaska Statutes section 09.10.040(b) does not apply to actions to collect child support arrears because such actions seek only to enforce judgments already established.[953] The original version of AS 09.10.040 placed a ten-year statute of limitations on "an action upon a judgment or decree of a court."[954] Two Alaska superior court judges held that AS 09.10.040 barred the Child Support Enforcement Division ("CSED") from collecting child support payments over ten years past due.[955] In response, the Alaska legislature passed an amendment to AS 09.10.040 that allowed actions to bring judgment for child support payments so long as such actions were begun before the youngest child included in the child support order turned twenty-one years old.[956] Subsequently, the supreme court dealt with CSED's appeal of the lower court's interpretation of AS 09.10.040, holding that because CSED's efforts to collect owed payments involved enforcing already existent judgments, such efforts did not constitute "bringing an action" within the terms of the old version of AS 09.10.040.[957]

CSED brought an action against Thomas Gause for child support arrears which Gause opposed because the action was not filed until a month after the Gause's youngest child had turned twenty-one.[958] When a lower court denied CSED's motion to collect, it appealed.[959] The court found that the amendment, AS 09.10.040(b), had been passed by the legislature in response to the erroneous interpretation of the original version of the statute by superior court judges.[960] Noting that "[a] statute passed based on a mistaken premise does not change the legal rule in effect before its passage,"[961] the court held that actions to collect child support arrears did not fall under the terms of the amended statute.[962] The court also refused to find that the doctrine of estoppel prevented CSED from seeking reimbursement for AFDC payments because Gause failed to show detrimental reliance.[963]

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952. 967 P.2d 599 (Alaska 1998).
953. *See id.* at 604.
954. *Id.* at 601 n.6 (quoting former version of ALASKA STAT. § 09.10.040).
955. *See id.* at 601.
956. *See id.*
957. *See id.*; *see also* State ex rel. Inman v. Dean, 902 P.2d 1321 (Alaska 1995).
958. *See Gause*, 967 P.2d at 600.
959. *See id.*
960. *See id.* at 601.
961. *Id.* at 603.
962. *See id.*
963. *See id.* at 604.

In *State ex rel. Wallace v. Delaney*,[964] the supreme court held that a Washington state agency's letter to a husband that recalculated his child support arrearage without including accrued interest did not supersede an Alaska court's child support order that required payment of accrued interest.[965] Pursuant to Donald Delaney and Karen Wallace's divorce, an Alaska support order required Donald to pay monthly child support.[966] The order imposed interest on late payments.[967] When Donald fell into arrearage, Alaska's Child Support Enforcement Division sought enforcement aid from the Office of Support Enforcement ("OSE") in Donald's home state of Washington.[968] OSE sent a letter to Donald that recalculated his past-due child support debt without interest.[969] The court held that this letter did not supersede the Alaska order under Alaska's Uniform Reciprocal Enforcement of Support Act.[970] The OSE letter was not a court order, nor did it specify that it modified, nullified or superseded the Alaska order.[971]

In *State v. Beans*,[972] the supreme court held that judicial review of a driver's license suspension due to delinquent child support payments under Alaska Statutes section 25.27.246 did not require a jury trial.[973] After failing to make his child support payments, Beans was notified by the Child Support Enforcement Division ("CSED") that his license would be suspended.[974] Under AS 25.26.247(i) such licensees may request judicial relief from CSED's decision.[975] Beans argued that the suspension is punitive, and thus criminal in nature, entitling him to a jury trial under the Alaska Constitution.[976] The court held that review by a judge of CSED's determination is constitutionally sufficient.[977] The court distinguished the license suspension from the license revocations in *Baker v. City of Fairbanks*[978] in three ways.[979] First, Beans did not face any of the collateral consequences of a formal criminal convic-

964. 962 P.2d 187 (Alaska 1998).
965. *See id.* at 191-92.
966. *See id.* at 188.
967. *See id.*
968. *See id.*
969. *See id.*
970. *See id.* at 189.
971. *See id.* at 190-91.
972. 965 P.2d 725 (Alaska 1998).
973. *See id.* at 731.
974. *See id.* at 726.
975. *See id.* at 727.
976. *See id.* at 729.
977. *See id.* at 731.
978. 471 P.2d 386 (Alaska 1970).
979. *See Beans*, 965 P.2d at 730.

tion.[980] Second, the loss of a license is only coercion to meet an obligation, not punishment for past misconduct.[981] Third, granting additional safeguards to delinquent obligors risks impairing the practical interests of children and their custodial parents.[982]

In *Maloney v. Maloney*,[983] the supreme court held that a child support award could be reduced where an obligor voluntarily retired from the military in order to improve his chances of securing better future civilian employment.[984] Michael Maloney sought to have his child support award substantially reduced following his retirement from the Air Force.[985] He presented evidence that he would have been passed over for promotion due to health problems, and that this significantly would have harmed his civilian employment prospects.[986] He further testified to his unsuccessful efforts at finding employment following retirement.[987] The court, applying an abuse of discretion standard, affirmed the superior court's order modifying support.[988] In addition, the court held that the earnings of the custodial parent, Donalita Maloney, could be considered where the non-custodial obligor, Michael, had shown grounds for reducing child support.[989]

In *Wright v. Shorten*,[990] the supreme court held that an ex-husband's letter to the court denying paternity in response to a child support claim should have been treated as an answer adequate to avoid a default judgment.[991] While married to Jason Wright, Kelly Shorten delivered a child and named Wright as the father.[992] After the couple divorced, Shorten sought child support from Wright.[993] Wright was served with Shorten's complaint in California and responded with a letter to the court in which he denied paternity and offered to support his denial with medical documentation.[994] The standing master treated the letter as an appearance, not an answer, and the court below entered a default judgment against Wright for failure to plead in or otherwise de-

980. *See id.*
981. *See id.*
982. *See id.* at 731.
983. 969 P.2d 1148 (Alaska 1998).
984. *See id.* at 1151-52.
985. *See id.* at 1150.
986. *See id.* at 1150-52.
987. *See id.* at 1152.
988. *See id.*
989. *See id.* at 1152-53.
990. 964 P.2d 441 (Alaska 1998).
991. *See id.* at 442.
992. *See id.*
993. *See id.*
994. *See id.*

fend the action.[995] The supreme court reversed, finding that Wright's letter should have been considered an answer because it furnished a timely and direct response to the complaint.[996] Because Wright showed mistake or excusable neglect and submitted an answer containing a meritorious defense, he deserved Rule 60(b)(1) relief from the default judgment.[997]

In *Bostic v. State*,[998] the supreme court held that the Child Support Enforcement Division ("CSED") violated a father's due process rights in two ways: By failing to give him notice and an opportunity to participate in a file review, and by basing its final determination of child support on evidence not presented at the formal hearing.[999] The CSED calculated Bostic's child support obligation by imputing to him the average income of a fifty-year old Alaskan male, despite his contention that he was unable to find work after his release from prison.[1000] The court considered Bostic's claims that he was denied notice and an opportunity to present his case in both informal and formal hearings at the administrative level.[1001]

The court found due process violations at both levels.[1002] First, the court concluded that CSED could not substitute a unilateral file review without notice to Bostic in place of an informal hearing.[1003] CSED also had failed to give Bostic notice that he had not submitted sufficient documentation to support his case.[1004] Second, the court found that the formal hearing failed to cure the earlier violations, because the hearing examiner's final determination was based on evidence presented after the hearing.[1005]

In *Elsberry v. Elsberry*,[1006] the supreme court held that the First Amendment did not forbid a court from imputing a divorced father's income for the purposes of calculating child support, despite the father's assertion that the court hold a hearing on the sincerity of his anti-tax religious beliefs.[1007] Keith Elsberry claimed to have an income below the poverty level but produced no tax rec-

