YEAR IN REVIEW

Alaska Supreme Court and Court of Appeals Year in Review 1996

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I. INTRODUCTION

*Year in Review* contains brief summaries of selected decisions by the Alaska Supreme Court and the Alaska Court of Appeals. The primary purpose of this review is to familiarize practitioners with significant decisions handed down by these courts in 1996. 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. Space does not permit review of all cases decided by the courts this year, but the authors have attempted to highlight decisions signaling a departure from prior law or resolving issues of first impression. The cases that were omitted applied well-settled principles of law or involved narrow holdings of limited import. The appendix lists the omitted cases and includes a brief parenthetical synopsis. 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 thirteen areas of the law: administrative, business, civil procedure, constitutional, criminal, election, employment, family, insurance, property, tax, torts, and trusts and estates.

II. ADMINISTRATIVE LAW

In 1996, in the area of administrative law, the Alaska Supreme Court addressed, among other topics, issues of how to determine if a construction project can be considered "public construction," whether the Department of Natural Resources has implied statutory authority to regulate royalty rates in state coal leases, and what constitutes an unresponsive bid in a state contract setting. In the land use and management area, the court considered whether state administrative agencies had made sufficient independent determinations before awarding contracts and leases and if differentiating between recreational and residential users of land in awarding purchase preferences raised constitutional concerns. Finally, in the administrative procedure area, the court addressed issues of availability of public documents and applicability of substantive due process rights in attorney disciplinary proceedings.

A. Public Contracting

In *Western Alaska Building & Construction Trades Council v. Inn-Vestment Associates of Alaska*, the Alaska Supreme Court
held that five factors should be weighed in determining whether state involvement in a construction project is significant enough that the project constitutes "public construction" or a "public work" under the provisions of Alaska's Little Davis-Bacon Act. The Act requires that wages paid on public construction projects not fall below a statutory prevailing rate. The five factors are the following: (1) the nature of the contract in which the state was a party (whether it was for construction or only for financing); (2) whether the structure under construction was to be used for a public purpose; (3) whether the state would control the structure after construction; (4) whether the state would continue to fund the project after construction; and (5) the relative portion of financing that the state would provide. The court held that these factors, while not exclusive or necessarily of equal weight, should be weighed together rather than individually.

Applying these factors, the court found that the actions of the Alaska Railroad Company ("AARC") in joining a partnership for the construction of a Comfort Inn on its property and by investing in the project constituted state involvement significant enough to invoke the Little Davis-Bacon Act. Although factors (4) and (5) weighed against a finding of state involvement, AARC's assumption of significant liability, its desire to augment its rail passenger business, its continuing participation and investment in hotel development, and its substantial power in the partnership led to the conclusion that state involvement in the project was significant.

In Usibelli Coal Mine, Inc. v. Department of Natural Resources, the supreme court held that the Department of Natural Resources ("DNR") has implied statutory authority to regulate royalty rates in state coal leases. Usibelli Coal Mine ("UCM") had entered three noncompetitive state coal leases under which a fixed royalty was to be paid to the state per ton of coal. Prior to the expiration of any of the leases' initial twenty-year royalty terms, DNR promulgated new regulations establishing a standard royalty rate of 5% of adjusted gross value.

2. ALASKA STAT. § 36.05 (Michie 1996).
3. See id. at 36.05.010.
5. See id. at 333-34 n.9.
6. See id. at 337.
7. See id. at 334-37.
9. See id. at 1145.
10. See id. at 1138.
Challenging the validity of the new regulations, UCM requested royalty relief pursuant to Alaska Statutes section 38.05.140(d). In addressing UCM's claim that DNR had no legislatively granted authority to promulgate the regulations, the supreme court found implied authorization in Alaska Statutes sections 38.05.020(b)(1), 38.05.145(a) and 38.05.150(d). The court further found "sufficient standards and procedural safeguards to ensure the valid exercise of agency authority."

In Danco Exploration, Inc. v. Department of Natural Resources, the supreme court held that a plaintiff was not entitled to recover interest from the state where the plaintiff was unable to maintain an action under the statute governing claims against the state. Danco Exploration, which had been declared the high bidder in a state lease sale of seven state oil and gas tracts, put down a bid deposit the state held for a year and a half. Because Danco was one day late in filing certain paperwork, the state declared the deposit forfeited. The superior court reversed the state's decision and ordered the state to issue the leases upon receipt of certain of the funds which had been refunded to Danco, plus interest. However, Danco's motion for an award of interest on the deposit from the time of the date of the forfeiture until the date of the superior court's decision was denied.

On appeal, the supreme court held that "except where the constitution directs otherwise, interest may not be assessed against the state except where interest is specifically authorized by the legislature." Danco argued that Alaska Statutes section 09.50.280 authorized an award of interest with respect to its bid deposit, but the court held that this only applied where Alaska Statutes section 09.50.250 (allowing for tort or contract claims against the state) established a substantive cause of action.

11. ALASKA STAT. § 38.05.140(d) (Michie 1996).
12. ALASKA STAT. §§ 38.05.020(b)(1), .145(a), .150(d).
15. See id.
16. See id. at 433.
17. See id.
18. See id. at 434.
19. See id.
20. Id. (citing Stewart & Grindle, Inc. v. State, 524 P.2d 1242, 1245 (Alaska 1974)).
21. ALASKA STAT. § 09.50.280 (Michie 1996). The statute provides that "[i]f judgment is rendered for the plaintiff, it shall be for the legal amount found due from the state with legal interest from the date it became due." Id.
22. Id. at § 09.50.250.
23. See Danco, 924 P.2d at 434 (citing Stewart, 524 P.2d at 1245).
Danco could not have maintained such an action for the interest since "[a] party who brings an appeal from a commissioner's decision to the superior court is bound by the result of such an appeal and may not maintain a separate action under [section 09.50.250]."

In *Neal & Company, Inc. v. City of Dillingham*, the supreme court held that a city contractor had not given sufficient notice to the city of problems at a construction site to support the contractor's Differing Site Conditions claims. The contract between Neal and the city, under which Neal was to excavate two lagoons for a sewage treatment facility, contained a Differing Site Conditions clause in compliance with Environmental Protection Agency requirements for projects that receive Agency funding. This clause allowed Neal to assert a claim against the city for money it spent because the site conditions were different than expected.

In analyzing the sufficiency of notice required to recover higher costs under the clause, the supreme court relied on federal case law dealing with such clauses and determined that, in spite of an express requirement of written notice under the clause, notice could be sufficient "if it was clear and it alerted or should have alerted the [contracting party] to the fact that [the contractor] had encountered differing site conditions." Neal claimed that a city engineer's observations regarding the conditions in question, made when he was researching other aspects of the site, constituted sufficient notice. Applying the above standard, the court rejected the argument that these observations constituted "clear non-written notice of a differing site condition."

In *Peninsula Correctional Health Care v. Department of Corrections*, the supreme court adopted verbatim a decision of the superior court upholding a contract award by the Department of Administration based on its findings that the winning bid was not non-responsive to the requested proposal or based on misrepresentation or fraud. The losing contractor had claimed that the winner failed to obtain letters of commitment—as required by the request for proposal ("RFP") issued by the Department of

24. *Id.* (citing ALASKA ADMIN. CODE tit. 11, § 02.010(d) (1996)).
26. *See id.* at 93-94.
27. *See id.* at 92.
28. *See id.* at 90.
29. *Id.* at 90, 93.
30. *See id.* at 90-91.
31. *Id.* at 94.
33. *See id.* at 427-29.
Corrections—from the loser’s employees who were staffing the current contract and who the winner proposed to employ to staff the contract after transition. The supreme court held that it was unrealistic to expect the winner to obtain letters of commitment from a competitor’s employees and that the contractor had complied with the language of the RFP, which called for letters of commitment from individuals “known” to the bidder to be committed to the contract.

In Lower Kuskokwim School District v. Foundation Services, Inc., the supreme court held that a corporation’s failure to file a state-required biennial corporate report or to pay a nominal corporation tax did not render non-responsive the corporation’s bid to provide transportation services to the District. The court ruled that the state Department of Education did not abuse its discretion in approving the contract. The court also noted that in order for a variance from the response required to invalidate the contract, the variance must provide the bidder with an unfair advantage. The court ruled that Transnorth’s failure either to file the report or to pay the nominal corporation tax did not provide it with an unfair advantage over other bidders.

In reviewing the Department of Education’s approval of the contract, the court examined whether the Department abused its discretion by being arbitrary or unreasonable. The court found that since the Department’s review was meant primarily to ensure that the proposed contract was reasonably priced and in the best interests of the District, the Department was not required to inquire into technicalities such as Transnorth’s failure to file the report and pay the tax in a timely manner, particularly since the District had already certified the bid as responsive.

B. Land Use and Resource Management

In Ninilchik Traditional Council v. Noah, the Alaska Supreme Court held that the Department of Natural Resources

34. See id. at 427.
35. See id. at 429.
37. See id. at 1389-90.
38. See id.
39. See id. at 1386 (citing Chris Berg, Inc. v. State, Dep’t of Transp., 680 P.2d 93, 94 (Alaska 1984)).
40. See id. at 1387.
41. See id. at 1388 (citing Southeast Alaska Conservation Council, Inc. v. State, 665 P.2d 544, 548 (Alaska 1983)).
42. See id. at 1389.
43. 928 P.2d 1206 (Alaska 1996).
("DNR") had a duty to independently determine that a proposed lease of lands subject to the Alaska Coastal Management Program ("ACMP") was consistent with locally defined District Coastal Management Programs ("DCMP") as required under the ACMP. The court ruled that the DNR could not rely solely on local assurances that the proposed land uses complied with the local programs. The Ninilchik Traditional Council ("NTC"), along with several environmental groups, challenged the DNR's decision to proceed with the sale of an oil and gas exploration lease for land in the Upper Cook Inlet and uplands on the Kenai Peninsula and in the lower Susitna Valley.

The court found that the DNR's determination was invalid because it failed to certify that the proposed lease met the requirements of affected DCMPs. The determination had been issued based on three local districts' certification that the proposed lease met their local standards. The court held that, although DNR could give deference to findings by local bodies that proposed uses were in conformance with the local plans, such deference "[did] not, however, relieve DNR of the duty to independently determine that a sale is consistent with the affected DCMPs." The court went on to find that, in the case of each of the districts, the proposed lease, as approved in the conclusive consistency determination ("CCD"), failed to conform to local DCMPs and that the CCD was therefore invalid as written. The court remanded the lease to DNR to address the failings of the CCD in this area.

In Kelso v. Rybachek, the supreme court upheld the validity of the new Alaska Administrative Code title 18 section 70.055, which had been adopted by the Alaska Department of Environmental Conservation ("DEC") to specify procedures for water usage reclassification. DEC had formulated the new regulation to

44. See ALASKA STAT. §§ 46.40.010-.210 (Michie 1996).
45. See ALASKA ADMIN. CODE tit. 6, § 80.010(b) (1995). The ACMP requires that the proposed lease be consistent with the ACMP as well as the incorporated standards of the affected DCMPs. See Ninilchik Traditional Council, 928 P.2d at 1209.
46. See Ninilchik Traditional Council, 928 P.2d at 1215.
47. See id. at 1209.
48. See id. at 1215.
49. See id. at 1215-17.
50. Id. at 1215.
51. See id. at 1215-17.
52. See id.
54. ALASKA ADMIN. CODE tit. 18, § 70.055 (1994).
55. See Rybachek, 912 P.2d at 541
comply with requirements of the U.S. Environmental Protection Agency that any reclassification of water usage that eliminated certain protected uses (recreation, fish, shellfish and wildlife) be made only after the completion of a use attainability analysis, which is an assessment of the factors that will affect the existing use. The court used the standard of review set forth in Department of Revenue v. Cosio, which specified that in order for a regulation to be valid it must be consistent with the authorizing legislation, be reasonable and not be arbitrary. It held that the regulation was consistent with the broad discretion of the agency to “‘adopt regulations . . . providing for control, prevention, and abatement of air, water, or land or subsurface land pollution . . . .’” The supreme court further held that since the regulation conformed to federal requirements for the state, it was reasonable and not arbitrary.

In Reichmann v. Department of Natural Resources, the supreme court held that disparity in treatment between recreational and residential users of land by the Director of the DNR in ruling on requests for preference rights to purchase land from the state pursuant to Alaska Statutes section 38.05.035(b)(5) did not violate either federal or state constitutional guarantees of equal protection. Reichmann's request to purchase land her family had used for recreational purposes was denied for a number of reasons, including that her family had not used the land for residential or commercial purposes. Ruling against her equal protection claim, the court held that, for the purposes of equal protection, recreational users are not a suspect class. Therefore, because the distinction between recreation and residential or commercial users was a rational means of carrying out the state's land management policies, the disparity in treatment was not a denial of equal protection.

The court also held, however, that the use of the distinction between recreational and residential or commercial users was im-

56. See id. at 537. The new EPA rules were published at 40 C.F.R. § 131 (1996).
57. 858 P.2d 621 (Alaska 1993).
58. See Rybachek, 912 P.2d at 540 (citing Cosio, 858 P.2d at 624).
59. Rybachek, 912 P.2d at 540 (quoting ALASKA STAT. § 46.03.020(10)(A) (Michie 1996)).
60. See id. at 541.
62. ALASKA STAT. § 38.05.035(b)(5) (Michie 1996).
63. See Reichmann, 917 P.2d at 1200.
64. See id. at 1199.
65. See id. at 1200.
66. See id.
proper because the criterion in the DNR Procedures Manual on which the distinction was based was a regulation not promulgated in accordance with the requirements for regulations under the Alaska Administrative Procedures Act. Nevertheless, the court upheld the denial of Reichmann's request because the DNR had separate, sufficient grounds for the denial.

In Thane Neighborhood Ass'n v. City and Borough of Juneau, the supreme court held that a city and borough planning commission impermissibly approved a mining company's large mine permit application because it imposed a condition that the project comply with water quality standards without information sufficient to determine whether the completed project would be able to adhere to the standards. The City and Borough of Juneau Planning Commission had approved Echo Bay Alaska, Inc.'s application for a large mine permit subject to a set of conditions. The Commission responded to concerns over the ability of the mine to meet applicable water quality standards by withholding approval of portions of the project until further information was received. But, while the Juneau code did allow the Commission to attach conditions to a permit, the court held that it did not support granting a permit for a project as a whole while excepting certain interlinked components of the project, as the Commission had attempted to do.

Analysis of Alaska case law in the area indicated that such "phasing through the use of conditions is prohibited where it is feasible to obtain the information necessary to de-

67. See id. at 1201.
68. See id. (citing ALASKA STAT. §§ 44.62.010 et seq. (Michie 1996)). The Alaska Administrative Procedures Act requires various means of public notice and consideration for the promulgation of a proposed regulation. See ALASKA STAT. §§ 44.62.010 et seq.
69. See Reichmann, 917 P.2d at 1201-02.
70. 922 P.2d 901 (Alaska 1996).
71. See id. at 910.
72. See id. at 903.
73. See id. at 906.
74. See id. (citing CITY AND BOROUGH OF JUNEAU, ALASKA, CODE §§ 49.15.330 (general standards for obtaining a conditional use permit), 49.15.330(g) (allowing the Commission to place any of several enumerated conditions, as well as any others reasonably necessary, on conditional use permits), 49.65.130(f) (allowing for approval if the Commission determines that the application, with appropriate conditions, is satisfactory), 49.65.135 (defining primary requirements for large mine permits) (1989)).
75. See id.
termine whether environmental standards will be satisfied before granting an initial permit, but allowed where it is impractical or impossible to create detailed development plans without conducting additional exploration.\(^{77}\) Since information on the project’s water standard compliance was feasibly obtainable, the Commission’s use of conditions to approve the permit application created an unacceptable danger that the project’s cumulative effects would not be adequately analyzed.\(^{78}\)

C. Administrative Procedure

In *Capital Information Group v. State*,\(^{79}\) the Alaska Supreme Court held that the deliberative process privilege, which allows the state to withhold certain proposals from the public despite the state’s public records statute, applied to each executive department’s proposals for new legislation sent to the Governor’s Legislative Liaison but not to budget proposals sent from executive departments to the Office of Management and Budget.\(^{80}\) *Capital Information Group*, a news organization that published periodicals describing state governmental activities, filed suit to obtain both sets of documents.\(^{81}\)

The court stated that the state’s public records statute\(^{82}\) has been broadly construed to further the goal of public access.\(^{83}\) However, the court also recognized that, in certain instances, prior precedent allowed for a deliberative process privilege to keep records confidential in order to allow for open and free discourse among governmental decision makers.\(^{84}\) The court held that such a privilege can be successfully invoked where the communication sought to be protected was pre-decisional and deliberative in nature.\(^{85}\) Once an agency demonstrated both of these criteria, the burden shifted to the party seeking disclosure to demonstrate that its need for the information outweighed the agency’s interest in preventing disclosure.\(^{86}\) The court held that the legislative proposals were properly withheld under the test it enunciated, but that the budget impact memoranda were not, since the legislature had enacted a statute overriding the executive’s request for secrecy.

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77. *Id.* at 908.
78. *See id.* at 910.
80. *See id.* at 41.
81. *See id.* at 32.
82. *See* ALASKA STAT. §§ 09.25.100-220 (Michie 1996).
84. *See id.*
85. *See id.* at 34.
86. *See id.* at 37.
concerning them.\textsuperscript{87}

In \textit{In re Trien},\textsuperscript{88} the supreme court held that lawyer disciplinary proceedings are not criminal in nature and therefore do not evoke substantive due process protections such as double jeopardy.\textsuperscript{89} The court also held that an investigative committee does not violate a subject's due process rights by acting as both adjudicator and prosecutor by calling and questioning witnesses, as long as no predisposition of the committee against the respondent is shown.\textsuperscript{90} Furthermore, it is not error to allow consideration of an attorney's prior disciplinary record in determining and reviewing sanction recommendations, since independent review provides a safeguard against any prejudicial impact arising therefrom.\textsuperscript{91}

III. BUSINESS LAW

In 1996, the Alaska Supreme Court decided several cases in business law concerning the interpretation and validity of contracts. The court addressed enforceability of contract terms, the possibility of the protection of ideas under contract and contract-like theories, and a buyer's challenge to an outstanding deed of trust on a purchased property.

In \textit{Alaska Travel Specialists, Inc. v. First National Bank of Anchorage},\textsuperscript{92} the Alaska Supreme Court held that the bank could not base a refusal to honor charge card purchases made at Alaska Travel Specialists ("ATS") solely on language in the merchant agreement that said it could refuse to pay charges that were "illegal" or "incomplete," where the contract also specified that reasonable procedures needed to be set out between the parties for resolving disputed charges.\textsuperscript{93} First National had refused to honor credit card deposits submitted by ATS that represented sales by the travel agency of airline vouchers that the bank had discovered through investigation to be possibly fraudulent.\textsuperscript{94} In reversing a summary judgment for the bank, the court said that First National had not proven its claim that the voucher scheme was illegal nor had it set up any "reasonable procedure" by which they could resolve disputed charges with ATS.\textsuperscript{95}

\textsuperscript{87} See id. at 41.
\textsuperscript{88} 929 P.2d 634 (Alaska 1996).
\textsuperscript{89} See id. at 640-41.
\textsuperscript{90} See id. at 642.
\textsuperscript{91} See id. at 644-45.
\textsuperscript{92} 919 P.2d 759 (Alaska 1996).
\textsuperscript{93} See id. at 765.
\textsuperscript{94} See id. at 761.
\textsuperscript{95} Id. at 765.
In Reeves v. Alyeska Pipeline Service Co., the supreme court held that ideas may be protected under contract and contract-like theories if all requirements of the applicable contract law are met, but that the recovery pursued may dictate the manner in which the requirements are applied. Reeves contacted Alyeska Pipeline Service in January 1991 to discuss a tourism idea he had. After speaking with a regional manager who assured him of confidentiality, Reeves orally disclosed his idea to construct a visitor center at an existing turnout that provided visitors a view of the Trans-Alaska Pipeline. Reeves proposed terms of a deal including a lease of the land from Alyeska to himself. Then, upon the manager’s request, Reeves submitted a written proposal outlining his ideas. After meeting with the manager and receiving several assurances that he would be involved in the deal, Reeves was informed that Alyeska was proceeding with the idea and implementing it on its own rather than involving Reeves as originally planned. Alyeska immediately erected a temporary structure and completed a permanent log cabin in 1992.

Reeves filed suit in 1993 claiming that Alyeska had improperly appropriated his idea and alleging a variety of tort and contract claims. He argued, and the supreme court agreed, that the parties entered into three different express oral contracts: (1) a confidentiality or disclosure agreement whereby Alyeska agreed that if Reeves disclosed the idea it would not be used without his participation; (2) a lease agreement whereby Alyeska agreed to lease the turnout to Reeves in return for a percentage of profits from the center’s operation; and (3) a memorialization agreement by which Alyeska agreed to commit the idea to writing. The Court considered the three contracts individually and found that the statute of frauds did not apply to the disclosure agreement, since the disclosure itself constituted performance of Reeves’s side of the contract and Alyeska was to comply by the summer tourist season. Therefore, performance would be completed within one year. Thus there existed a genuine issue of material fact as to the existence of the disclosure agreement. The statute of frauds was held applicable to the lease and memorialization agreements, however.

Addressing the availability of ideas under contract theory, the
court found that the idea need not be novel to get protection under an express contract theory. Because implied-in-fact contracts are so closely related to express contracts, ideas may also be protected by an implied-in-fact contract without the idea being novel. However, because the idea was not novel and thus lacked the requisite property-like qualities, Reeves could not be protected under a quasi-contract theory for the appropriation of the idea itself.

The court found, however, that Reeves possibly had a quasi-contract claim based on unjust enrichment from Alyeska's benefiting from his expertise and services in drafting the proposal, and remanded the case for further proceedings.

In *Joyner v. Vitale*, the supreme court held that the holder of a deed of trust was the third-party beneficiary of a contract between the seller and buyer of real property, and therefore the holder of the deed of trust could recover against the buyer. Vitale held a deed of trust on real property that secured a promissory note; the property was held in an estate. Vitale agreed to an assumption of his debt by the purchaser of the property. However, after purchasing the property, Joyner, the buyer, challenged the deed of trust. The supreme court affirmed the trial court's finding that a valid contract existed between the buyer and the seller of the property and that the statutory warranty deed expressly stated that the sale was subject to the deed of trust. The court further noted that Joyner could not raise defenses that the seller of the property could have asserted against Vitale and held that Joyner must honor his contractual promise to pay Vitale under the deed of trust.

IV. CIVIL PROCEDURE

The Alaska Supreme Court faced a variety of procedural issues in 1996. Although many of the cases summarized in this section also address important substantive issues, procedural questions predominate. The case summaries are divided into two primary categories: timeliness in prosecution and appeal and modi-
IFICATION OF JUDGMENT. OTHER CASE SUMMARIES DEALING WITH CIVIL PROCEDURE ISSUES APPEAR UNDER THE "MISCELLANEOUS" HEADING AT THE END OF THIS SECTION.

A. TIMELINESS OF PROSECUTION AND APPEAL

IN AIROLOFSKI V. STATE,114 THE ALASKA SUPREME COURT HELD THAT THE SUPERIOR COURT'S GRANT OF SUMMARY JUDGMENT TO DEFENDANT BASED UPON IMPLIED WAIVER AND ESTOPPEL WAS IMPROPER, EVEN THOUGH PLAINTIFF HAD FAILED FOR SIX YEARS TO NOTIFY DEFENDANT OF HIS INTENT TO LITIGATE.115 IN SEPTEMBER 1987, AIROLOFSKI FILED A COMPLAINT AGAINST THE MUNICIPALITY OF ANCHORAGE ("MOA"), AMONG OTHERS, FOR NEGLIGENCE IN CONNECTION WITH TWO INSTANCES OF MISTAKEN ARREST.116 AFTER ASSIGNMENT TO THE SUPERIOR COURT'S "FAST-TRACK" CALENDAR UNDER CIVIL RULE 16.1,117 MOA REACHED AN AGREEMENT WITH AIROLOFSKI GIVING MOA AN UNLIMITED EXTENSION TO ANSWER THE COMPLAINT PENDING THE OUTCOME OF SETTLEMENT NEGOTIATIONS.118

FOLLOWING DISMISSAL FOR LACK OF PROSECUTION OF AIROLOFSKI'S CLAIM AGAINST ANOTHER DEFENDANT, THE CASE FILE WAS ADMINISTRATIVELY CLOSED BUT NEVER PROPERLY TRANSFERRED TO THE INACTIVE CALENDAR UNDER CIVIL RULE 16.1(G), WHICH REQUIRES AN ACTUAL TRANSFER OF THE CASE, AS WELL AS WRITTEN NOTICE TO COUNSEL OF THE TRANSFER.119 AIROLOFSKI DID NOT CONTACT MOA REGARDING THE CASE AGAIN UNTIL OCTOBER 1993. MOA'S MOTION TO DISMISS UNDER CIVIL RULE 16.1(G) WAS DENIED, BUT ITS SUBSEQUENT MOTION FOR SUMMARY JUDGMENT PURSUANT TO THE DOCTRINES OF ESTOPPEL AND IMPLIED WAIVER WAS GRANTED BY THE SUPERIOR COURT. ON CROSS-APPEAL OF THE SUPERIOR COURT'S REFUSAL TO DISMISS AIROLOFSKI'S CLAIM, MOA ARGUED THAT THE SUPERIOR COURT SHOULD HAVE DISMISSED THE CLAIM UNDER CIVIL RULE 16.1(G) DESPITE THE COURT SYSTEM'S FAILURE TO FOLLOW THE RULE'S GUIDELINES.120

RELYING ON ITS DECISION IN FORD V. MUNICIPALITY OF ANCHORAGE,121 THE SUPREME COURT DISAGREED, HOLDING THAT "[T]HE PLAIN LANGUAGE OF RULE 16.1(G) PRECLUDES DISMISSAL OF FAST-TRACK CASES WITHOUT TRANSFER TO THE INACTIVE CALENDAR AND, IMPORTANTLY, NOTICE TO THE PARTIES."122 FORD INVOLVED A VERY SIMILAR SITUATION, AND SPECIFICALLY HELD THAT "[A] LITIGANT SHOULD NOT BE PENALIZED FOR THE COURT'S ERROR [IN

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115. See id. at 895.
116. See id. at 891.
117. ALASKA R. CIV. P. 16.1 (establishing special procedures for reducing delay in civil litigation).
118. See Airoulofski, 922 P.2d at 891 (citing ALASKA R. CIV. P. 16.1(g)).
119. See id. at 893.
120. See id.
122. Airoulofski, 922 P.2d at 893.
failing to place the case upon the inactive calendar].” Further-
more, as the court had ruled in Ford, Civil Rule 41(e) does not
apply to fast-track cases; instead, Rule 16.1(g) is the exclusive
means by which to dismiss cases once they are placed on the fast-
track.

Finally, the supreme court held that the superior court's grant
of summary judgment for MOA was improper since Airoulofski's
delay in prosecuting his claim did not amount to "unequivocal
conduct indicating a purpose to abandon the right," even though
the neglect may have resulted in prejudice to MOA. Noting that
the parties had agreed to an unlimited extension pending settle-
ment negotiations, the court held that a reasonable person would
not necessarily conclude that Airoulofski had impliedly waived his
claim against MOA.

In Arbelovsky v. Ebasco Services, Inc., the supreme court
held that the trial judge abused his discretion when he dismissed an
action with prejudice after the plaintiffs failed to comply promptly
with the court's order to pay costs and attorneys' fees. Arbe-
lovsky and Garcia, plaintiffs in this case, had refiled a lawsuit that
had been previously dismissed without prejudice for failure to
prosecute in a timely manner.

Upon the plaintiffs' refiling of the lawsuit, Ebasco Services
filed motions for awards of previous costs and attorneys' fees,
which the superior court ordered the plaintiffs to pay within thirty
days or be subject to dismissal with prejudice. Perhaps due to a
misunderstanding involving the denial of their motion to reconsid-
er, the plaintiffs tendered payment thirteen days late, after
which Ebasco Services moved for dismissal with prejudice for the
plaintiffs' failure to tender prompt payment. After denying the
motions, the court granted reconsideration and scheduled oral ar-
gument on the motions to dismiss. Upon the failure of plaintiffs'
counsel to appear at the hearing, the judge granted the pending

123. Ford, 813 P.2d at 656.
124. ALASKA R. CIV. P. 41(e) (allowing for dismissal of claims for want of
prosecution; nonetheless, even Rule 41(e) requires notice to the plaintiff and an
opportunity to show cause in writing why the action should not be dismissed).
125. See Ford, 813 P.2d at 656.
(Alaska 1978); Miscovich v. Tryck, 875 P.2d 1293 (Alaska 1994)).
127. See id.
129. See id. at 227.
130. See id. at 226.
131. See id.
132. See id.
motions to dismiss with prejudice.\textsuperscript{133}

Despite the fact that the plaintiffs were found to have engaged in "serious dilatory conduct,"\textsuperscript{134} the supreme court held that their conduct did not rise to the level of misconduct required to dismiss with prejudice.\textsuperscript{135} Such a severe sanction required a showing of "willful noncompliance"\textsuperscript{136} "gross violations"\textsuperscript{137} of the Rules,\textsuperscript{138} or "extreme circumstances,"\textsuperscript{139} as well as a record indicating "a reasonable exploration of possible and meaningful alternatives to dismissal."\textsuperscript{139} If such meaningful alternatives were available, more lenient sanctions had to be imposed instead of the harsher dismissal with prejudice.\textsuperscript{140} Since payment was made immediately after the denial of the plaintiffs' motion for reconsideration of the payment order, and since there was no evidence of willful noncompliance by the plaintiffs, the circumstances fell short of supporting the trial judge's dismissal with prejudice.\textsuperscript{141} In addition, the supreme court noted that the trial court failed to consider adequately alternatives to dismissing the case with prejudice.\textsuperscript{142}

B. Modification of Judgment

In \textit{Sandoval v. Sandoval},\textsuperscript{143} a divorce settlement case, the Alaska Supreme Court affirmed the superior court's denial of the husband's motion to set aside judgment, brought under Civil Rule 60(b)(1),\textsuperscript{144} because the motion, made almost a year from the entering of the trial court's decree, was not made within a "reasonable time."\textsuperscript{145} Although Mr. Sandoval claimed he had been unable to attend the divorce hearing due to being involuntarily detained by his overseas job, the superior court found that Mr. Sandoval had been served with the proposed decree, was aware of the disputed provisions in the decree before the judge entered his final

\begin{itemize}
\item \textsuperscript{133} See id. at 227.
\item \textsuperscript{134} Id. at 229.
\item \textsuperscript{135} See id.
\item \textsuperscript{136} Id. at 227 (quoting Otis Elevator Co. v. Garber, 820 P.2d 1072, 1074 (Alaska 1991)).
\item \textsuperscript{137} Id. (quoting Power Constructors, Inc. v. Acres Am., 811 P.2d 1052, 1055 (Alaska 1991)).
\item \textsuperscript{138} Id. (quoting Mely v. Morris, 409 P.2d 979, 982 (Alaska 1966)).
\item \textsuperscript{139} Id. (quoting Power Constructors, 811 P.2d at 1055).
\item \textsuperscript{140} See id.
\item \textsuperscript{141} See id.
\item \textsuperscript{142} See id. at 229.
\item \textsuperscript{143} 915 P.2d 1222 (Alaska 1996).
\item \textsuperscript{144} ALASKA R. CIV. P. 60(b)(1).
\item \textsuperscript{145} Sandoval, 915 P.2d at 1224.
\end{itemize}
judgment, and yet took no action until almost a year later. In *Benedict v. Key Bank of Alaska*, the supreme court found that the trial court did not abuse its discretion when it denied Benedict's motion for relief from a default judgment exactly one year after entry of the judgment. The court found that Benedict's motion was not made within a reasonable time under Civil Rule 60(b)(3), which provides that parties seeking relief from judgment must make a motion "within a reasonable time, and in any case no later than one year after the date of notice of the judgment."

In *Ben Lomond, Inc. v. Schwartz*, the supreme court held that the superior court's denial of Lomond's JNOV motion was proper, since the evidence presented at trial adequately supported the jury's finding of Lomond's breach of fiduciary duty. Lomond's motion for a directed verdict on the issue of fraud was denied at trial. The jury subsequently found that Schwartz had improperly converted joint venture funds for his own use and that Lomond had in turn breached his fiduciary duty to defendant Railwater.

Contesting the reviewability of the superior court's denial of JNOV, Railwater contended that Lomond moved for a directed verdict only on the issue of fraud. While a court's denial of JNOV is not reviewable if the moving party failed to move for a directed verdict on the issue at the close of evidence at trial, the supreme court found that the issues of fraud and breach of fiduciary duty were effectively merged in this case and therefore the denial of the JNOV motion was reviewable. Since both the parties and the court treated the two claims as one throughout the litigation, Lomond's motion for directed verdict on the issue of fraud preserved its right to move for JNOV or new trial on the issue of breach of fiduciary duty. Nonetheless, the court held that the adequacy of the evidence at trial supported the superior court's

146. See id. at 1223-24.
148. See id. at 491.
149. ALASKA R. Civ. P. 60(b)(3).
150. Id. (quoting ALASKA R. Civ. P. 60(b)(3)).
152. See id.
153. See id. at 633-34.
154. See id.
155. See id. (citing ALASKA R. Civ. P. 50(b); Richey v. Oen, 824 P.2d 1371 (Alaska 1992)).
156. See id. at 634-35.
157. See id. at 635.
denial of Lomond's request for JNOV or a new trial.\footnote{158}{See id. at 635-36.}

In \textit{Denali Federal Credit Union v. Lange},\footnote{159}{924 P.2d 429 (Alaska 1996).} the supreme court held that denial of a creditor's motion for a writ of execution against two properties was a final judgment and therefore appealable.\footnote{160}{See id. at 431.} The court explained that, since the effect of the motion was that the creditor could do nothing further to prosecute the action, it had the effect of "disposing of the case and ending the litigation."\footnote{161}{Id.} Therefore, the decision was an appealable final judgment.

\textbf{C. Miscellaneous}\

In \textit{Wasserman v. Bartholomew},\footnote{163}{923 P.2d 806 (Alaska 1996).} the Alaska Supreme Court held that the trial court abused its discretion in prohibiting a non-party witness's trial testimony as a sanction for her refusal to cooperate at a deposition under Civil Rule 37\footnote{164}{ALASKA R. Civ. P. 37.} or alternatively as cumulative evidence under Evidence Rule 403.\footnote{165}{ALASKA R. EVID. 403; see Wasserman, 923 P.2d at 814.} The supreme court determined that Civil Rule 37 could not be the basis for excluding testimony for two reasons: first, such an action was not an appropriate or effective sanction against a non-party witness under the rule, and, second, there was no indication that the appellants, who claimed to be harmed by the exclusion, encouraged or caused the refusal of the non-party witness to answer the questions posed to her in the deposition.\footnote{166}{See Wasserman, 923 P.2d at 811-12.} As to the trial court's claim that introduction of the evidence would be cumulative under Evidence Rule 403, the supreme court noted that the trial court made its decision without knowledge of the contents of the non-party witness's sealed statement.\footnote{167}{See id. at 812.} Therefore, exclusion under Evidence Rule 403 was inappropriate.\footnote{168}{See id. at 814.} The supreme court remanded to the trial court to determine whether to reopen the evidence solely to consider the testimony of the non-party witness with or without any other evidence within the scope of her testimony, or to hold a new trial.\footnote{169}{See id. at 814-15.}
In *Landers v. Municipality of Anchorage*, the supreme court held that the plaintiff did not waive his right to challenge the superior court's ruling on a motion in limine to exclude evidence, even though he failed to make an offer of proof. In an action to recover damages for personal photographs and videotapes disposed of by the Municipality, Landers sought to include evidence of the sentimental and emotional value of the items. However, the superior court granted the Municipality's motion in limine to exclude this evidence and Landers failed to respond by offering proof of their special value.

In general, Evidence Rule 103(a)(2) requires an offer of proof to preserve error based upon a trial court's ruling excluding evidence. The court noted, however, that in *Agostinho v. Fairbanks Clinic*, the court had reviewed the superior court's exclusion of evidence pursuant to its ruling on a motion for a protective order and had held that, under such circumstances, it was appropriate to examine the protective order itself rather than the events at trial. Based upon its holding in *Agostinho* and a determination that a motion in limine was functionally equivalent to a motion for a protective order, the court found that Landers did not waive his right to challenge the superior court's ruling on the motion in limine merely by failing to make an offer of proof.

In *Era Aviation, Inc. v. Campbell*, the supreme court affirmed the superior court's summary judgment decision against air carriers seeking refunds of landing fees paid to the Alaska Department of Transportation and Public Facilities in accordance with a regulation subsequently declared illegal. In the original action, several air carriers, not including Era Aviation, filed suit against the Commissioner, the Department of Transportation, and the state, asserting that Department regulations increasing landing fees at state rural airports were illegal. The plaintiffs sought and obtained injunctive relief and a refund of the fees they had paid under the regulation, on the court's holding that the regulation

171. *See id.* at 614.
172. *See id.* at 615.
173. *See id.* at 615-16.
174. ALASKA R. EVID. 103(a)(2).
175. *See id.* at 616.
177. *See Landers*, 915 P.2d at 614 (citing *Agostinho*, 821 P.2d at 717).
178. *See id.* at 617.
180. *See id.* at 607.
181. *See id.*
failed to "comply with the Alaska Administrative Procedure Act and was thus invalid and unenforceable." 182

Just prior to the entry of partial summary judgment for the original plaintiffs, several other air carriers intervened in the original action in order to claim refunds. 183 Shortly thereafter, Era Aviation filed a separate lawsuit for a refund of landing fees, which the court consolidated with the action of the intervenors (collectively "Air Carriers"). 184 The defendants' subsequent motion for summary judgment was granted. 185

Acknowledging that the Air Carriers' remedy for relief lay in a common law action in assumpsit, the supreme court first held that the requirement under Principal Mutual Life Insurance Co. v. State, Division of Insurance 186 of a formal protest at the time of payment applies to all actions in assumpsit brought against a government agency. 187 Such a protest "must not only notify the state that the payer believes the levy to be illegal, but must also signal that the payer intends to seek a refund." 188 Although the Air Carriers voiced their opposition to the landing fees before the Department and the legislature, such opposition was insufficient to notify the state that they intended to seek reimbursement. 189 Furthermore, the Air Carriers' attempt to recover based on the suit filed by the original plaintiffs failed because that lawsuit satisfied only the original plaintiffs' protest obligation. 190 Finally, the court rejected the Air Carriers' contention that their right to equal protection was violated by denying them reimbursement while reimbursing the original plaintiffs. 191 The court found that a rational basis existed for the distinction between the protesting and the non-protesting payers. 192

In Edwards v. Alaska Pulp Corp., 193 the supreme court rejected the superior court's determination that Civil Rule 82 194 preempts application of the common fund doctrine for reimbursement of attorneys' fees. 195 Recognizing that the common fund doctrine is

182. Id. at 608.
183. See id.
184. See id.
185. See id.
187. See Era Aviation, 915 P.2d at 609.
188. Id. at 611.
189. See id. at 612.
190. See id.
191. See id. at 613.
192. See id.
194. ALASKA R. CIV. P. 82.
195. See Edwards, 920 P.2d at 756.
a fee-spreading mechanism, while Rule 82 is a fee-shifting tool, the court held that "Rule 82 does not preempt the applicability of the common fund doctrine, wholly or in part."196

In Ahwinona v. State,197 the supreme court held that a suit for personal damages resulting from a snowmobile accident was properly dismissed pursuant to the state's Rule 12(b)(6)198 motion to dismiss for failure to state a claim, since the plaintiff had previously executed a valid personal injury release which was clear on its face.199 Ahwinona signed a document entitled "Release of All Claims," which purported to release all defendants from liability for Ahwinona's injuries in consideration for $6000, receipt of which was acknowledged.200 In upholding the validity of the release, the court rejected Ahwinona's contention that he expected to recover the sum of $6000 from each of the defendants.201

In Sopcak v. Northern Mountain Helicopter Services,202 the supreme court held that a determination of lack of subject matter jurisdiction by a federal court in Alaska under Article 28 of the Warsaw Convention necessarily precluded subject matter jurisdiction in state courts in the same matter under the doctrine of collateral estoppel.203 Plaintiffs filed wrongful death and personal injury claims in the superior court arising out of a crash in Alaska of a helicopter operated by Northern Mountain, a Canadian corporation.204 Plaintiffs also filed a complaint in the U.S. District Court for the District of Alaska.205 The district court subsequently granted Northern Mountain's motion to dismiss for lack of subject matter jurisdiction, based on its finding that under Article 28 of the Warsaw Convention, to which the U.S. is a signatory, Alaska was not an available forum.206 Northern Mountain then moved to dis-

196. Id.
198. ALASKA R. CIV. P. 12(b)(6).
199. See Ahwinona, 922 P.2d at 886.
200. See id. at 884-85.
201. See id. at 886.
203. See id. at 1008.
204. See id. at 1007.
205. See id.
207. See Sopcak, 924 P.2d at 1007 ("Article 28 only allows subject matter jurisdiction in the United States if the United States is the domicile of the carrier, the carrier's principal place of business, the place of business through which the contract has been made, or the place of destination of the flight." Id. at 1007-08 (emphasis added) (citing Sopcak v. Northern Mountain Helicopter Servs., 859
miss the state court action for want of jurisdiction and the motion was granted on the basis of collateral estoppel. The supreme court held that, under Alaska case law, collateral estoppel precludes relitigation of a previously determined issue where an action is first brought in a federal court and subsequently brought in state court. Since the federal district court rendered its decision before the state court claim was concluded, and the issue of subject matter jurisdiction was the same in this case for both state and federal courts, the state court was collaterally estopped from relitigating the issue of subject matter jurisdiction.

In Washington Insurance Guaranty Ass'n v. Ramsey, the supreme court found that Washington Insurance Guaranty Association (“WIGA”), a non-profit, unincorporated entity formed by Washington statute for the purpose of protecting the policy holders of insolvent insurance companies, was subject to the personal jurisdiction of the superior court and was not statutorily immune from an action for refusal to settle. In an underlying action in which WIGA, in lieu of an insolvent Washington insurer, sponsored the defense of a construction company and one of its employees against an action for negligence, WIGA refused, over the advice of counsel for the defendants, claimant Ramsey's offer to settle for $200,000. Ramsey and the defendants then entered into a settlement agreement whereby Ramsey was awarded damages of $300,000 but covenanted not to seek payment of the judgment from the defendants, and they in turn assigned to Ramsey their claims against WIGA for the amount of the judgment. Ramsey then filed an action for refusal to settle against WIGA. The jury in that action found for Ramsey and awarded her $200,000.

On the issue of personal jurisdiction, WIGA argued that it had not met the “minimum contacts” standard since its contacts

F.Supp. 1270, 1271-72 (D. Alaska 1992)). The district court found that the destination of the flight was Vancouver, Canada. See id. at 1008. 208. See id. 209. See id. (citing Campion v. State, Dep’t of Community and Reg’l Affairs, 876 P.2d 1096, 1098 (Alaska 1994)). 210. See id. at 1009-10 (stating that “[a]s a federal treaty, the Warsaw Convention has the force of federal law and preempts inconsistent state law . . . . Alaska can only assert jurisdiction if Article 28 can be satisfied.”). 211. 922 P.2d 237 (Alaska 1996). 212. See WASH. REV. CODE §§ 48.32.010 et seq. (1994). 213. See Ramsey, 922 P.2d at 242. 214. See id. at 243. 215. See id. at 239. 216. See id. 217. See id. at 238.
with Alaska were a result of its statutory duty under the Washington Insurance Guaranty Association Act and were not voluntary actions that availed it of the protection of local laws. Noting that, in many jurisdictions, the act of guaranteeing an obligation in the forum state alone is enough to invoke personal jurisdiction, the court held that, where a statutory duty requires the establishment of contacts with a foreign state, and those contacts result in an actionable claim, as did WIGA's participation in and refusal to settle the negligence claim, personal jurisdiction is proper. The court reserved the question of whether statutory conduct that does not result in the injury in question can be relied upon to establish jurisdiction.

On the issue of whether or not WIGA was immune, WIGA argued that provisions of its chartering act granted it immunity from suit arising from the performance of its statutory duties. The court examined the statute and Washington case law and found that the reasonable settlement of claims was an element of WIGA's statutory duty. Thus, failure to settle did not count as performance of statutory duties and therefore did not give rise to the immunity clause.

V. CONSTITUTIONAL LAW

In 1996 the Alaska Supreme Court and the Alaska Court of Appeals decided cases in several areas of constitutional law. The decisions are divided below into four categories: due process, double jeopardy, free speech, and the right to jury trial. The court of appeals also considered the propriety of probation conditions that impinged on constitutional rights and one void for vagueness issue. Some overlap exists between these categories and the section of Year in Review summarizing cases on constitutional protections in the criminal law.

A. Due Process

In A. Fred Miller, Attorneys at Law v. Purvis, the Alaska Supreme Court held that the limits imposed on appeals from fee arbitration panels by Alaska Bar Rule 40(u) do not constitute a denial of constitutional due process. Miller's client had invoked the Alaska Bar Rules' mandatory fee arbitration provisions, and upon

218. See id. at 241.
219. See id. at 242.
220. See id. at 242 n.17.
221. See id. at 243.
222. See id. at 244.
hearing the case, the arbitration panel concluded that a reasonable fee payment under the circumstances would have been only $8,500, rather than the $42,000 charged by Miller.224

Miller argued that mandatory arbitration is constitutional only when there is the opportunity for judicial review on the merits for instances of "clearly erroneous findings of fact and arbitrary and capricious application of the law."225 Since Alaska Bar Rule 42(u) does not provide for judicial review of arbitration on the merits,226 Miller argued that such fee arbitration was unconstitutional as a denial of due process, relying heavily on Bayscene Resident Negotiators v. Bayscene Mobilehome Park.227 In Bayscene the California Court of Appeals struck down a city ordinance requiring binding arbitration for mobile home rent disputes as denying due process, stressing the failure of the ordinance to provide for judicial review of the evidence.228 Miller also relied on dictum in State v. Public Safety Employees' Ass'n,229 in which the Alaska Supreme Court, noting the heightened standard of review commanded by compulsory "interest" arbitration,230 adopted an "'arbitrary and capricious standard'" to be applied henceforth "'as a matter of common law.'"231

Declining to extend the dictum in Public Safety to the creation of a bright-line rule applicable to all compulsory arbitration, the supreme court held that the limits on appeals of fee arbitration imposed by Rule 40(u) were not a denial of due process.232 The court also noted the lack of any requirement under the due process clause of the Fourteenth Amendment to the U.S. Constitution that requires states to provide litigants with a right to appeal administrative decisions.233 As the court system has the power to control

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224. See id. at 611.
225. Id. at 612.
226. ALASKA BAR R. 40(u) (allowing either party to appeal the arbitration panel's ruling to the superior court on the grounds specified in Alaska's Uniform Arbitration Act, which in turn allows appeals of awards involving fraud, partial or prejudicial arbitrators, obvious miscalculations of figures, arbitrators exceeding their power and the like. See ALASKA STAT. §§ 09.43.120-.180 (Michie 1996)). Nowhere does the statute allow for an appeal on the merits. See id.
228. See id. at 636.
230. "Interest arbitration is a type of arbitration where the arbitrator establishes new contract terms rather than deciding how disputes arising under existing contracts should be resolved." Miller, 921 P.2d at 614 n.3.
231. Id. at 614 (quoting State v. Public Safety Employees' Association, 798 P.2d at 1287-88).
232. See id. at 618.
233. See id. at 615 (citing In re LiVolsi, 428 A.2d 1268,1276 (N.J. 1981)).
the fee arrangements between lawyers and clients, it may also determine the procedure for resolving fee disputes. The court noted that further policy considerations specific to attorney fee arbitration favor a definitive resolution in arbitration without appellate review on the merits.

In Snyder v. State, the supreme court held that a person arrested for driving while intoxicated ("DWI") had a right under the due process clause of the Alaska Constitution to an independent blood alcohol test whether or not he submitted to the statutorily mandated breathalyzer test. Snyder failed to provide an adequate breath sample for the breathalyzer but requested that he be allowed to obtain an independent test of his blood alcohol content. The police denied his request.

The court noted that the need to protect the rights of individuals arrested for DWI had increased with the rise in public concern about drinking and driving, and the resulting rise in DWI penalties and enforcement. The court held that due process, therefore, extended beyond allowing defendants to obtain an independent blood test to refute the state's breathalyzer evidence, and vested in the individual the right to obtain such a test as exculpatory evidence regardless of the possession of breathalyzer evidence by the state: "[W]e are convinced that the opportunity to obtain evidence of blood alcohol content is a reasonably necessary safeguard, essential to the adequate protection of the accused's right to a fair trial." The court reasoned that, although its ruling would require the state to facilitate the arrestee's access to an independent test, such a burden was justified because "the objective evidence is inherently evanescent, is potentially presumptively exculpatory, and can be obtained by the accused by placing only a slight burden on the state." The court noted, however, that the accused could waive his right to an independent test, and the state could be

234. See id. at 615-17 (citing Anderson v. Elliot, 555 A.2d 1042 (Me. 1989); In re LiVolsi, 428 A.2d 1268, 1276 (N.J. 1981)).
235. See id. at 618. Among the considerations mentioned by the court are "the need for public confidence in the lawyer/client relationship, the difficulty which clients of limited income may have in procuring an attorney to represent them against another attorney, and the vulnerability of clients when litigating against their former lawyers." Id.
238. See Snyder, 930 P.2d at 1277.
239. See id. at 1276.
240. See id. at 1278.
241. Id. at 1277 (citing Gunderson v. Municipality of Anchorage, 792 P.2d 673, 676 (Alaska 1990)).
242. Id. (internal references omitted).
excused from not affording him an attempt to obtain a test if it were not feasible to do so.\textsuperscript{25}

B. Double Jeopardy

In \textit{Todd v. State},\textsuperscript{24} the Alaska Supreme Court held that the imposition of consecutive sentences for felony murder and the predicate felony of robbery did not violate the double jeopardy clauses of the state and federal constitutions, and, furthermore, the predicate felony of robbery was not a lesser included offense of felony murder.\textsuperscript{25} The court cited a string of U.S. Supreme Court cases for the proposition that the double jeopardy clause, in the context of multiple charges stemming from the same crime, protects only against punishment inflicted beyond that which was contemplated by the legislature when it created separate statutes potentially governing the same act.\textsuperscript{26} The court then concluded that the Alaska legislature intended to allow for separate convictions and cumulative punishments for felony murder and for the predicate felony of robbery, and decided to "view felony murder as a distinct area of the criminal law not governed by traditional lesser-included offense analysis."\textsuperscript{27}

In \textit{Municipality of Anchorage v. Skagen},\textsuperscript{28} the court of appeals held that a default forfeiture of an unclaimed vehicle did not constitute "punishment" within the meaning of the double jeopardy clause of the U.S. Constitution until the person asserted a legal interest in the unclaimed vehicle and succeeded in reopening the forfeiture proceedings.\textsuperscript{29} As a result of Skagen's failure to enter an appearance in the Municipality's forfeiture proceeding instituted under Alaska Municipal Code section 9.28.026C, the Municipality obtained a default judgment against the unclaimed vehicle.\textsuperscript{30} The court held that Skagen's default amounted to a failure to assert ownership.\textsuperscript{31} That failure would bar any claim that the forfeiture of the vehicle amounted to a punishment for purposes of double jeopardy.\textsuperscript{32} Until such time as Skagen chose to assert a legal inter-

\begin{itemize}
  \item \textsuperscript{243} See \textit{id.} (citations omitted).
  \item \textsuperscript{244} 917 P.2d 674 (Alaska 1996).
  \item \textsuperscript{245} See \textit{id.} at 681.
  \item \textsuperscript{247} \textit{Id.} at 681.
  \item \textsuperscript{248} 920 P.2d 284 (Alaska Ct. App. 1996).
  \item \textsuperscript{249} See \textit{id.} at 288.
  \item \textsuperscript{250} See \textit{id.} at 284.
  \item \textsuperscript{251} See \textit{id.} at 288.
  \item \textsuperscript{252} See \textit{id.}.
\end{itemize}
est in the unclaimed vehicle and succeeded in reopening the forfeiture proceedings, the court held that Skagen's double jeopardy claim would not be ripe.253

In Aaron v. City of Ketchikan,254 the court of appeals held that the double jeopardy clause of the Alaska Constitution did not preclude a city from prosecuting a defendant for refusing to submit to a breath test, even though the Department of Public Safety had already taken administrative action against defendant's driver's license based on the same incident.255 The court of appeals had previously rejected the same double jeopardy argument under the federal Constitution in State v. Zerkel,256 but Aaron argued that the Alaska Constitution afforded greater protection.257 The court held that Aaron failed to meet his burden of justifying such a divergence.258 The court of appeals reiterated its conclusion in Zerkel that a state does not inflict punishment on a driver by suspending or revoking his license in administrative proceedings upon evidence of violations of the rules governing the licensed activity.259

C. Right to Jury Trial

In State v. District Court,260 the Alaska Court of Appeals held that the mandatory revocation of a driver's license is a punitive measure giving rise to a right to jury trial and a right to appointed counsel under the Alaska Constitution.261 The court affirmed the district court's grant of a right to jury trial and appointed counsel for minors charged with underage drinking and possession of alcohol.262 The court cited Baker v. City of Fairbanks,263 in which the Alaska Supreme Court stated that the right to jury trial applied to any prosecutions that "may result in the loss of a valuable license, such as a driver's license."264 The court emphasized the criminal nature of the proceedings under which the defendants' licenses would be revoked, noting that Alaska Statutes section 28.15.185265 is a pu-

253. See id.
255. See id. at 337.
257. See ALASKA CONST. art. I, § 9; see also U.S. CONST. amend. V.
258. See Aaron, 927 P.2d at 336.
259. See id. at 337.
261. See id. at 1296-97.
262. See id.
265. ALASKA STAT. § 28.15.185 (Michie 1996) (mandating driver's license revocation (or revocation of their privilege to obtain one) for minors aged 13-17
nitive measure imposing a specified punishment for persons found guilty of a particular criminal offense.\footnote{266}

D. Miscellaneous

In \textit{Cook v. Botelho},\footnote{267} the Alaska Supreme Court held that a governor's constitutional authority to reconsider a political appointment terminated upon the appointee's assumption of office and that the legislature may confirm an appointment without being formally notified by the incumbent governor as is required under Alaska Statutes section 39.05.080.\footnote{268} Cook was named by Governor Hickel to the Alaska Public Utilities Commission while the state legislature was in recess.\footnote{269} Governor Knowles assumed office before the legislature reconvened.\footnote{270} Less than a month after the legislature convened, the new governor informed the legislature that he would not present Cook's name to the body for confirmation and stated that any consideration of him would "be of no legal effect."\footnote{271} The legislature nevertheless voted to confirm the appointment.\footnote{272} The state attorney general subsequently brought action against Cook, in which the legislature intervened as a defendant.\footnote{273}

The court held that the appointment was complete when Cook assumed office, and at that time the governor's power to reconsider the appointment ended.\footnote{274} Furthermore, while the governor was statutorily required to present the appointee's name to the legislature,\footnote{275} the relevant statute set the procedural steps for legislative confirmation, not for the substantive elements of the governor's act of appointment.\footnote{276} The governor could not refuse to act under the statute, and thus, the governor could not remove Cook from office without following established removal statutes.\footnote{277} The court also held that the legislature could confirm an appointee, once the governor's role in the appointment process was complete, without awaiting the governor to present the appointee to the leg-

\footnotesize{convicted of drinking or possessing alcoholic beverages).}

\footnote{See \textit{District Court}, 927 P.2d at 1296-97.}
\footnote{267. \textit{921 P.2d} 1126 (Alaska 1996).}
\footnote{268. \textit{ALaska Stat.} § 39.05.080 (Michie 1996).}
\footnote{269. \textit{See Cook}, 921 P.2d at 1127.}
\footnote{270. \textit{See id.}}
\footnote{271. \textit{Id.}}
\footnote{272. \textit{See id.}}
\footnote{273. \textit{See id.}}
\footnote{274. \textit{See id.} at 1129.}
\footnote{275. \textit{See ALaska Stat.} § 39.05.080(1) (Michie 1996).}
\footnote{276. \textit{See Cook}, 921 P.2d at 1130.}
\footnote{277. \textit{See id.; ALaska Stat.} § 42.05.035 (Michie 1996).}
Finally, the court held that Cook was validly appointed to a full term, finding that the Alaska Constitution and appointment statutes allow the governor to appoint an Commission member to a full term while the legislature is in recess and allow the legislature to confirm such an appointment.

In Carlson v. State, Commercial Fisheries Entry Commission, the supreme court heard a second appeal from a class action challenging the state’s practice of charging nonresident commercial fishers licensing and limited entry permit fees that are three times those charged to resident commercial fishers. In Carlson I, the case was remanded so that the superior court could address the class’s Privileges and Immunities Clause claim. Specifically, the issue to be considered on remand was “whether all fees and taxes which must be paid to the state by a nonresident to enjoy the state-provided benefit are substantially equal to those which must be paid by similarly situated residents when the residents’ pro rata shares of state revenues to which nonresidents make no contribution are taken into account.” In making this assessment, the class proposed a “per capita” formula that computed the contribution made by each state resident to the cost of maintaining the commercial fisheries and compared this figure with the fee differential. The state offered a “pro rata” formula that compared the total contributions made by state residents with the total fees paid by nonresidents. The superior court accepted the class’s per capita formula, and the state appealed.

On the second appeal, the supreme court concluded that the class’s per capita formula was the appropriate formula for determining whether the fee differential violates the Privileges and Immunities Clause because it allowed for a weighing of the relative burden imposed on resident and nonresident commercial fishers. Therefore, the case was remanded for application of the per capita formula.

278. See Cook, 921 P.2d at 1130.
279. See id. at 1132.
281. See id.
283. See Carlson, 919 P.2d at 1338.
284. Id. at 1339 (quoting Carlson I, 798 P.2d at 1278).
285. See id.
286. See id.
287. See id.
288. See id. at 1343.
289. See id. at 1344.
In *Pullen v. Ulmer*, the supreme court held that wildlife can be characterized as a state asset subject to appropriation, and that a proposed initiative compelling a particular allocation of wildlife among competing users is an appropriation of state property and therefore contrary to Article XI, Section 7 of the Alaska Constitution. The case concerned a proposed initiative that would provide that subsistence users, personal users and sport fisheries would receive a portion of the salmon harvest before the remaining harvestable salmon were allocated to other users.