995. *See id.* at 442-43.
996. *See id.* at 444.
997. *See id.*
998. 968 P.2d 564 (Alaska 1998).
999. *See id.* at 569.
1000. *See id.* at 565.
1001. *See id.* at 567-68.
1002. *See id.* at 569.
1003. *See id.* at 568.
1004. *See id.*
1005. *See id.* at 569.
1006. 967 P.2d 1004 (Alaska 1998).
1007. *See id.* at 1004.

ords to support his claim.[1008] He asserted that his religious beliefs prevented him from paying federal taxes, and requested a hearing on the sincerity of his beliefs after the court imputed to him the income of an average Alaskan man his age.[1009] The Child Support Enforcement Division produced evidence indicating that Elsberry's income as a self-employed mechanic, though difficult to determine, was higher than he claimed.[1010] The supreme court affirmed the lower court's ruling, holding that no hearing was necessary because the court did not base its conclusion on a presumption of the insincerity of his religious beliefs.[1011] Instead, the supreme court found that the lower court "simply observed that [Elsberry] had failed to submit any documentation of his asserted income"[1012] and found the other evidence regarding his earning capacity to be more credible than Elsberry's affidavit claiming poverty.[1013]

C. Marital Property

In *Broadribb v. Broadribb*,[1014] the Alaska Supreme Court held that the property award by the superior court in a divorce proceeding will be reviewed under an abuse of discretion standard.[1015] Under this standard, the court rejected a petitioner's numerous appeals to reduce the award of property to his ex-wife.[1016] The court, citing Ms. Broadribb's long-time absence from the workforce and the need to maintain a home for their children, refused to reduce the monthly alimony award granted by the superior court or to order the sale of the family home.[1017] In addition, the court refused to reverse the superior court's inclusion of Mr. Broadribb's survivor benefits in its calculation of his total assets.[1018] Furthermore, the court affirmed the superior court's order to cash in stock options at particular times, noting that the superior court is required to consider only immediate tax consequences when making such orders, and not long-term tax strategies.[1019]

1008. *See id.* at 1005.
1009. *See id.* at 1005-06.
1010. *See id.*
1011. *See id.* at 1007.
1012. *Id.*
1013. *See id.*
1014. 956 P.2d 1222 (Alaska 1998).
1015. *See id.* at 1225.
1016. *See id.*
1017. *See id.* at 1226-27.
1018. *See id.* at 1227.
1019. *See id.* at 1227-28.

In *Dodson v. Dodson*,[1020] the supreme court held that a promissory note transferred to both spouses during marriage could not become one spouse's personal liability to the other after separation.[1021] Both Jim and Robin signed papers authorizing the transfer of the promissory notes, and Robin's past participation in trust-related matters indicated that she was "fully aware" of the significance of transferring the stocks to herself and her husband as individuals.[1022] Thus the promissory notes should not have been enforced against Jim as his separate debt and in favor of Robin as her separate property.[1023]

In *Horchover v. Field*,[1024] the supreme court held that an order requiring a divorced spouse to provide an accounting to the other spouse merely enforced, and did not alter, the property agreement between the spouses when the accounting was necessary to ascertain whether the spouse was in compliance.[1025] Sylvia claimed that her ex-husband Robert was not complying with their property settlement and requested an order requiring Robert to provide an accounting.[1026] The order was granted,[1027] and Robert claimed on appeal that the order modified the terms of the agreement and therefore was outside of the court's jurisdiction.[1028] The supreme court upheld the order, ruling that the purpose of the accounting was to determine if Robert was complying with the property settlement.[1029] Thus, the order merely enforced the property settlement, and could be reversed only if there was an abuse of discretion.[1030]

In *Zito v. Zito*,[1031] the supreme court held that a court has inherent authority to enforce the division of retirement benefits through a qualified domestic relations order,[1032] and that an agreement for equitable division of retirement benefits earned during a marriage is presumed to encompass survivor benefits.[1033] The Zitos agreed to divide equitably William's retirement fund when the couple divorced in 1988, but disagreed over whether the agreement

1020. 955 P.2d 902 (Alaska 1998).
1021. *See id.* at 905-07.
1022. *Id.* at 907.
1023. *See id.*
1024. 964 P.2d 1278 (Alaska 1998).
1025. *See id.* at 1283-84.
1026. *See id.* at 1280.
1027. *See id.*
1028. *See id.* at 1282.
1029. *See id.* at 1283-84.
1030. *See id.* at 1282.
1031. 969 P.2d 1144 (Alaska 1998).
1032. *See id.* at 1146.
1033. *See id.* at 1148.

incorporated benefits accrued during the marriage.[1034] Kathleen obtained a qualified domestic relations order that resolved the disagreement in her favor and also awarded survivor benefits to her.[1035] Affirming this order, the supreme court first held that the order enforced the original agreement between the parties, and therefore was within the lower court's inherent authority.[1036] The court then held that the award of survivor benefits was proper, noting that it implicitly had held in an earlier case that survivor benefits are an intrinsic part of retirement benefits and should be presumed to be included in an agreement dividing retirement benefits.[1037]

D. Miscellaneous

In *C.T. v. J.S. and C.B.*,[1038] the Alaska Supreme Court held that a mother was not equitably estopped from withdrawing consent to adoption merely by stating that the would-be adopting father was the child's father.[1039] C.T. told her daughter that her father was C.T.'s boyfriend C.B., when in fact the natural father was J.S.[1040] J.S. and C.B. wished to terminate J.S.'s parental rights and declare the girl adopted by C.B.[1041] The court rejected their assertion that C.T.'s statements to her daughter estopped her from withdrawing consent to the adoption.[1042] The court declined to rule on whether a mother ever can be equitably estopped from withdrawing her consent to an adoption.[1043]

In *In re Adoption of A.F.M.*,[1044] the supreme court vacated an adoption decree because the child's natural father did not fail "significantly without justifiable cause . . . to provide for the care and support of the child as required by law."[1045] Alaska Statutes section 25.23.050(a)(2)(B) provides for the waiver of a natural parent's consent in adoption when the parent has failed to support the child for the period of at least one year.[1046] However, the statute

1034. *See id.* at 1145.
1035. *See id.*
1036. *See id.* at 1146.
1037. *See id.* at 1147-48 (citing Wahl v. Wahl, 945 P.2d 1229 (Alaska 1997)).
1038. 951 P.2d 1199 (Alaska 1998).
1039. *See id.*
1040. *See id.*
1041. *See id.*
1042. *See id.*
1043. *See id.*
1044. 960 P.2d 602 (Alaska 1998).
1045. *Id.* at 604-05.
1046. *See* ALASKA STAT. § 25.23.050(a)(2)(B) (Michie 1994).

does not specify a method to calculate the year of nonsupport.[1047] Bruce Farley, the natural father, had made one support payment on August 15, 1995, and the next payment on August 16 of the following year. Strictly construing AS 25.23.050 in favor of the natural parent, the court rejected the adoptive parent's argument that Farley missed the year requirement by one day.[1048] Instead, the court found that Farley had missed only eleven months and thus had not violated the statute.[1049]

In *Hernandez v. Lambert*,[1050] the supreme court held that issuance of a new birth certificate by the state effectively recognized a tribal court's adoption order as a customary adoption of an Indian child and accordingly triggered the one-year time limit for paternity suits.[1051] Hernandez, the putative father, sought to escape the bar imposed on paternity suits by Alaska Statutes section 25.23.140(b)[1052] by challenging the legitimacy of an adoption order issued by a tribal court.[1053] Regardless of whether the tribal court had jurisdiction to issue an adoption order, the issuance of a new birth certificate by the Bureau of Vital Statistics gave the tribal court's order legal color.[1054] The court dismissed claims that the adoption order was invalid on the grounds of fraud and lack of notice because such grounds explicitly were time-barred by the statute.[1055]