The court first held that insofar as the loss, use or exploitation of wildlife directly affected the state's fish, wildlife is a state asset, even though other incidents of ownership may not be present in the state's legal relationship to its asset. As such, the state had a strong interest in salmon migrating within its waters, and this interest prevented appropriation of these fish by initiative.

Second, the court held that the proposed initiative was an appropriation of state property. Drawing from some of its previous decisions, the court concluded that the constitutional prohibition embodied by Article XI, section 7 was meant to prevent electoral majority self-enrichment with state assets and to preserve to the legislature the power to make decisions regarding the allocation of state assets. The court concluded that the proposed initiative would violate both of these objectives, and, therefore, granted the requested permanent injunction.

In *Scudero v. State*, the court of appeals held that a First Amendment defense to a fishing law violation was a question of law and was therefore properly decided by the judge. Scudero, a Metlakatlan, claimed that the alleged violation of three fishing statutes was an act of civil disobedience to protest the state's imposition of fishing regulations on Metlakatlans, and that the civil disobedience amounted to constitutionally protected free speech.

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291. *See id.* at 60, 63.
292. *See id.* at 55.
293. *See id.* at 59.
294. *See id.* at 60.
295. *See id.*
296. *See id.* at 63.
298. *See id.*
299. *See id.* at 63-64.
301. *See id.* at 685.
302. *See id.*
The trial judge ruled that Scudero's actions did not constitute speech and refused to instruct the jury on Scudero's civil disobedience defense.\(^{303}\)

The court, relying on the Model Penal Code and Alaska Rules of Criminal Procedure 12(b),\(^{304}\) held that although the right to trial by jury entitled a defendant to have a jury determine whether each of the essential elements of the crime has been established, that right did not entitle a defendant to have a jury resolve extrinsic factual issues that pertain to legal defenses but are not directly linked to an essential element of the offense.\(^{305}\)

In *Turney v. State*,\(^ {306} \) the court of appeals held that, for a defendant to be convicted of trespass on publicly owned property under Alaska Statutes section 11.46.350(a)(2) for failure to leave public property "after being lawfully directed to do so by the person in charge [of the property],"\(^ {307} \) the defendant's failure to leave must be contemporaneous with the lawful order to leave.\(^ {308} \) The court held that a public official may not permanently ban a person from a public facility, even if such a ban were contingent on the intent of the person to engage in some prohibited conduct, because this ban would not be contemporaneous with the person's failure to leave.\(^ {309} \)

The court also held that not all speech protected by the First Amendment to the U.S. Constitution is exempted from the definition of "noise" in the disorderly conduct statute.\(^ {310} \) Rather, the court construed the statute to exempt only those exercising protected First Amendment rights, thus preserving the state's prerogative reasonably to regulate the time, place and manner in which free speech rights are exercised.\(^ {311} \) The court noted that a blanket exception in the disorderly conduct statute for all speech protected by the First Amendment would lead to the irrational result that loud unruly protests in the middle of the night in quiet neighborhoods would be unregulated by the disorderly conduct statute, as long as they were of a political nature. The court rejected this out-

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303. See id.
304. MODEL PENAL CODE § 1.12(4)(b) (1985); ALASKA R. CRIM. P. 12(b).
305. See Scudero, 917 P.2d at 686 (citing MODEL PENAL CODE § 1.12(4)(b) (1985); ALASKA R. CRIM. P. 12(b)).
308. See Turney, 922 P.2d at 288.
309. See id. at 289.
310. See id. at 292; ALASKA STAT. § 11.61.110(a)(2) (Michie 1996) (disorderly conduct occurs if "in a public place or in a private place of another without consent, . . . the person makes unreasonably loud noise").
311. See Turney, 922 P.2d at 292.
come. In State v. Lawler, the court of appeals reversed the district court’s ruling that Alaska Administrative Code title 5, section 27.131(f), a strict liability regulation defining the minimum mesh size for fishing nets, was so vague that it violated due process under the Fourteenth Amendment to the U.S. Constitution.

Lawler was cited for fishing with an undersized gillnet. The court of appeals held that Lawler failed to meet his burden of proving either that the regulation’s definition of mesh size was unreasonably vague or that he had made reasonable efforts to act lawfully. Noting that participants in a closely regulated commercial activity such as commercial fishing may be held to a higher standard of compliance than ordinary citizens, the court rejected Lawler’s “tacit assumption that the state was constitutionally required to give [him] an error-free and mathematically precise way to determine his net’s mesh size before he undertook any commercial fishing activity.”

VI. CRIMINAL LAW

The past year brought a wide variety of criminal law cases before the Alaska Supreme Court and the Alaska Court of Appeals. These diverse cases have been divided into two main categories, constitutional protections and general criminal law. These categories are further divided into more specific areas.

A. Constitutional Protections

1. Search and Seizure. In D’Antorio v. State, the Alaska Supreme Court held illegal a police search of personal papers that had been sustained by the trial court under the “second glance” doctrine. D’Antorio was arrested in Ohio in compliance with an outstanding arrest warrant, and an Ohio police detective inventoried the items in his car at the time of his arrest. Because

312. See id.
314. See id. at 1366.
315. See id. at 1367.
316. See id. (citing State v. Martushev, 846 P.2d 144, 149 (Alaska Ct. App. 1993)).
317. See id. at 1366 (citing Martushev, 846 P.2d at 150).
318. Id.
320. See id. at 1159.
321. See id.
322. See id. at 1160.
there was an outstanding Alaska arrest warrant for D'Antorio, an Alaska state trooper later took possession of certain papers found in D'Antorio's car and, without a search warrant, read and copied them. 323

The supreme court held that under federal and Ohio law, a detailed search of the personal papers by the inventorying detective would have exceeded the permissible scope of an inventory search. Relying in part on United States v. Grill, 324 the court of appeals concluded that police officers are allowed a "second glance" at seized property equal in scope and intensity to their first lawful view of the property. 325 But the supreme court held that, because the state trooper's detailed examination of the personal papers greatly exceeded the Ohio police detective's authority to examine the papers while inventorying them, the State Trooper's search was not valid. 326 According to the court, D'Antorio retained a privacy expectation in the personal papers that did not evaporate upon their being inventoried. 327 The court reversed D'Antorio's conviction and remanded for a new trial. 328

In State v. Page, 329 the court of appeals extended State v. Glass 330 to hold that police in certain instances must obtain a warrant before recording people's activities on video. 331 Police videotaped Page delivering cocaine to a police informant while in a private residence. 332 The state conceded that under Glass the conversation between Page and the informant was protected from recording and that there were no exigent circumstances that would have excused the police from obtaining a warrant. 333 The court held that if the conversation would have been protected under Glass from electronic monitoring, and furthermore if Page had a reasonable expectation of "visual privacy," then the police had an obligation to obtain a warrant before videotaping Page's activities. 334

In Carter v. State, 335 the court of appeals held that a search

323. See id.
324. 484 F.2d 990 (5th Cir. 1973).
325. See D'Antorio, 926 P.2d at 1166.
326. See id.
327. See id.
328. See id. at 1168.
330. 583 P.2d 872 (Alaska 1978) (holding that police must obtain a warrant before secretly recording people's conversations).
331. See Page, 911 P.2d at 515.
332. See id.
333. See id.
334. See id.
warrant obtained to search a residence was issued without sufficient probable cause and therefore certain evidence should have been suppressed in superior court. Carter had been charged with one count of misconduct involving a controlled substance for growing marijuana at his residence. The search warrant had been obtained after the police presented evidence based on anonymous informants’ statements and on evidence of a suspicious pattern of electrical consumption obtained from utility records.

The court applied the two-prong test articulated by the U.S. Supreme Court, in Aguilar v. Texas and Spinelli v. United States, which presently governs a probable cause analysis of Article I, sections 14 and 22, of the Alaska Constitution. The test requires that a confidential informant’s basis of knowledge and his veracity be established when a search warrant is based on the informant’s hearsay. The court held here that this test had not been satisfied with regard to the anonymous tips. The addition of the evidence concerning electrical consumption to the four anonymous tips was insufficient to establish probable cause to support a search warrant since unusual electrical consumption has no inherent incriminatory value.

In Lloyd v. State, the court of appeals held that a person who calls “Crime Stoppers” does not automatically qualify as a citizen informant, since the information relayed by the caller alleging criminal misconduct by itself does not provide the court issuing the search warrant with any evidence as to the informant’s intrinsic trustworthiness. The court noted that traditionally, a distinction has been drawn between police informants and citizen informants, with more relaxed requirements for establishing the credibility of the latter. The informant’s status must be determined based on

336. See id. at 621.
337. See id.
338. See id.
341. ALASKA CONSt. art I, §§ 14, 22.
343. See id.
344. See id. at 625.
346. In order to issue a search warrant based on an informant’s information, the reliability of that informant must be established. To establish the reliability of a citizen informant, “no showing of prior reliability is required; the police need only verify ‘some details of the information.’” Id. at 1286 (quoting Erikson v. State, 507 P.2d 508, 518 (Alaska 1973)).
347. See id. at 1287.
348. See id. at 1284.
the specific facts submitted to the issuing court so that it can assess the informant's probable motives. The court found that the Aguilar-Spinelli analysis formally applies to cases where a search warrant is issued, and therefore, the evidence presented to the issuing court must in itself establish the informant's status as a citizen informant. The court concluded that the credibility of the informant was not established by independent police corroboration; since no other evidence of the caller's motive was offered to the court issuing the search warrant, other than evidence that an informant placed the call to the "Crime Stoppers" line, reliance on the tip failed the Aguilar-Spinelli credibility prong.

In Betts v. State, the court of appeals upheld the legality of a warrant that authorized the search of all persons present in a trailer identified by an informant as the site of drug dealing. The court held that it is proper to authorize the search of all persons present when the evidence offered to support a search warrant is sufficient to indicate the likelihood of any person present at a particular location being involved in the criminal activity that prompted the warrant. The court appended the opinion of the superior court to its own opinion, which noted such evidence was more likely to be sufficient at a private residence than at a large facility open to the public. In this case, evidence showed that the residents had a history of involvement with drugs and that a number of people in the residence had been viewed using drugs within ninety minutes prior to the issue of the warrant.

In Joubert v. State, the court of appeals held that a condition of probation that requires the probationer to consent to a search of his house or person at the request of his probation officer does not serve as prospective consent to a search at any time by the offi-

349. See id.
351. See Lloyd, 914 P.2d at 1287.
352. See id. at 1288, 1290.
354. See id. at 765.
355. See id. at 764 (citing State v. DeSimone, 288 A.2d 849, 850 (N.J. 1972); 2 WAYNE R. LAFAVE, SEARCH AND SEIZURE; A TREATISE ON THE FOURTH AMENDMENT § 4.5(e), at 345-46 (3d ed. 1996)).
357. See id. at 767.
Joubert's probation had been revoked after cocaine was found in his house by his probation officer. The officer had obtained permission to enter the house from Joubert's daughter, who lived there, but had not obtained permission to search the house and had not spoken at all to Joubert, who was not present at the time of the search. On appeal, the court held that, even if a probationer's rights to Fourth Amendment protection are somewhat diminished, societal interest in protecting the rights of others who might be affected by an outstanding right to search a probationer's house, such as room-mates or family members, outweighed the state's interest in conducting such searches to monitor probationers. The evidence obtained by the search of Joubert's house was thus obtained illegally and should have been excluded. Therefore, the trial court's order revoking Joubert's probation was reversed.

In Waters v. State, the court of appeals held that police officers executing a search warrant were prohibited from searching personal property of visitors in a personal residence only when they knew or should have known that the article in question belonged to a visitor. The court held that even a strong suspicion of ownership by a visitor does not constitute actual knowledge.

In McClelland v. State, the court of appeals held that an odor of marijuana at defendant's house, combined with evidence of abnormally high electrical usage at the residence, was sufficient to give rise to probable cause to issue a warrant to search defendant's house for evidence related to a suspected marijuana-growing operation.

2. Miscellaneous. In State v. Fremgen, the Alaska Supreme Court stated that a refusal to allow the mistake-of-age defense in a case of statutory rape would violate the Alaska Constitution, because it would impose criminal liability without criminal intent. The court upheld a long line of cases that established that to convict a person of a serious crime without the requirement of criminal intent would be a deprivation of liberty without due
process of law.\textsuperscript{370} In \textit{Javed v. Department of Public Safety, Division of Motor Vehicles},\textsuperscript{371} the supreme court held that a statute limiting a license revocation hearing to issues concerning the reasonableness of an arresting officer's belief that the person was driving while intoxicated violates due process.\textsuperscript{372} Javed was accused of driving while intoxicated; his defense was that a friend was driving.\textsuperscript{373} At the first of three hearings for the license revocation proceedings, Javed requested that three eye witnesses to events surrounding his arrest be subpoenaed.\textsuperscript{374} The hearing officer subpoenaed the three witnesses after the second hearing.\textsuperscript{375} None of the subpoenaed witnesses appeared at the last hearing.\textsuperscript{376} Nevertheless, the hearing officer affirmed the license revocation, stating that the law requires only that the arresting officer have reasonable grounds to believe that Javed was driving.\textsuperscript{377}

The court held that it was a violation of due process for Javed to be prohibited from contesting that he was driving.\textsuperscript{378} It relied upon \textit{Thorne v. Department of Public Safety} for the proposition that at a revocation hearing, the accused ""must be granted the opportunity to fully contest issues of 'central importance' to the revocation decision.""\textsuperscript{379} The court held that the statute was facially constitutional and, under the statutory saving clause,\textsuperscript{380} is invalid only under circumstances—such as in this case—where due process requires that a defendant have the opportunity to address contested issues other than the reasonableness of the police officer's belief that Javed was driving while intoxicated.\textsuperscript{381}

In \textit{West v. State},\textsuperscript{382} the court of appeals, on an issue of first impression in the state, affirmed a superior court's conclusion that police communication with a barricaded defendant who was holding police at bay did not constitute an interrogation requiring a Mi-
randa warning. West had communicated with a state trooper for three and one-half hours by telephone while remaining in his brother's cabin and threatening to blow up the cabin should the police approach. The court noted that its holding was consistent with those of all other jurisdictions that had considered the issue.

In *State v. Summerville*, the court of appeals held that an amendment to Alaska Rules of Criminal Procedure 16 allowing reciprocal discovery was unconstitutional. Summerville had been charged with two counts of first-degree sexual assault and one count of second-degree sexual abuse of a minor. The state requested that Summerville provide discovery pursuant to the amended Criminal Rule 16. Summerville sought a protective order, claiming that the amendment violated the state constitution's privilege against self-incrimination. The court of appeals agreed with the superior court's conclusion that Rule 16's court-ordered disclosure by the defense of names, addresses, phone numbers and statements of potential defense witnesses was expressly prohibited by the Alaska Supreme Court's holding in *Scott v. State*. Because the legislation amending Criminal Rule 16 included language stating that the provisions of the newly enacted rule were not severable, the court of appeals joined the superior court in finding that the new rule was entirely invalid and that, therefore, the preexisting form of the rule would control.

In *Petersen v. State*, the court of appeals upheld the constitutionality of state stalking statutes against a challenge by three defendants convicted of first- and second-degree stalking. The defendants asserted that the statutory definition of stalking, as codified in Alaska Statutes section 11.41.270, was unconstitution-

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384. See id. at 113.
385. See id. at 112.
386. See id. at 113.
388. See id. at 467.
389. See id. at 466.
390. See id.
391. See id.
392. See id. at 466-67 (citing *Scott v. State*, 519 P.2d 774, 786 (Alaska 1974) (holding that requiring the accused to disclose the names and addresses of witnesses and statements of witnesses violated the accused's state constitutional privilege against self-incrimination)).
393. See id. at 467.
395. ALASKA STAT. § 11.41.270 (Michie 1996). The statute defines the crime of stalking in the second degree as being committed when a "person knowingly engages in a course of conduct that recklessly places another person in fear of death or physical injury, or in fear of the death or physical injury of a family member."
ally vague. The court of appeals considered this in two parts, as a substantive due process claim and, alternatively, as an overbreadth claim because the statutory definition includes innocent conduct that cannot be properly criminalized. Considered alone, the court noted that the definition of "nonconsensual contact" is broad; however, the court stated that the statute required the state additionally to prove the requisite mens rea of knowing engagement in such contact, that such contact place another person in fear of injury or death and that the defendant act "recklessly" with regard to this result.

The court noted that, while there were troubling hypothetical cases that may more strongly put into contention the constitutionality of the statute's definition of stalking, none of the cases before the court were "borderline" cases. The court concluded that the state's stalking statutes are constitutional and do not on their face prohibit constitutionally protected speech or conduct.

In Williams v. State, the court of appeals held that the trial court's judgment ordering the defendant to participate in and "complete" a treatment program offered by the prison did not exceed a court's statutory authority to order a defendant to "comply with" a treatment program. Williams had challenged a court order that, while in prison, he participate in and complete a sex offender treatment program, claiming that the court only had statutory authority to order a defendant to "participate in or comply with [a] treatment plan." Therefore, the court of appeals upheld the trial court's sentence as within its authority.

Id. § 11.41.270(a). The statute further defines "course of conduct" as "repeated acts of nonconsensual contact involving the victim or a family member," and defines "nonconsensual contact" as "any contact with another person that is initiated or continued without that person's consent, that is beyond the scope of consent provided by that person, or that is in disregard of that person's expressed desire that the contact be avoided or discontinued." Id. § 11.41.270(b)(1), (b)(3). The statute goes on to list several examples of "nonconsensual contacts." See id. § 11.41.270(b)(3)(A)-(G).

396. See Petersen, 930 P.2d at 424.
397. See id.
398. See id. at 425.
399. Id. at 428-29.
400. See id. at 431.
402. Id. at 106.
403. Id. (quoting ALASKA STAT. § 12.55.015(a)(10) (Michie 1996)).
404. Id.
405. See id.
In *Close v. Municipality of Anchorage*, the court of appeals held that a jury can consider a charged offense and a lesser-included offense in any order without violating the double jeopardy clause. Close was charged with reckless driving, but the jury, upon Close’s request, was instructed to consider the lesser-included offense of careless driving. Although the jury found him guilty of both offenses, the court of appeals held that, even if the jury had deliberated on the lesser-included offense before the charged offense, “[j]ury verdicts have no preclusive effect under the double jeopardy clause until the trial judge accepts the jury’s verdicts.” In this case, the trial judge had merged the lesser offense with the greater offense for a single conviction of reckless driving.

In *Hathaway v. State*, the court of appeals held that a defendant can be convicted of only one count of arson in the first degree if he or she is charged with setting only one fire and damaging only one piece of property. Therefore, the court merged into one count Hathaway’s conviction of nine counts of arson, based on the nine victims who had been placed in danger of serious physical injury due to the apartment building fire he set. The court also held that the double jeopardy clause of the Alaska Constitution does not prohibit both a conviction of arson and a conviction of assault, since the crime of arson is by origin a property crime requiring intent to damage property, while the crime of assault involves the defendant placing another person in fear of imminent serious physical injury.

In *Samson v. State*, the court of appeals held that there was no reasonable expectation of privacy in utility records. The police had obtained a search warrant authorizing them to obtain records of a power company which showed the history of power consumption at Samson’s residence. Based upon these records, the police obtained a second warrant to search Samson’s home when

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407. See id. at 43.
408. See id. at 42.
409. Id. at 43.
410. See id. at 42.
412. See id. at 1345.
413. See id. at 1344-45.
414. See id. at 1345-46.
416. See id. at 173.
417. See id. at 171.
they discovered controlled substances.\textsuperscript{418} Samson argued that the state needed probable cause to examine his utility records.\textsuperscript{419} The superior court held that the Samson did not have a subjective expectation of privacy in the records, and even if he did have such an expectation, that society was not prepared to consider it a reasonable expectation.\textsuperscript{420}

In \textit{Perry v. State},\textsuperscript{421} the court of appeals held that the trial court should have allowed the defendant to change his plea of no contest to charges of assault and murder, given that he was under great time pressure in deciding how to plead and he had difficulty with his attorney, and that the record showed he was not trying to manipulate the system by changing his plea.\textsuperscript{422} Perry was indicted on two counts of first-degree assault and one count of attempted murder in connection with an altercation aboard a fishing vessel.\textsuperscript{423} Shortly before the trial began, Perry filed a pro se motion to discharge his counsel, alleging that his counsel was not prepared to go to trial. The trial judge denied the motion and ordered the trial to proceed as scheduled, even though defense counsel was out of town at that time.\textsuperscript{424} Perry then called his attorney to discuss a possible plea agreement with the state. After several time-restricted discussions, Perry agreed to plead no contest, but several hours later he decided to withdraw his plea and immediately contacted the district attorney's office. The motion to withdraw was not filed until the day after the scheduled trial date, and the trial judge denied Perry's motion, finding that he was attempting to have the trial canceled by manipulating the state's ability to procure witnesses and personnel.\textsuperscript{425} The court of appeals found this argument unpersuasive. Although the state would clearly be prejudiced by allowing Perry to withdraw his plea, because the trial would be held in Undaska, a remote area in the Aleutian chain, the court found that the prejudice was not so substantial as to justify denying Perry his right to trial.\textsuperscript{426}

\textsuperscript{418} See \textit{id.}. \\
\textsuperscript{419} See \textit{id.}. \\
\textsuperscript{420} See \textit{id.} at 173. \\
\textsuperscript{421} 928 P.2d 1227 (Alaska Ct. App. 1996). \\
\textsuperscript{422} See \textit{id.} at 1229-30. \\
\textsuperscript{423} See \textit{id.} at 1227. \\
\textsuperscript{424} See \textit{id.} at 1228. \\
\textsuperscript{425} See \textit{id.} at 1229. \\
\textsuperscript{426} See \textit{id.} at 1230.
B. General Criminal Law

1. Evidence. In *McCracken v. State*, the Alaska Court of Appeals held that the trial court properly admitted into evidence the defendant's statements to a police officer immediately following the crime, since the defendant did not attempt to invoke his right to remain silent and because the statements were made voluntarily. The court of appeals also held that a homicide defendant raising the defense of self-defense should be permitted to introduce evidence as to the victim’s character derived not only from personal experience but also from what others had told the defendant about the victim’s propensity for violence and what the victim, himself, had told the defendant about his past violent actions. The court found that this type of evidence is not hearsay; rather it helps the jury assess whether the defendant’s actions were reasonable and may also help the jury determine who was the original aggressor. The court of appeals found that the trial court had erred in limiting McCracken’s evidence of the victim’s violent character to that which McCracken had personally observed, and, therefore, reversed the judgment.

In *Motta v. State*, the court of appeals found that the superior court erroneously denied a motion to suppress evidence of Motta’s confession to police. The court noted that, under *Miranda v. Arizona*, a defendant was entitled to be advised regarding his rights under the Fifth and Sixth Amendments to the U.S. Constitution before being subjected to a custodial interrogation. The court then found that an interrogation that had begun as voluntary and non-custodial had become sufficiently confrontational by the time of Motta’s confession that Motta should have been apprised of his *Miranda* rights.

The superior court’s denial of the motion to suppress the confession likely would not have been harmless error if the confession was the only account of the offense to come from Motta, but Motta testified at trial in his own defense as to a version of events that

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428. See id. at 897.
429. See id. at 898.
430. See id.
431. See id. at 899.
433. See id. at 39.
435. See *Motta*, 911 P.2d at 37.
436. See id. at 38.
437. See id. at 39.
closely paralleled his tainted confession. The court of appeals directed the parties to file supplemental briefs to address whether the court's harmless error analysis should consider whether Motta might not have testified or might have testified differently if the superior court had not erred in denying his motion to suppress.

In another court of appeals case dealing with a defendant's confession to police, Cole v. State, the court reversed Cole's conviction for second-degree sexual abuse of a minor, finding that Cole's confession was involuntary and inadmissible because it had been obtained by psychological coercion or improper inducement. Cole had been interrogated by police for seventy minutes, during which he confessed to touching his adoptive sixteen-year-old daughter for his own sexual gratification. On appeal, Cole claimed that deceptive interrogation techniques were used and that the confession should be inadmissible. After a detailed factual inquiry into the interrogation, the court found that the interrogator's ruse regarding the threatened use of a polygraph test and the interrogator's deceptive claim concerning evidence obtained by a warrant were both improper. Relying in part on United States v. Guerrero, "the totality of these circumstances" led the court to conclude that the confession was involuntary and should have been suppressed.

In Brown v. Municipality of Anchorage, the court of appeals held that the superior court had not erred in admitting evidence that the defendant had shot and killed a dog ten months prior to his present conviction for shooting a dog. The court of appeals found that evidence of the prior shooting was probative of Brown's

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438. See id. at 40.
439. See id. at 41.
441. See id. at 832.
442. See id. at 821-22.
443. See id. at 822.
444. State v. Glass, 583 P.2d 872 (Alaska 1978) (holding that, under the Alaska Constitution, police officers must obtain a search warrant before engaging in surreptitious electronic monitoring or recording of conversations without both parties' consent).
446. 847 F.2d 1363 (9th Cir. 1988) (stating the test for voluntariness of a confession as being "whether, considering the totality of the circumstances, the government obtained the statement by physical or psychological coercion or by improper inducement so that the suspect's will was overborne").
447. Cole, 923 P.2d at 832.
449. See id. at 656.
state of mind, his intent, and the lack of mistake.\textsuperscript{450} The court also held that the superior court did not err in its jury instructions that provided for an affirmative defense of self-defense to the charge of cruelty to animals.\textsuperscript{451} Finally, the court held that the jury's verdict was not inconsistent in acquitting Brown of unlawfully discharging a firearm while convicting him of cruelty to animals, since the jury could logically conclude that shooting to frighten the dog was reasonable, but shooting to kill the dog was not reasonable.\textsuperscript{452}

In \textit{Williams v. State},\textsuperscript{453} the court of appeals, in a case involving four counts of sexual abuse of a minor, held that the introduction of testimony concerning the behavior of sex abuse victims, conceded by the state to be inadmissible when used to establish that an alleged victim was in fact abused, was harmless error.\textsuperscript{454} With regard to one of the two victims, the court reasoned that, since Williams used a mistaken assailant defense, and essentially conceded that this victim had in fact been sexually abused, the error had no prejudicial effect.\textsuperscript{455} With respect to the other victim, Williams claimed both the mistaken identity offense and, alternatively, that there was no "sexual contact" as defined in the statute.\textsuperscript{456} Nevertheless, the court held that the admission of the testimony was harmless since Williams in essence conceded that someone had at least attempted to have sexual contact with the victim, and thus the jury could reasonably conclude that it would be unsurprising for the second victim to behave like a sexual abuse victim.\textsuperscript{457}

In \textit{Natkong v. State},\textsuperscript{458} the court of appeals affirmed the defendant's convictions of first degree sexual assault of a minor, holding that prior inconsistent statements of the victim could be introduced into evidence where the victim effectively denied the truth of the statements at trial.\textsuperscript{459} The victim had told several people, including her mother, a social worker and a doctor, that she had been repeatedly sexually assaulted by Natkong, her father.\textsuperscript{460} At trial, the victim responded to questions regarding the incident by saying that she could not remember that the incidents happened.\textsuperscript{461} The prose-

\begin{footnotes}
\footnote{450. See id.}
\footnote{451. See id. at 660.}
\footnote{452. See id. at 661.}
\footnote{453. 928 P.2d 600 (Alaska Ct. App. 1996).}
\footnote{454. See id. at 603.}
\footnote{455. See id. at 603-04.}
\footnote{456. See id. at 604.}
\footnote{457. See id.}
\footnote{458. 925 P.2d 672 (Alaska Ct. App. 1996).}
\footnote{459. See id. at 678.}
\footnote{460. See id. at 673-74.}
\footnote{461. See id. at 674-75.}
\end{footnotes}
cution, over objection, introduced the victim’s earlier statements under Alaska Evidence Rule 801(d)(1)(A), which states that, despite the ordinary rule against hearsay, a witness’s prior inconsistent statements are admissible to prove the truth of the matters contained in them.\(^{462}\) The defense asserted, on appeal, that the statements did not fall under that rule because the witness’s non-responsive testimony did not amount to her having testified at trial, a requirement under 801(d)(1)(A).\(^{463}\) The court of appeals held that, under its earlier holding in *Van Hatten v. State*,\(^{464}\) “‘[w]hen a witness deliberately seeks to avoid testimony by claiming loss of memory in response to specific questions, prior statements of the witness relating to the subject matter are[“]inconsistent[”] within the meaning of Evidence Rule[] . . . 801(d)(1)(A).’”\(^{465}\) The court also noted that this holding is consistent with the current interpretation of the equivalent Federal Rule of Evidence 801(d)(1)(A).

In *Cornwall v. State*,\(^{467}\) the court of appeals held that the trial court committed reversible error when, in a custodial interference conviction, it excluded testimony by defendant’s attorney concerning what he had told defendant about the legal effect of a superior court’s custody orders.\(^{468}\) The court held that the testimony was relevant to whether Cornwall had the requisite mental state.\(^{469}\) Cornwall’s attorney had informed her that the state had improperly taken emergency custody of her daughter and Cornwall could take her daughter and leave.\(^{470}\) The court of appeals held that the Cornwall’s conversation with her attorney was relevant, not under a “mistake of law” defense, but rather to refute the required finding that Cornwall knew that she had no legal right to take or keep the child from the custodian.\(^{471}\)

In *State v. Case*,\(^{472}\) the court of appeals held that the standard set forth in *Stern v. State*\(^{473}\) should be used to determine whether the admission of improper evidence before a grand jury, in the form of an inadmissible statement, required the dismissal of the

\(^{462}\) See *id.* at 675-76 (citing ALASKA R. EVID. 801(D)(1)(a)).