In *Grober v. State*,[1056] the supreme court held that the statute of limitations for paternity actions tolls during a child's minority.[1057] This tolling occurs whether the action is brought by either a parent or a guardian ad litem such as the Child Support Enforcement Division.[1058] The court further held that the standing order, which required a putative father to submit to a blood test without notice or hearing, was unconstitutional.[1059]

In *Sielak v. State*,[1060] the supreme court held that the Child Support Enforcement Division's ("CSED's") newly granted authority to disestablish paternity did not extend to fathers for

1047. *See A.F.M.*, 960 P.2d at 605.
1048. *See id.*
1049. *See id.*
1050. 951 P.2d 436 (Alaska 1998).
1051. *See id.* at 441.
1052. ALASKA STAT. § 25.23.140(b) (Michie 1996).
1053. *See Hernandez*, 951 P.2d at 439.
1054. *See id.* at 441.
1055. *See id.* at 440.
1056. 956 P.2d 1230 (Alaska 1998).
1057. *See id.* at 1232 (citing ALASKA STAT. § 09.10.140 (Michie 1996)).
1058. *See Grober*, 956 P.2d at 1232.
1059. *See id.* at 1234-35.
1060. 958 P.2d 438 (Alaska 1998).

whom the statute of limitations for contesting paternity expired prior to the law's implementation.[1061] After Sielak separated from his wife in 1984, she had children by another man in 1986 and 1987.[1062] Since he was still married to the mother, Sielak received a notice of financial responsibility from CSED in 1988 and he did not contest this order until 1996.[1063] Under Alaska Statutes section 25.27.166, effective January 1, 1996, CSED has authority to disestablish paternity, provided that the petition is brought within three years of the child's birth.[1064] The court held that CSED lacked the authority to disestablish paternity.[1065] Sielak's argument that this constituted an unconstitutional ex post facto law was rejected because the statute does not change the legal consequences of actions prior to its passage, but simply fails to include Sielak in "the class of putative fathers who may take advantage of CSED's new authority."[1066]

In *H.C. v. State*,[1067] the supreme court held that the parental rights of a father who had abandoned his child for over a year could be terminated on the ground that the daughter was a child-in-need as a result of parental conduct, but not as a result of substantial risk of physical harm.[1068] D.K. had visiting rights to see his daughter, H.C., who was in state custody because he was unable to care for her.[1069] When D.K. moved to Texas and failed to communicate with H.C. for more than a year, the Division of Family and Youth Services moved to terminate D.K.'s parental rights.[1070] D.K.'s departure from Alaska and lack of communication with his daughter evidenced a disregard of parental obligations that destroyed any possibility of developing a parent-child relationship.[1071] Because D.K. had not accepted treatment for the mental illness that motivated his behavior, the court held that his conduct was likely to continue.[1072] Accordingly, H.C. was determined to be a child-in-need as a result of parental conduct and D.K.'s parental rights were terminated.[1073] However, because there was no evidence that H.C. had ever suffered physical harm from D.K., she

1061. *See id.* at 440.
1062. *See id.* at 439.
1063. *See id.*
1064. *See id.* (citing ALASKA STAT. § 25.27.166 (Michie 1996)).
1065. *See id.* at 440.
1066. *Id.*
1067. 956 P.2d 477 (Alaska 1998).
1068. *See id.* at 485.
1069. *See id.* at 479-80.
1070. *See id.* at 480.
1071. *See id.* at 482, 484.
1072. *See id.* at 484.
1073. *See id.* at 485.

was held not to be a child-in-need due to substantial risk of physical harm.[1074]

In *E.M. v. State*,[1075] the supreme court held that termination of the parental rights of an Indian child was appropriate where sufficient evidence existed that the father failed to obtain court-ordered substance abuse treatment, the child was frequently left alone, and people in the father's house posed a danger to the child.[1076] The court applied a clearly erroneous standard when reviewing the factual finding of a trial court regarding termination of parental rights.[1077] Under Alaska Statutes section 47.10.080(c)(3),[1078] termination requires a showing by clear and convincing evidence that the child is in need of aid due to parental conduct and that the parental conduct is likely to continue to exist if parental rights are not terminated.[1079] The Indian Child Welfare Act requires a finding by a preponderance of the evidence that "active efforts have been made to provide remedial services and rehabilitative programs designed to prevent the breakup of the Indian family and that these efforts have proved unsuccessful,"[1080] and a finding "beyond a reasonable doubt, including the testimony of qualified expert witnesses, that custody of the child by the parent or Indian custodian is likely to result in serious emotional or physical damage to the child,"[1081] before terminating parental rights for an Indian child.

E.M. previously had abandoned the child, but custody was restored to him contingent upon compliance with a case plan that included parenting classes, drug screening, and home visits.[1082] In the present proceeding, a social worker testified that E.M. was not in compliance with the substance abuse program, that the child had been left alone on numerous occasions, that the house was dirty and unsafe for the child, and that E.M. had been attacked by visitors while the child was present.[1083] A psychologist testified that E.M.'s unstable conduct was likely to continue and that this would be harmful to the child.[1084] Taken together, this evidence demon-

1074. *See id.* at 484-85.
1075. 959 P.2d 766 (Alaska 1998).
1076. *See id.* at 766-67.
1077. *See id.* at 768 (citing *In Re* S.A., 912 P.2d 1235, 1237 (Alaska 1998)).
1078. ALASKA STAT. § 47.10.080(c)(3) (Michie 1996).
1079. *See E.M.*, 959 P.2d at 768.
1080. *Id.* (citing 25 U.S.C. § 1912(d) (1997)).
1081. *Id.* (citing 25 U.S.C. § 1912(f) (1997)).
1082. *See id.* at 767.
1083. *See id.* at 769.
1084. *See id.* at 770.

strated that the factual findings of the trial court were not clearly erroneous.[1085]

In *O.R. v. State*,[1086] the supreme court held that the failure of parents to provide for their child's physical needs constituted substantial physical neglect warranting termination of parental rights, even if the child did not experience any actual physical harm.[1087] When A.R. was born to C.R. and O.R., she tested positive for cocaine and temporarily was placed in the custody of the state.[1088] The parents visited A.R. only sporadically and between them missed nearly 150 scheduled visits with the child.[1089] The court relied on *D.H. v. State*,[1090] a case based on nearly identical facts, in which the court held that the parents' failure "to make any sustained effort to establish a parent-child relationship" supported a finding of substantial neglect.[1091] C.R. and O.R. argued nonetheless that Alaska Statutes section 47.10.010(a)(6),[1092] which allows termination of parental rights for substantial physical neglect, requires a showing that the child actually suffered harm.[1093] The court ruled that this issue was decided in *D.H.*, where the court focused its inquiry on the conduct of the parents, and not the actual harm to the child.[1094]

IX. INSURANCE LAW

In *Progressive Insurance v. Simmons*,[1095] the Alaska Supreme Court held that statutory amendments to the Motor Vehicle Safety Responsibility Act implicitly repealed the unaltered statutory definition of "underinsured motor vehicle" ("UMV").[1096] Simmons, a minor passenger injured in an automobile accident, suffered damages exceeding the insurance policy's liability limits.[1097] She sought to recover underinsured motorist ("UIM") benefits under the policy.[1098] The insurance company refused, claiming that the automobile did not qualify as a UMV because its UIM limits did

1085. *See id.*
1086. 968 P.2d 93 (Alaska 1998).
1087. *See id.* at 97.
1088. *See id.* at 95.
1089. *See id.* at 95-96.
1090. 929 P.2d 650 (Alaska 1996).
1091. *O.R.*, 968 P.2d at 97 (quoting *D.H.*, 929 P.2d at 653).
1092. ALASKA STAT. § 47.10.010(a)(6) (Michie 1996).
1093. *See O.R.*, 968 P.2d at 97.
1094. *See id.* at 97-98.
1095. 953 P.2d 510 (Alaska 1998).
1096. *See id.* at 512.
1097. *See id.*
1098. *See id.*

not exceed its liability limits.[1099] The insurance company pointed to Alaska Statutes section 28.20.445(h), which defines a UMV as one whose liability coverage is "less than the limit for . . . underinsured motorist coverage under the insured's policy."[1100]