\(^{463}\) See *id.* at 676.


\(^{465}\) *Natkong*, 925 P.2d at 677 (quoting *Van Hatten*, 666 P.2d at 1051).

\(^{466}\) See *id.* at 677-78 (citations omitted).


\(^{468}\) See *id.* at 648.

\(^{469}\) See *id.* at 647-49.

\(^{470}\) See *id.* at 643.

\(^{471}\) See *id.* at 648-49.


defendant's indictment. The Stern test requires the superior court to first subtract the improper evidence from the total case heard by the grand jury to determine whether the remaining evidence was legally sufficient to indict the defendant. Then, the court must determine the degree to which the improper evidence might have unfairly prejudiced the grand jury's decision. In applying the Stern test, the court of appeals found that since the record indicated that sufficient admissible evidence, mostly eyewitness testimony, existed to indict the defendant, the inadmissible statements did not unfairly prejudice the grand jury's considerations. The court of appeals then found that the trial court had erred in applying the Chapman v. California test, holding that this test could only be applied if an error of constitutional dimension had occurred at trial, and therefore the court reversed the dismissal of the indictment.

In Johnson v. State, the court of appeals held that evidence voluntarily submitted by defendant's sister to police following an illegal search of his living quarters was sufficiently attenuated from the illegal search to purge the taint of illegality; therefore, the exclusionary rule did not operate to bar the evidence. The court noted that the test of attenuation does not turn on whether the challenged evidence would have been discovered but for the illegal violation.

Finally, in Hazelwood v. State, the court of appeals declined to apply the inevitable discovery doctrine to evidence tainted by being illegally derived, absent a showing that the evidence would have been otherwise inevitably discovered in light of "either events already in progress or procedures already in place." The court held that there was insufficient evidence in the record to admit evidence regarding Hazelwood's blood-alcohol content and Hazelwood's own statements under the inevitable discovery doc-

474. See Case, 928 P.2d at 1241.
475. See Stern, 827 P.2d at 445-56.
476. See Case, 928 P.2d at 1241.
477. 386 U.S. 18 (1967) (requiring courts to apply a harmless beyond a reasonable doubt standard).
478. See Case, 928 P.2d at 1241.
480. See id. at 769-71 (citing United States v. Shephard, 21 F.3d 933, 939 (9th Cir. 1994) (outlining a three-factor test for evaluating the attenuation of evidence seized following an unlawful search)).
481. See id. at 769.
483. Id. at 1271. The inevitable discovery doctrine allows admission of illegally obtained evidence if the evidence would have "inevitably" been discovered anyway using proper police methods. See id.
trine.\textsuperscript{484}

2. Criminal Procedure. In \textit{State v. Gilbert},\textsuperscript{485} the Alaska Supreme Court held that a prosecutor's comment on the defendant's failure to call an alibi witness was harmless error.\textsuperscript{486} In rebuttal closing arguments, the prosecutor noted that Gilbert had failed to call the one alibi witness that could have corroborated his location at a certain time.\textsuperscript{487} The supreme court held that, even if the prosecutor's comments were in error, they were harmless error and did not shift the burden of proof.\textsuperscript{488}

In \textit{Braun v. State},\textsuperscript{489} the court of appeals reversed a conviction for soliciting the unlawful exploitation of a minor.\textsuperscript{490} The court determined that prosecution under the relevant statute\textsuperscript{491} required evidence that Braun had asked someone else to induce a child under eighteen years of age to engage in one of the listed sexual activities.\textsuperscript{492} In this case, Braun had communicated directly with the minors.\textsuperscript{493}

In \textit{Jackson v. State},\textsuperscript{494} the court of appeals held that if a defendant is released from prison having served his period of imprisonment while the case is still on appeal, any subsequent period of probation is not subject to an automatic stay under Alaska Rules of Appellate Practice 206(a)(3), which states that "[a]n order placing the defendant on probation shall be stayed if an appeal is taken."\textsuperscript{495} Jackson was arrested for a probation violation some weeks after being released following an eighteen-month sentence in a case in which the appeal was still pending.\textsuperscript{496} Jackson argued that he was not actually on probation at the time of his arrest because his period of probation was automatically stayed under Appellate Rule 206(a)(3) due to his pending appeal.\textsuperscript{497} The court rejected Jackson's argument. Addressing an issue of first impression, the court first ruled that a trial court has concurrent jurisdiction with the court of appeals to decide probation

\textsuperscript{484} \textit{Id.} at 1276.
\textsuperscript{485} 925 P.2d 1324 (Alaska 1996).
\textsuperscript{486} \textit{See id.} at 1329.
\textsuperscript{487} \textit{See id.} at 1326.
\textsuperscript{488} \textit{See id.} at 1328.
\textsuperscript{489} 911 P.2d 1075 (Alaska Ct. App. 1996).
\textsuperscript{490} \textit{See id.} at 1083.
\textsuperscript{491} \textit{See ALASKA STAT.} § 11.41.455(a) (Michie 1996).
\textsuperscript{492} \textit{See Brown,} 911 P.2d at 1083.
\textsuperscript{493} \textit{See id.}
\textsuperscript{494} 926 P.2d 1180 (Alaska Ct. App. 1996).
\textsuperscript{495} \textit{ALASKA R. APP. PRAC.} 206(a)(3); \textit{see Jackson,} 926 P.2d at 1187.
\textsuperscript{496} \textit{See Jackson,} 926 P.2d at 1183.
\textsuperscript{497} \textit{See id.}
matters in cases that are pending appeal. The court then examined the history of Appellate Rule 206(a)(3), and noted that its predecessor, former Federal Criminal Rule 38, applied only to defendants who received probation but not imprisonment as a sentence from the court. If Rule 206(a)(3) were applied in the same manner as its predecessor, it would not extend to Jackson, because he had been sentenced to imprisonment. The court reasoned that if probation were stayed in cases where the prisoner’s case was still on appeal, the delayed start of the probationary period might actually penalize the prisoner by extending government supervision longer than in a similar case where the appeal had already been decided.

In Howell v. State, the court of appeals held that the failure to give a jury a heat of passion instruction was reversible error. Howell had argued with the decedent while at Howell’s home, and, as decedent drove away from Howell’s trailer, Howell shot twice at decedent’s truck, killing him. Howell asserted two affirmative defenses: (1) he shot out of fear, therefore in the heat of passion; and (2) he shot out of self-defense. The court noted that precedent has consistently interpreted the Alaska statute pertaining to heat of passion to encompass the emotion of fear as well as other intense emotions. Therefore, the court remanded the case for either a retrial of the first-degree murder charge or entry of a conviction for manslaughter.

In Nelson v. State, the court of appeals held that although a trial court’s jury instructions omitted any mention of “knowing conduct,” the mention of “recklessness” in the instructions adequately conveyed to the jury the need to find that the defendant consciously disregarded a risk of harm. Nelson was convicted of third-degree assault after she attempted to run down with a truck two plain-clothes security officers in the parking lot of a Sears

498. See id. at 1185.
500. See Jackson, 926 P.2d at 1185-86.
501. See id. at 1186.
502. See id. at 1187.
504. See id. at 1211.
505. See id. at 1204.
506. See id. at 1205.
507. See ALASKA STAT. § 11.41.115(a) (Michie 1996).
508. See Howell, 917 P.2d at 1206.
509. See id. at 1210-11.
511. Id. at 334.
On appeal, Nelson claimed that the jury instructions may have caused the jury to misunderstand the need for proof that Nelson was "aware of and consciously disregarded the risk" of harm her acts caused. The court held that no plain error existed in the instructions, since they informed the jury of the state's need to prove that Nelson was aware that her actions might cause injury or instill fear in others of imminent serious harm, and they did not lead the jury to believe that she could be convicted if they found that she was merely driving the truck recklessly.

In State v. Tinsley, the court of appeals held that it was an abuse of discretion to relax Criminal Rule 35(a)'s 120-day time limit by almost seven years to allow the defendant's motion for reduction of his sentence based on his contention that he is now rehabilitated. Tinsley had argued to the superior court that the 120-day time limit was too short to allow defendants to show that they deserved a modification because of their rehabilitation. However, the court of appeals held that a judge may relax the time limit of Criminal Rule 35(a) through the use of Criminal Rule 53 only after a particularized showing that circumstances beyond the control of Tinsley prevented compliance with the 120-day time limit. The court rejected Tinsley's argument that the time limit was generally insufficient to demonstrate genuine rehabilitation and thus that it would be unjust to apply the time limit to any defendant achieving rehabilitation after the time period.

In Bangs v. State, the court of appeals held that the superior court did not abuse its discretion in refusing to waive Rule 35.1(h)'s requirement that all ground for relief must be raised in a defendant's first application for post-conviction relief. Bangs claimed that he had not raised certain issues in his first application because both his trial counsel and his counsel on appeal ineffectively assisted him. However, the court found that Bangs's claim of ineffective assistance against his trial counsel was foreclosed.
because the issue had been raised both in his direct appeal and in his first application for post-conviction relief. As for Bangs's counsel on appeal, the court noted that Bangs failed to provide any information regarding which attorney selected the issues and the statement of points on appeal, "how and why they were selected, what other issues were considered and reserved, and how counsel got the impression that [the defendant] wanted him to do more than pursue the issues already raised." Because this missing information was presumably within the scope of Bangs's personal knowledge, and because Rule 35.1(d) requires that an application for post-conviction relief be supported by "all facts within the personal knowledge of the applicant," the court found that there was no ground for concluding that he was proceeding in good faith and acting with due diligence.

In Kameroff v. State, the court of appeals held that, where an arrestee suspected of driving while intoxicated has requested the opportunity to contact an attorney before taking a breathalyzer test, police may not restrict access to the telephone as a means of controlling the arrestee's behavior. After having been arrested on suspicion of driving while intoxicated and brought to the police station, Kameroff became unruly and repeatedly told police that he would take a breathalyzer test if he could contact an attorney first. The police told him that he could call an attorney only if he would calm down. Kameroff did not take the test and was charged with refusing to submit to a breathalyzer test pursuant to Alaska Statutes section 28.35.032(a).

The court applied the rule of Copelin v. State, which mandates that a prisoner required to take a breathalyzer test under section 28.35.032 has the right to be afforded a reasonable opportunity to contact an attorney before taking the test. The court ruled that, in spite of Kameroff's unruly behavior, it was unreasonable for the police to refuse him access to a phone to call an attorney, because it did not appear that to allow the call would endan-

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524. See id. at 1069.
525. Id. at 1070.
526. ALASKA R. CRIM. P. 35.1(d).
527. See Bangs, 911 P.2d at 1070.
529. See id. at 1178.
530. See id. 1176-77.
531. See id.
532. ALASKA STAT. § 28.35.032(a) (Michie 1996).
534. See Kameroff, 626 P.2d at 1177 (citing Copelin, 659 P.2d at 1212).
ger the police officers or anyone else.\textsuperscript{535} It is the state's burden to prove that the denial of the telephone was reasonable and using such a denial in an effort simply to control a disruptive prisoner did not meet this standard.\textsuperscript{536}

The court also overturned the trial judge's ruling that Kameroff could introduce evidence of a prosecution witness's bias based on the witness's probationary status only if he could first establish that the witness's statement had changed (presumably to reflect a bias toward the state).\textsuperscript{537} The court noted that the U.S. Supreme Court had found as a general matter that a witness's status as a probationer is a potential reason for the witness to be biased toward the state.\textsuperscript{538} The state argued that, under Alaska Evidence Rule 403, a court may exclude evidence of a witness's bias if the probative force of the evidence is outweighed by concerns over its relevance or necessity.\textsuperscript{539} The court of appeals held that this rule did not permit the judge to establish as a preliminary hurdle for the introduction of such evidence that the defendant establish that the potential bias was reflected in inconsistent statements by the witness.\textsuperscript{540} The court cited its earlier opinion in \textit{Wood v. State},\textsuperscript{541} noting the distinction between reasonable limits on inquiry into possible bias and the prohibition of all such inquiry.\textsuperscript{542}

In \textit{Knix v. State},\textsuperscript{543} the court of appeals held that a statement is considered a "sworn statement" for the purposes of Alaska's perjury statute,\textsuperscript{544} even if the public official notarizing the statement did not actually administer an oath and did not certify that the statement was signed or sworn to before him.\textsuperscript{545} The defendants argued that the statement did not meet the requirements of a "sworn statement" under the perjury statute because it was not certified by a public official as described in Alaska Statutes section 09.63.030(a), which requires that the notarizing officer certify "on the document that it was signed and sworn to or affirmed before the officer."\textsuperscript{546} The court rejected this argument, saying that a statement would be considered a "sworn statement" when it

\textsuperscript{535} See id. at 1178.
\textsuperscript{536} See id.
\textsuperscript{537} See id. at 1180.
\textsuperscript{538} See id. at 1179 (citing Davis v. Alaska, 415 U. S. 308, 317-18 (1974)).
\textsuperscript{539} See id.
\textsuperscript{540} See id. at 1180.
\textsuperscript{542} See Kameroff, 926 P.2d at 1180 (citing \textit{Wood}, 837 P.2d at 746-47).
\textsuperscript{544} See ALASKA STAT. § 11.56.200 (Michie 1996).
\textsuperscript{545} See \textit{Knix}, 922 P.2d at 917.
\textsuperscript{546} ALASKA STAT. § 09.63.030(a) (Michie 1996).
amounted to "a verification on its face of the truthfulness of the facts contained therein." The court, noting that a "sworn statement" could be made under either "oath or affirmation," cited the Alaska Supreme Court for the proposition that an affirmation is a statement that signifies that the testator is bound to act truthfully by conscience. Thus, the defendants' statement before a notary and signature under the "penalty of perjury" phrase amounted to an affirmation sufficient to qualify the statement as a "sworn statement" under the perjury statute.

The court also held that the crime of engaging in a scheme to defraud requires specific intent on the part of the accused. The defendants argued that the pattern jury instruction given by the court for the crime of engaging in a scheme to defraud mistakenly identified the mens rea required for the crime as "knowingly," while they contended that the crime required specific intent. The state argued that since the statute in question does not specify a required state of mind, the mens rea requirement is set by Alaska Statutes section 11.81.610(b), which states that if a criminal statute does not specify a required mental state, the requirement shall be that the accused knowingly committed the act. The court rejected the state's argument, holding that the plain language of "scheme to defraud" itself implied specific intent, and therefore specific intent is an element of the crime. However, the court also held the language of the statute conveyed the same intent to the jury as well. Thus, even if the jury instruction did not explicitly include a requirement of intent, it did so implicitly, and the jury could not have found the defendants guilty without having found specific intent.

The defendants also argued that they had not "knowingly, intelligently, and voluntarily" waived their right to testify at trial, as
they claim was required by *LaVigne v. State.* The trial judge questioned defendants thoroughly about whether they knowingly waived that right, but the defendants responded only with vague references to threats supposedly made to them to discourage them from testifying. The judge attempted to elicit further information, and offered the resources of the court in resolving any situation and protecting the defendants, but the defendants did not clarify their remarks and the judge proceeded with the trial. The court of appeals held that in such a situation, the most a judge can do is what the trial court had done, that is, to offer the court’s full cooperation in resolving any threats against the defendants and allow them either to accept that help or not. Because they chose not to accept that help, the court ruled that the defendants had knowingly, intelligently, and voluntarily waived their right to testify. The court, in a footnote, noted that although the “knowingly, intelligently, and voluntarily” standard could be applicable in this case, it was not clear from *LaVigne* that it was applicable in every case, and suggested that certain conflicts between the right to testify and the right to remain silent suggest that such a standard was not always feasible.

In *Harrison v. State,* the court of appeals held that an affidavit could be considered a sworn statement for a finding of perjury, even though it was not made under oath and did not contain a statement that a notary or other public official empowered to administer oaths was unavailable. *Harrison* had made false statements in an affidavit that had not been notarized but that included language indicating the affiant made the statement under penalty of perjury. The court ruled that, even though Alaska Statutes section 09.63.020(a) requires a statement that a notary or other public official empowered to administer oaths was not available for an unsworn affidavit to be considered a “sworn statement” under the perjury statute, *Harrison*’s affirmation in the affidavit that he made the statements contained therein knowingly under penalty of perjury, along with the basic policy underlying the perjury statute that substance is favored over form, support the holding that the

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559. See Knix, 922 P.2d at 917-18.
560. See id. at 918.
561. See id. at 919.
562. See id.
563. See id. at 918 n.6.
565. See id. at 110.
566. **ALASKA STAT.** § 09.63.020(a) (Michie 1996).
In Adams v. State, the court of appeals held that Criminal Rule 24(c)(10), which disqualifies jurors who have a guardian/ward relationship with the victim of the crime, applies only when the guardian/ward relationship is still in existence at the time of the trial. Therefore, the court of appeals held that Adams was not entitled to challenge a juror for cause since the juror, the director of a children's shelter in which the victim had stayed for a few days after the crime, did not have a guardian/ward relationship with the victim at the time of the trial. The court of appeals also held that the stringent standard of juror dismissal, established in Dalkovski v. Glad, can be applied in a case where the defense is challenging the credibility of the victim only when the juror had knowledge of facts that directly bear on the victim's credibility. Since the record failed to establish that the juror in question had any knowledge of the material facts of the case, there was no basis for his automatic dismissal.

In Singleton v. State, the court of appeals held that the term "unconditional discharge" in the juror disqualification statute, Alaska Statutes section 09.20.020, should be interpreted according to the plain language of Alaska Statutes section 12.55.185(12), which states that "unconditional discharge" means "that a defendant is released from all disability arising under a sentence, including probation and parole . . . ." Therefore, the court held that renewed eligibility for jury service after a conviction is conditioned upon release from all restrictions directly imposed by the sentence; jury service is not conditioned upon release from

569. ALASKA R. CRIM. P. 24(c)(10).
570. See Adams, 927 P.2d at 755.
571. See id.
572. 774 P.2d 202, 205 (Alaska 1989) (holding that a juror's personal knowledge of the facts of a case will give rise to a valid challenge for cause unless the knowledge is of incidental or collateral facts).
573. See Adams, 927 P.2d at 756.
574. See id.
576. ALASKA STAT. § 09.20.020 (Michie 1996) (providing that "[a] person is disqualified from serving as a juror if the person . . . (2) has been convicted of a felony for which the person has not been unconditionally discharged").
577. Id. § 12.55.185(12) (Michie 1996).
578. Id.
collateral restrictions, such as loss of voting or firearm privileges.\textsuperscript{579}

The court of appeals also held that the police officers' failure to record the names of bystanders at an arrest scene did not constitute a discovery or due process violation since the officers had "no obvious basis to believe that other individuals [than the defendants] at the arrest scene had 'potentially exculpatory evidence.'"\textsuperscript{580}

In \textit{Plate v. State},\textsuperscript{581} the court of appeals held that Alaska Criminal Rule 24(b)(2)\textsuperscript{582} does not authorize a trial judge to substitute an alternate juror for a regular juror once deliberations have begun.\textsuperscript{583} In this case, the jury had deliberated for four and one-half hours on a Friday and then had decided to reconvene and continue deliberations on the following Monday.\textsuperscript{584} Over the weekend one of the jurors was killed in an accident, and, when the court reconvened, the trial judge appointed an alternate juror to replace the deceased juror.\textsuperscript{585} Plate sought post-conviction relief, contending that the trial judge had committed reversible error by replacing the original juror.\textsuperscript{586} Looking to the language of Alaska Criminal Rule 24(b)(2),\textsuperscript{587} precedent in other states,\textsuperscript{588} and federal court interpretations of the Federal Rule of Criminal Procedure 248,\textsuperscript{589} the court concluded that the trial judge committed plain error in allowing an alternate juror to replace an original juror once deliberations had begun.\textsuperscript{589}

In light of this holding, the court of appeals affirmed the trial court's post-conviction relief action that set aside Plate's convictions on five of the six counts.\textsuperscript{590} The court of appeals also affirmed the trial court's refusal to set aside Plate's acquittal on Count Five of the indictment, holding that the constitutional protection against double jeopardy barred a judge from vacating an acquittal.\textsuperscript{591}

The court also determined the factors necessary to claim

\textsuperscript{579} See Singleton, 921 P.2d at 638.
\textsuperscript{580} Id. at 640 (quoting March v. State, 859 P.2d 714, 716 (Alaska Ct. App. 1993)).
\textsuperscript{582} ALASKA R. CRIM. P. 24(b)(2).
\textsuperscript{583} See Plate, 925 P.2d at 1060.
\textsuperscript{584} See id. at 1057.
\textsuperscript{585} See id.
\textsuperscript{586} See id.
\textsuperscript{587} ALASKA R. CRIM. P. 24(b)(2).
\textsuperscript{588} See Plate, 925 P.2d at 1057 (discussing People v. Burnette, 775 P.2d 583 (Colo. 1989)).
\textsuperscript{589} FED. R. CRIM. P. 24(c); see Plate, 925 P.2d at 1060 (discussing federal court interpretations).
\textsuperscript{590} See Plate, 925 P.2d at 1060.
\textsuperscript{591} See id. at 1061.
\textsuperscript{592} See id.
privilege under Alaska’s Evidence Rule 506(a)(2) which deals with communications made to a clergy member. The court held that the person claiming privilege must prove (1) that he or she subjectively believed that the conversation with the clergyman was being held in private, (2) that this belief was reasonable under the circumstances, (3) that he or she intended that the communication not be disclosed to anyone except in furtherance of its purpose, and (4) that he or she reasonably believed that this intention was shared by the clergyman. In this case, the court of appeals found that the trial record indicated that Plate had disclosed his crime of sexual abuse to his clergyman with the belief that the communication was confidential and that the belief was reasonable under the circumstances. However, the trial court had not resolved the third and fourth factors of the privilege requirement, so the court of appeals held that, if Plate was to be retried, the trial court should renew its consideration of this issue and should enter findings pursuant to the third and fourth factors of the privilege requirement.

In Ozenna v. State, the court of appeals held that a statute amending an appellate rule to state that appellate courts are not authorized to allow extensions of more than sixty days in criminal cases did not impliedly repeal or amend a rule allowing time limits to be relaxed upon a showing of good cause. A single-judge order entered by the court of appeals granted Ozenna’s motion to accept his notice of appeal, which was filed late. The state argued in its motion for full-court reconsideration that Appellate Rule 502(b), which allows the court of appeals to extend any deadline contained in the rules for good cause, was promulgated by the Alaska Supreme Court, Appellate Rule 521

593. ALASKA R. EVID. 506(a)(2).
594. See Plate, 925 P.2d at 1065.
595. See id.
596. See id. at 1066.
597. See id.
599. See id. at 641.
600. See id. at 640.
did not specify time limits on the appellate court's ability to authorize extensions, so "the Alaska Supreme Court could not have intended to subject the powers granted [in Rule 502(b)] to any time limitation stated in Rule 521." The state argued that chapter 79, section 21 of the 1995 Alaska Session Laws, amending Rule 521 to disallow the acceptance of appeals filed over sixty days late, should be interpreted as having impliedly amended Rule 502(b). The court of appeals rejected this argument, citing prior supreme court holdings that "a statute dealing with a procedural matter will not alter a conflicting rule of court unless the statute is enacted with the stated purpose of changing that rule." Since the legislature did not specifically state an intent to amend or limit Appellate Rule 502 when it enacted chapter 79, section 21, of the 1995 Alaska Session Laws, the court affirmed the order granting acceptance of Ozenna's appeal.

In McRae v. State, the court of appeals held that it is within a presiding judge's discretion to assign the adjudicative phase of a probation revocation proceeding to a resident superior court judge, rather than the original sentencing judge, and to assign the dispositive phase to the original sentencing judge. The court also held that McRae was properly prohibited from exercising a peremptory challenge against the resident judge, because he had already used his one peremptory challenge during the proceedings leading to his original conviction.

3. Sentencing. In Scott v. State, the Alaska Court of Appeals held that once a defendant enters a knowing and voluntary no contest plea, the sentencing court is entitled to treat each element of the offense as having been proven, despite the defendant's protestations of innocence. In this case, Scott had pleaded no contest to a charge of attempted first-degree sexual abuse of a minor. The sentencing judge, therefore, ordered Scott to participate in a sex offender treatment program as part of his

602. Ozenna, 921 P.2d at 641.
603. See id.
605. See id.
607. See id. at 1082.
608. See id. at 1082-83 (citing ALASKA STAT. § 22.20.022(d) (Michie 1996); ALASKA R. CRIM. P. 25(d)(1)).
610. See id. at 1238.
611. See id. at 1234.
prison sentence. Scott appealed this order based on the assertion that he could plead no contest to the charge but maintain his factual innocence for the purposes of sentencing. The court of appeals found that there is general agreement that a plea of no contest has the same effect as a plea of guilty in that the defendant waives his right to challenge the state's proof of the essential elements of the crime. The sentencing court's order was affirmed.

In Wassillie v. State, the court of appeals held that the fact the victim had been asleep was a permissible aggravating factor in a conviction for second-degree abuse of a minor. The applicable statute provides for an aggravating factor in cases where "the defendant knew or reasonably should have known that the victim of the offense was particularly vulnerable or incapable of resistance due to advanced age, disability, ill health, or extreme youth or was for any other reason substantially incapable of exercising normal physical or mental powers of resistance." A trial judge could properly conclude that a person asleep was particularly vulnerable.

In Hampel v. State, the court of appeals held that a defendant was not entitled to deduct good time credit in calculating the mandatory minimum prison term which must be served before the defendant would be eligible for discretionary parole. Before Hampel was eligible for discretionary parole, he first had to serve at least the minimum term of imprisonment for first-degree murder. Hampel sought to reduce this minimum term by his good time credit awarded to a prisoner under Alaska Statutes section 33.20.101(a). However, the court held that the plain meaning of section 33.20.010(a) applies the good time credit reduction only to the original sentence actually received from the court.

In State v. Hiser, the court of appeals vacated part of a sen-

612. See id.
613. See id. at 1236.
614. See id. at 1237-38.
616. See id. at 1073.
618. Id. § 12.55.155(c)(5).
619. See Wassillie, 911 P.2d at 1073.
621. See id. at 523.
622. See id. at 522; ALASKA STAT. § 33.15.180(b) (Michie 1996).
623. Id. § 33.20.101(a).
624. See Hampel, 911 P.2d at 522 (finding this interpretation supported by the legislative history).
tencing order that required the Department of Corrections to provide a certain medication for the defendant. The court ruled that although Hiser had the right to pursue a civil action if the Department of Corrections did not provide him with adequate medical treatment, the supreme court's earlier decisions made it clear that it was not in the power of the superior court to order specific treatment.

In *Putnam v. State*, the court of appeals held that Alaska Statutes section 12.55.090(a), read together with section 12.55.080, allows Alaska courts to suspend either fines or imprisonment as a predicate to granting probation. The court noted that placing a defendant on probation always requires the suspension of some portion of the sentence. However, Putnam contended that when a crime is punishable by both fine and imprisonment, the second sentence of section 12.55.090(a) allows the sentencing court to grant probation only when it suspends imprisonment. Although the Alaska statute was modeled on 18 U.S.C. section 3651, which vests federal courts with only very narrow authority to order split sentences, the Alaska statute in no way limits the court's authority to order unsuspended incarceration, a partially suspended fine, and a period of probation.

4. Miscellaneous. In *Barry v. State*, the Alaska Court of Appeals held that, under 18 U.S.C. section 922, a court could, as a condition of probation, prohibit a convicted felon from carrying any firearm that has been shipped or transported in interstate or...
foreign commerce. Barry admitted that any firearm and ammunition he might possess would come to Alaska via interstate or foreign commerce. The court held that the current statute "manifests a clear [c]ongressional intent" to prohibit felons from possessing a firearm or ammunition.

The court of appeals rejected Barry’s argument that felons on probation in Alaska are not subject to this federal statute since their civil rights are restored upon release from incarceration. The court, relying on United States v. Andaverde and United States v. Meeks, held that the disqualification of defendants on probation or parole from serving as jurors means that, for the purposes of federal firearms laws, Barry’s civil rights have not been restored. Finally, the court of appeals held that, even if federal law did not prohibit Barry from possessing a firearm, the trial court’s imposition of this condition of probation was permissible because it was “reasonably related to the protection of the public.”