The supreme court rejected the insurance company's argument, reasoning that subsection (h) implicitly had been repealed by the state legislature's adoption in 1990 of an "excess approach" to automobile insurance coverage.[1101] Prior to these amendments, Alaska law had operated under a narrow "reduction scheme" for compensating those injured by UIMs.[1102] The reduction scheme precluded injured persons from combining liability and UIM coverage, even when neither amount alone would fully pay the person's actual damages.[1103] In 1990, however, the Alaska Legislature adopted a broader "excess approach" that permitted an injured person to supplement available liability coverage with UIM payments up to the extent of actual damages or combined policy limits, whichever was less.[1104] In the present context of excess coverage, the narrow UMV definition found in AS 28.20.445(h) "serve[d] no rational purpose" and failed to comport with the amendments' legislative history, suggesting that its "continued existence was not contemplated" at the time of the 1990 amendments.[1105]

In *National Chiropractic Mutual Ins. Co. v. Doe*,[1106] the United States District Court for the District of Alaska held that a declaratory judgment action filed by an insurer seeking to determine its liability for an insured doctor's alleged sexual assault should be stayed pending the outcome of the tort suit against the doctor in state court.[1107] The insurance company sought declaratory judgment in federal court, claiming that its coverage did not apply to a sexual assault committed by the insured doctor.[1108] The court decided to exercise its discretionary authority under the Declaratory Judgment Act[1109] and hear the claim, but the court determined that it would be impossible to resolve the insurance coverage claim without first resolving whether the doctor had acted intentionally

1099. *See id.*
1100. *Id.* at 513.
1101. *See id.* at 519.
1102. *See id.* at 514.
1103. *See id.*
1104. *See id.* at 515.
1105. *Id.* at 518.
1106. 23 F. Supp.2d 1109 (D. Alaska 1998).
1107. *See id.* at 1124.
1108. *See id.* at 1113.
1109. 28 U.S.C. §2201(a) (1997).

or negligently.[1110] Consequently, the court held that the declaratory judgment should be stayed pending the outcome of the underlying state court litigation.[1111]

In *Ace v. Aetna Life Ins. Co.*,[1112] the United States Court of Appeals for the Ninth Circuit held that an insurer's conduct supported a finding of bad faith liability,[1113] a damage award for emotional distress,[1114] and punitive damages,[1115] but that the amount awarded in punitive damages was excessive.[1116] Ace, an Alaska resident, was injured in a sledding accident and brought suit against Aetna after her attempts to claim long-term disability benefits were frustrated.[1117] Because Aetna had based its denial of Ace's claim on an illegal claim eligibility standard, lied about its claim adjustment guidelines, and refused to investigate the claim, the court found clear and convincing evidence of outrageous conduct on Aetna's part.[1118] Accordingly, an award of punitive damages was warranted.[1119] Aetna's conduct further supported a finding of bad faith liability on the insurer's part.[1120]

Nevertheless, because the jury awarded punitive damages in an amount 130 times larger than the amount awarded for compensatory damages, and because no Alaska courts have approved amounts similar in size, the court held the award to be excessive and instructed the lower court to determine an appropriate figure on remand.[1121] In addition, the court rejected Aetna's appeal that the jury was not properly instructed that the plaintiff must show severe emotional distress to receive a damage award.[1122] A requirement of severe emotional distress does not apply to a breach of good faith and fair dealing by an insurer to an insured.[1123]

1110. *See National Chiropractic*, 23 F. Supp.2d at 1124.
1111. *See id.*
1112. 139 F.3d 1241 (9th Cir. 1998).
1113. *See id.* at 1249.
1114. *See id.*
1115. *See id.* at 1247.
1116. *See id.* at 1248.
1117. *See id.* at 1242-46.
1118. *See id.* at 1246.
1119. *See id.* at 1247.
1120. *See id.* at 1249.
1121. *See id.* at 1248-49.
1122. *See id.* at 1249.
1123. *See id.* at 1250.

X. PROPERTY

A. Restrictions on Use

In *Dickerson v. Williams*,[1124] the Alaska Supreme Court held that a lower court did not abuse its discretion in enforcing a settlement agreement that provided a landowner with an extended easement area to build a road across another landowner's lot.[1125] A roadway easement across the upper 200 feet of Williams's lot was recorded for the benefit of adjacent owners and the public.[1126] The new road built across that area began sinking into what was discovered to be federal wetlands and further road building would be complicated by the need to secure permits under federal law.[1127] Dickerson sued, seeking restoration of the easement area to its original size, and the case was settled with an agreement to expand the easement area by fifty feet onto which a new road could be built.[1128] When this land also was discovered to contain federal wetlands, Dickerson sought relief from enforcement of the settlement agreement, alleging mistake, excusable neglect, newly discovered evidence and misrepresentation.[1129]

The lower court denied relief because under the settlement agreement Dickerson expressly assumed the risk of wetlands.[1130] The supreme court affirmed. While Dickerson may have neglected the risk of wetlands, such neglect was not excusable because Dickerson had been aware of the risk of wetlands for years.[1131] Dickerson's claim that the newly discovered evidence of wetlands nullified the agreement failed because the evidence was discoverable before the settlement with due diligence and there was no proof that threatening behavior on Williams' part prevented exercise of such diligence.[1132]

In *Gerstein v. Axtell*,[1133] the supreme court held that a cable company's claim, under the Cable Communications Policy Act of 1984, to access a private easement was moot because the company had obtained access through eminent domain.[1134] Gerstein Communications sought access to a private easement owned by the

1124. 956 P.2d 458 (Alaska 1998).
1125. *See id.* at 464.
1126. *See id.* at 460.
1127. *See id.*
1128. *See id.* at 460-61.
1129. *See id.* at 462, 464.
1130. *See id.* at 464-65.
1131. *See id.* at 466.
1132. *See id.* at 467.
1133. 960 P.2d 599 (Alaska 1998).
1134. *See id.* at 600.

Golden Valley Electric Association ("GVEA") and located on the Axtell family's property.[1135] When the Axtells denied Gerstein access, Gerstein sued GVEA and the Axtells seeking a declation that the Cable Act gave it access.[1136] In the alternative, Gerstein asked the court to exercise its eminent domain power to condemn a sufficient portion of the Axtell's property as an easement through which Gerstein could run its cable line.[1137] The superior court held that the Cable Act did not authorize Gerstein's use of the easement but granted Gerstein's eminent domain request.[1138]

In *Hayes v. A.J. Associates Inc.*,[1139] the supreme court held that state-reserved mineral interests are open to exploration under Alaska Statutes section 38.05.185(a) even where the surface interest is owned by a private party.[1140] A.J. Associates brought an ejectment action after Hayes staked mining claims to minerals under land owned by A.J. Associates.[1141] The property where the claim was staked was created by dumping crushed rock onto submerged lands.[1142] A.J. Associates received the surface rights from the state, but the state reserved the mineral rights.[1143] The court held that the mineral rights retained by the state constituted "state land" for purposes of AS 38.05.195,[1144] which states that "[r]ights to deposits of minerals in or on state land that is open to claim staking may be acquired by discovery, location, and recording."[1145] The court rejected the argument that this would interfere with the quiet enjoyment of the surface rights, noting that surface owners must anticipate that the state's reserved right someday may be exercised.[1146]