In Kinney v. State, the court of appeals held that the state did not have to prove that the defendant knew he was breaking the law by arranging a sale of liquor in a local-option community where, by local vote, the sale of liquor was prohibited. Kinney argued that the crime of bootlegging is malum prohibitum, and therefore the state had to prove that Kinney acted with criminal intent. The court of appeals, noting that the distinction between

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637. See id. at 257; 18 U.S.C. § 922 (1996). The appellant in this case had been convicted of criminally negligent homicide committed while he was driving drunk and was sentenced to five years of imprisonment with three years, three months suspended.
638. See Barry, 925 P.2d at 256.
639. Id.
640. See id. at 257 (citing Ball v. United States, 470 U.S. 856 (1985) (holding that a convicted felon who had stolen a handgun from a friend’s car could be convicted of violating 18 U.S.C. § 922 once the government proved the handgun was previously shipped in interstate commerce)).
641. See id.
642. 64 F.3d 1305 (9th Cir. 1995), cert. denied, 116 S. Ct. 1055 (1996).
643. 987 F.2d 575 (9th Cir. 1993).
644. See Barry, 925 P.2d at 257.
645. Id. at 258 (quoting Roman v. State, 570 P.2d 1235, 1240 (Alaska 1977)).
647. See id. at 1290.
648. “[A] crime is termed ‘malum prohibitum’ if it is ‘not inherently evil [but is] wrong only because prohibited by the legislature.’” Id. at 1292 (quoting 1 WAYNE R. LAFAVE & AUSTIN W. SCOTT, SUBSTANTIVE CRIMINAL LAW § 1.6(b) (1986)).
649. Id. at 1291.
crimes that are "mala prohibita" and those that are "mala in se" has never been precise, rejected Kinney's contention that a showing that the defendant knew the law and violated it regardless was necessary. The court found that this case could be distinguished from *Steve v. State* since the crime in the instant case was one of commission and not omission; it was common societal knowledge that the sale of liquor without a license was prohibited and it was common Alaskan knowledge that some communities prohibit the sale of alcohol.

In addition, the court held that the unavailability of the "no personal profit" defense in local-option communities, although available for people charged with distributing liquor without a license, was not a violation of the due process clause of the state constitution because the legislature had a rational basis for drawing the distinction. Because selling alcohol in a local-option community is illegal under all circumstances, even with a license, the fact that Kinney did not profit is irrelevant.

In *State v. E.E.*, the court of appeals held that a trial court does not have authority to determine placement and treatment decisions concerning a juvenile delinquent once the child has been committed to the supervision of the Alaska Department of Health and Social Services. Instead, the court's authority in juvenile cases "arises from, and is limited by, statute." In this case, Alaska Statutes section 47.10.080(b) applied, and the court was required to select one of the three options in the disposition of the delinquent child. The court chose "release on probation to the custody of the department for placement in a nondetention setting." However, the trial court had further determined that "the child cannot be moved from his [current] placement . . . without a court order." The court of appeals reversed this decision and

650. "A crime is 'mala in se' if it is 'wrong in [itself], inherently evil.'" *Id.* at 1292 (quoting LAFAVE & SCOTT, *supra* note 648, § 1.6(b)).
651. *See id.*
652. 875 P.2d 110, 122 (Alaska Ct. App. 1994) (stating that when a crime is defined in terms of a failure to act, "one may not be held liable if one does not know the facts indicating a duty to act").
653. *See Kinney,* 927 P.2d at 1295.
654. *See id.* at 1295.
655. *See id.*
657. *See id.* at 3.
659. *ALASKA STAT.* § 47.10.080(b)(3) (Michie 1996).
661. *Id.* (quoting *ALASKA STAT.* § 47.10.080(b)(3)).
662. *Id.*
found that once the child had been committed to the supervision of the department, the department, not the court, had the responsibility to determine the child's placement and treatment.  

VII. ELECTION LAW

In the area of election law, the Alaska Supreme Court heard cases dealing with the appropriate franchise for elections and referenda within the state. Another case involving the substitution of a gubernatorial candidate was held to be moot. The final case analyzed the Municipality of Anchorage's charter to determine whether voter approval was necessary for an action taken by the municipality.

In *Cissna v. Stout*, the Alaska Supreme Court held that absentee votes of nonresidents, who admitted in writing to election officials that they no longer resided in that district, were properly rejected. According to the Alaska Constitution, voters in state and local elections must be residents of the district in which they vote. The supreme court also held that an absentee ballot postmarked after the election date should be rejected, regardless of the reason for the voter's failure to postmark the ballot on or before the date of election. The court reasoned that public policy prohibits counting votes cast after the polls close.

In *Price v. Dahl*, the supreme court held that an application for a referendum challenging a comprehensive plan approved for a specific area within a borough was correctly rejected by the borough clerk because the proposed referendum did not provide for all borough voters to vote on the referendum. Price had filed an application for a referendum on the Matanuska-Susitna Borough's plan to develop roads on pre-existing rights-of-way in the Chase area. The application allowed only Chase residents to vote on the referendum.

The court rejected Price's argument that Alaska Statutes section 29.26.130(e) required that only those living in the affected

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663. *See id.* at 4.
665. *See id.* at 370.
666. ALASKA CONST. art. V, § 1.
668. *See id.* at 370.
669. *See id.*
671. *See id.* at 544.
672. *See id.* at 543.
673. *See id.*
area could vote on the referendum and held that the subsection in question applied only to signature requirements for the application for a referendum, but did not address the issue of who could vote in such a referendum. According to the court, residents of the entire borough had the right to vote on a referendum on the Chase comprehensive plan, therefore, the referendum application was flawed because it attempted to exclude borough voters residing outside the affected area from voting.

In *O'Callaghan v. State*, the supreme court held that an appeal challenging the substitution of candidates in a gubernatorial election was moot because the challenged candidates' terms in office had ended. The court held that the public interest exception to the mootness doctrine did not apply because the disputed issues were not likely to be repeated. Also, the court upheld an award of attorney's fees against O'Callaghan on the ground that his suit against a co-defendant was frivolous. In deciding this question, the court applied the exception to the rule against assessing attorney's fees against a public interest plaintiff that arises when that plaintiff's action is frivolous.

In *Area G Home and Landowners Organization, Inc. v. Anchorage*, the supreme court held that the Municipality of Anchorage ("MOA") was authorized by its charter to extend its police service area to include previously unserved sections of the city without a separate vote by the previously unserved residents. The city sought to extend the Anchorage Police Service Area ("APSA") to include a section of the city known as the Hillside. MOA's charter requires that the expansion of any city service area be approved by the residents of the "area affected." However, residents of the Hillside had repeatedly voted not to be included in the APSA.

676. *See id.* at 544.
678. *See id.* at 1388.
679. *See id.* at 1389.
680. *See id.* at 1390. O'Callaghan's suit named Campbell, the losing candidate in the 1990 general election for lieutenant governor, as a co-defendant. The suit which was filed over two years after the election, charged Campbell only with submitting his declaration of candidacy two days late. *See id.*
681. *See id.*
682. 927 P.2d 728 (Alaska 1996).
683. *See id.* at 735.
685. *Id.* at 729 (citing MUNICIPALITY OF ANCHORAGE CHARTER art. IX, § 901(a)).
686. *See id.* at 730.
The supreme court looked to the legislative history of the MOA charter to determine the interpretation of the phrase "area affected" and determined that it referred to any area of the city that stood to be affected by a change in cost or quality of service due to the expansion. The court ruled that MOA had correctly found that both the Hillside residents and all residents of the old APSA were in the "area affected" by the expansion of the service area because the division of cost within the APSA would change significantly. Because the ordinance was subject to the collective approval by a majority vote of all residents of the old APSA and the Hillside, the court affirmed the superior court's dismissal of Area G's suit.

VIII. EMPLOYMENT LAW

In 1996, the Alaska Supreme Court's employment law docket was dominated by workers' compensation cases. In this area, the court ruled on questions of both benefits determination and claims procedure. However, the court also had the opportunity to turn its attention to cases concerning employment discrimination and collective bargaining. One such case was French v. Jadon, Inc., in which the supreme court, adopting standards from federal case law, held that an abusive or hostile work environment could constitute workplace discrimination in the form of sexual harassment. The court also addressed grievance procedures as well as other miscellaneous issues.

A. Workers' Compensation

1. Claims Procedure. In Tipton v. ARCO Alaska, the Alaska Supreme Court held that Alaska Statutes section 23.30.110(c), the section of the Alaska Workers' Compensation statute that requires an employee to request a hearing on his claim within two years of the employer's notice of controversion, does not apply when a hearing has been canceled after the employee's initial hearing request. Tipton had filed a request for a hearing on his workers' compensation claim within two years of ARCO's notice of controversion. The scheduled hearing was canceled.

687. See id. at 732-35.
688. See id. at 735-38.
689. See id. at 739.
692. ALASKA STAT. § 23.30.110(c) (Michie 1996).
693. See Tipton, 922 P.2d at 913.
694. See id. at 911.
when it appeared that the parties had reached a settlement that eventually was abandoned. While Tipton pursued tort claims against ARCO in superior court, two years passed after the cancellation of the workers' compensation hearing and ARCO filed to have the claim dismissed under section 23.30.110(c). The court held that the plain meaning of the statute required only that the claimant file a request for hearing within two years of the employer's initial notice of controversion, rejecting ARCO's argument that the two-year time limit was renewed after a canceled hearing. The court reasoned that the "defense of statute of limitations is 'generally disfavored,'" and that the law should not be stretched to accommodate it.

In Huston v. Coho Electric, the supreme court reiterated its holding in Tipton that once an employee has filed a request for a hearing of his workers' compensation claim within the two-year time limit set forth in Alaska Statutes section 23.30.110(c), he has permanently fulfilled the time requirement of that section and may not be barred under that section from pursuing his claims at any time in the future.

In Himschoot v. Shanley, the supreme court held that a state employee who was injured in a car accident caused by a vehicle driven by another state employee was not limited to workers' compensation remedies. Shanley sued the state as a third party for injuries caused by its employee and agent Himschoot, the driver who caused the accident. The supreme court held that when an employee with workers' compensation coverage sues a particular employer as a third party, the employer may not use the statutory presumption of compensability found in Alaska's workers' compensation statute to require the employee to establish that he was within the scope of his employment at the time of the injury. The supreme court upheld the trial court's ruling that the

695. See id. at 912.
696. ALASKA STAT. § 23.30.110(c); see Tipton, 922 P.2d at 912.
698. Id. at 912 (quoting Lee Houston & Assocs. v. Racine, 806 P.2d 848, 854 (Alaska 1991)).
699. See id. at 913 (citing Safeco Ins. v. Honeywell, 639 P.2d 996, 1001 (Alaska 1981)).
702. ALASKA STAT. § 23.30.110(c) (Michie 1996).
703. See Huston, 923 P.2d at 820.
705. See id. at 1042.
706. See id. at 1037.
707. See id. at 1041 (citing Alaska Pulp Corp. v. United Paperworkers Int'l
state had failed to carry its burden to prove that Shanley was acting within the scope of his employment at the time of the injury.\textsuperscript{708}

In \textit{Second Injury Fund v. Arctic Bowl},\textsuperscript{709} the supreme court held that, for purposes of the 100-week time limit under Alaska Statutes section 23.20.205(f)\textsuperscript{710} for reporting compensable injuries to the Second Injury Fund ("SIF"), time begins to run not when the employer learns about an injury, but when he learns that an injury is compensable under section 23.20.205.\textsuperscript{711} In this case, the employer, Arctic Bowl, knew of an operation undergone by its employee; however, it did not know until approximately two years later that the employee's surgery, in conjunction with a previous injury suffered by the employee, met the requirements of the combined effects test of section 23.20.205(a)\textsuperscript{712} and qualified Arctic Bowl for SIF reimbursement.\textsuperscript{713} The court rejected SIF's contention that "injury" was defined in Alaska Statutes section 23.30.265(17)\textsuperscript{714} simply as an injury that occurred during the course of employment.\textsuperscript{715} The court ruled that section 23.30.265(17) did not actually define the term "injury" in the statute, but merely delimited the injuries to be covered by the statute.\textsuperscript{716} Since the entire statute is concerned with the subject matter of injuries that meet the combined effects test, the requirement in section 23.30.205(f) that an employer notify SIF of a compensable injury within 100 weeks of learning of the injury does not begin to run until the employer has knowledge that the injury meets the combined effects test and is therefore compensable under the statute.\textsuperscript{717}

In \textit{Tinker v. Veco, Inc.},\textsuperscript{718} the supreme court held that a verbally communicated notice of an injury to an employer or other appropriate supervisor that contains substantially the same infor-

\begin{itemize}
\item \textsuperscript{708} See id. at 1042.
\item \textsuperscript{709} 928 P.2d 590 (Alaska 1996).
\item \textsuperscript{710} \textsc{Alaska Stat.} § 23.20.205(f) (Michie 1996).
\item \textsuperscript{711} \textit{See Arctic Bowl}, 928 P.2d at 594-95.
\item \textsuperscript{712} This section provides that if an injury occurs during the course of employment that, in its combined effect with a previous injury of any origin, results in compensation liability substantially greater than that which would be caused by the second injury alone, then the employer will be reimbursed by the second injury fund for the portion of its workers' compensation payments to the injured employee that represent payment beyond 104 weeks of compensation. \textit{See \textsc{Alaska Stat.}} § 23.30.205(a).
\item \textsuperscript{713} \textit{See Arctic Bowl}, 928 P.2d at 591.
\item \textsuperscript{714} \textsc{Alaska Stat.} § 23.30.265(17).
\item \textsuperscript{715} \textit{See Arctic Bowl}, 928 P.2d at 594.
\item \textsuperscript{716} \textit{See id.}
\item \textsuperscript{717} \textit{See id. at} 594-95.
\item \textsuperscript{718} 913 P.2d 488 (Alaska 1996).
\end{itemize}
mation as would be contained in a written communication will usually satisfy section 100(d)(1) of the Workers' Compensation Act, which provides conditions under which failure to supply timely, written notice of an injury is excusable. The court noted that the two conditions that must be met to be excused are (1) the employer or an appropriate agent in charge must have knowledge of the injury and (2) the failure to notify must not prejudice the employer. An employer would be prejudiced by the failure to notify if it was prevented from conducting a timely investigation of the events incident to the injury or if it was prevented from supplying the employee with appropriate medical treatment. In Tinker, the employee had told his supervisor at the time of his injury that he had suffered frostbite while moving equipment on the North Slope. The court held that sufficient written notice need not have contained any more information than the employee had provided verbally and that "it would require an exceptional set of circumstances for this difference in the form by which the information was conveyed to prejudice the employer."

2. Benefits. In Meek v. Unocal Corp., the Alaska Supreme Court held that, under the Alaska Workers' Compensation Act, a worker was not barred from applying for or receiving permanent total disability ("PTD") benefits by applying for reemployment benefits under section 41 of that act. The court reasoned that previous decisions established that the designation of a disability as "permanent" did not mean that a worker could never rehabilitate himself to employability. Therefore, an employee applying for reemployment benefits is not necessarily disqualified from receiving PTD benefits.

The court also held that the section's statutory presumption of

720. See Tinker, 913 P.2d at 492.
721. See id. at 491-92 (citing ALASKA STAT. § 23.30.100(d)(1)).
723. See id.
724. Id.
726. ALASKA STAT. §§ 23.30.005-.270 (Michie 1996).
727. See Meek, 914 P.2d at 1279.
728. See id. (citing Vetter v. Alaska Workmen's Compensation Bd., 524 P.2d 264, 266 (Alaska 1974) (holding that there is an educational component to disability)).
729. See id.
compensability, which places the burden of producing evidence on the employer, applies to applications for PTD benefits. In making this determination, the court relied on its holding in Municipality of Anchorage v. Carter that "the text of [section] 23.30.12(a)(1) indicates that the presumption of compensability is applicable to any claim for compensation under the workers' compensation statute." The court, in holding that a presumption of compensability applied to PTD claims, noted that it had previously applied the presumption to a temporary total disability claim.

In Sulkosky v. Morrison-Knudsen, the supreme court held that rebuttal of a claim of permanent total disability ("PTD") need not include proof that the worker could obtain "suitable gainful employment." The superior court had affirmed the Alaska Workers' Compensation Board's decision to downgrade Sulkosky's PTD benefits to partial permanent disability benefits based on evidence that Sulkosky had misrepresented the severity of his disability at his original hearing before the board. Sulkosky claimed that the "odd lots" doctrine in workers' compensation case law, which says that a worker may be found permanently totally disabled if he can find no regular work because of his disability even if he could obtain sporadic "odd jobs," dictated that the board must find that a worker could obtain regular work before his status could be downgraded. Sulkosky then defined "regular work" as "suitable, gainful employment," defined as being "as near as possible to his average weekly wage as determined at the time of the injury" under the vocational rehabilitation section of the Alaska Workers' Compensation Act. The court rejected the combination of these two different elements of workers' compensation law and held that for a worker to be included in the "odd lots" doctrine, there must be no reasonably stable market suited to the worker's capabilities.

730. ALASKA STAT. § 23.30.120(a)(1).
731. See Meek, 914 P.2d at 1279-80.
733. Meek, 914 P.2d at 1279 (quoting Carter, 818 P.2d at 665).
734. See id. (citing Wien Air Alaska v. Kramer, 807 P.2d 471, 474 (Alaska 1991)).
736. Id. at 167.
737. See id. at 160.
738. See J.B. Warrick Co. v. Roan, 418 P.2d 986, 988 (Alaska 1966) (stating that a worker need not be in a state of "abject helplessness" to be found totally and permanently disabled).
739. See Sukovsky, 919 P.2d at 167.
740. Id. at 166 (citing ALASKA STAT. §§ 23.30.041(c), 395 (Michie 1996)).
741. See id. at 167.
In *Wagner v. Stuckagain Heights*, the supreme court held that under workers' compensation statutes in effect between 1984 and 1988, eligibility for permanent total disability ("PTD") benefits precluded eligibility for permanent partial disability ("PPD") benefits. The court found that the language and structure of the statute, which provided for PPD benefits only where various injuries did not amount to total disability and which effectively made total disability and partial disability distinct alternatives, did not support the concurrent award of PTD and PPD benefits. The supreme court also held that public policy arguments against both unjust enrichment and encouragement of malingering supported such a construction of the statute.

In *Raris v. Greek Corner*, the supreme court held that an employee not living in the state is not exempt from the eligibility requirements of the reemployment benefits section of the Alaska Workers' Compensation Act. After having been injured while working as a waitress at The Greek Corner, Raris applied for reemployment benefits and then moved to Greece. The Greek Corner subsequently offered her a job as a telephone solicitor (a position not precluded by her injury) for 75% of her pre-injury wage. Under Alaska Statutes section 23.30.041(f)(1) of the Act, such an offer precludes a claimant from eligibility for reemployment benefits. The court rejected Raris's argument that the section was not meant to apply to out-of-state claimants. In interpreting the statute, the court reasoned that since the legislature had made the availability of suitable jobs outside the state a potential bar for state residents to be eligible for reemployment benefits, the legislature must have contemplated that out-of-state claimants would be barred by the availability of suitable jobs in state. Although the court did not hold that payment of reemployment benefits to an out-of-state resident was never appropriate, it did note that since the section contemplates ongoing contact

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743. Alaska Workers' Compensation Act, 1983 ch. 70, Alaska Sess. Laws § 7 (current version at ALASKA STAT. § 23.30.190(a)(1)).
744. See *Wagner*, 926 P.2d at 459.
745. See id. at 458.
746. See id. at 458-59.
748. See id. at 512; see also ALASKA STAT. § 23.30.041 (Michie 1996).
749. See *Raris*, 911 P.2d at 510.
750. See id. at 511.
751. ALASKA STAT. § 23.30.041(f)(1).
752. See *Raris*, 911 P.2d at 512.
753. See id. (citing ALASKA STAT. § 23.30.041(e)(2), (p)(3)).
between the claimant and a rehabilitation specialist, it favors Alaska residency.

In *Konecky v. Camco Wireline*, the supreme court held that a worker was not eligible for vocational reemployment benefits under the Alaska Workers' Compensation Act since his injury did not reduce his physical abilities below the level of ability specified for his pre-injury occupation by U.S. Department of Labor's Selected Characteristics of Occupations Defined in the Dictionary of Occupational Titles ("SCODDOT"), even if the actual physical abilities required by the occupation were greater than as described in SCODDOT. An injury sustained on his job as a "hoistman" reduced Konecky's abilities so that he could perform only "medium" heavy lifting. Evidence clearly established that his job had required that he lift more than 100 pounds, which is classified as "heavy" lifting. The court held that, because Alaska Statutes section 23.30.041(e) requires that the definition of job requirements contained in SCODDOT be dispositive in determining eligibility for reemployment benefits, and because SCODDOT defined "hoist operator" as requiring only medium-lifting ability, the trial court had been correct in denying Konecky's appeal of a denial of reemployment benefits. The supreme court held that the clear language of the statute, along with its apparent purpose to streamline the claims process, precluded Konecky's argument that the result was unjust and that it was contrary to the legislature's intent.

In *Arnesen v. Anchorage Refuse*, the supreme court held that, for purposes of Alaska Statutes section 23.30.041(e), which defines eligibility of a workers' compensation claimant for vocational reemployment benefits, the occupation of real estate broker or agent is a job. Arnesen had been injured at his former job with Anchorage Refuse, received disability benefits, and applied for and was denied reemployment benefits because his physical

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754. See id. at 513 (citing ALASKA STAT. § 23.30.041(g)-(n)).
755. See id.
757. See id. at 283.
758. Id. at 278-79.
759. Id.
760. ALASKA STAT. § 23.30.041(e) (Michie 1996) (covering vocational reemployment benefits).
761. See Konecky, 920 P.2d at 283.
762. See id.
764. ALASKA STAT. § 23.30.041(e).
765. See Arnesen, 925 P.2d at 665.
capabilities were not below the level of those required of a real estate agent, a job he had held within ten years prior to his injury.\textsuperscript{766} Appealing the denial of reemployment benefits, Arnesen argued that because he worked for commission only and was therefore not eligible for the benefits of the "employer/employee relationship" such as minimum wage protections, he did not have a job, and therefore he remained eligible for reemployment benefits.\textsuperscript{767} The court rejected this argument, ruling that coverage under minimum wage statutes was not a necessary element of a job, and that since "real estate agent" was listed in the U.S. Department of Labor's Selected Characteristics of Occupations Defined in the Dictionary of Occupational Titles, it should be construed as a job under the statute.\textsuperscript{768}

B. Workplace Discrimination

In \textit{French v. Jadon, Inc.},\textsuperscript{769} the Alaska Supreme Court held that Alaska's workplace anti-discrimination statute does encompass a hostile or abusive work environment as a form of sex discrimination.\textsuperscript{770} In defining the rule, the court referred to precedent interpreting Title VII of the Civil Rights Act of 1964,\textsuperscript{771} the federal counterpart to Alaska Statutes section 18.80.220(a).\textsuperscript{772} Citing \textit{Harris v. Forklift Systems},\textsuperscript{773} the court held that a hostile or abusive work environment is created when the challenged conduct is "severe or pervasive enough 'to create an objectively hostile or abusive environment—an environment that a reasonable person would find hostile or abusive.'"\textsuperscript{774} The court also held, based on \textit{Harris}, that "there is no violation 'if the victim does not subjectively perceive the environment to be abusive' because the conduct 'has not actually altered the conditions of the victim's employment.'"\textsuperscript{775} In defining the objective standard, the court again quoted \textit{Harris}: "'[W]hether an environment is 'hostile' or 'abusive' can be determined only by looking at all the circumstances. These may include the frequency of the discriminatory conduct; its severity; whether it is physically threatening or humiliating, or a mere offensive utterance; and whether it unreasonably interferes'"

\begin{thebibliography}{99}
\bibitem{766} See id. at 663.
\bibitem{767} Id. at 664 n.5.
\bibitem{768} Id. at 665.
\bibitem{769} 911 P.2d 20 (Alaska 1996).
\bibitem{770} See id. at 32 (citing \textit{ALASKA STAT.} § 18.80.220 (Michie 1996)).
\bibitem{772} \textit{ALASKA STAT.} § 18.80.220(a); see \textit{French}, 911 P.2d at 28.
\bibitem{773} 510 U.S. 17 (1993).
\bibitem{774} \textit{French}, 911 P.2d at 28 (quoting \textit{Harris}, 510 U.S. at 21).
\bibitem{775} Id. at 29 (quoting \textit{Harris}, 510 U.S. at 21-22).
\end{thebibliography}
with the work performance of an employee.\textsuperscript{776}

In \textit{Muller v. BP Exploration (Alaska)},\textsuperscript{777} the supreme court held that the prohibition against discrimination on the basis of marital status in Alaska's anti-discrimination statute\textsuperscript{778} does not preclude an employer from discriminating against an employee based on the identity of his or her spouse or future spouse, but only prohibits discrimination based on the status of being married.\textsuperscript{779} The court was responding to a certification of that issue from the U.S. District Court for the District of Alaska.\textsuperscript{780} In deciding between the employees' proposed expansive definition of "marital status" to include the identity of one's spouse, and BP's proposed adherence to the ordinary meaning of the term as simply whether or not one is married, the supreme court looked to the plain meaning of the statute's words, legislative history, and purpose, as well as to public policy considerations.\textsuperscript{781} The court held that common usage of the term "marital status" limited the meaning of the term to the status of being married or not, and did not encompass the identity of one's spouse.\textsuperscript{782}

In examining the legislative history of the anti-discrimination statute, the supreme court found that the legislature had not specified a meaning for "marital status" other than the ordinary meaning.\textsuperscript{783} The court further found that if it were to give the term the more expansive meaning proposed by the employees, it would have to ascribe to the legislature the intent of affecting all anti-nepotism rules in the state, including several statutes limiting nepotism in state government service.\textsuperscript{784} The court held that without some evidence of legislative intent to make such a sweeping new rule, it could not give the term "marital status" any other but its ordinary meaning.\textsuperscript{785} The court also held that the ordinary meaning of "marital status" supported the legislature's express purpose in passing the anti-discrimination statute of eradicating discrimination against a person based on his or her inclusion in a broad-based category, married or unmarried.\textsuperscript{786} Furthermore, the court found that this interpretation protected the state's interest in

\textsuperscript{776} Id. at 30 (quoting \textit{Harris}, 510 U.S. at 23).
\textsuperscript{777} 923 P.2d 783 (Alaska 1996).
\textsuperscript{778} See \textit{ALASKA STAT.} § 18.80.220(a)(1) (Michie 1996).
\textsuperscript{779} See \textit{Muller}, 923 P.2d at 784.
\textsuperscript{780} See id.
\textsuperscript{781} See \textit{id.} at 787-88.
\textsuperscript{782} See \textit{id.} at 788.
\textsuperscript{783} See \textit{id.}
\textsuperscript{784} See \textit{id.} at 789.
\textsuperscript{785} See \textit{id.} at 790.
\textsuperscript{786} See \textit{id.} at 791.
allowing employers to set reasonable employment policies.  

C. Collective Bargaining

In *Fairbanks Police Department Chapter, Alaska Public Employees Association v. City of Fairbanks*, the Alaska Supreme Court held that section 215(a) of the Public Employment Relations Act ("PERA"), which requires legislative approval of any monetary aspect of a collective bargaining agreement with public employees, does apply to agreements reached through arbitration under section 200(b) of PERA. When the Fairbanks City Council failed to fund the monetary award achieved by police department employees in an agreement reached through arbitration, the employees sued to enforce the agreement. The court relied upon "the explicit provision that section 215(a) applies to 'any agreement entered into under [sections] 23.40.070-23.40.260,'" in holding that the agreement was not valid without legislative approval. The court also recognized that one purpose of section 215(a) is to maintain control of public expenditures in the hands of the legislature. The court rejected the argument that the city was equitably estopped from not honoring the award because the arbitration had been characterized as binding. In the face of such statutory clarity, the court reasoned, the employees could have placed no reliance on any perceived assertion that the city would waive its right to refuse to fund the award.

In *Municipality of Anchorage v. Gentile*, the supreme court held that, under collective bargaining agreements between the city and representatives of non-union command staff of the police and fire departments, retirement medical benefits were not subject to unilateral reduction by the city. Plaintiffs claimed that the Municipality of Anchorage ("MOA") breached its contract by reduc-
ing retirement medical benefits contained in collective bargaining agreements ("CBAs") with its non-union fire department and police department command staffs.\textsuperscript{798} Since the language of the agreements was not specific and could support either the plaintiffs' interpretation that the benefits were vested in retirees for life or MOA's interpretation that the benefits were vested only for the duration of the CBAs (typically three years), the court turned to extrinsic evidence to determine the intent of the parties.\textsuperscript{799} After reviewing the negotiation histories of the CBAs and the post-formation conduct of the parties to the contract, the court concluded that the trial judge's ruling for the plaintiffs on the breach of contract claim was not clearly erroneous.\textsuperscript{800}

In \textit{State v. Alaska State Employees Ass'n/AFSCME Local 52},\textsuperscript{801} the supreme court held that the statute transferring employees from the Alaska Department of Community and Regional Affairs ("DCRA") to the Alaska Housing Finance Corporation ("AHFC")\textsuperscript{802} did not entitle the employees to a continuation of their collective bargaining agreements ("CBAs") after their transfer.\textsuperscript{803} Despite evidence of legislative intent that the CBA be honored by AHFC,\textsuperscript{804} the court upheld the plain language of the statute, which delineated exactly what responsibilities and obligations were to be transferred with the employees.\textsuperscript{805} The court also held that the successor doctrine, which obligates employers to bargain with the chosen representatives of employees transferred as a business operation, is effective only if "(1) there [is] substantial continuity of product, departmental organization, job functions, and work force after the transfer, and (2) [the bargaining unit] remain[s] ... appropriate ... after the transfer."\textsuperscript{806} Therefore, the court held that the Alaska Labor Relations Agency failed to consider these two required factors in its analysis of whether the general government bargaining unit, of which DCRA employees had been a part, was still an appropriate bargaining unit for the em-

\begin{footnotes}
\item[798.] \textit{See id.} at 255.
\item[799.] \textit{See id.} at 257.
\item[800.] \textit{See id.} at 260.
\item[801.] 923 P.2d 18 (Alaska 1996).
\item[802.] 1992 Alaska Sess. Laws ch. 4, § 142(a).
\item[803.] \textit{See State Employees Local 52}, 923 P.2d at 28.
\item[804.] \textit{See id.} at 23-24. The Alaska House of Representatives had adopted a Letter of Intent, later approved by the Senate, stating that it intended that the CBA be honored by AHFC. \textit{See id.} at 18.
\item[805.] \textit{See id.; see also ALASKA STAT.} §§ 44.47.370–.560, .635 (Michie 1996).
\item[806.] \textit{State Employees Local 52}, 923 P.2d at 25 (citing \textit{Northwest Arctic Reg'l Educ. Attendance Area v. Alaska Pub. Serv. Employees Local 51}, 591 P.2d 1292, 1295 (Alaska 1979)).
\end{footnotes}
ployees, and so remanded the case for further consideration on this issue.\textsuperscript{807}

In \textit{Sever v. Alaska Pulp Corp.},\textsuperscript{808} the supreme court held that an employee on strike whose position was subsequently filled by a permanent replacement and whose union was decertified in an election, was not an employee for purposes of state law in considering a tort for termination in breach of public policy.\textsuperscript{809} Although the supreme court noted that it had previously suggested that the termination of an at-will employee might be illegal if it violated some fundamental principle of public policy,\textsuperscript{810} it held in this case that, even if it were formally to recognize such a tort, it would necessarily be predicated on the presence of a contractual relationship between the employer and the employee.\textsuperscript{811} In the absence of such a relationship, there can be no breach because there is no duty.\textsuperscript{812} The court then held that, although Sever had been reinstated at APC under the order of the NLRB, his rights under federal law did not establish a contractual obligation toward him on the part of APC under state law.\textsuperscript{813} Furthermore, since any collective bargaining agreement had expired when Sever's union was decertified during the strike, and since the hiring of permanent replacements terminated the employment relationship between Sever and APC, there was no contractual relationship between Sever and APC.\textsuperscript{814} Therefore, Sever's claim of termination in breach of public policy could not stand.\textsuperscript{815}

D. Grievance Claims

In \textit{Alaska Public Employees Ass'n v. Department of Environmental Conservation},\textsuperscript{816} the Alaska Supreme Court held that, in an employment grievance against the state that goes to arbitration, the arbitrator has the authority to order that the employee be reassigned to a position that matches the function of his former position, even if the new position differs in title from the original position.\textsuperscript{817} Noting that the arbitrator had contemplated the possibility that the employee's new position would be nominally different

\begin{thebibliography}{8}
\bibitem{807} See id. at 27-28.
\bibitem{808} 931 P.2d 354 (Alaska 1996).
\bibitem{809} See id. at 358-59.
\bibitem{810} See ARCO Alaska v. Akers, 753 P.2d 1150 (Alaska 1988).
\bibitem{811} See \textit{Sever}, 931 P.2d at 357 (citing \textit{Akers}, 753 P.2d at 1153.).
\bibitem{812} See id. at 358.
\bibitem{813} See id.
\bibitem{814} See id.
\bibitem{815} See id. at 357-59.
\bibitem{816} 929 P.2d 662 (Alaska 1996).
\bibitem{817} See id.
\end{thebibliography}
from the original, \textsuperscript{818} the court ruled that the arbitrator was within his authority to reinstate an employee to a different position than his original position based on a similarity in function. \textsuperscript{819} The court relied on its holding in \textit{Sea Star Stevedore v. Local 302}, \textsuperscript{820} in which it had referred to an arbitrator the question of whether the arbitrator had meant to restore an employee to his former job or to his former job function. \textsuperscript{821} The court noted that “[i]t follows that the arbitrator had the authority to define the worker’s former job by function, not just by his former title.” \textsuperscript{822} The court supported its holding by referring to the broad authority given arbitrators to fashion any remedy necessary to resolve a dispute.\textsuperscript{823}

In \textit{Voight v. Snowden}, \textsuperscript{824} the supreme court held that a former employee of the Alaska Court System could not be excused from the requirement to exhaust administrative remedies in his grievance for wrongful termination on the ground that administrative appeal was futile.\textsuperscript{825} The court held that the involvement of the Administrative Director of the Alaska Court System in an investigation into the former employee's job performance, where the Administrative Director was the ultimate decision-maker in an administrative appeal of the termination, did not make it certain that the appeal would end in a decision adverse to the employee, especially where the involvement of the Administrative Director was minimal, and appeal procedures provided for an objection to a biased hearing officer.\textsuperscript{826}

In \textit{Romulus v. Anchorage School District}, \textsuperscript{827} the supreme court held that an employee's failure to exhaust contractual remedies in a dispute with his employer did not automatically bar him from proceeding in court against the employer if the contractual remedies would be futile and where the employee did not receive notice of a time limit for exercising such remedies.\textsuperscript{828} Romulus was suspended without pay from his job as a Reserve Officer Training Corps instructor at an Anchorage high school after he was accused

\begin{thebibliography}{99}
\bibitem{818} See \textit{id. at 665}.
\bibitem{819} See \textit{id}.
\bibitem{820} 769 P.2d 428 (Alaska 1989).
\bibitem{821} See \textit{Alaska Public Employees Ass'n, 929 P.2d at 666} (citing \textit{Sea Star Stevedore, 769 P.2d at 428})
\bibitem{822} \textit{Id.}
\bibitem{823} See \textit{id. (citing Board of Educ. v. Ewig, 609 P.2d 10, 12 (Alaska 1980))}
\bibitem{824} 923 P.2d 778 (Alaska 1996).
\bibitem{825} See \textit{id. at 783}.
\bibitem{826} See \textit{id. at 781-83}.
\bibitem{827} 910 P.2d 610 (Alaska 1996).
\bibitem{828} See \textit{id. at 615-16}.
\end{thebibliography}
of sexually assaulting two of his students. The manual that governed Romulus's rights in such a situation provided that his "appeal of last resort" was to the school district's labor relations director. The court held that, since it was the district's director himself who had suspended Romulus, an appeal would be futile and failure to do so did not bar the action in court. The supreme court further held that Romulus's action was not barred because he failed to appeal within the ten-day time limit set by the manual, because the district had failed to notify Romulus of the deadline. The court also held that Romulus's due process rights were violated when he was suspended without pay before a hearing took place, and remanded the case for a determination of the amount of back pay Romulus was due.

E. Miscellaneous

In Stone v. International Marine Carriers, the Alaska Supreme Court held that suits for willful failure to pay for maintenance and cure against private operators of vessels owned by the United States are precluded under the exclusivity clause of the federal Suits in Admiralty Act ("SAA"), which states that the United States is the only available defendant in a suit for which the SAA provides a remedy against the United States. Stone, a seaman, was injured while working aboard a vessel owned by the United States and operated by International Marine Carriers ("IMC"). Stone sued for IMC's refusal to pay maintenance and cure.

The court initially noted that the tort of willful failure to pay maintenance and cure traditionally has provided three remedies: (1) compensatory damages for aggravation of injuries because of failure to pay; (2) punitive damages; and (3) attorney's fees. The court held that because IMC was responsible for administering maintenance and cure claims that were the responsibility of the

829. See id. at 611-12.
830. See id. at 615. The manual was the "Exempt Employees’ Administrative Procedures Manual" of the Anchorage School District. See id.
831. See id.
832. See id. at 615-16.
833. See id. at 616-17.
836. See Stone, 918 P.2d at 557.
837. See id. at 552.
838. See id. at 553.
839. See id. at 555 (citing 1 THOMAS J. SCHOFENBAUM, ADMIRALTY AND MARITIME LAW § 6-34, at 366-67 (2d ed. 1994)).
United States under the SAA, the United States could be held responsible for compensation for aggravation of injuries caused by unpaid maintenance and cure under agency theory. It held further that, under the U.S. Supreme Court's decision in Miles v. Apex Marine Corp., punitive damages are no longer available in general maritime law for willful failure to pay maintenance and cure. Finally the court held that, even though a recovery of attorney's fees against the United States was not provided for by the SAA, because the law makes it clear that it is the United States who is ultimately responsible for compensation for unpaid maintenance and cure, attorney's fees cannot be sought from a private operator. Thus, having established that the SAA provided for all available remedies for Stone in an action against the United States, the court held that Stone's action against IMC was precluded by the exclusivity clause of the SAA.

In Metcalfe Investments v. Garrison, the supreme court, in overturning summary judgment for Garrison and her co-defendants, held that an oral non-competition agreement does not violate the statute of frauds if there is no clear time limit and that the lack of a time limit or geographical restriction did not make the agreement unenforceably vague. Garrison, a real estate broker, had left her job with Metcalfe Investments and subsequently made sales to customers from a list generated by Metcalfe at its expense. Metcalfe claimed that this violated an oral agreement between the parties that Garrison, on leaving the firm, would not take or use any lists of prospective customers.

The court held that because the promise of the contract could be completely fulfilled within one year (for example, by the death of Garrison) the contract did not violate the statute of frauds.

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840. 46 U.S.C. § 742 (1994) (stating that as a vessel owner, the United States is generally responsible for the same claims as would be available against a private owner).
841. See Stone, 918 P.2d at 556.
843. See Stone, 918 P.2d at 555 (citing Miles, 498 U.S. at 36). The Miles court held that federal statute now dominates maritime law, and therefore any remedy not specifically allowed therein is no longer available. See Miles, 498 U.S. at 36.
844. See Stone, 918 P.2d at 556-57.
845. See id. at 557.
847. See id. at 1361-62.
848. See id. at 1359.
849. See id. at 1358.
850. See id. at 1362 (citing RESTATEMENT (SECOND) OF CONTRACTS § 130 cmt. b, illus. 9 (1981); ARTHUR L. CORBIN, 2 CORBIN ON CONTRACTS § 453 at 568 (1950)).
Additionally, the court determined that if a covenant not to compete was otherwise reasonable, a court could define such terms as time and geographical limits to make the contract enforceable.\(^{851}\) Because the agreement was not a general restraint of trade, but merely an agreement not to take Metcalfe’s customers, it was therefore subject to an even less stringent test of reasonableness and did not need to define such terms.\(^{852}\)

In *Scott v. Briggs Way Co.*,\(^{853}\) the supreme court held that an employee of a fishing business who was injured while working on land as a maintenance person prior to the fishing season was not a “seaman” for purposes of invoking the Jones Act at the time of his injury.\(^{854}\) The supreme court relied on the U.S. Supreme Court’s recent delineation of a two-part test for determining seaman status under the Jones Act.\(^{855}\) First, the “employee's duties must ‘contribut[e] to the function of the vessel or to the accomplishment of its mission.”\(^{856}\) Second, “a seaman must have a connection to a vessel in navigation . . . that is substantial in terms of both its duration and its nature.”\(^{857}\) The U.S. Supreme Court also emphasized that “the Jones Act remedy is reserved for sea-based maritime employees whose work regularly exposes them to ‘the special hazards and disadvantages to which they who go down to sea in ships are subjected.”\(^{858}\) In this case, the court held that since Scott was working as a maintenance person on dry land and the salmon season was more than two weeks away, and since his maintenance duties included no apparent connection to any vessel in navigation, Scott was not a seaman at the time he was injured for purposes of recovering under the Jones Act.\(^{859}\)

**IX. FAMILY LAW**

This year, the Alaska Supreme Court handed down several important decisions in Child in Need of Aid (“CINA”) cases addressing whether a CINA adjudication, which permits the state to take emergency custody of a neglected or abused child, to seek

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851. See id. at 1361.
852. See id.
854. See id. at 348. The Jones Act is the federal statute that governs recovery for the injury to or the death of a seaman. See 46 U.S.C. app. § 688 (Supp. 1997).
856. Id. at 2190 (quoting McDermott Int'l v. Wilander, 498 U.S. 337, 355 (1991)).
857. Id.
858. Id. (quoting Seas Shipping Co. v. Sieracki, 328 U.S. 85, 104 (1946) (Stone, C.J., dissenting)).
859. See *Scott*, 909 P.2d at 348.
placement out of the home and to petition for termination of parental rights, can stand if the parent is willing to care for the child. It also decided cases interpreting various elements of the CINA statute, including the parental ability to care, imminent and substantial risk and neglect.

The supreme court decided several child custody cases in 1996, both reviewing trial court custody decisions and deciding child custody procedural issues. The court also heard child support cases involving the application of Civil Rule 90.3, which sets the guidelines for determining the amount of child support in a given case, as well as cases involving modification of support agreements and other procedural issues. Finally, the court rendered several important decisions concerning marital property, including whether damages from a tort settlement agreement, bonds purchased prior to marriage and individual fishing quotas could be considered marital property.

A. Child in Need of Aid

In In re S.A., 860 the Alaska Supreme Court held that a child cannot be adjudicated as a CINA under Alaska Statutes section 47.10.010(a)(2)(A) 861 if the parent or caregiver is willing to care for the child. According to the court, the parent or caregiver’s ability to care should not be considered under subsection A; instead, subsections B through F address the ability to care criteria. 862 In so holding, the court explicitly overruled three prior cases that allowed a subsection A CINA adjudication based on a parent’s lack of ability to care. 863 The court based its decision on the plain language of the statute, finding that subsection A covers the “willingness to care” but not “ability to care.” 864 The court also looked to the structure of the statute and found that the ability to

861. ALASKA STAT. § 47.10.010(a)(2)(A) (Michie 1996). Since this decision, Alaska Statutes section 47.10.010 has been amended such that subsections (a)(2)(A)-(F) are now designated as (a)(1)-(6).
862. See S.A., 912 P.2d at 1242.
863. See id.
865. S.A., 912 P.2d at 1239. Subsection A allows for CINA adjudication if the child refuses to accept available care or has no parent, guardian, custodian, or relative caring or willing to provide care. See ALASKA STAT. § 47.10.010(a)(2)(A). Subsections B through F allow for CINA adjudication if a parent fails to provide medical treatment, causes or creates a risk of substantial physical harm, sexually abuses the child, approves of the child’s delinquent acts, or physically abuses or neglects the child. See id. § 47.10.010(a)(2)(B)-(F).
care is not relevant under subsection A because of the following: (1) considering ability to care under subsection A would permit CINA adjudications for parenting deficiencies much less severe than for those covered by subsections B through F; (2) in contrast to subsection A, subsections B through F provide clear standards for adjudicating a child CINA based on a parent’s inability to care; and (3) considering ability to care under subsection A would make subsections B through F superfluous.\(^8\)\(^6\) Instead, the court determined that the better way to interpret and apply subsection A is in situations where the parent abandons the child, the child runs away or the child refuses to accept the parent’s care.\(^8\)\(^6\)\(^7\)

The supreme court affirmed the *In re S.A.* ruling in *In re J.L.F.*\(^8\)\(^6\) holding that subsection A of the statute\(^8\)\(^6\) does not call for an assessment of a caregiver’s ability to care.\(^8\)\(^7\)\(^0\) Quoting *S.A.*, the court stated that “a child may not be adjudicated CINA [under subsection A] on the grounds that the child’s parent or caregiver is unable to care for the child if the parent or caregiver is willing to care for the child.”\(^8\)\(^7\)\(^1\) The court then reversed the superior court’s determination that the children qualified as CINA under subsection A\(^8\)\(^7\)\(^2\) since the two children in this case had relatives willing to care for them.\(^8\)\(^7\)

The court also held that the statute under which a parent’s rights can be terminated when she unreasonably withholds her consent to adoption\(^8\)\(^7\)\(^4\) did not apply in this case for two reasons. First, the statute may be applied only to the remedial phase of a CINA proceeding. Since the CINA determination was found to be erroneous, the statute could not be applied.\(^8\)\(^7\)\(^5\) Second, the statute applies only to parents who do not have custody. Here, because there was no court order depriving the mother of visitation rights, she did not lack custody within the meaning of the statute.\(^8\)\(^7\)\(^6\)

Similarly, in *R.R. v. State*,\(^8\)\(^7\)\(^7\) the supreme court held that a parent’s “ability to care” is not relevant in deciding if a child is a

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867. *See id.* at 1240.
869. *See ALASKA STAT. § 47.10.010(a)(2)(A).*
871. *Id.* (quoting *S.A.*, 912 P.2d at 1235).
872. *See id.* at 1265.
873. *See id.* at 1261-63.
874. *See ALASKA STAT. § 25.23.180(c)(2) (Michie 1996).*
876. *See id.* at 1264-65.
CINA under subsection A. The court stated that the legislature intended the state to assume custody of minors only to remedy severe parenting deficiencies and prevent significant harm to children. The court held that its finding in *In re S.A.* applies to cases where there is a relative willing to provide care, since the terms "parent" and "relative" are parallel. In this case, since the child was not without a "parent, guardian, custodian, or relative caring or willing to care" for her, the superior court's CINA finding was vacated.

The supreme court also held that, in applying CINA Rule 15(g), which requires the state to make reasonable efforts to prevent removal of a child from his or her parents, the trial court need only make a finding that the state’s treatment plan for the child is reasonable. R.R., whose four children were removed from her care due to her personality disorder, claimed that since the superior court’s findings mentioned “only in passing” that reasonable efforts were made to prevent removal of the children from her home, the findings did not meet the CINA Rule 15(g) requirements. The supreme court found this claim to be without merit.

In *F.T. v. Department of Health and Social Services*, the supreme court affirmed the trial court’s determination that R.T., daughter of F.T., was a CINA pursuant to subsection A, since she refused F.T.’s care. Evidence was presented from the child’s therapists, social workers and mother that she feared her father, became extremely upset when the possibility of returning to his care was mentioned and explicitly refused visitations with him. The court also held that the trial court’s decision to deny completely F.T.’s visitation rights until he progressed in his treatment programs was supported by clear and convincing evidence that

878. *Id.* at 757.
879. *See id.*
882. *Id.*
883. ALASKA R. CINA P. 15(g).
885. *Id.* at 754.
886. *See id.*
888. ALASKA STAT. § 47.10.010(a)(2)(A) (Michie 1996). Under the statute, a child may be adjudicated a CINA for "being habitually absent from home or refusing to accept available care, or having no parent, guardian, custodian, or relative caring or willing to provide care, including physical abandonment . . . ." *Id.*
890. *See id.* at 280-81.
In *T.B. v. State*, the supreme court reversed the trial court’s CINA adjudication pursuant to Alaska Statutes section 47.10.010 (a)(2)(A), (C) and (F). First, the court held that one isolated incident in which T.B. yelled at and threatened the child did not establish an “‘imminent and substantial risk’” that the child would suffer substantial physical harm as required under subsection C. Second, the court held that T.B.’s concern for her child’s health and safety provided a justifiable reason for her withdrawal of the child from school for three months, so that “‘substantial . . . neglect’” was not established as required under subsection F. Third, the court held that the requirements of subsection A had not been met since, although T.B.’s parental rights to the child had been terminated at an earlier date, the child’s guardian had legally appointed T.B. as custodian of the child and T.B.’s two and one-half years of caring for the child qualified her as a custodian “‘caring and willing to provide care’” for the child.

In *D.H. v. State*, the supreme court held that the state provided ample evidence for the trial court to properly adjudicate T.H. a CINA under Alaska Statutes section 47.10.010(a)(2)(F) when it showed that the mother was a drug addict, failed to establish a parent-child relationship with her daughter, T.H., and was not available to provide for her daughter’s daily care. The court further held that the state’s attempts to assist the mother in enrolling and completing drug rehabilitation programs adequately fulfilled the state’s duties under CINA Rules 15(g) and 17(c)(2), which require the state to pursue efforts to prevent removal of a child from her parents and make reasonable efforts toward reunification. However, the court held that the state failed to provide sufficient evidence that T.H. would suffer serious emotional or physical damage if left in the mother’s custody, as is required un-

891. See *id*. at 282. When visitation rights are actually or constructively terminated, the clear and convincing evidence standard is applied. See *In re D.P.*, 861 P.2d 1166, 1167 (Alaska 1993).


893. ALASKA STAT. § 47.10.010(a)(2)(A), (C), (F) (Michie 1996); see *T.B.*, 922 P.2d at 276.

894. *T.B.*, 922 P.2d at 274 (quoting ALASKA STAT. § 47.10.010(a)(2)(C)).

895. *Id*. at 274-75 (quoting ALASKA STAT. § 47.10.010(a)(2)(F)).

896. *Id*. at 275 (quoting ALASKA STAT. § 47.10.010(a)(2)(A)).


898. ALASKA STAT. § 47.10.010(a)(2)(F).

899. See *D.H.*, 929 P.2d at 654.

900. ALASKA R. CINA P. 15(g), 17(c)(2).

901. See *D.H.*, 929 P.2d at 654.
der CINA Rule 17(c)(2) when the child is a Native Alaskan. Therefore, the court remanded the decision to the trial court for it to make explicit findings on the issue of whether or not there would be any such damage.

In *In re J.B.*, the supreme court held that the state had the authority to seek a determination of paternity in a case that raised substantial questions concerning parentage. In making its determination as to the appropriate caregiver for a child adjudicated as a CINA, the superior court found that the paternity of the child’s presumptive father was an important consideration. The supreme court, relying on precedent set in Utah and California, affirmed the superior court’s authority to grant the state’s motion for a finding that the presumptive father was not the child’s father based on evidence from a paternity test.

**B. Child Custody**

In *Rooney v. Rooney*, the Alaska Supreme Court affirmed the superior court’s decision to award primary physical custody of Morgan Rooney to Thomas Rooney, the former husband of Morgan’s biological mother. The supreme court upheld the superior court’s broad discretion in determining custody questions and found that, while Thomas was not Morgan’s biological parent, the court did not err in applying the best interests of the child as the deciding standard. The supreme court then held that since the mother had not made a claim to a biological preference right over Morgan in the Rooney’s 1987 divorce decree, the principle of collateral estoppel precluded her from now asserting such a claim. The supreme court also found that the superior court did not abuse its discretion in considering the relevant statutory factors of continuity, child’s preference and cultural needs. In particular, the

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902. See *id.* at 656.
903. See *id.*
905. See *id.* at 880.
906. See *id.*
908. See *J.B.*, 922 P.2d at 881.
910. See *id.* at 216.
911. See *id.*
912. See *id.*
913. See *id.* at 216-18 (citing ALASKA STAT. § 25.24.150(c), (c)(3), (c)(5) (Michie 1996)).
court determined that, although Morgan expressed a preference to share his time equally with his mother and Thomas (who lived in different cities), a preference that results entirely from the child’s desire to satisfy his parent’s wishes does not fall within the mandates of the statute. Finally, the supreme court held that the superior court is not required to follow a guardian ad litem’s recommendations. As long as the court’s reasons for rejecting the custody investigation are not clearly erroneous, the court does not abuse its discretion.

In Vachon v. Pugliese, the supreme court held that the trial court erroneously weighed the statutory custody factors in awarding custody to Pugliese when it discounted the continuity and stability factors. After living together for three years in Alaska and having a child, Vachon and Pugliese separated. A year after the separation, Vachon returned to her family’s home in Massachusetts with the child. Pugliese petitioned the Alaska superior court to establish paternity, custody, visitation and support. The court subsequently awarded custody to Pugliese and denied Vachon’s claim for child support.

On appeal, the supreme court reversed the child custody order, returning custody to Vachon. The court found that the trial court had erred in concluding that Vachon’s conduct of moving with the child to Massachusetts was wrongful and constituted custodial interference. The supreme court found that Vachon did not conceal the child’s location, violate a court custody order or make threats that Pugliese would never see the child again. Furthermore, Vachon complied with all the court’s orders and facilitated visitations between Pugliese and the child. The court concluded that the statutory best interest factors indicated that Vachon should have custody, given that she was the primary caregiver and the child’s sole custodian after the parties separated and therefore the award of custody to Vachon would foster the interest

914. See id. at 217-18.
915. See id. at 219.
916. See id.
918. See id. at 379.
919. See id. at 374.
920. See id.
921. See id.
922. See id.
923. See id. at 380.
924. See id. at 376-79.
925. See id. at 378.
926. See id.
of continuity and stability.\textsuperscript{927}

In \textit{Hayes v. Hayes},\textsuperscript{928} the supreme court held that a decision by the custodial parent to move the children away from their previous home does not need to be supported by clear and convincing evidence that such a move is in the children's best interests.\textsuperscript{929} Instead, it must be shown that it is in the children's best interest to remain in the custody of the present custodial parent given the proposed move.\textsuperscript{930} The supreme court also affirmed the trial court's denial of the husband's motion to require the wife to repay the Permanent Fund Dividend ("PFD") money she borrowed from the children, basing its decision on prior case law and the legislature's silence as to what parents must do with PFD money received on behalf of unemancipated minors.\textsuperscript{931}

In \textit{Kelly v. Kelly},\textsuperscript{932} the supreme court held that a divided custody award, in which the child would alternately live with each parent for six months until the child began kindergarten, was not an abuse of discretion since no evidence indicated that this arrangement would be harmful to the child.\textsuperscript{933} The supreme court also held that the permanent custody order, which awarded the mother custody of the child for the school year and the father custody during vacations, was not supported by the record since findings indicated a preference for the father as the primary custodian but no findings were made to support awarding primary custody to the mother.\textsuperscript{934} Therefore, the supreme court vacated and remanded the permanent custody order.\textsuperscript{935}

In \textit{Mariscal v. Watkins},\textsuperscript{936} the supreme court vacated the superior court's orders in a child custody case that neither parent expose the child to inappropriate sexual behavior, use alcohol in the child's presence or drive with the child within twelve hours of having consumed alcohol.\textsuperscript{937} The superior court had made no findings with respect to the parent's sexual conduct and had spe-

\begin{footnotesize}
\begin{itemize}
\item \textsuperscript{927} See \textit{id.} at 380.
\item \textsuperscript{928} 922 P.2d 896 (Alaska 1996).
\item \textsuperscript{929} See \textit{id.} at 899.
\item \textsuperscript{930} See \textit{id.} at 899-900 n.5 (citing \textit{House v. House}, 779 P.2d 1204, 1208 (Alaska 1989)).
\item \textsuperscript{931} See \textit{id.} at 900-01 (citing \textit{Lee v. Cox}, 790 P.2d 1359 (Alaska 1990) (holding that "there is no law in [Alaska] requiring parents to set aside their children's permanent funds").
\item \textsuperscript{932} 926 P.2d 1168 (Alaska 1996).
\item \textsuperscript{933} See \textit{id.} at 1168-69.
\item \textsuperscript{934} See \textit{id.}
\item \textsuperscript{935} See \textit{id.}
\item \textsuperscript{936} 914 P.2d 219 (Alaska 1996).
\item \textsuperscript{937} See \textit{id.} at 221-22.
\end{itemize}
\end{footnotesize}
specifically found there to be no evidence of alcohol abuse. The supreme court cautioned the superior court to consider only proper factors in making custody decisions and stated that the court "[should] not unnecessarily impose its moral values upon a litigant."

In *R.F. v. S.S.*, the supreme court held that a father convicted of murdering his wife did not have custody of his child and could not reasonably withhold consent to the child’s adoption by his deceased wife’s parents. The child’s grandparents had physical custody of the child from the time of his mother’s murder and were granted custody pending adoption of the child. Under Alaska Statutes section 25.23.180(c)(2), a court may issue an order terminating a parent and child relationship where “a parent who does not have custody of the child is unreasonably withholding consent to adoption, contrary to the best interest of the minor child . . . .” The supreme court rejected R.F.’s contention that his refusal to consent was not unreasonable until all appeals were exhausted. The court found that R.F.’s chances for success were very slight and that leaving the child in limbo while R.F. pursued all possible post-conviction remedies would not advance the best interests of the child.