In *Leisnoi, Inc. v. Stratman*,[1147] the supreme court held that a previously established injunction only barred a rancher's horseback riding activities and did not affect his right to extract gravel from lands under a quitclaim deed.[1148] Stratman consented to a permanent injunction preventing the operation of a horse riding business on land owned by Leisnoi, Inc., to which Stratman held

1135. *See id.* at 599.
1136. *See id.*
1137. *See id.* at 600
1138. *See id.* at 600-01.
1139. 960 P.2d 556 (Alaska 1998).
1140. *See id.* at 562-63.
1141. *See id.* at 559.
1142. *See id.*
1143. *See id.*
1144. *See id.* at 562.
1145. ALASKA STAT. § 38.05.195 (Michie 1996).
1146. *See Hayes*, 960 P.2d at 563.
1147. 956 P.2d 452 (Alaska 1998).
1148. *See id.* at 455.

grazing leases, in exchange for Leisnoi waiving a claim for attorney's fees and costs in a lawsuit against Stratman.[1149] When Stratman began removing gravel from the land, Leisnoi sought an order to show cause why Stratman was not in violation of the injunction.[1150] The injunction was treated as a negotiated contract because both parties drafted its language and because the surrender of a claim for attorney's fees and costs in exchange for consent to the injunction constituted consideration.[1151] The court found that extrinsic evidence and the failure of the injunction to address the quitclaim deed indicated that the parties did not intend for the injunction to affect Stratman's subsurface rights to the land.[1152]

In *Stratman v. Leisnoi, Inc.*,[1153] the supreme court held that a quiet title action should be stayed while a separate action that could affect title to the parcel was pending under the Alaska Native Claims Settlement Act ("ANCSA").[1154] In 1974, the Secretary of the Interior certified Leisnoi as the village corporation for Woody Island.[1155] In 1976, Stratman filed an action in federal district court seeking to decertify Leisnoi.[1156] After a disputed settlement agreement, the federal court reopened the decertification suit in 1995.[1157] In 1996, Leisnoi brought suit in superior court to quiet title to a parcel of land patented to it in 1985.[1158] The superior court granted summary judgment to Leisnoi.[1159] The supreme court held that, because the decertification action may affect title to the property and because the superior court may not determine the merits of the decertification action, the quiet title action should have been stayed pending the outcome of the decertification action.[1160]

In *Leisnoi, Inc. v. Stratman*,[1161] the United States Court of Appeals for the Ninth Circuit held that under the Alaska Native Claims Settlement Act ("ANCSA"),[1162] a Village Corporation may withhold consent to mining operations by an owner of the subsurface estate only where such mining occurs within land physically

1149. *See id.* at 453.
1150. *See id.* at 452.
1151. *See id.* at 454.
1152. *See id.* at 454-55.
1153. 969 P.2d 1139 (Alaska 1998).
1154. *See id.* at 1139.
1155. *See id.*
1156. *See id.* at 1140.
1157. *See id.*
1158. *See id.* at 1140-41.
1159. *See id.* at 1139.
1160. *See id.* at 1143.
1161. 154 F.3d 1062 (9th Cir. 1998).
1162. 43 U.S.C. §§ 1601-1629(a) (1997).

occupied by the Native village.[1163] Under ANCSA, the subsurface estate in much of the lands awarded to Alaskan Natives belonged to Regional Corporations while the surface estate belonged to smaller Village Corporations.[1164] Stratman received subsurface rights from a Regional Corporation to land possessed by the Village Corporation of Leisnoi, Inc.[1165] Leisnoi sought to prevent Stratman from mining lands on Kodiak Island.[1166] The court found that under ANCSA, the consent of the Village Corporation was required for mining only where such mining occurred on land within the boundaries of the Native village.[1167] The land constituting a Native village, as opposed to the land to which the Village Corporation holds title, is determined by "physical evidence of occupancy," and not by historic use of the land.[1168] Because the Native village of Woody Island failed to demonstrate evidence of occupancy of Kodiak Island, Stratman did not need the Village Corporation's consent in order to mine there.[1169]

B. Transfers and Conveyances

In *Swiss v. Chignik River Ltd.*,[1170] the Alaska Supreme Court held that occupants of land used as subsistence campsites may be entitled to more than one campsite for a given subsistence use under the Alaska Native Claims Settlement Act ("ANCSA").[1171] ANCSA requires village corporations to convey title to the surface estate to any occupant of tracts of land used "as a primary place of residence, or as a primary place of business, or as a subsistence campsite."[1172] Under past precedent, occupants may claim only one primary place of business.[1173] However, the court found that no such limit should be imposed for subsistence campsites.[1174] First, the plain language of the statute does not place limits on the number of subsistence campsites, as it does for residences and businesses.[1175] Second, as a practical matter, many natives leading traditional subsistence lifestyles must move among several campsites,

1163. *See Lesnoi*, 154 F.3d at 1066-68.
1164. *See id.* at 1065.
1165. *See id.*
1166. *See id.*
1167. *See id.* at 1068.
1168. *Id.*
1169. *See id* at 1071-72.
1170. 951 P.2d 433 (Alaska 1998).
1171. *See id.*
1172. 43 U.S.C. § 1613(c)(1) (1997).
1173. *See Swiss*, 951 P.2d at 434.
1174. *See id.* at 436.
1175. *See id*. at 435.

due to their reliance on more than one species for their livelihood and to the migratory nature of prey.[1176] The court did not determine whether a site used for subsistence and for other purposes qualified as a subsistence campsite under ANCSA.[1177]

In *Frost v. Ayojiak*,[1178] the supreme court held that the misidentification of a parcel of real property was not merely a "clerical error" within the meaning of Rule 60(a),[1179] but instead related to a substantive defect in the initial judgment.[1180] Frost had purchased a house located on a parcel of land, Lot 3, that Ayojiak believed he owned.[1181] Ayojiak later brought a successful action for ejectment against Frost.[1182] Following this judgment, Frost discovered that their house was not in fact on Lot 3, but on Lot 3B, which had been owned by the city but had been deeded to Ayojiak subsequent to the ejectment action.[1183] The superior court amended its earlier ruling, holding that the misidentification of the lot was "clerical error" pursuant to Rule 60(a).[1184] The supreme court held that the amendment of the judgment changed it substantively and was not within the scope of Rule 60(a).[1185]

C. Landlord-Tenant

In *Ostrow v. State*,[1186] the Alaska Supreme Court held that a previous landowner had forfeited her possessory interest in personal property left on the land and was barred from bringing a conversion action against the state.[1187] Ostrow contracted with the state to purchase and improve a plot of agricultural land.[1188] Ostrow defaulted on several payments and failed to adhere to the development plan, so the state terminated the contract.[1189] The state notified Ostrow that she had sixty days to remove all chattels from the property.[1190] Ostrow, however, left several pieces of metal cul-

1176. *See id.*
1177. *See id.* at 436.
1178. 957 P.2d 1353 (Alaska 1998).
1179. *See* ALASKA R. CIV. P. 60(a) ("Clerical mistakes in judgments . . . may be corrected . . . at any time").
1180. *See Frost*, 957 P.2d at 1357.
1181. *See id.* at 1355.
1182. *See id.*
1183. *See id.*
1184. *See id.* at 1356.
1185. *See id.* at 1357.
1186. 963 P.2d 1021 (Alaska 1998).
1187. *See id.* at 1025.
1188. *See id.* at 1021.
1189. *See id.* at 1022.
1190. *See id.* at 1021.

vert ("multiplate") on the land for over sixty days.[1191] After the state proceeded to remove the multiplate from the land, Ostrow filed a conversion lawsuit.[1192] The court found that Ostrow lacked a possessory interest in the multiplate at the time of alleged conversion.[1193] Because she had failed to remove her property from the land within the sixty-day period, she had forfeited her possessory rights.[1194] Without a possessory interest in the property at the time of the wrongful act, Ostrow could not maintain a cause of action for conversion.[1195]