In *Bird v. Starkey*, the supreme court held that the trial court must articulate the reasons for its child custody decision where those reasons are not apparent from the record. Since the parents of Justin, who shared joint custody of him, could not agree on which school he should attend, Justin’s mother filed a motion in superior court for an order allowing Justin to attend her school of choice. The court issued an order for Justin to attend this school without any accompanying explanation. In remanding this decision, the supreme court explained that, when making such decisions, "the trial court must provide adequate findings of fact . . . so that a reviewing court may clearly understand the grounds on

938. See id.
939. Id.
940. 928 P.2d 1194 (Alaska 1996).
941. See id. at 1197-98.
942. See id. at 1194-95.
943. ALASKA STAT. § 25.23.180(c)(2) (Michie 1996).
944. *R.F.*, 928 P.2d at 1195 (quoting ALASKA STAT. § 25.23.180(c)(2)).
945. See id. at 1197-98.
947. See id. at 1249.
948. See id. at 1247.
949. See id. at 1248.
which the lower court reached its decision.'"950

In *McDow v. McDow*,951 the supreme court affirmed the superior court's holding that it did not have jurisdiction to hear a child custody case since Washington was the home state of the child and was the state where the original custody decree was entered.952 Bobbie McDow had entered a complaint seeking custody of her sister's child based on alleged neglect and abuse.953 The sister lived in Washington and had been awarded custody of the child after her divorce; however, the sister had sent the child to live with Bobbie for the six months preceding this action.954 In resolving the jurisdiction issue, the court looked to the Parental Kidnapping Prevention Act955 and the Uniform Child Custody Jurisdiction Act,956 and found that the Alaska superior court could not modify the Washington custody decree because the Washington court retained continuing and exclusive jurisdiction to modify the decree.957 The court also looked to Washington law to make this determination, applying *Greenlaw v. Smith*955 to hold that a "'court which enters a child custody decree continues to have jurisdiction to modify that decree so long as one of the parties remains in the state and so long as the child's contact with the state continues to be more than slight.'"959

In *Jones v. Jones*,960 the supreme court held that the "reprehensibility standard,"961 which applies when a party has abducted or retained physical custody of the child in order to gain a custody decree,962 should also apply when similar behavior is exhibited in order to modify a custody decree of another state.963 Applying this standard to Mr. Jones's actions of filing a motion in

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950. *Id.* (quoting Waggoner v. Foster, 904 P.2d 1234, 1235 (Alaska 1995)).
952. *See id.* at 1053.
953. *See id.* at 1050.
954. *See id.*
957. *See McDow*, 908 P.2d at 1053.
958. 869 P.2d 1024 (Wash. 1994).
961. The court concluded in *Stokes v. Stokes*, 751 P.2d 1363 (Alaska 1988) that the reprehensibility standard applies when the conduct is "so objectionable that a court . . . cannot in good conscience permit the party access to its jurisdiction." *Id.* at 1366.
963. *See* Uniform Child Custody Jurisdiction Act, ALASKA STAT. § 25.30.070(b); *Jones*, 925 P.2d at 1342-43.
Alaska courts to modify the California child custody decree and of keeping his children in Alaska after their visitation period in violation of the decree, the supreme court affirmed the trial court's award of attorney's fees under section 25.30.070(c)\(^{964}\) to Mrs. Jones.\(^{965}\)

C. Child Support

In \textit{Berkbigler v. Berkbigler},\(^{966}\) the Alaska Supreme Court remanded the superior court's modification of a child support award because the court failed to make specific findings supporting its variation of the award from that required by the calculations of Civil Rule 90.3.\(^{967}\) The superior court had denied Judy Berkbigler's request to increase the award when Randall Berkbigler's transfer to England resulted in increased income.\(^{968}\) The superior court denied the increase because it concluded that Randall's cost of living and the cost of transporting his children to England for visitation had also increased.\(^{969}\) However, the superior court failed to make explicit findings regarding Randall's adjusted annual income, failed to specify the amount of support required by Rule 90.3 and failed to make specific findings in support of its variation from the formula in Rule 90.3.\(^{970}\) The supreme court remanded for these findings, holding that specific findings are necessary in order to review the decision on appeal.\(^{971}\)

The court further held that a non-custodial parent who experiences an increase in income cannot be excused from paying additional support by showing that the children's needs are already being met by the current support award.\(^{972}\) In addition, the court held that the non-custodial parent's "fair share" of child support is the amount fixed by the guidelines of Rule 90.3 and should not be reduced due to personal debt unless the parent can show his or her expenses to be "extraordinary" as defined by 90.3(c)(1)(A).\(^{973}\)

\(^{964}\) Uniform Child Custody Jurisdiction Act, \textit{ALASKA STAT.} § 25.30.070(c).
\(^{965}\) \textit{See Jones}, 925 P.2d at 1343.
\(^{966}\) 921 P.2d 628 (Alaska 1996).
\(^{967}\) \textit{See id.} at 631 (citing \textit{ALASKA R. CIV. P.} 90.3(c)(1)).
\(^{968}\) \textit{See id.} at 630.
\(^{969}\) \textit{See id.}
\(^{970}\) \textit{See id.} at 631.
\(^{971}\) \textit{See id.}
\(^{972}\) \textit{See id.} at 631-32 (citing \textit{ALASKA R. CIV. P.} 90.3 commentary II, which states that Rule 90.3 "operates on the principle that as the income available to both parents increases, the amount available to support the children also will increase").
\(^{973}\) \textit{See id.} at 632 (citing \textit{ALASKA R. CIV. P.} 90.3 commentary II; \textit{ALASKA R. CIV. P.} 90.3(c)(1)(A)).
In *Turinsky v. Long*, the supreme court held that, when there is no material factual dispute regarding child support, the court may calculate the child support without a hearing. However, the court remanded the calculation of child support because the superior court erroneously relied on the amount of visitation actually exercised, instead of the visitation ordered by the court, to calculate support arrearages. The court also remanded the child support calculation because the superior court based its calculations on Rule 90.3(a), indicating one parent had sole or primary custody of all the children during the entire period of dispute, when, in fact, custody status changed between the first custody order and the second order entered four years later. The court stated that the most accurate way to calculate support in such a situation was to calculate it for each interim period independently.

The court also stated that if a custody order did not give either parent sole or primary physical custody of all the children and also did not give both parents shared custody of all the children, then a "hybrid" calculation authorized by Rule 90.3(c) should be made, applying Rule 90.3(a) for children in one parent's sole or primary custody and Rule 90.3(b) for children whose custody is shared, and then offsetting or adding the results to determine the net obligation for each period. Finally, the supreme court affirmed the superior court's visitation order as sufficiently detailed, even though the order was orally issued and not recorded.

In *Richmond v. Pluid*, the supreme court held that the ruling in *Cox v. Cox*, which held that child support waivers are not valid or enforceable unless reviewed and approved by a court pursuant to the requirements of Civil Rule 90.3, should be applied retroactively to the date when Civil Rule 90.3 was enacted. The parties

975. See *Turinsky*, 910 P.2d at 594 (distinguishing *Adrian v. Adrian*, 838 P.2d 808 (Alaska 1992) as requiring an evidentiary hearing only when there is a dispute, such as when one party contests the other's income statement).
976. See id. at 595.
977. ALASKA R. CIV. P. 90.3.
978. See *Turinsky*, 910 P.2d at 595-97.
979. See id.
980. See id. at 596.
981. See id. at 593.
984. ALASKA R. CIV. P. 90.3.
985. See *Richmond*, 925 P.2d at 255. Civil Rule 90.3 was enacted August 1, 1991.
had entered into a side agreement partially waiving Pluid's child support obligations.\textsuperscript{96} The court found that retroactive application did not violate the four conditions established in \textit{Plumley v. Hale}.\textsuperscript{97} to determine whether a judicial ruling should solely be applied prospectively.\textsuperscript{98} First, while the \textit{Cox} decision was a case of first impression, it was foreshadowed by the adoption of Civil Rule 90.3.\textsuperscript{99} Second, justifiable reliance on an alternative interpretation of law did not exist at the time when Richmond and Pluid presented their agreement to the court, since the \textit{Cox} holding was decided two weeks prior to the parties' hearing.\textsuperscript{99} Third, undue hardship would not occur from retroactive application.\textsuperscript{99} Finally, the court decided that broad, retroactive application of the \textit{Cox} decision would best accomplish the purpose of Civil Rule 90.3 to ensure adequate child support.\textsuperscript{99}

In \textit{Taylor v. McGlothlin},\textsuperscript{99} the supreme court reversed a superior court decision to modify retroactively a child support agreement formed in 1976 because, even though it had not been judicially approved, the agreement was legally enforceable at the time it was made.\textsuperscript{94} Following an earlier decision,\textsuperscript{95} the court then found that a child support agreement created before Rule 90.3 was enacted is immune to retroactive modification.\textsuperscript{96}

The supreme court further held that the superior court did not err in setting Taylor's prospective child support payments at an amount less than the Rule 90.3 calculations required.\textsuperscript{97} The superior court had correctly found that "substantial hardship" would occur to Taylor's "subsequent children" if a deviation from the Rule 90.3 level of support was not made.\textsuperscript{98} However, the court remanded this portion to the superior court to reconsider in light of the fact that retroactive modification of the child support would

\textsuperscript{96}See \textit{Taylor}, 919 P.2d at 1353.
\textsuperscript{97}See \textit{Malekos v. Yin}, 655 P.2d 728 (Alaska 1982).
\textsuperscript{98}Id. at 1349 (citing ALASKA R. CIV. P. 90.3(c)(3)).
not occur.999

In Neilson v. Neilson,1000 the supreme court vacated and re-
manded a superior court modification order pursuant to Civil Rule
90.3, because the superior court had erred in accepting the Mas-
ter’s erroneous child support calculation.1001 The Master had dis-
allowed approximately $7,020 worth of Robert’s claimed business
expenses, in part because the Master had relied on the wife’s
“unsubstantiated” review of Robert’s expenses.1002 The supreme
court held that the determinative factor as to whether a claimed
expense is deductible under Rule 90.3 is “whether it is an ‘ordinary
and necessary expense required to produce the income’ and
whether the allowance of such an expense would defeat the goals
of Civil Rule 90.3.”1003

In Boone v. Gipson,1004 the supreme court narrowly construed
the exception to the general prohibition on modifying child sup-
port payments retroactively, holding that it applies both to in-
creases and decreases in child support.1005 Boone challenged the
superior court’s retroactive application of increased child support
payments upon Gipson’s motion for reconsideration, arguing that
granting the motion without affording him an opportunity to re-
spond was a violation of Civil Rule 77(k)(3).1006 Rule 77(k)(3) pro-
vides that “[n]o response shall be made to a motion for reconsid-
eration unless requested by the court, but a motion for
reconsideration will ordinarily not be granted in the absence of
such a request.”1007 The supreme court held that “in the absence of
an explanation of a compelling reason for it not to request a re-
sponse, the superior court abused its discretion in granting Gip-
son’s motion for reconsideration” without allowing Boone to re-
spond.1008

The court also held that former Civil Rule 90.3(h)(2),1009 which
prohibits retroactive modification of child support payments, ap-
plies to decreases as well as increases in payments.1010 Therefore, it
limited the application of the increased payments to the date when

999. See id. at 1355.
1001. See id. at 1274.
1002. Id.
1003. Id. at 1273 (quoting ALASKA R. CIV. P. 90.3).
1005. See id. at 748.
1006. See id. at 747; see also ALASKA R. CIV. P. 77(k)(3).
1007. Boone, 920 P.2d at 748.
1008. Id.
1009. Former ALASKA R. CIV. P. 90.3(h)(2) (amended effective July 15, 1995).
1010. See Boone, 902 P.2d at 749.
Boone was served with a motion for modification. In *State v. Demers*, the supreme court held that the plain language of the statutory provisions for the execution of judgments, Alaska Statutes section 09.35.010, does not give the court discretion to decide whether to issue a writ of execution once a valid judgment for the payment of the money has been entered. Furthermore, the statutes controlling parental support payments confine the court's discretion to determining whether judgment should be granted. Once the court determines the amount of money owed, it has no power to restrict or condition the execution of the judgment. The supreme court concluded that since the legislature has created a child support system in which the courts are without power directly to forgive or modify child support payments after they become due and unpaid, courts should also be without power to do so indirectly by restricting executions of those judgments.

In *Van Alfen v. Van Alfen*, the supreme court held that the plain terms of a marriage dissolution agreement determine the effective date when child support payments can be increased. The agreement in this case contained two grounds for self-executing increases in support payment, one following an annual review on September 1 to make adjustments if the divorced father's income had increased, and the other upon the occurrence of the father's "graduation and his employment in a new position at a higher rate of pay." The superior court had authorized an increase in payments on February 1 due to the father's new employment. However, since the father had not in fact graduated, the supreme court held that it was error to rely on the second ground to increase the support payments. Nevertheless, the supreme court remanded for entry of the increased payment order to begin September 1, 1993, when the annual review would have accounted for the increase in the father's income.

1011. See id.
1013. ALASKA STAT. § 09.35.010 (Michie 1996).
1014. See Demers, 915 P.2d at 1219 (citing ALASKA STAT. § 09.35.010).
1015. See id. at 1220 (citing ALASKA STAT. §§ 25.27.225-.226 (Michie 1996)).
1016. See id.
1017. See id.
1019. See id. at 1077.
1020. Id.
1021. See id. at 1077-78.
1022. See id. at 1078.
In *State v. Carrick*,¹⁰²³ the supreme court held that the Child Support Enforcement Division ("CSED") must provide further information regarding the procedural steps necessary to redirect to the CSED the monthly payments the defendant currently receives from the Department of Veteran Affairs ("DVA") and uses to meet part of his child support obligation, so that the CSED is reimbursed for its public assistance to the child's mother.¹⁰²⁴ Since CSED had provided the child's mother with public assistance, it had a right to all subsequent support paid to her.¹⁰²⁵ However, the court held that, until CSED demonstrates that it is legally feasible to redirect the payments by the DVA so that they are paid to CSED instead of to the mother, Carrick is entitled to have the payments to the mother credited against his monthly child support obligations.¹⁰²⁶

In *DeVaney v. State*,¹⁰²⁷ the supreme court held that the trial court was entitled to correct a clerical error in the stated amount of child support sua sponte pursuant to Civil Rule 60(a).¹⁰²⁸ In this case, the court and both parents had agreed that DeVaney would pay $175 per child per month in child support to his former wife, but the court's order mistakenly stated the child support as $175 per month.¹⁰²⁹ Despite the error, DeVaney paid the full $175 per child per month, but neither party informed the court of the mistake.¹⁰³⁰ Seven years later, while reviewing the files to respond to DeVaney's recent petition for reduction in his child support obligation, the court discovered the error and amended the order to reflect the court's original decree.¹⁰³¹ DeVaney appealed this amendment, claiming a violation of due process and the inapplicability of Rule 60(a) in this situation.¹⁰³² The court concluded that DeVaney could not show an interest of sufficient importance to warrant due process protection, and, because the error was properly characterized as a clerical one, Rule 60(a) allowed the court to correct the error sua sponte.¹⁰³³

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¹⁰²⁴ See id. at 806.
¹⁰²⁵ See id. at 805.
¹⁰²⁶ See id.
¹⁰²⁷ 928 P.2d 1198 (Alaska 1996).
¹⁰²⁸ See id. at 1200; ALASKA R. Civ. P. 60(a).
¹⁰²⁹ See DeVaney, 928 P.2d at 1199.
¹⁰³⁰ See id.
¹⁰³¹ See id.
¹⁰³² See id. at 1199-1200.
¹⁰³³ See id. at 1200.
D. Marital Property

In *Hatten v. Hatten*, the Alaska Supreme Court held that the designation or structuring of damages in a tort settlement agreement does not control whether divorce action proceeds are separate or marital property. The court acknowledged that under *Bandow v. Bandow*, "to the extent a tort recovery compensates for losses to the marital estate, it is marital property. To the extent the recovery compensates for losses to a spouse's separate estate, it is his or her separate property." However, the court held that this test does not preclude the superior court from reclassifying damages. The court then remanded the case for a determination of whether the spouse's proceeds from the settlement of a wrongful termination claim is marital property. The court also affirmed the superior court's decision to divide prospective proceeds from a pending litigation as of the date of the domestic trial instead of the couple's separation date because the now-objecting spouse effectively waived his argument against this date during trial.

In *Lundquist v. Lundquist*, the supreme court held that "an award of punitive damages should be apportioned in the same manner as the underlying compensatory damages award" when dividing property in divorce proceedings. The court, by analogy, also followed the *Bandow v. Bandow* rule. The court rejected possible per se rules that punitive damages be treated always as separate property or always as marital property.

In *Gardner v. Harris*, the supreme court held that bonds purchased prior to marriage and then transferred to a couple's joint account during the marriage for the purpose of gaining credit for marital use were correctly considered separate, pre-marital as-

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1035. *See id.* at 673.
1037. *Hatten*, 917 P.2d at 672 (quoting *Bandow*, 794 P.2d at 1350).
1038. *See id.* at 672-73.
1039. *See id.*
1040. *See id.* at 672.
1042. *Id.* at 51.
1043. 794 P.2d 1346, 1348 (Alaska 1990) (providing that when compensatory damages compensate for losses to the marital estate, they are marital property, and when they compensate for losses to a separate estate, they are separate property).
1044. *See Lundquist*, 923 P.2d at 50-51.
Harris had purchased the bonds prior to the marriage and later transferred the bonds into the couple’s joint “Cash Management Account” against which both spouses wrote checks and made credit card transactions. The couple used the interest from the bonds for joint expenses and used the bonds as collateral to refinance jointly-owned real estate. However, the trial court found that the “corpus of the bonds remained intact throughout the marriage, and matured as it would have even if the parties had never married; nor had [the parties] ever placed them in a joint account.” Therefore, Harris retained the money left from the bonds after they had been deemed his separate property.

In Ferguson v. Ferguson, the supreme court held that an individual fishing quota (“IFQ”) created a property interest which, if marital, was subject to division in a divorce proceeding. The court found that an IFQ had independent value because it granted the holder the right to compete in a limited access industry. The court also found that for the purposes of a divorce proceeding, the IFQ qualified as marital property only to “the extent that it is attributable to work performed during the marriage.” Therefore, the court reversed the trial court’s holding that the entire interest in the IFQ was marital property, and instead held that, because the husband had possessed the IFQ for several years prior to the marriage, the value of the IFQ attributable to the work performed prior to the marriage qualified as separate property.

In McCoy v. McCoy, the supreme court held that the trial court did not clearly err in declining to apply a rescission remedy in dividing property in a divorce proceeding because it found that

1046.  See id. at 100.
1047.  See id. at 97.
1048.  See id.
1049.  Id. at 98-99. In determining the nature of the property, the trial court considered the following factors: (1) evidence that both spouses have actively participated in the ongoing maintenance and management of the property; (2) evidence of an oral or written agreement to convert pre-marital property to, or keep it separate from, marital property; and (3) although commingling is not automatically indicative of intent to join property, “placing separate property in joint ownership is rebuttable evidence that the owner intended the property to be marital.” Id. (quoting Chotiner v. Chotiner, 829 P.2d 829, 833 (Alaska 1992)).
1050.  See id.
1052.  See id. at 599-600.
1053.  See id.
1054.  Id (quoting Chotiner v. Chotiner, 829 P.2d 829, 832 (Alaska 1992)).
1055.  See id. at 600.
the couple had significantly commingled their assets during the marriage. The supreme court also held that the trial court did not abuse its discretion in declining to invade the premarital property in fashioning an equitable distribution between the couple. According to the court, because the spouses had shared domestic responsibilities, there was no need to invade Mrs. McCoy's premarital property in order to compensate Mr. McCoy for any nonpecuniary services that benefitted the property.

In *Musser v. Johnson*, the supreme court reversed the superior court's award of attorney's fees in a divorce settlement because the court had not relied on relevant considerations when awarding the fees. Although the court has broad discretion to award attorney's fees in a divorce action, prior decisions have held that the court must consider "the relative economics situation and earning power of each party" and the conduct of each party. If "a party has acted in bad faith or engaged in vexatious conduct," then fees may be awarded. Since the parties' economic situations were equal and the husband's conduct was not vexatious, the court's award of attorney's fees to the wife was found to be an abuse of discretion.

The supreme court affirmed the remaining portions of the divorce decree, holding that the superior court did not err in refusing to enforce the property settlement agreement, since the wife did not "understand fully the nature and consequences" of her actions. The court further held that the superior court may treat the property division after a marriage of short duration as an action in the nature of a rescission restoring the parties to their status quo. Finally, the superior court did not err in denying the husband's motion to recuse as untimely since he waited six months to file his motion after being notified of the presiding judge.

In *Notkin v. Notkin*, the supreme court upheld a superior court's set-aside of a prior property settlement agreement that was

1057. See id. at 462.
1058. See id. at 464.
1060. See id. at 1243.
1061. Id. (quoting Streb v. Streb, 774 P.2d 798, 803 (Alaska 1989)).
1062. Id. (quoting Kowalski v. Kowalski, 806 P.2d 1368, 1373 (Alaska 1991)).
1063. See id.
1064. Id. at 1241-42 (quoting ALASKA STAT. § 25.24.230(a)(1), (2) (Michie 1996)). The wife testified that she had been confused about the Agreement's terms when she signed it. See id.
1065. See id. at 1242 (citing Rose v. Rose, 755 P.2d 1121, 1125 (Alaska 1988)).
1066. See id. (citing ALASKA R. CIV. P. 42(c)(3)).
entered into before a divorce proceeding.\textsuperscript{1068} Although the agreement had been filed with the superior court, the court had not approved it, nor had the court incorporated the agreement into a divorce decree.\textsuperscript{1069} The supreme court cited \textit{Kerslake v. Kerslake}\textsuperscript{1070} for the proposition that a separation agreement should be controlling absent evidence that it was entered into involuntarily or without full understanding.\textsuperscript{1071} In this case, the court stated that the wife, originally from Thailand and not fully conversant in English, did not possess a complete understanding of the nature and consequences of that agreement at the time she entered into it.\textsuperscript{1072} The supreme court upheld the superior court's set-aside despite the fact that testimony in the lower court suggested the wife "knew in a general way that she was accepting an unfair arrangement in exchange for some immediate cash and finality."\textsuperscript{1073}

E. Miscellaneous

Other family law cases decided by the Alaska Supreme Court in 1996 include cases involving restriction of visitation rights and rehabilitative alimony. In \textit{J.F.E. v. J.A.S.},\textsuperscript{1074} the supreme court held that in the absence of a finding that photographs and videotapes taken by the father of his unclothed child were lewd, salacious, or evinced sexual abuse, there was not sufficient evidence to restrict the father's visitation privileges.\textsuperscript{1075} The court held that the photographs and video tapes in question were too innocent and innocuous to support the trial court's order for supervised visitation rights, finding that they were typical of baby pictures taken by non-abusive parents and that there was no legal basis for the court to condemn the tapes as inappropriate in themselves.\textsuperscript{1076}

The court further held that a visitation order created pursuant to Alaska Statutes section 25.20.060(a)\textsuperscript{1077} is to apply the "best interest of the child" standard in determining the nature of the order; when such an order requires supervised parental visitation, it must be accompanied by findings, pursuant to Alaska Statutes section 25.24.150(c),\textsuperscript{1078} that specify how unsupervised visitation will

\textsuperscript{1068} See id. at 1111.
\textsuperscript{1069} See id.
\textsuperscript{1070} 609 P.2d 559 (Alaska 1980).
\textsuperscript{1071} See Notkin, 921 P.2d at 1111 (citing Kerslake, 609 P.2d at 560 n.1).
\textsuperscript{1072} See id.
\textsuperscript{1073} Id.
\textsuperscript{1074} 930 P.2d 409 (Alaska 1996).
\textsuperscript{1075} See id. at 411.
\textsuperscript{1076} See id.
\textsuperscript{1077} ALASKA STAT. § 25.20.060(a) (Michie 1996).
\textsuperscript{1078} Id. § 25.24.150(c).
adversely affect the child’s physical, emotional, mental, religious and social well-being.¹⁰⁷⁹

In *Myers v. Myers*, the supreme court held that an award of rehabilitative alimony, granted to minimize the economic effects of a divorce on a spouse who has few job skills and little earning capacity, is proper when the spouse has a specific plan to pursue a graduate degree after completing her undergraduate studies and has identified a potential career goal; she does not need to enter the job market immediately upon completion of her undergraduate degree.¹⁰⁸¹ Furthermore, the supreme court held that the spouse’s full-time student status during the marriage did not preclude her from receiving rehabilitative alimony.¹⁰⁸²

**X. INSURANCE LAW**

The Alaska Supreme Court decided several cases in the insurance law area in 1996. These cases discussed issues including the efficient proximate cause rule, coverage of Rule 82 attorney’s fees, uninsured motorist liability and the statute of limitations for filing a personal injury claim against a decedent’s estate.

In *State Farm Fire and Casualty Co. v. Bongen*, the Alaska Supreme Court held that an insurance policy provision excluding any loss resulting from earth movement, regardless of the cause, was enforceable.¹⁰⁸⁴ The Bongens had filed a claim for the destruction of their home due to a mudslide induced by heavy rains. State Farm denied coverage based on the exclusionary language contained in the Bongens’s policy.¹⁰⁸⁵ The Bongens argued that, because the mudslide was caused by the city of Kodiak when it undermined the soils above their home, and because their policy did not exclude loss caused by the city’s negligence, their loss should be covered under the efficient proximate cause rule, which states that if the initial, precipitating cause of a multiple-cause loss is covered by an insurance policy, the insurer is liable for the loss even if subsequent causes are not covered by the policy.¹⁰⁸⁶ The court rejected this argument, holding that the efficient proximate cause rule did not apply in cases where the policy plainly excludes

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¹⁰⁸¹. *See id.* at 328.
¹⁰⁸². *See id.* at 329.
¹⁰⁸⁴. *See id.* at 1048.
¹⁰⁸⁵. *See id.* at 1043.
the type of damage that actually caused the loss. 1087 Noting the superior court’s finding of apparent agreement among both parties that “the policy terms as written exclude coverage in the present case,” 1088 the supreme court held that, since the policy terms were unambiguous, 1089 the earth movement exclusion in the Bongens’s policy was enforceable. 1090

In *Safety National Casualty Corp. v. Pacific Employers Insurance Co.*, 1091 the supreme court held that excess insurers are not liable for contribution to primary insurers to cover attorney’s fees payable under Alaska Civil Rule 82 1092 when the total amount paid does not exceed the policy limits of the primary insurer. 1093 Safety National Insurance Corporation acknowledged that it provided unlimited primary coverage for Rule 82 fees, but claimed that Pacific Employers Insurance Company was a co-insurer for such payments. 1094 The supreme court rejected Safety’s alleged distinction between Rule 82 attorney’s fees and primary liability payments, and held that since the total settlement amount was within Safety’s policy limits, Pacific had no liability for contribution to Safety. 1095

In *Russell v. Criterion Insurance Co.*, 1096 the supreme court held that an insurance policy’s language limiting the insurer’s liability for attorney’s fees awarded against itself provided the clear disclosure required where it disclosed the limitation by reference to a percentage schedule as well as the insured’s potential liability for any fees awarded beyond the limitation. 1097 Under title 3, section 29.010(a) of the Alaska Administrative Code, 1098 insurers may limit their liability for attorney’s fees awarded against their insureds if the limit is not “less than the amount which would be allowed under Civil Rule 82(a)(1) to the prevailing party in a contested case if the amount recovered were equal to the liability limit of the policy.” 1099 Section 29.010(d) requires that, if the insurer wants to impose such a limit, it “must clearly disclose to its insured

1087. *See id.* at 1044-45.
1088. *Id.* at 1044.
1089. *See id.* at 1046.
1090. *See id.* at 1048.
1092. ALASKA R. CIV. P. 82 (providing for award of attorney’s fees).
1094. *See id.* at 750-51.
1095. *See id.* at 751.
1097. *See id.* at 667.
1098. ALASKA ADMIN. CODE tit. 3, § 29.010(a) (Michie Supp. 1997).
1099. *Russell*, 917 P.2d at 665 (quoting ALASKA ADMIN. CODE tit. 3, § 29.010(a)).
the limitation and the insured's potential liability for attorney fees if judgment exceeds the liability limits of the policy.\textsuperscript{1100}

In State Farm Mutual Automobile Insurance Co. v. Harrington,\textsuperscript{1101} the supreme court held that an agreement to settle an insured's claim under uninsured or underinsured motorist coverage ("U coverage") for policy limits must include applicable Rule 82 attorney's fees and pre-judgment interest in addition to the facial limits of the policy.\textsuperscript{1102} Under Alaska Statutes section 21.89.020(c)(1),\textsuperscript{1103} automobile liability insurance policies must provide U coverage limits equal to the limits voluntarily purchased to cover the liability of the person insured for bodily injury or death.\textsuperscript{1104} The court cited precedent establishing that "policy limits" are construed to include not only the facial limits of the policy, but also "such other sums as are payable in addition to facial limits."\textsuperscript{1105} The court reasoned that since the evident purpose of section 21.089.020(c)(1) was to provide for the insured the same benefit in the event of a claim under U coverage as that for which he would be liable under a claim against him, the inclusive construction of "policy limits" applied to U coverage as well as personal liability coverage.\textsuperscript{1106}

In Victor v. State Farm Fire and Casualty Co.,\textsuperscript{1107} the supreme court held that, according to the insured's policy language, uninsured motorist ("UM") benefits for injuries caused by an uninsured tortfeasor and another joint tortfeasor were to be determined by deducting settlement payments by one tortfeasor from the insured's total damages rather than from the UM policy limits.\textsuperscript{1108} Victor was in an automobile accident involving two other drivers, one of which was found by arbitrators to be 25% at fault and the other, who was uninsured, was found to be 75% at fault.\textsuperscript{1109} Victor settled with the insured driver for $50,000. His insurer, State Farm Fire and Casualty Co. ("State Farm"), sought to deduct that amount from Victor's UM coverage limit of $100,000.\textsuperscript{1110}

State Farm argued that the liability limiting language in clause

\textsuperscript{1100} Id. (quoting ALASKA ADMIN. CODE tit. 3, § 29.010(d)).
\textsuperscript{1101} 918 P.2d 1022 (Alaska 1996).
\textsuperscript{1102} See id. at 1025-26.
\textsuperscript{1103} ALASKA STAT. § 21.89.020(c)(1) (Michie 1996).
\textsuperscript{1104} See Harrington, 918 P.2d. at 1025 (citing ALASKA STAT. § 21.89.020(c)(1)).
\textsuperscript{1105} Id. at 1026 (citing Hughes v. Harrelson, 844 P.2d 1106 (Alaska 1993); Schulz v. Travelers Indemnity Co., 754 P.2d 265 (Alaska 1988)).
\textsuperscript{1106} See id.
\textsuperscript{1107} 908 P.2d 1043 (Alaska 1996).
\textsuperscript{1108} See id. at 1045.
\textsuperscript{1109} See id. at 1044.
\textsuperscript{1110} See id.
7 of Victor's policy, "any amount payable under this coverage," referred to the limit of policy liability under clause 1, which in Victor's case was limited to $100,000.\textsuperscript{111} Victor, however, argued that the limiting language referred instead to the language of the general insuring clause of the policy under the Section III heading "Coverage U," which in this case was found by an arbitrator to total close to $300,000.\textsuperscript{112} In finding for Victor, the court found that clauses 1 and 7 both modify the Coverage U insuring clause instead of modifying or subordinating one another.\textsuperscript{113} In addition, the court noted that the underlying purpose of such reduction clauses is to prevent double recoveries, which would not be furthered by State Farm's interpretation requiring a reduction from policy limits where total damages exceed the policy limits.\textsuperscript{114}

In \textit{Hamilton v. Blackman},\textsuperscript{115} the supreme court held that the four-month limitation period for filing claims against a decedent's estate\textsuperscript{116} does not apply where the plaintiffs submitted a timely claim with decedent's insurer that did not exceed the limits of insurance.\textsuperscript{117} The court also held that the two-year personal injury limitation statute was suspended by Alaska Statutes section \textsuperscript{13.16.455}\textsuperscript{118} for the four months following the decedent's death.\textsuperscript{119} Finally, the court held that a plaintiff bringing a claim against a decedent's estate covered by liability insurance is required to obtain court appointment of a personal representative and bring suit against the decedent's personal representative.\textsuperscript{120}

\textsuperscript{111} Id. at 1045.
\textsuperscript{112} Id.
\textsuperscript{113} See id. at 1046.
\textsuperscript{114} See id.
\textsuperscript{115} 915 P.2d 1210 (Alaska 1996).
\textsuperscript{116} See \textit{id.} at 1214 (citing \textit{ALASKA STAT.} \textsection{} 13.16.460 (Michie 1996)). Subsection (a) states that "all claims against a decedent's estate which arose before the death of the decedent ... are barred against the estate ... unless presented ... (1) within four months after the date of the first publication of notice to creditors." \textit{ALASKA STAT.} \textsection{} 13.16.460(a).
\textsuperscript{117} See \textit{Hamilton}, 915 P.2d at 1214 (citing \textit{ALASKA STAT.} \textsection{} 13.16.460(c)(2)). The court stated that this was the first time the court directly addressed this particular subsection. See \textit{id.}
\textsuperscript{118} \textit{ALASKA STAT.} \textsection{} 13.16.455.
\textsuperscript{119} See \textit{Hamilton}, 915 P.2d at 1215.
\textsuperscript{120} See \textit{id.} at 1215-16 (basing its holding on \textit{ALASKA STAT.} \textsection{} 09.05.015(a)(11) (Michie 1996) which provides that Alaska courts have jurisdiction over actions against a decedent's personal estate representative to enforce claims against the decedent, as long as the court would otherwise have had jurisdiction over the decedent if still living).
XI. Property

The Alaska Supreme Court decided a number of cases in the property area in 1996. For example, two of the cases dealt with right-of-way issues, several others concerned easements, and one addressed issues regarding a city zoning and planning code. Also, one professional malpractice case involving negligently overlooked restrictions on real property was decided as a case of first impression in Alaska.

In Fitzgerald v. Puddicombe, the Alaska Supreme Court held that proof of a "generally followed route across the land in question" sufficed to demonstrate a public right-of-way pursuant to former 43 U.S.C. section 932. Although Congress repealed former section 932 in 1976, it still governs claims of federal grants of rights-of-way from before that date. Following the rule as set forth in Hamerly v. Denton, the court held that, for the grant to occur, there needs to be evidence either that appropriate public authorities of the state have acknowledged through a positive act that the state accepted the grant or that there was a public user "for such a period of time and under such conditions" as to indicate that the state accepted the grant.

While the court agreed with the superior court that there was no evidence proving that the state had accepted the statutory grant through a positive act of its public authorities, the court held that there was a sufficient showing of pre-entry use to establish a grant under former section 932. The court found sufficient the fact that there had been several trails across the property, at least one of which was several decades old; it did not require the precise path of one of the trails to be proven.

In Parker v. Alaska Power Authority, the supreme court held that the Alaska Power Authority ("APA"), by acquiring a right-of-way across real property, had not affected any mining right property interests such that the holder of the mining interests was not entitled to compensation for a taking accomplished by eminent domain. The state had issued the APA a right-of-way permit to build two power line towers on state-owned land over

1123. See Fitzgerald, 918 P.2d at 1019.
1125. Fitzgerald, 918 P.2d at 1019 (quoting Dillingham Commercial Co. v. City of Dillingham, 705 P.2d 410, 413 (Alaska 1985)).
1126. See id. at 1019-20.
1127. See id. at 1021-22.
1129. See id. at 1091.
which Parker held a mining claim. Parker contended that the permit amounted to a taking of a part of his property interest, and therefore that he was entitled to just compensation under Alaska Statutes section 09.55.400.1131

The court held that a mineral rights owner's surface rights are statutorily limited and are subject to reasonable concurrent usage because Alaska law reserves minerals from every land grant. Therefore, the state, as possessor of the surface rights, was permitted to convey its interests as it did in this case, and such conveyance did not grant the APA an interest in or possession over Parker's mining interests.1133

In Groff v. Kohler,1134 the supreme court held that in cases of mutual mistake, a deed to property may be reformed.1135 Furthermore, the court held that the party seeking reformation must clearly and convincingly show that "both parties [had] an identical intention as to the terms to be embodied in [the] proposed written conveyance . . . and [the] writing executed by them is materially at variance with that intention." In this case, an admitted "clerical error" by the title insurance company resulted in the omission of one of the two easements intended by Groff to be in the deed.1137 However, since Kohler testified that he was unaware of Groff's intention that he had a second easement, the supreme court affirmed the trial court's holding that since Kohler did not share Groff's belief regarding the existence of two easements, no mutual mistake had occurred; therefore, the deed could not be reformed.1138

In Mount Juneau Enterprises v. City and Borough of Juneau,1139 the supreme court held that the city of Juneau's reliance on the validity of an easement transferred to it by Alaska Electric Light & Power was a sufficient good faith belief in the integrity of its claim to the easement to support an inverse condemnation of the property.1140 For an inverse condemnation to apply, a government must take possession of property in good faith, but with the mistaken belief that the taking does not require the exercise of eminent do-

1130. See id. at 1089.
1131. See id. (citing ALASKA STAT. § 09.55.400 (Michie 1996)).
1132. See id. at 1090-91 (citing ALASKA STAT. § 38.05.255 (Michie 1996)).
1133. See id. at 1091.
1135. See id. at 874.
1136. Id. (quoting Martin v. Maldonado, 572 P.2d 763, 768 n.12 (Alaska 1977) (citing REST. OF CONTRACTS § 504 (1943))).
1137. See id. at 871.
1138. See id. at 874.
1140. See id. at 773.
The court also held that the city was not required to compensate Mount Juneau Enterprises ("MJE") for the inverse condemnation, because although MJE's principal had owned an option to purchase the land over the easement when the taking took place, MJE could not produce the option or recall its terms. The court held that there was no evidence to support MJE's claim that the value of the option was reduced, therefore no compensation was due.

In *Bear Fritz Land Co. v. Kachemak Bay Title Agency, Inc.*, the supreme court held that property designated as wetlands by the Army Corps of Engineers did not have encumbrances or defects in title resulting from such designation. Bear Fritz Land Company had allegedly purchased land without knowing that it had been designated as wetlands by the Corps a year prior to the purchase. Bear Fritz sued the title insurers for failure to disclose this information concerning the wetlands designation and a wetlands permit that the prior owners had received from the Corps but which had expired before Bear Fritz's discovery of the wetlands designation. Bear Fritz claimed that the non-disclosure of the permit in the title insurance policy and the preliminary agreement for title insurance on the property amounted to a breach of contract and negligence upon which Bear Fritz reasonably relied.

The court held that the permit and classification in question did not affect title to the property in any manner. The permit and classification affected only the market value of the title, and not the marketability of title. Drawing a parallel to *Domer v. Sleeper*, which dealt with building and fire codes, the court held that an encumbrance was not present because the permit and classification neither gave a third party a right or interest in the property nor burdened the property with a lien or servitude. The court also held that the language within the policy excepting cov-
verage for governmental regulation was reasonably "clear and un-
ambiguous." Therefore, the general theory that interpretation
of insurance policy language should be interpreted in favor of cov-
erage was inapplicable.

In *Griswold v. City of Homer*, the supreme court held that
an amendment by the Homer City Council to the city's zoning and
planning code did not constitute spot zoning when the amendment
was consistent with the comprehensive city plan, the amendment
served the interests of the general community rather than primar-
ily the interests of private citizens and the relative size of the re-
zoned area was not unreasonably small.

Griswold sued the city to challenge an amendment that al-
lowed motor vehicle sales and services in the city of Homer's cen-
tral business district ("CBD"), claiming that the rezoning constitu-
ted spot zoning, which is an arbitrary exercise of legislative
power with no substantial public purpose and is thereby illegal.
The court found that the rezoning was consistent with the city's
comprehensive plan, which intended for the CBD to be subject to
business and commercial use. The court gave deference to the
City Council as legislative policy maker in accepting its reasoning
for adopting the amendment as not arbitrary or capricious, and it
found that the council was ultimately motivated by community
benefits rather than any benefits incidentally conferred on any pri-
vate owners. Finally, the size of the area rezoned was not suffi-
cient in itself to command a finding that the council's decision was
a result of prejudice or improper motives.

In *Breck v. Moore*, the supreme court explored for the first
time the appropriate measure of damages to be applied in a pro-
fessional malpractice case involving restrictions on real property
negligently overlooked. The Moores had hired Breck, an attor-
ney, to assist them in closing a real estate transaction. Although
Breck had received a letter from a title guaranty company indi-

1153. *Id.*
1154. *See id.*
1156. *See id.* at 1022-25.
1157. *See id.* at 1019. The court defined spot zoning as "the process of singling out a small parcel of land for a use classification totally different from that of the surrounding area, for the benefit of the owner of such property and to the detri-
ment of other owners." *Id.* at 1020 (quoting ROBERT M. ANDERSON, AMERICAN
LAW OF ZONING § 5.12, at 358 (3d ed. 1986)).
1158. *See id.* at 1021.
1160. *See id.* at 1025.
1162. *See id.* at 607.
cating that the property in question was governed by restrictions in the subdivision plot, Breck never asked for or obtained a copy of the plot, and he failed to advise the Moores that there might be title restrictions on the property. Some time after closing the transaction, the Moores discovered that the plot did in fact contain significant no-dwelling and sewage facility restrictions.

After affirming that the Moores were damaged by Breck’s negligence, the court held that the Moores were entitled to receive the property as they expected it, and, therefore, that the appropriate measure of damages is the lesser of the cost of curing the defect (in this case, the no-dwelling restriction) or the diminution of the property value caused by the restriction. The case was remanded to the trial court for recalculation of damages.

XII. TAX LAW

In *CH Kelly Trust v. Municipality of Anchorage, Board of Equalization*, the Alaska Supreme Court held that it was improper for the Board to ignore recent sales prices in appraising the value of property for tax purposes. *CH Kelly* had purchased four lots at a Federal Deposit Insurance Corporation land liquidation auction several months before the Board’s appraisal, for prices significantly lower than the appraised values. The court found that the Board had not considered the recent sales prices in its appraisal and held that, without such consideration, the appraisal was arbitrary and represented the application of a “fundamentally wrong principle of valuation.” The supreme court noted that the statutory goal of such appraisals is to find the fair market value of property and that, while recent sales prices are not dispositive, they must be considered.

1163. *See* id. at 602.
1164. *See* id.
1165. *See* id. at 606-07.
1166. *See* id. at 608.
1167. *See* id. at 609.
1169. *See* id. at 1382.
1170. *See* id. at 1381.
1171. *See* id. at 1382.
1172. *Id.* (quoting North Star Alaska Hous. Corp. v. Fairbanks N. Star Borough Bd. of Equalization, 778 P.2d 1140, 1143-44 (Alaska 1989)).
1173. *See* id. (citing ALASKA STAT. § 29.45.110(a) (Michie 1996)).
1174. *See* id. The court noted that there were conditions under which the sales price might not reflect the fair market value of the property in question, such as, in this case, if the FDIC were seeking only to recoup specific losses, or, in any case, where characteristics of the sales transaction would make it less than be-
XIII. TORT LAW

In 1996, the Alaska Supreme Court addressed questions of duty of care, failure to warn and various procedural issues regarding tort claims. The court also addressed scope of employment as a material issue in a defamation action and disapproved future use of the sudden emergency doctrine.

In *Chokwak v. Worley*, the Alaska Supreme Court held that a state statute which provided civil immunity to social hosts who serve alcohol also provided hosts who serve to minors protection from civil liability from injuries resulting from the minor's intoxication. In examining the statute at issue, Alaska Statutes section 04.21.020, the court found that legislative history supporting the conclusion that hosts who serve to minors should be held liable was not strong enough to require that the plain meaning of the statute, which immunizes all hosts from liability, be narrowed.

In *Smith v. State*, the supreme court held that an issue of material fact as to the precise nature and duty of care assumed by the state in voluntarily undertaking to fix a defective fluoride pump precluded summary judgment for the state in a negligence action. In May 1992, Smith died as a result of a fluoride poisoning incident in Hooper Bay, the cause of which was traced to abnormally high fluoride levels in the water system owned and operated by the township. In April 1992, in response to elevated fluoride levels in water samples, the state had made repairs on the fluoride pump and had further plans to replace the pump in the near future.

After being sued by Smith’s estate, the state conceded only that it assumed a duty to use reasonable care in performing the repairs to the pump, and that, since there was no evidence that the work was negligently performed, it was not liable for Smith’s death. Smith’s estate argued that the state undertook the more extensive duty of actually taking care of the fluoride problem, and thus it should be held liable if it was negligent in failing to com-
plete this task and if such failure was a cause of Smith's death. The supreme court concluded that the superior court's reliance on the duty arising from what the state actually did (a question of law), as opposed to the duty arising from what it undertook to do (a question of fact), was misguided, and thus the existence of a material fact (what exactly the state undertook to do) precluded summary judgment. In *Waskey v. Municipality of Anchorage*, the supreme court held that the arrest of Waskey pursuant to a facially valid arrest warrant for Waskey's brother did not constitute false imprisonment. The court found that the arresting officer did not have a duty, enforceable in tort, to perfectly identify a person arrested. The court relied on *Stephens v. State* in holding that the police officer did not have a duty of care to proceed without error in his legal action against Waskey's brother.

In *Trigg v. City of Nome*, the supreme court held that Alaska Statutes section 09.65.070(d) conferred immunity from liability on municipalities for failure to warn of hazards of which the municipality is aware. The Triggs were seriously injured while riding on their snow machines when they collided with a pipeline owned by the U.S. Air Force. The Triggs then brought suit against Nome, claiming that Nome was liable for their injuries for failing to warn them of the pipeline by use of reflectors, lights or other markings.

The Triggs argued that the statute only confers immunity for failures to inspect or abate a hazard, but that it does not confer immunity for failure to warn of a hazard. Affording the statute its plain meaning, the supreme court disagreed, finding that any failure by the city to place warning markers on the pipeline was a failure to abate a hazard, and thus came within the plain meaning of the statute, conferring immunity upon the city of Nome.

1184. See id.
1185. See id. at 635.
1187. See id. at 343.
1188. See id. at 344.
1190. See Waskey, 909 P.2d at 344.
1192. ALASKA STAT. § 09.65.070(d) (Michie 1996).
1193. See Trigg, 929 P.2d at 1274.
1194. See id. at 1273.
1195. See id.
1196. See id. at 1274.
1197. See id.
In *Maddox v. River & Sea Marine, Inc.*, the supreme court held that summary judgment was improper when material issues existed as to foreseeability and obviousness of the danger giving rise to a tort claim. Maddox was injured when he attempted to detach from his truck a boat and trailer purchased from River & Sea Marine, Inc. After finding that the tongue-jack supplied with the trailer was broken, Maddox injured his back while attempting to lift the trailer with his back under the bow of the boat. Maddox claimed that River & Sea was negligent in selling him an improperly matched boat and trailer and a broken tongue-jack.

Noting the general tort rule that one’s duty extends no further than foreseeable consequences, the supreme court found that, drawing all reasonable inferences in favor of Maddox, the trial record contained evidence suggesting that it was foreseeable that individuals might try to lift the boat-trailer combination by hand. Furthermore, the court found that while the risk of injury associated with such lifting may have been obvious to Maddox, River & Sea still had a duty to inform Maddox of the weight of the boat-trailer combination; without such information, it may have been unreasonable to expect Maddox to realize the hazards associated with lifting the trailer. Under these circumstances, the court held that summary judgment should have been denied.

In *McConkey v. Hart*, the supreme court held that prejudgment interest under Alaska Statutes section 09.30.070 accrued from the date at which defendant received actual notice of plaintiff’s claim and applied only to past damages. Future damages were discounted to the date of trial. McConkey was admittedly negligent in diagnosing and performing laser surgery on Hart’s eye condition in November 1990. After a trial, the jury returned a verdict of $69,592 against McConkey, including past and future economic and non-economic losses. The future losses were not discounted to present value. The trial court entered judgment for this

1199. See id. at 1040.
1200. See id. at 1034-35.
1201. See id. at 1035.
1202. See id.
1203. See id. at 1036-37.
1204. See id. at 1037-39.
1205. Id. at 1040.
1207. ALASKA STAT. § 09.30.070 (Michie 1996).
1208. See McConkey, 930 P.2d at 405-06.
1209. See id. at 406.
amount plus prejudgment interest on the entire award accruing from March 24, 1992, the date Hart met with McConkey in his office.\textsuperscript{1210}

The supreme court held that the prejudgment interest should not have been applied to the future losses, unless those losses were discounted to their value before the time of the trial, since the "purpose of awarding prejudgment interest to a plaintiff is to make a plaintiff whole by compensating her for the use of money rightfully hers between the time of the injury and the trial."\textsuperscript{1211} To allow prejudgment interest on future losses would give Hart a windfall.\textsuperscript{1212}

In \textit{Smith v. Thompson},\textsuperscript{1213} the supreme court held that equitable estoppel did not bar Thompson from asserting a statute of limitations defense against Smith's personal injury claim arising out of an automobile collision, despite Smith's assertions that Thompson's insurer misled her as to the validity of a release.\textsuperscript{1214} The court also held that the statute of limitations was not equitably tolled due to the insurer's alleged misrepresentation as to the release, since Smith was not pursuing any alternative legal remedy when negotiating the settlement and release.\textsuperscript{1215}

In \textit{Howarth v. State},\textsuperscript{1216} the supreme court held that an individual whose intentional criminal acts resulted in incarceration cannot receive damages from another whose negligence may have contributed to the incarceration.\textsuperscript{1217} Howarth brought a legal malpractice action against the public defender who represented him on a charge of first-degree sexual assault.\textsuperscript{1218} Howarth entered a plea of nolo contendere to the charge and served seven years of a ten-year sentence before the superior court granted Howarth's motion to withdraw his plea based on its finding that Howarth's public defender ineffectively counseled him.\textsuperscript{1219} The public defender had failed to discuss certain evidence with Howarth, and, as a result, he pled nolo contendere to a charge of second-degree sexual assault.\textsuperscript{1220} Howarth then brought an action for malpractice against

\begin{footnotes}
\item[1210.] See \textit{id.} at 404.
\item[1211.] \textit{Id.} at 405.
\item[1212.] See \textit{id.} at 406.
\item[1213.] 923 P.2d 101 (Alaska 1996).
\item[1214.] \textit{See id.} at 104-05.
\item[1215.] \textit{See id.} at 105.
\item[1216.] 925 P.2d 1330 (Alaska 1996).
\item[1217.] \textit{See id.} at 1335-36.
\item[1218.] \textit{See id.} at 1331.
\item[1219.] \textit{See id.}
\item[1220.] \textit{See id.}
\end{footnotes}
his attorney.\textsuperscript{1221}

The supreme court found that Howarth's intentional criminal acts, for which he was convicted, were a legal cause of his seven-year term of imprisonment.\textsuperscript{1222} Furthermore, Howarth was collaterally estopped from denying that he committed the acts essential to the crime charged to which he pled nolo contendere.\textsuperscript{1223} Finally, even though the public defender's conduct may have been negligent and may have contributed to Howarth's incarceration, Howarth had no civil remedy for incarceration damages caused by his intentional criminal conduct.\textsuperscript{1224}

In \textit{Jaso v. McCarthy},\textsuperscript{1225} the supreme court held that, in an action to recover damages resulting from an automobile accident, the admission of evidence of claimant's insurance coverage for a previous accident was harmless error, since the trial record otherwise supported the jury's verdict.\textsuperscript{1226} Furthermore, the trial court was not required to give a curative instruction regarding the admission of such evidence when McCarthy failed to request one at the end of trial as the court had suggested.\textsuperscript{1227}

In \textit{Lyons v. Midnight Sun Transportation Services},\textsuperscript{1228} the supreme court held that the trial judge's jury instruction regarding the sudden emergency doctrine\textsuperscript{1229} was harmless error but disapproved future use of the doctrine.\textsuperscript{1230} Lyons argued that the driver of a truck owned by Midnight Sun was negligent in causing the death of his wife.\textsuperscript{1231} "The court instructed the jury that, if a defendant is acting in response to a sudden emergency, he is not expected "to exercise the same judgment and prudence the law requires of a person in calmer and more deliberate moments."\textsuperscript{1232} The jury found that, while the truck driver was in fact negligent, his negligence was not a legal cause of the accident.\textsuperscript{1233} The supreme court held that, because the jury found the driver not liable based

\textsuperscript{1221.} See id.
\textsuperscript{1222.} See id. at 1333.
\textsuperscript{1223.} See id.
\textsuperscript{1224.} See id. at 1335-36.
\textsuperscript{1225.} 923 P.2d 795 (Alaska 1996).
\textsuperscript{1226.} See id. at 799.
\textsuperscript{1227.} See id. at 800.
\textsuperscript{1228.} 928 P.2d 1202 (Alaska 1996).
\textsuperscript{1229.} The sudden emergency doctrine states that "a person confronted with a sudden and unexpected peril, not resulting from that person's own negligence, is not expected to exercise the same judgment and prudence the law requires of a person in calmer and more deliberate moments." See id. at 1203-04.
\textsuperscript{1230.} See id. at 1204-06.
\textsuperscript{1231.} See id. at 1203.
\textsuperscript{1232.} Id. at 1204.
\textsuperscript{1233.} See id. at 1203
on issues of causation instead of negligence, the sudden emergency instruction was harmless.\textsuperscript{1234} However, the court went on to explicitly disapprove of further use of the sudden emergency instruction, finding that it added nothing to the established duty of care owed by all to act reasonably under the circumstances.\textsuperscript{1235}

\section*{XIV. TRUSTS AND ESTATES}

In \textit{Barber v. Barber ("Barber II")},\textsuperscript{1236} the Alaska Supreme Court held that the superior court's termination of a trust was not set aside by an earlier supreme court decision to remand the case concerning the sale of real property held in trust.\textsuperscript{1237} In the earlier case, \textit{Barber v. Barber ("Barber I")},\textsuperscript{1238} the supreme court had held that, because an objecting non-income beneficiary of the property was not given personal notice of the settlement proceeding, the superior court had erred in overruling his objection, and the case was remanded for further proceedings.\textsuperscript{1239}

On appeal, the issue was whether the superior court's termination of the trust in 1990 was set aside by the supreme court's decision in \textit{Barber I}.\textsuperscript{1240} The supreme court ruled that the termination of the trust was not set aside because of the remand.\textsuperscript{1241} On remand, the superior court was simply required to hear the non-income beneficiary's objections and determine whether the trust termination was an abuse of discretion by the trustee.\textsuperscript{1242}

\begin{flushright}
\textit{J. Catherine Bramlage}
Peter M. Lee
Benjamin E. Waller
Richard T. Welch
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\textsuperscript{1234} See \textit{id.} at 1204.
\textsuperscript{1235} See \textit{id.} at 1204-06.
\textsuperscript{1236} 915 P.2d 1204 (Alaska 1996).
\textsuperscript{1237} See \textit{id.} at 1206.
\textsuperscript{1238} 837 P.2d 714 (Alaska 1992).
\textsuperscript{1239} See \textit{Barber II}, 915 P.2d at 1207.
\textsuperscript{1240} See \textit{id.} at 1208.
\textsuperscript{1241} See \textit{id.}
\textsuperscript{1242} See \textit{id.}
APPENDIX

CASES OMITTED FROM 1996 YEAR IN REVIEW

ADMINISTRATIVE LAW

(holding that the superior court did not abuse its discretion in
dismissing Geczy’s appeal of a denial by Department of Natural
Resources of a leasehold claim for want of prosecution or in re-
fusing to reinstate it when Geczy offered no sufficient explana-
tion for her failure to comply with a court order).

Gunderson v. University of Alaska, Fairbanks, 922 P.2d 229
(Alaska 1996)
(refusing to overturn the award of a contract to provide coal and
hauling services to the University of Alaska, Fairbanks).

Kimble v. Department of Commerce and Economic Development,
Board of Nursing, 928 P.2d 1201 (Alaska 1996)
(holding that when the Board of Nursing adopts in its entirety a
proposed decision of a hearing officer, it need not prepare a
transcript of the hearing).

Matthews v. University of Alaska, Fairbanks, 925 P.2d 1052
(Alaska 1996)
(holding that the University of Alaska, Fairbanks grievance
council did not abuse its discretion in denying Matthews’s re-
quest for a hearing as untimely, when Matthews filed his request
more than two months past the filing deadline and gave no ex-
planation for the delay).

Northern Timber Corp. v. Department of Transportation and
Public Facilities, 927 P.2d 1281 (Alaska 1996)
(holding that Northern Timber Corporation was not entitled to
relief on its claim that the Department of Transportation and
Public Facilities had altered the terms of a contract for im-
provements to the Hoonah Airport).

BUSINESS LAW

Bowers Office Products, Inc. v. Fairbanks North Star Borough
School District, 918 P.2d 1012 (Alaska 1996)
(holding that summary judgment was appropriate where the
claims raised were resolved in a prior appeal of the same case).

Ilardi v. Parker, 914 P.2d 888 (Alaska 1996)
(holding that a superior court’s failure to support its decision de-
nying a homestead exemption with sufficient findings of fact and
conclusions of law warranted remand).

(reviewing an alleged settlement contract and holding that, al-
though the parties appeared to have reached a preliminary agreement on several related issues, they failed to reach a final agreement that encompassed all the material terms regarding the particular dispute at issue).

**CIVIL PROCEDURE**

Waage v. Cutter Biological Division of Miles Laboratories, Inc., 926 P.2d 1145 (Alaska 1996)

(holding that factual questions of fraudulent misrepresentation and concealment, reasonable reliance on such misrepresentations, and exercise of due diligence on the part of the plaintiff precluded summary judgment for the defendant on grounds that the action was time barred).

**CRIMINAL LAW**


(holding that evidence obtained by a state trooper on board defendant’s vessel did not violate the defendant’s Fourth or Fifth Amendment rights and therefore could be used against the defendant on a charge of possession of a firearm by a felon).


(holding that the imposition of consecutive sentences for a total composite sentence of five years imprisonment with one and one-half years suspended was appropriate for convictions on one count of third-degree assault and two counts of second-degree assault stemming from an accident in which several people were injured and in which the defendant was driving while intoxicated).


(holding that a search warrant affidavit supported only by a police informant’s assertions that defendant was growing marijuana was invalid, since such assertions failed to provide sufficient reason to believe that the informant was a credible person).


(holding that the trial court’s failure to inquire into whether the defendant’s decision not to testify was knowing and voluntary as required under Alaska Criminal Rule 27.1(b) was harmless error).

**EMPLOYMENT LAW**


(holding that the Alaska Workers’ Compensation Board correctly decided to deny a claim for certain medical expenses incurred by an injured employee of the school district based on the fact that the treating physician had not filed a timely treatment plan so that the plaintiff was not entitled to any payment for treatment she received in excess of the amount normally ren-
dered for her injury under Alaska Statutes section 23.30.095(c)).

(holding that an arbitration award in an employee grievance claim filed by Foster against the city of Fairbanks was not ambiguous because the arbitrator's true intent was apparent and that, because Foster failed to correct the factual errors in the arbitrator's opinion, she was estopped from arguing them on appeal).

Stephens v. ITT/Felec Services, 915 P.2d 620 (Alaska 1996)
(holding that when considering whether there is sufficient evidence to show whether a work-related injury occurred, the Alaska Workers' Compensation Board must specify findings adequate to demonstrate that the Board had weighed the evidence presented by both parties).

**FAMILY LAW**

(holding that clear and convincing evidence that the father was exposing his two children to hazardous and unsanitary conditions and that the father’s substance abuse was likely to continue supported the trial court’s CINA adjudication based on neglect).

(holding that Social Security children’s insurance benefits (“CIB”) should be treated as earned income of the parent in determining child support payments and that ongoing child support obligations of parents should be offset by CIB payments made to their children, including children who have received Aid to Families with Dependent Children).

**INSURANCE LAW**

(holding that the “implied insured” doctrine does not apply in a suit against a landlord by the tenant's insurance company).

**PROPERTY LAW**

(holding that adverse possession without any permanent improvements to the land adversely possessed nor any other actions which would put the owners of the land on notice of a claim of a possessory interest entitled the adverse possessor only to a prescriptive easement rather than fee title).

**TORT LAW**

(holding that the determination of whether an employee is acting within the scope of employment is a fact-specific issue requiring
case-by-case determination, thus summary judgment is precluded in a tort action for defamation raising such a question).