D. Miscellaneous

In *Falke v. Council of the City of Fairbanks*,[1196] the Alaska Supreme Court held that the entry of summary judgment does not violate the right to a jury trial because the Alaska Constitution's takings provisions[1197] do not apply to public property.[1198] Falke and other Fairbanks property owners challenged the sale of the Fairbanks Municipal Utilities System ("FMUS") by the city of Fairbanks.[1199] The court rejected Falke's claim that because property owners had funded the construction of FMUS, they were its de facto owners.[1200]

In *Native Village of Eyak v. Trawler Diane Marie, Inc.*,[1201] the United States Court of Appeals for the Ninth Circuit held that the federal paramountcy doctrine bars a Native village's claim of aboriginal title to a portion of the outer continental shelf of the United States.[1202] The federal paramountcy doctrine vests property rights to offshore waters, including the outer continental shelf, in the federal government.[1203] The doctrine evolved from a series of disputes between coastal states and the federal government regarding the extent of control states could exercise over adjacent seas.[1204] The Ninth Circuit applied the doctrine to the village's claim, reasoning that "[i]f, as a matter of constitutional law, the federal gov-

1191. *See id.* at 1022.
1192. *See id.* at 1023.
1193. *See id.* at 1024.
1194. *See id.* at 1025.
1195. *See id.* at 1024-25.
1196. 960 P.2d 589 (Alaska 1998).
1197. *See* ALASKA CONST. art. I, § 18 (1997).
1198. *See Falke*, 960 P.2d at 590.
1199. *See id.* at 589-90.
1200. *See id.* at 590.
1201. 154 F.3d 1090 (9th Cir. 1998).
1202. *See id.* at 1097.
1203. *See id.* at 1092-94.
1204. *See id.*

ernment must be possessed of paramount rights in offshore waters, it makes no difference whether the competing domestic claimant is a state or tribe of American natives."[1205] The villagers claimed a right to exclusive use of the outer continental shelf due to their tribe's thousand-year history of fishing and hunting there prior to the founding of the United States.[1206] The court rejected this argument, concluding that right was lost upon the ascension of the Union.[1207]

XI. TORT LAW

In *M.A. v. United States*,[1208] the Alaska Supreme Court held that medical malpractice may be found where a healthy child is born due to a physician's negligent failure to diagnose a pregnancy.[1209] Ordinary tort damages may be recovered for proximately caused injuries through the time of childbirth, but not for the costs of raising a healthy child.[1210] Additionally, the court held that a relative may not claim damages for emotional distress resulting from misdiagnosis of a patient's pregnancy unless a preexisting duty is owed by the patient's physician to the relative, or circumstances create bystander liability.[1211]

In *Bolieu v. Sisters of Providence in Washington*,[1212] the supreme court held that a health care facility owes a duty of care to the spouses of its nursing employees to take reasonable measures to minimize the spread of infection.[1213] Two men claimed to have contracted staph infections through contact with their wives who worked in a health facility.[1214] The court reversed the trial court's ruling that the hospital owed no duty of care toward the spouses of employees.[1215] Applying the factor-based test used in *D.S.W. v. Fairbanks North Star Borough School District*[1216] to decide whether a duty of care exists, the court found that the spread of infectious disease to spouses is a foreseeable harm[1217] which can be reduced with little difficulty, since health facilities already are required to

1205. *Id.* at 1096.
1206. *See id.*
1207. *See id.*
1208. 951 P.2d 851 (Alaska 1998).
1209. *See id.* at 854.
1210. *See id.* at 856.
1211. *See id.* at 856-57.
1212. 953 P.2d 1233 (Alaska 1998).
1213. *See id.* at 1241.
1214. *See id.* at 1234.
1215. *See id.* at 1241.
1216. 628 P.2d 554 (Alaska 1981).
1217. *See Bolieu*, 953 P.2d at 1236.

satisfy high regulatory standards.[1218] The court emphasized that a duty of care exists regardless of the severity or ubiquity of the infectious disease involved, although severity and ubiquity may bear on what types of precautions satisfy the duty.[1219]

In *Miller v. Phillips, CNM*,[1220] the supreme court held that a treating physician may express expert opinions formed as a supervisory participant, and that evidence showing a midwife's lack of panic in prior deliveries was admissible to demonstrate competence and to answer an alleged tendency to panic.[1221] Gage Miller's parents appealed an unsuccessful malpractice suit against his midwife for injuries Gage suffered during his delivery.[1222] The Millers alleged reversible error because a physician listed as a general witness offered expert testimony, and because character evidence was improperly admitted.[1223] The court noted that where the treating physician testifies on matters concerning a patient, "the distinction between an expert witness and a fact witness inevitably becomes blurred."[1224] Although Dr. Newton had no personal contact with the patient before or during the delivery, his role as supervisor of the midwife left him "involved intimately in the events surrounding Gage's birth."[1225] The court also found evidence that the midwife had not panicked on prior child delivery occasions was admissible because it served to show professional competency with regard to the procedures at issue and because it responded to the suggestion that the midwife could not deal with panic situations.[1226] In any event, the court held that to the extent that such evidence was inadmissible character evidence, it was harmless.[1227]

In *Ward v. Lutheran Hosp. & Homes Soc'y of Am.*,[1228] the supreme court held that a hospital is not liable under either the nondelegable duty to provide quality emergency care or the theory of apparent agency where the physicians are independent contractors selected by the patient[1229] and the operator of a blood bank has no duty to obtain informed consent from prospective donees.[1230] Ward was admitted to Fairbanks Memorial Hospital ("FMH") in order

1218. *See id.* at 1238.
1219. *See id.* at 1239-41.
1220. 959 P.2d 1247 (Alaska 1998).
1221. *See id.* at 1248.
1222. *See id.* at 1249.
1223. *See id.* at 1249-50, 1252.
1224. *Id.* at 1250.
1225. *Id.* at 1251.
1226. *See id.* at 1253.
1227. *See id.*
1228. 963 P.2d 1031 (Alaska 1998).
1229. *See id.* at 1034.
1230. *See id.* at 1036.

to give birth.[1231] There she was treated by Dr. Dunlap, who had provided her prenatal care, and two assisting physicians, none of whom were employed by the hospital.[1232] In the course of her treatment, she required blood transfusions supplied by FMH's blood bank. These transfusions later turned out to be contaminated with hepatitis C.[1233] Ward brought suit against FMH for failing to obtain her informed consent before her physicians ordered blood transfusions.[1234] However, FMH had neither a nondelegable duty to provide quality emergency care nor any liability under an apparent agency theory to Ward because she chose her physicians and they were not hospital employees.[1235] In determining the appropriate standard of care for blood banks, the court looked to industry custom and official guidelines[1236] and decided that simple presentation of expert testimony was not enough to establish a duty.[1237]

In *Reid v. Williams*,[1238] the supreme court upheld a statute that precludes a successful medical malpractice plaintiff from recovering medical expenses already paid by the plaintiff's insurer.[1239] Reid won a favorable verdict in his malpractice action against Dr. Williams; however, the trial court reduced Reid's damage award for medical expenses by nearly $6,000, on the ground that Reid's insurer already had paid that amount.[1240] Reid claimed that the statute authorizing the reduction of damages, Alaska Statutes section 09.55.548(b),[1241] violated his rights under substantive due process and equal protection.[1242] First, the court rejected Reid's due process argument, holding that the statute bears a reasonable relationship to a legitimate government purpose.[1243] Looking to the legislative history, the court found that AS 09.55.548(b) was enacted in response to a vast increase in medical malpractice actions, which the legislature believed was leading insurers to raise premiums or decline to offer coverage to would-be defendants.[1244] The court then rejected Reid's equal protection argument, holding that

1231. *See id.* at 1033.
1232. *See id.*
1233. *See id.*
1234. *See id.*
1235. *See id.* at 1035.
1236. *See id.* at 1037.
1237. *See id.* at 1036.
1238. 964 P.2d 453 (Alaska 1998).
1239. *See id.* at 455.
1240. *See id.*
1241. ALASKA STAT. § 09.55.548(b) (Michie 1996).
1242. *See Reid*, 964 P.2d at 455-56.
1243. *See id.* at 455.
1244. *See id.* at 456-57.

the legislature's classification between doctors and other tort defendants bears a fair and substantial relation to attainment of a legitimate government objective.[1245]

In *Hildebrandt v. City of Fairbanks*,[1246] the supreme court held that a city may not be held liable for failing to train a police officer adequately absent a constitutional violation by the officer,[1247] and that mere negligence by a state official does not implicate the Due Process Clause.[1248] Hildebrandt sought recovery under 42 U.S.C. § 1983 and common law tort principles after a police officer's vehicle struck and injured him during a high speed chase.[1249] The court noted that, while a municipality may face liability under section 1983 for failure to train employees, a successful plaintiff must show that (1) his constitutional rights have been violated, (2) a municipal policy constitutes deliberate indifference to these constitutional rights, and (3) the policy was the cause of the constitutional violation.[1250] For a bystander to sustain a section 1983 claim for injuries of this nature, the officer must have violated the bystander's constitutional rights.[1251] The court held that the officer's actions constituted negligence but failed to "shock the conscience," and therefore Hildebrandt did not suffer a constitutional violation.[1252]

In *Adams v. City of Tenakee Springs*,[1253] the supreme court held that a city's fire department staffing decisions are a matter of resource allocation entitled to discretionary function immunity.[1254] Adams sued Tenakee Springs claiming that because the city negligently understaffed the fire department, a fire was allowed to spread until it destroyed their inn.[1255] However, the court noted that a fire department's staffing decisions which allocate scarce resources are immune from judicial review.[1256] Although the city had no designated fire chief, in violation of a municipal ordinance, enough evidence had been introduced at trial relating to the lack of a leader at the fire, so any exclusion of evidence on negligence was harmless.[1257]

1245. *See id.* at 455.
1246. 957 P.2d 974 (Alaska 1998).
1247. *See id*. at 977-78.
1248. *See id.* at 979-80.
1249. *See id.* at 975.
1250. *See id.* at 977 (citing City of Canton v. Harris, 489 U.S. 378, 389-90 (1989)).
1251. *See id*. at 978.
1252. *Id*. at 978-80.
1253. 963 P.2d 1047 (Alaska 1998).
1254. *See id.* at 1051.
1255. *See id.* at 1049.
1256. *See id.* at 1051.
1257. *See id.* at 1053.

In *Mesiar v. Heckman*,[1258] the supreme court held that the state owed no actionable duty to resource users to exercise reasonable care in fisheries data collection and management.[1259] A class comprised of subsistence fishermen sued the Alaska Department of Fish & Game ("ADF&G") alleging negligent operation of a sonar fish counter on which ADF&G relied to make fishery closure decisions.[1260] The court found that ADF&G had no duty to the resource users.[1261] Even though harm to the resource users was foreseeable, almost all such management decisions adversely affected one group or another.[1262] The harm remained purely economic and thus was not highly morally blameworthy.[1263] Imposing a duty on ADF&G would risk impeding its ability to manage resources by encouraging decisions based on the demands of a single group.[1264]

In *Arctic Tug & Barge, Inc. v. Raleigh, Schwarz & Powell*,[1265] the supreme court held that summary judgment is appropriate in tort cases where the undisputed facts only reasonably permit an inference that one party owes the other no duty whatsoever or owes a duty of considerably smaller scope than what the other party claims.[1266] Arctic Tug & Barge, Inc. sued Raleigh, Schwarz & Powell, an insurance broker, alleging negligent misrepresentation for not having disclosed to Arctic that a policy taken out by another party to insure goods Arctic was transporting did not waive subrogation.[1267] The supreme court upheld the trial court's grant of summary judgment that found no disputes of material fact and no duty to disclose on the part of Raleigh, because Arctic had failed to make clear any concern with a waiver of subrogation.[1268] While summary judgment is disfavored where the scope of duty is at issue or where it is unclear if particular conduct constitutes a breach of such duty,[1269] it was appropriate in this case because the undisputed facts allowed only the conclusion that no tort duty existed.[1270]

In *Kooly v. State*,[1271] the supreme court held that the public owner of a highway right-of-way bore no duty to make it safe for

1258. 964 P.2d 445 (Alaska 1998).
1259. *See id.* at 447.
1260. *See id.*
1261. *See id.* at 450.
1262. *See id.*
1263. *See id.* at 451.
1264. *See id.*
1265. 956 P.2d 1199 (Alaska 1998).
1266. *See id.* at 1203.
1267. *See id.* at 1200.
1268. *See id.* at 1201-03.
1269. *See id.* at 1203.
1270. *See id.* at 1204.
1271. 958 P.2d 1106 (Alaska 1998).

sledding.[1272] Kooly brought suit when his son died while sledding on a state owned right-of-way commonly used for this purpose.[1273] In determining whether a duty should be imposed, the court considered several factors including: closeness of connection between the injury suffered and defendant's conduct; moral blame attached to defendant's conduct; policy of preventing future harm; extent of community consequences and burden to defendant resulting from imposition of such a duty; and the cost, prevalence, and availability of insurance for the risk involved.[1274] The court concluded that there was not a close connection between the state's conduct and the accident, that little moral blame could be assigned to the state, and that imposing liability would not further the goal of preventing such future harms.[1275] Most importantly, the court found that imposing such a duty on the state would inflict heavy damage judgments without appreciably improving public safety.[1276]

In *Power Constructors Inc. v. Taylor & Hintze*,[1277] the supreme court held that a defendant law firm was not estopped from arguing in a malpractice action that the client's damages in the underlying suit would have been less than the firm's original estimate.[1278] It also held that interest must be allocated separately to the malpractice judgment and to the judgment in the underlying case,[1279] and that the jury's verdict was acceptable even though the plaintiff relied on a total cost approach to calculate damages.[1280] In addition, the court adopted a rule imposing upon defendants the burden of proving uncollectability when legal malpractice results in the loss of a meritorious claim.[1281]

Power Constructors Inc. ("PCI"), a general contractor, brought the underlying claim against the engineer and designer of a construction project.[1282] The case languished for several years and ultimately was dismissed with prejudice for lack of prosecution.[1283] PCI then brought a malpractice action against its counsel, Taylor & Hintze ("T&H").[1284] T&H made an offer of judgment for

1272. *See id.* at 1109-10.
1273. *See id.* at 1107.
1274. *See id.* at 1108.
1275. *See id.* at 1109.
1276. *See id.*
1277. 960 P.2d 20 (Alaska 1998).
1278. *See id.* at 27.
1279. *See id.* at 36.
1280. *See id.* at 44.
1281. *See id.* at 31-32.
1282. *See id.* at 24.
1283. *See id.*
1284. *See id.* at 25.

one million dollars, which PCI refused.[1285] The jury's verdict was less favorable than T&H's offer.[1286]

At trial, T&H claimed that the value of PCI's underlying claim was no more than $115,000, even though while it represented PCI it estimated the value to be in excess of five million dollars.[1287] The court found that T&H had issued the latter figure as a tentative estimate and was not estopped from changing its position.[1288] The court went on to observe that two judgments are at issue in a legal malpractice case – the judgment sought against the attorney, and the underlying cause – and each must be considered separately in computing and allocating prejudgment interest.[1289] On the issue of jury calculation of damages, the court acknowledged its preference for the actual cost method, where each element of extra expense incurred for the alleged breach is added up.[1290] In the proceedings below, the jury heard evidence related to the total cost amount, but it also heard other evidence and was carefully instructed to ignore all that was not evidence of actual amount, so the verdict was proper.[1291]

In *General Motors v. Farnsworth*,[1292] the supreme court held that the defense of comparative negligence in strict liability cases extends to those cases where a plaintiff misuses a product and that misuse is a proximate cause of his injuries.[1293] Farnsworth was a passenger in a General Motors vehicle that was struck by a driver under the influence of narcotics.[1294] Farnsworth's seatbelt restraint caused her severe abdominal injuries and a fracture of the spine.[1295] The superior court refused to give a comparative negligence instruction or require the jury to allocate fault to the driver who caused the accident, and the jury returned a large verdict against General Motors.[1296] The supreme court held that comparative negligence is a defense to strict liability in tort, and that a comparative negligence instruction should have been given.[1297] In addition, the court held that an instruction should have been given that the impaired driver caused Farnsworth's injuries as a matter of law, since

1285. *See id.*
1286. *See id.* at 26.
1287. *See id.*
1288. *See id.* at 27.
1289. *See id.* at 35.
1290. *See id.* at 41.
1291. *See id.* at 44.
1292. 965 P.2d 1209 (Alaska 1998).
1293. *See id.* at 1215.
1294. *See id.* at 1211-12, 14.
1295. *See id.* at 1212.
1296. *See id.* at 1211.
1297. *See id.* at 1215.

original tortfeasors are considered the proximate cause of subsequent injuries resulting from foreseeable negligent acts.[1298] However, the court did note that the apportionment of damages instruction given by the superior court was appropriate to guide the jury in the event it chose to reject the parties' contention that either all or none of Farnsworth's injuries were caused by the defective seat belt.[1299] Where damages are to be apportioned, the burden of limiting liability belongs with the defendants.[1300]

In *Neary v. McDonald*,[1301] the supreme court held that summary judgment dismissing a negligent entrustment claim is appropriate where no evidence shows that the parents supplied the vehicle to or had control over the vehicle driven by their adult son.[1302] Neary brought a negligent entrustment claim against McDonald because the vehicle involved in the collision had registration papers listing McDonald's mother as a co-owner.[1303] However, there was no evidence to create a genuine issue of material fact as to whether McDonald's parents had helped him purchase the vehicle.[1304] Further, McDonald's parents never had control of the vehicle such that they could prevent him from driving it, and the mother's status as co-owner did not establish the superior right of control necessary to find liability.[1305] The dissent argued that a genuine issue of material fact arose as to whether the mother had superior control of the vehicle because her son's unlicensed status limited his right to possess and control the vehicle.[1306]

In *Brent v. Unicol, Inc.*,[1307] the supreme court held that an independent contractor can be liable to a third party injured by a dangerous condition created by the contractor, even though the injury occurred after the contractor left the worksite and the property owner accepted the work.[1308] ARCO hired Unicol as an independent contractor to perform excavation as part of a construction project.[1309] Before leaving the completed job, Unicol placed rig mats over the excavated squares but left gaps along the edges.[1310] Later, Brent, an employee of another independent contractor, in-

1298. *See id.* at 1217-18.
1299. *See id*. at 1219.
1300. *See id*. at 1220.
1301. 956 P.2d 1205 (Alaska 1998).
1302. *See id.* at 1212.
1303. *See id.* at 1207.
1304. *See id.* at 1212.
1305. *See id.* at 1209, 1211.
1306. *See id.* at 1213.
1307. 969 P.2d 627 (Alaska 1998).
1308. *See id.* at 628.
1309. *See id.*
1310. *See id.*

jured himself after falling into one of the excavated squares.[1311] In deciding whether Unicol owed Brent a duty of care, the court adopted the majority rule that a contractor must exercise reasonable care for the protection of third parties who foreseeably may be endangered by its negligence, and the contractor may be held liable even after the work has been accepted.[1312] Unicol did not meet any of the conditions that would discharge its duty, such as Unicol having disclosed fully the harm to ARCO or ARCO having recognized the harm.[1313] Nor would any independent duty on ARCO's part to inspect the site and detect the condition relieve Unicol of liability.[1314] The court remanded the case for determination of material facts as to the condition of the site when Unicol left it.[1315]

In *Safeway, Inc. v. Mackey*,[1316] the supreme court held that a reasonable factfinder may accept an expert's opinion on the causes of a medical condition, even where the expert admits that the causes of the condition generally are unknown.[1317] The Workers' Compensation Board denied Mackey benefits based on the testimony of a rheumatologist who admitted that the causes of fibromyalgia are unknown, but nonetheless testified that Mackey's employment was not a substantial factor in causing the condition.[1318] Mackey argued that medical testimony should not rebut the presumption of compensability in employee benefits cases because any theory on causation of the condition is speculative.[1319] The court disagreed, stating that if it were to adopt Mackey's argument as a rule, it would create an irrebuttable presumption against employers whenever employees claimed a condition whose causes are unknown by the medical community.[1320]

In *Buchea v. United States*,[1321] the United States Court of Appeals for the Ninth Circuit held that a child who is adopted before the death of her natural parents cannot recover as a beneficiary of

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1311. *See id.*
1312. *See id.* at 630.
1313. *See id.*
1314. *See id.*
1315. *See id.* at 632.
1316. 965 P.2d 22 (Alaska 1998).
1317. *See id.* at 28.
1318. *See id.*
1319. *See id.* at 27.
1320. *See id.* at 28. The court ruled similarly in *Norcon, Inc. v. Alaska Workers' Compensation Bd.*, 880 P.2d 1051 (Alaska 1994), where a doctor's analysis of risk factors for heart attacks was allowed to rebut a presumption even though the causes of heart attacks are unknown.
1321. 154 F.3d 1114 (9th Cir. 1998).

the natural parent under Alaska's wrongful death statute.[1322] Laura was adopted by her grandparents pursuant to Savoonga tribal custom several months before her natural father died.[1323] After the father's death, the representative of his estate brought wrongful death claims under the Federal Tort Claims Act and the Alaska wrongful death statute on behalf of Laura as beneficiary.[1324] The court held that Alaska law severs entirely all legal relationships between an adopted child and her natural parents, including the right to bring a claim as a child under Alaska's wrongful death statute.[1325] The court rejected several other claims advanced by the plaintiff, including the argument that Savoonga custom, which does not terminate parental rights, should apply.[1326] The court ruled that since the plaintiff sought the protection of an Alaska statute, the legal relationship between natural parent and child must be determined by Alaska law.[1327]

XII. TRUSTS AND ESTATES

In *Evancoe v. Evancoe (In re Estate of Evanco)*,[1328] the Alaska Supreme Court held that the joint tenancy designations on stock certificates constituted valid and effective will substitutes.[1329] Alaska Statutes section 13.31.070[1330] declares certain will substitutes to be non-testamentary and thereby not subject to the formal requirements of a will.[1331] The court identified stock certificates as written instruments within the meaning of AS 13.31.070.[1332] Moreover, the statute had been superseded by AS 13.33.101,[1333] a similar provision that clearly encompassed stock certificates.[1334] Thus, the court found nothing improper about the distribution of joint tenancy stocks outside of probate to the named joint tenants.[1335]

1322. *See id.* at 1116.
1323. *See id.* at 1115.
1324. *See id.*
1325. *See id.* at 1116.
1326. *See id.*
1327. *See id.* at 1116-17.
1328. 955 P.2d 525 (Alaska 1998).
1329. *See id.* at 528.
1330. ALASKA STAT. § 13.31.070 (Michie 1996).
1331. *See Evancoe*, 955 P.2d at 527.
1332. *See id.*
1333. ALASKA STAT. § 13.33.101 (Michie 1996).
1334. *See Evancoe*, 955 P.2d at 527.
1335. *See id.* at 526.

Michael P. Carey
Alison C. Conlon
Steven E. Miskinis
Justin C. Sullivan